

Intellectual Property & Information Technology Laws News Bulletin

VA VAISH ASSOCIATES ADVOCATES
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From the Editor's Desk...



Dear Readers,

Following the International standards for classification of Trade Marks, India has amended the Trade Marks Rules, 2002 to incorporate 3 additional service class headings as per the NICE classification. The Amendment also reworks the existing class 42. Now, Classes 1 to 45 of the NICE classification of goods and services are recognised in India, and as such registration of Trade Marks can be done in all 45 classes in India.

In this issue we have focused on major trade mark infringement cases in India which have demonstrated a significant impact in creating extremely healthy precedents in the IPR regime. In a spate of recent judgments, the Indian judiciary has been prompt in providing interim remedies to trademark proprietors.

This issue also analyses the order of the Delhi High Court refusing injunction in a patent infringement case on one of the grounds amongst others that the Patentee had failed to demonstrate that the patent was being worked in the Country. A note of warning therefore to all future patentees would have to file statements of working along with interim injunction applications, failing which; it is likely that Courts would not find the "balance of convenience" in the favour of the patentee.

Another issue, which requires attention, is the law of comparative advertising in India. Recently, a number of cases have been filed before various High Courts of India against denigrating advertisements. In this issue, we bring forth an analysis of the law relating to the Disparagement and comparative advertising in India with a special focus on judicial precedents.

We are continuing with our regular features like "Injunctions Granted and Injunctions Refused", which gives a bird's eye view to our readers of the decisions of the Indian Courts in Trade Mark related cases.

We welcome, as always, your views, comments and input.

With Regards,

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INJUNCTIONS GRANTED!!

INJUNCTIONS REFUSED!!!

Knowledge Series

GUIDE TO LAW OF TRADE MARKS IN INDIA

LAW OF COMPARATIVE ADVERTISING AND DISPARAGEMENT IN INDIA

For Private Circulation

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IMPORTANT NOTICE

“NICE”

Amendment to classification of goods and services in India

The Trade Marks Rules, 2002 was recently amended to incorporate additional service class headings. India has added 3 more classes of services to the classification of services for the reason of registration of service marks. This amendment was carried out to bring the classification of goods and services for trade mark in conformity with the NICE Classification. The Amendment also reworks the existing class 42 and adds the following additional classes to the list of existing class of services:

- 42: Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software;
- 43: Services for providing food and drink; temporary accommodation;
- 44: Medical services, veterinary services, hygienic and beauty care for human beings or animals; agriculture, horticulture and forestry services; and
- 45: Legal services; security services for the protection of property and individuals; personal and social services rendered by others to meet the needs of individuals.

Classification of goods and services in India may be found at http://ipindia.nic.in/tmr_new/Classification_Goods_18June2010.htm

Earlier, Class 42 also incorporated all services falling in Class 43, 44 and 45. Pursuant to the induction of Class 43, 44 and 45, it has become mandatory to amend the classification of all registered marks in India, which were registered in Class 42 with respect to services falling in Classes 43, 44 and 45, and accordingly file new applications. Earlier registrations in Class 42 with respect to services falling in Classes 43, 44 and 45 will no longer hold good.

(Source: http://ipindia.nic.in/tmr_new/tmr_act_rules/Notification_20May2010.pdf)

INDIAN IPR DECISIONS

NESTLE INDIA LIMITED

VS.

MOOD HOSPITALITY PVT. LTD.

[2010 (42) PTC 514 (Del.) (DB)]

“YO! China”

vs.

“ 'Masala Yo!' &'Chilly Chow Yo!'”.

'YO!' a plain and informal expression used world over to convey excitement has been subject of a trade mark war in India.



Moods Hospitality (MH) that runs a chain of Chinese restaurants in India under the name 'Yo! China' filed a suit for trade mark infringement and passing off at the Delhi

High Court seeking an interim injunction against the use of the expression 'Yo' by Nestle India for their recently-launched Maggi Cuppa Mania Instant Noodles in two flavours – 'Masala Yo!' and 'Chilly Chow Yo!'. MH claimed



prior rights over the use of 'YO!' in relation to noodles. MH argued that the trade mark 'Yo!' has become distinctive of its popular Chinese restaurant chain 'Yo! China' and its products. On the other hand, Nestle India argued that mark 'Yo!' lacks trade mark character and is publici juris.

Setting aside the order of the single judge bench, wherein Nestle was restrained from using the expression “YO!”, the Appellate Court observed that there is nothing to suggest that the word “Yo” in “Masala YO!” and “Chilly Chow Yo!” would create a connection in the minds of the customers with respondent as being the source of the product. On the contrary, the use of mark “Yo” retains its primary meaning of inviting attention or as an exclamation. This is all the more so because the appellant's distinctive trade mark “MAGGI” is prominently displayed on the appellant's “Cuppa Mania” products. It must also be remembered that the dispute here is with the use of the mark “Yo” (with or without the exclamation mark) and, therefore, the comparison has to be made with MH's registered trade mark “Yo!” and not “Yo! China” which, taken as a whole, cannot be confused with “YO!”.

Case on Dilution of trade mark

ITC LIMITED

VS.

PHILIP MORRIS PRODUCTS SA & ORS.

2010 (42) PTC 572 (Del.)



In the dispute between ITC and Philip Morris & Others for the alleged trade mark dilution of ITC owned Welcome Group 'Namaste' logo by Philip Morris' stylized logo of the Marlboro trademark, the Delhi High Court has ordered that ITC is not entitled to a temporary injunction against Philip Morris.

The Delhi High Court refused to grant an injunction against the use of a device mark by Philip Morris in relation to its Marlboro brand of cigarettes in India. The trademark action filed by ITC was based on the registration and use of its W-namaste logo. The Delhi High Court held that the 1999 Act has enjoined protection against dilution, if the following essential elements are established –

- the impugned mark is identical or similar to the senior mark;
- the senior or injured mark has a reputation in India;
- the use of the impugned mark is without due cause;
- the use of the impugned mark (amounts to) taking unfair advantage of, or is detrimental to, the distinctive character or reputation of the registered trade mark.

It was further held that as the law does not provide for a presumption of infringement in the case of dilution of trade mark, each of the aforesaid elements has to be established before an injunction can be granted on this ground.

The court also said that the test of similarity of marks, namely dilution, was a notch higher than required in the said Act. It also held that in deciding the question of the similarity of the two marks in a dilution action, the Court must focus on the 'global' look rather than on the common elements of the two marks.

The court further held that though the 'aura' of the ITC mark could go beyond the niche hospitality services and extend to

1. "Namastey" is the traditional way of wishing in India. Physically, it is wished with folded hands.
2. <http://en.wikipedia.org/wiki/Namaste>

other luxury goods, there was nothing to show that such association could extend to cigarettes.

The court considered this aspect to be crucial as ITC itself sold cigarettes without the said mark. There was also nothing on record to show that the use of Phillip Morris's mark would be detrimental to the distinctive character of the ITC mark. The Court further held "In the case of logos and other marks, the application of the "identity" or "similarity" test has to result in a conclusion that the rival marks bear a very close resemblance, seen from an overall perspective.

Case on Disparagement

S.C. JOHNSON AND SON

Vs.

BUCHANAN GROUP PTY LTD. & ORS.

2010 (42) PTC Del 77

The Hon'ble Delhi High Court understanding of the evolving law on comparative advertisement restrained the Defendants CIF from disparaging the products of the Plaintiff by advertisement.

Mr Muscle (Plaintiff) alleged that CIF's (Defendant) advertisement was derogatory of its product. The CIF advertisement displayed, among other things, an orange-coloured container with a unique "indentation and nozzle/trigger" (similar to Mr Muscle's container), representing that an advanced product like CIF can remove tough kitchen stains better than any others.



The court, while granting the temporary injunction, said that every comparison does not necessarily amount to disparagement. Consequently, what is required to be answered is, whether there is denigration of plaintiffs' products. The answer to this question would be "what is the fundamental purpose for which the product is manufactured". The Court went on to say that in the instant case, the impugned advertisement prima facie does seem to denigrate the plaintiff's product. It was held that it comes within the test of the defendants alluding to a "specific defect" or "demerit" in the plaintiffs' product. On the basis of the above principles, an injunction was granted against CIF.

Case on Patent Infringement

ASIAN ELECTRONICS LTD.

Vs.

HAVELLS INDIA LIMITED

MIPR2010(2)1

Asian Electronics Ltd., who holds the Patent bearing No. 193488 (for converting fluorescent lighting units, such as tube-lights, from working on an inductive operation mechanism to an electronic operation mechanism without the need for any re-wiring) filed a suit for infringement of patent against Havells Indian Ltd.



The Delhi High Court dismissing the application for interim injunction observed that the Plaintiffs were not claiming an invention in any of the individual components of the conversion kit. **Instead** the invention was claimed for a conversion kit which comprised of several individual components such as the adaptors, the ballast etc. The Hon'ble Court also made reference to the bar of Section 3(d) of the (Indian) Patents Act, 1970, which states that a mere use of a known process, machine or apparatus unless such known process results in a new product will not be considered to be a patentable invention. The Court also found the suit patent to be anticipated by the prior U.S. Patent cited by the Defendant. In the above mentioned case, no interim relief was granted by the Court.

INJUNCTIONS GRANTED!!!

INJUNCTIONS REFUSED!!!



Under this regular head of our news letter, we give you a very brief description of decisions of the Supreme Court of India and various High Courts w.r.t. Trade Marks in capsule form, to give our reader a fair and quick idea about the mind set of Indian Courts, in IP matters.

In the following cases **INJUNCTIONS** have been **GRANTED** by Courts in India.

TAZIN (Medicines)	Vs	TAZIN (Medicines)
JOHNSON (hot plate, toasters, electric water heaters)	Vs	JOHNSON' (electric water heaters)
MANPOWER (Recruitment Services)	Vs	MANPOWER (Recruitment Services)

WITCO (handcrafted luggage)	Vs	NITCO (luggage, bags)
AYUR (Cosmetics)	Vs	AYUR CARE (healthcare services)
MEECO (Electronic Goods)	Vs	MEEKO (Cable Wires)
Volini (Medicine)	Vs	Voni Gel (Medicine)
Nivea	Vs	Nivea Int.
Maggi	Vs	Magic
Travaltan	Vs	Travaxor
Cialis	Vs	Scalis
Drot	Vs	Drotin
Postman	Vs	Super Postman
Kingfisher	Vs	Kingfresher
Folvite	Vs	Folv
Lemolate	Vs	Lemotab
Anchor	Vs	Encore

In the following cases **INJUNCTIONS** were **REFUSED**.

Evanova	Vs	Econova
Meronem	Vs	Meromer
Graniset	Vs	Granicip
City	Vs	Star City
Officer's Choice	Vs	Original Choice
Peter Scot	Vs	Scotch
PRIUS (Cars)	Vs	PRIUS (auto parts)
PP JEWELLER (jewellery)	Vs	PP BUILDWEL (construction business)
LO-SORB, LOSORB (edible oil products)	Vs	Low Absorb Technology (Edible Oil)
MINISTER COTTON (garments)	Vs	MINISTER WHITE (garments)

KNOWLEDGE SERIES

Guide to the Law of Trade Marks in India



Registration of a trade mark under the (Indian) Trade Marks Act, 1999 is not a condition precedent for seeking protection in India.

Acquisition of right in a trade mark in India

Right in a trade mark can be acquired in any of the following ways:-

- Registration
- First Adoption and Long, Continuous, honest, bonafide, uninterrupted use
- Assignment of a registered or unregistered trade mark.

Threats to a trademark in India

Usually following threats may be anticipated in case of a registered as well as unregistered Trade Mark in India:

- In case of a registered trade mark Cancellation of Registration
- During the course of registration; Opposition
- Litigation :-
 - a. *Infringement action* in case of a registered trade mark.
 - b. *Passing off action* in case of an unregistered trade mark.

It is important to note that registration of a trade mark *does not preclude* litigation for passing off, and the trade mark remains challengeable despite registration on various grounds which may include:

- Prior Adoption and Use³
- Prior Registration
- Confusion in the market⁴
- Likelihood of deception in the mind of the purchasing public and trade⁵
- Allied and cognate goods⁶
- Counter of sale
- Manufacturing potential

3. Milmet Oftho Industries and Ors Vs. Allergan Inc. (2004) 12SCC624

4. Cadila Health Care Ltd. vs. Cadila Pharmaceuticals Ltd. (2001) 5SCC73

5. Parle Products (P) Ltd. vs. J.P. and Co., Mysore AIR 1972SC 1359

6. H.M. Saraiya Ors. Vs. Ajanta India Ltd. and Anr [1994] 1SCR708

In any litigation relating to trade mark the size and volume of the business of the defending party will be immaterial.

Law of “Passing off” in India

The law of “Passing off” can be summarised in a general proposition that no man may “pass off” his goods as those of another.

“Passing off” is a common law right, based on the principles of natural justice, which protects goodwill and reputation of a person and prevents dishonest or improper use of goodwill by a third person in the trade mark. The term “Passing off” has not been defined under the (Indian) Trade Marks Act, 1999, and same is primarily based on “judge made” law.



It is important to note that in case of a litigation pertaining to a trade mark the statutory right as well as the common law right become important. At times the common law rights may prevail over the rights acquired by registration of a trade mark.

Indian law of passing off is primarily based on following principles:-

- First Adoption
- Honest and Bonafide Adoption and user.
- Long, Continuous, open, concurrent, honest and uninterrupted user.

It is important to note that for establishing a case for passing off, a plaintiff may be required to prove:

- goodwill,
- deception by a third person and
- damage or possible damage to the Plaintiff⁷.

It is reiterated that even an unregistered trade mark can seek protection of passing off under the Trade Marks Act, 1999⁸.

Law of Infringement of Trade Marks in India

In India the registration of trade mark under the Trade Marks Act, 1999 confers a statutory right of exclusive use of the trade mark

7. Beiersdorf A.G. v. Ajay Sukhwani and Anr. 156(2009)DLT83

8. Section 27 (2) of the Trade Marks Act, 1999

in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in case of infringement of trade mark in the manner provided under the Trade Marks, Act, 1999⁹.



It is pertinent to mention herein that even after registration of trade mark under the Trade Marks Act, 1999 a trade mark can still be rectified and/ or cancelled on an application made by an aggrieved person in the prescribed manner to the Intellectual Property Board (IPAB)¹⁰ (An Appellate Authority under the Act) or the Registrar of Trade Marks.

Difference between Law on Passing off and Law on Infringement in India

The difference between the concept of passing off and infringement has been clearly set out in the case of



Rob Mathys India Pvt. Ltd.v. Synthes Ag Chur¹¹.

- **Firstly**, nature of remedy in two types of actions is different.
 - a An action for passing off is Common Law remedy, based on principles of natural justice (i.e. First Adopter and User will survive in case of conflict);
- while**
- b. an infringement action is a statutory remedy (which is based on a right granted or created by virtue of registration under the Trade Marks Act, 1999).
- **Secondly**,
 - a) Issue in a passing off action is: "Is the defendant selling goods in the market so marked as to be designed or calculated to lead purchaser to believe that they are the plaintiff's goods?"
 - b) The issue in an infringement action, on the other hand will be: "Is the defendant using a mark which is the same as or which is colourable imitation of the plaintiff's registered trade mark?"
- **Thirdly**,
 - a) in an infringement action, the statutory protection is absolute in the sense that once a mark is shown to

offend, there being imitation phonetically, visually or otherwise to lead the purchaser to believe and purchase goods of another as that of plaintiff, no further evidence of violation of plaintiff's statutory right is necessary.

- b) But in a passing off action, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff.

It is important to note that generally First Adoption and user is treated as superior to the Registration.

Defences available in case of an infringement or passing off

Following defences may be available against an infringement or passing off action to a Defendant:



- Delay and Laches
- Acquiescence
- Honest and Bonafide
 - o Adoption, and
 - o Use.
- Difference in goods and services
- Difference in Counter of sale
- Class of Purchasers
- Nature of the Product
- Pricing
- Absence of the element of confusion or deception.

Law of Delay and Laches in IP Litigation



It may be noted that mere delay in initiating an action against the infringement and passing off a trade mark does not disentitle an aggrieved person from any relief. Delay alone may not be sufficient to deny relief, unless it has caused

prejudice to the defendant who in view of the delay has come

9. Section 28 (1) of the Trade Marks Act, 1999

10. Section 57 of the Trade Marks Act, 1999

11. MANU/DE/0308/1997

nurture a belief that the plaintiff has consciously given up his rights to claim infringement or passing off¹².

In an infringement of trade mark, delay by itself may not be a ground for refusing to issue injunction as has been observed by Lahoti, J. in *Midas Hygiene Industries (P) Ltd. v. Sudhir Bhatia and Ors.*¹³ in the following terms:

“The law on the subject is well settled. In cases of infringement either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest.”

Law of Acquiescence in IP Litigation

It may be further noted that the concept of acquiescence is recognised under the Section 33 of the Trade Marks Act, 1999 meaning thereby that when the proprietor of an earlier trademark cannot contest the validity of registration or the use of a subsequent trade mark, if he has acquiesced in the use of the subsequent trade mark for a continuous period of 5 years.

In *Power Control Appliances and Ors. v. Sumeet Machines Pvt. Ltd.*¹⁴ the Supreme Court has stated that:

Acquiescence is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark, trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches.

Furthermore in *Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai Patel and Ors.*¹⁵ the Supreme Court has observed that 'acquiescence' is a facet of delay, when a party allows the other to invade his right and spend money and the conduct of the party is such that it is inconsistent with the claim for exclusive rights for trademark, trade name. *Mere silence or inaction does not amount to acquiescence.* Action and conduct of both parties have to be examined to determine whether it would be unjust and unequitable to injunct the defendants on the ground of delay. *Lapse of time unless compounded with other factors is normally is not taken as a bar to grant of injunction*¹⁶.

12. Beiersdorf A.G. v. Ajay Sukhwani and Anr. 156(2009)DLT83

13. 2004(28)PTC121(SC)

14. [1994]1SCR708

Law of Allied and Cognate Goods, Trade Channel, Counter of sale

in Trademark Litigation in India

In India it may also be noted that a product bearing a similar/deceptively similar trade mark cannot be sold if the goods to be sold fall in the category of allied or cognate goods or where the nature of the goods are similar or where the trade channels and/or counter of sale used for selling the products are same or similar.



In the matter of *H.M. Saraiya Ors. Vs. Ajanta India Ltd. and Anr.*¹⁷, the Bombay High Court while relying on various judgments of the Hon'ble Supreme Court on allied and cognate goods observed that

“The test whether or not goods or services are "of the same description" would seem to be supplied by the question

Are the two sets so commonly dealt in by the same trader that his customers, knowing his mark in connection with one set and seeing it used in relation to the other,

would be likely to suppose that it was so used also to indicate that they were his?

The matter should be looked at from a business and commercial point of view.

The Court further approved the following principle in deciding whether goods are goods of the same description into three classes-

- *the nature and composition of the goods;*
- *the respective uses of the articles;*
- *the trade channels through which the commodities respectively are bought and sold.”*

This article can also be viewed at

<http://www.mondaq.com/article.asp?articleid=111142>

Law of Comparative Advertising In India

Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information



15. AIR2006SC3304

16. Beiersdorf A.G. v. Ajay Sukhwani and Anr. 156(2009)DLT83

17. 2006(33)PTC4(Bom)

made available through these advertisements. The Indian Courts in various judicial pronouncements have observed that Comparative advertising is a part of human nature. Some of the most effective advertising is comparative, but it is not without risks. Effective advertising delivers a message that is remembered. It can change the way the world views a product or service and can generate sales.

On the basis of the law laid down by the Supreme Court of India in the case of *Tata Press Ltd. Vs. MTNL & Ors.* [(1995) 5 SCC 139], it is amply clear that:

- a) An advertisement is commercial speech and is protected by Article 19(1)(a) of the Constitution.
- b) An advertisement must not be false, misleading, unfair or deceptive.
- c) Of course, there would be some grey areas but these need not necessarily be taken as serious representations of fact but only as glorifying one's product.

A mere comparison of products or services by the advertiser does not amount to disparagement of products or services of the competitor. "Comparative advertising" by means of using others products is permissible in India, however while doing so the advertiser cannot disparage the goods or services of the other. Any such act disparaging or denigrating the goods or services of another constitutes an act of product disparagement.

In India, there is no codified law to restrain companies from indulging in false publicity campaign. The Law relating to "disparagement" in India has mainly evolved through judicial pronouncements in the recent past.

The earliest decision on disparagement in India was of the Calcutta High Court in *Chloride Industries Ltd. v. The Standard Batteries Ltd.* decided on 30-09-1994. It was an action brought forth by the manufacturers of Exide Battery against their competitor on the ground that the competitor indulged in disparagement. The Calcutta High Court held therein that if the goods are disparaged maliciously or with some other such intent to injure and not by way of fair trade rivalry, the same would be actionable. The principle laid down in the above mentioned case has been followed by various High Courts as well as the Supreme Court of India in deciding cases on the issue of disparagement.

Moving a step further, the Calcutta High Court in *Reckitt & Colman of India Ltd v. M.P.Ramachandran and Ors.* [1999 PTC (19) 741] has enunciated five guiding principles on the issue of disparagement which have set the trend in the direction that the law has taken in India. Almost all subsequent decisions on the

issue of disparagement refer to the said decision. Five principles that were enunciated in the said decision are as follows:

- (a) A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.
- (b) He can also say that his goods are better than his competitors', even though such statement is untrue.
- (c) For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others.
- (d) He however, cannot, while saying that his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words, he defames his competitors and their goods, which is not permissible.
- (e) If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

The above five principles were cited with approval by the Delhi High Court in *Reckitt & Colman of India Ltd v. Kiwi T.T.K. Ltd.* [1996 (16) PTC 393] decided in the year 1996. However, the Delhi High Court in a recent decision (decided on 02.02.2010) in the case of *Dabur India Limited Vs. Colortek Meghalaya Pvt. Ltd. and Godrej Sara-Lee* [MIPR2010(1)195] relying on the principle laid down by the Supreme Court of India in *Tata Press Ltd. Vs. MTNL & Ors.*, that false, misleading, unfair or deceptive advertising is not protected commercial speech has held that the propositions (a) and (b) above and the first part of proposition (c) as laid down in *Reckitt & Colman of India Ltd v. M.P.Ramachandran and Ors (Supra)* are not good law. The Delhi High Court in the same case upheld proposition (d) and (e).

It may thus be stated that in India the settled law on the subject appears to be that a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing his goods and the same will not give a cause of action to other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation to the goods of the manufacturer so doing. However, a manufacturer is not entitled to say that his competitor's goods are bad so as to puff and promote his goods.

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