



TRADEMARK PROTECTION IN INDIA: WITH SPECIAL REFERENCES TO UNREGISTERED TRADEMARK USE.

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Abstract:

Today trademark plays very vital role in identification of goods and services with their quality. Trademark is a kind of good and reputation pertaining to the goods and service provider and helps to identify them with a specific mark to serve better for the consumer. As it is a kind of intellectual property, legal protection is available to it. Violation of trademark right in case of registered trademark it is infringement and in case of unregistered trademark it will be passing off. Injunction, damages and account for profit are the remedies available for violation of trademark rights in India. Now India trademarks are governing under Indian Trade Mark Act, 1999.

Introduction:

A trademark is any term, phrase, symbol, or design that identifies your goods or services or a combination of these things. It is how clients identify you in the marketplace and differentiate you from your competition. The identity or brand image of a specific product or service is referred to by the term "trademark." A trademark is used to identify commodities, whereas a service mark is used to identify services. A trademark:

- Identifies the origin of your goods or services.
- Provides trademark legal protection.
- Aids in the prevention of counterfeiting and fraud.

Unregistered Trademarks:

- Unregistered trademarks are those that have not been registered under the Trademark Registration Act. Section 5(4)(a) of the Trademarks Act of 1994 allows for the protection of an unregistered trademark. The Act of defending an unregistered trademark is known as passing off."

Definition of Trademark:

A trademark or trade mark is one of the Intellectual Property Rights. Trademark is a visual symbol and it might be in the form of work, phrase, design, sound, smell, colour, product configuration, numbers, combinations of those, a device, or a label applied to articles of commerce, which is capable of distinguishing the goods or services of one person from those of others, It has been defined to mean a mark 1Wadehra, B.L., (2000), Law relating to patent

Trademarks Copyright Designs and Geographical Indications, Delhi: Universal Law © 2019 JETIR April 2019, Volume 6, Issue 4 www.jetir.org (ISSN-2349-5162) JETIR1904P29 Journal of Emerging Technologies and Innovative Research (JETIR) www.jetir.org 165 capable of being represented graphically.² Trademark is capable of distinguishing the goods or services of one person from those of others including the shape of goods, their packing and combination of colours. 'A trade mark is a sign that individualizes the goods or services of a given enterprise and distinguishes them from its competitors.'³ Trade mark is represented by the symbol TM

Literature Review:

Narayanan P., 2004:

Law of Trade Mark and Passing off, Eastern Law house, Kolkata, With the fast-growing computer technology, internet, information storage through computer databases, cyberspace and information technology, the laws relating to Patents, Designs, Trade Marks, Copyrights, Confidential Information, Industrial & Trade Secrets and Know-how, have undergone revolutionary changes, on our Parliament passing the Trade Marks Act 1999, the Geographical Indications of Goods Act 1999, the Designs Act 2000, the Information Technology Act 2000, the Semiconductor Integrated Circuits Layout-Design Act 2000 and the Patents (Amendment) Acts of 2002 & 2005.

Trademark Rules 2002 :

The models of this presentation are called as Trademark Rules 2002. Both Act and its game-plan of principles came to influence on September fifteenth 2003. trademark show 1999 and its trademark rules 2002 immediately oversee Indian Trademark Laws in India. Laws of trademarks depend on upon mannerism and beguiling similarity. On off chance that particular signs are vigorously utilized brand regard made by one individual will be uninhibitedly utilized by another. Estimation of particular sign relies on upon courses of action volume and open relationship of sign with quality.

Trademark (Amendment) Act, 2010:

The Trademarks (Amendment) Bill was passed by Parliament and assented to by President on 21st September 2010. Trademarks (Amendment) Rules, 2013 have been made to give effect to Trademark (Amendment) Act 2010.

Trademarks (Amendment) Rules, 2013 :

By notification dated eighth July 2013, Trademarks (Amendment) Act 2010 and Trademarks (Amendment) Rules, 2013 came into force. Trademarks (Amendment) Rules, 2013 came into energy to enable India to submit to Madrid Protocol. Madrid Protocol is direct, facilitative and down-to-earth system for selection of overall Trademarks. India's interest of tradition has enabled Indian associations to enrol their Trademarks in Member Countries of Protocol through recording singular application in one tongue and by paying onetime cost in one currency

Essential elements of Unregistered Trademark:

The Trademark is not registered under the Trademarks Act 1999
The symbol "TM" is used by the owner of an unregistered trademark.
It is protected by customary/common law rather than the Trademarks Act of 1999.
Its protection is based on the product's reputation, which the owner must verify.
In the event of a dispute with an identical or similar registered trademark, the owner must present proof of use of such a mark.

Features as follows and with them it is easy to understand the scope of trademark

a) Device: Device is a mark, which refers to any pictorial representation, which does not come under any other category.

b) Brand: Though the precise significance of the word 'brand' in the definition of mark is not clear, it refers to those kinds of symbols, which are branded on the goods, in which case the symbols themselves would constitute the trademark for e.g. "Temple Brand" or "Gopuram brand".

c) Heading: it is also a mark in relation to textile goods. It may contain letters or numerals or any combination thereof.⁸

d) Label: It refers to a composite mark containing various features including devices, words and Section 2 (1) (zb) of Trademarks Act of India, 1999.

e) Ticket: It appears to be something stitched or tagged on the goods and containing the mark printed or pasted thereon.

f) Name: It refers to the name of a company, individual or firm. It includes an abbreviation of a name and also work, letter or numeral.

g) Shape: Shape of goods and package including case, box and container etc does form a trademark.

h) Trade Name: Definition of 'mark' includes 'name' as such the term "trademark" includes 'trade name'. The connection or nexus between the marks used in relation to the goods and the person claiming a right to use the same is necessary.⁹

i) House Mark and Product Mark: In trade particularly in the pharmaceutical trade we come across two types of trademarks.

One is product mark, which is used only in respect of one particular product; it often referred to as brand name of the product. And another mark is that House mark which is used on all the products of a manufacturer. matter, usually of a descriptive character, which will be varied depending upon the nature of the goods. In such cases the Registrar may insist as a condition of registration that the blank space should be filled in only matter of specified character.

Protection of Unregistered Trademark:

Unregistered trademarks have statutory protection under Sections 34 and 35 of the Trademark Act of 1999. These clauses protect the rights of unregistered trademarks by merely declaring that a prior user of a trademark has precedence over later users, even if the brand is registered.

India, as a common law jurisdiction, observes codified not only law but also common law principles, and as such, allows for infringement and passing off lawsuits against trademark infringement. The Trade Marks Act, Section 135, recognizes both infringements and passing off proceedings.

Even under Section 11(3) of the Act, a trademark must not be registered if its use in India is likely to be hampered by the law of passing off that protects an unregistered brand.

Disadvantages of Unregistered Trademark

1) One of the biggest disadvantages of not having the Trademark registered is that the owner will have to establish that there is goodwill and reputation associated with your unregistered brand that is utilized to sell products or provide services in the case of litigation.

2) It does not have the statutory benefit provided by the Trademarks Act, such as the ability to sue for infringement under Section 27 of the Act.

- 3) The owner of an unregistered trademark bears the weight of the consequences of not having legal proof of ownership for their intellectual property.
- 4) When the ownership of an unregistered trademark is contested, the burden of evidence lies on the owner.
- 5) An unregistered trademark will not get much recognition apart few specific regions. It will definitely limit the brand's recognition.
- 6) The owner of an unregistered mark cannot use the "R" symbol but must instead use "TM," implying that the mark is not registered.

Conclusion:

In India, trademark registration is not required, in contrast to other laws from numerous other nations. Unregistered trademarks undoubtedly have some legal protection. Such protection, however, cannot be compared to the rights that a registered trademark has.

It should go without saying that a registered trademark owner has a lighter burden of proof than one who owns an unregistered trademark. As a result of its importance as evidence as well as the benefits it offers, trademark registration is recommended.

Trademarks are considered as a form of intellectual property. Hence trademarks could be sold, purchased, assigned, and licensed in the lines of any other property. The very different feature of the trademark is that it is a symbol of goodwill. So the transfer of trademark requires much care and caution than that of the transfer of other properties. It is a very valuable asset in the field of business since it involves goodwill, reputation and the market. Reputation and goodwill could be earned only through hard work for years. Here we can appreciate the importance of trademarks by remembering the words "this hard-earned right is as important as money in the bank". Hence, people are willing to invest large sums of money to acquire, assign or license trademarks. The courts and the law in the interest of the business worlds as well as the consumer have always safeguard protection of trademarks. The reforming of the laws with respect to trademark to meet the challenges of the technological business world is very much required and the same has been guaranteed by the international agreements like the TRIPS agreement.

Bibliography:

- 1) Wadehra, B.L., (2000), Law relating to patent Trademarks Copyright Designs and Geographical Indications, Delhi: Universal Law
- 2) Section 2 (1) (zb) of Trademarks Act of India, 1999.
- 3) Kirloskar Diesel Recon v. Kirloskar Proprietary
- 4) Section 2 (1) (zb) of Trademarks Act of India, 1999.
- 5) World Intellectual Property Organization.