



Protection Of Trademarks In The Realm Of Deceptive Similarity: In The Age Of AI

By Abhishek Yadav and Dr. Jane Eyre Mathew

INTRODUCTION

The legal rights arising from intellectual activity in the fields of industry, science, literature, and the arts are collectively referred to as intellectual property. There are two main reasons why countries have laws protecting intellectual property. One is to codify into law the economic and moral rights of creators over their works as well as the public's right of access to them. Second, as a purposeful act of policy, the government should support fair trade, which will advance social and economic development, as well as creativity and the dissemination and application of its findings. The term "intellectual property" refers to a loose collection of legal doctrines that govern the uses of intangible property and indicates rights over them for the person whose mental effort created them.

Trade secrets, designs, patents, trademarks, copyright, and geographical indications are the primary topics covered by intellectual property rights. Patents cover technology and operations. Trademarks pertain to what you will name it. Design is concerned with appearance. The topic of copyright is artistic or literal expression. Geographical indication addresses the product's place of origin. Intellectual property rights safeguard people's original ideas and creative expression.

TRADEMARK

A trademark is any symbol that uniquely identifies a company's products and sets them apart from those of its rivals.¹ Producers who use trademarks to market a specific good or service benefit greatly from easier recognition and guaranteed quality. If a competitor's mark can cause confusion, the mark owner has the right to stop them from using it.² In this way, similar low-quality substitutes will be prevented from replacing good-quality ones.

¹ Introduction to Intellectual Property-theory and practice(Kluwer Law International,1997)pg184

² Trade Related Aspects on Intellectual Property Rights(TRIPS) Article 16

A trademark is a term, symbol, or combination of terms that a seller or manufacturer uses to identify a good or service.³ When people can relate to that specific good or service, sales flow much more easily and the distinctiveness is preserved.

According to the Trade Mark Act of 1999, a "well-known trade mark" is any mark related to any goods or services that have gained recognition from a significant portion of the public that uses them or receives them, and that mark's use in connection with other goods or services is likely to be interpreted as indicating a connection between those goods or services and the person using the mark in relation to the first mentioned goods or services.⁴

One type of intellectual property is a trademark, which is used to safeguard a product's or service's brand. Therefore, the definition of a trademark is a mark that can be graphically represented and that can be used to identify one person's goods and services from those of others. This mark can be any combination of colors, devices, brands, headings, labels, tickets, names, signatures, words, letters, numbers, or any combination of these.⁵ Although it is not required, it is advised given the current state of affairs where trademark infringement is on the rise and many cases are being challenged.

Additionally, trademarks must be protected globally. This is stated because the majority of them have local or regional name brands and continuously promote these unimpressive names while attempting to obtain international approval. Thus, a trademark can be thought of as an apparatus that endows a specific good or service with uniqueness and a means of identification. A growing number of nations also permit the registration of less conventional trademark types, like one-color marks, three-dimensional marks (product package shapes), audible marks (sounds), or olfactory marks (scents).⁶

It is stated that a trademark is an important marketing tool and a valuable business asset that may provide some funding for the enterprise. A brand is always a trademark, but a trademark is not always a brand.⁷ This is cited because trademarks and brands are sometimes confused; a trademark is a distinctive sign or indicator of some kind in a business organization, whereas a brand is just a name, logo, or symbol. As a result, trademarks have a broader meaning than brands. A trademark can also serve as a guarantee or symbol of the caliber of the products that bear it.⁸ Consumers are frequently persuaded to purchase a specific product by its unique trademark, which stands for outstanding performance. A trademark serves as a symbol of the goods' worth or goodwill, which can be evaluated based on how much the public believes about the goods' quality and particular source.⁹

³ Earnst Graft, Isreal Sam Sagrey ,Isreal Saguy Food Product Development(Springer 1991)pg 367

⁴ P.K. Vasudeva, World Trade Organization: Implications for Indian Economy(Pearson Education,2005)pg 169

⁵ Source <http://www.businessgyan.com/content/view/623/220/> article written by Santhosh Vikram Singh as on 15th Nov,2003,accessed on May 4th,2009

⁶ Making a Mark: An Introduction to Trademarks for Small and Medium-sized Enterprises by WIPO ,2003 edition page 3

⁷ Ronald Hildret, Siegrun Kane Trademark Law(4th edition,Practising Law Institute,2002)pg2

⁸ Carl W Battle, Legal Forms for Everyone(5th edition,Allworth Communications Inc,2006)pg143

⁹ Vinod Sople, Managing Intellectual Property(PHI Learning Pvt Ltd,2006) pg 104

Generally, trademarks are positioned in any way on the products, their packaging, displays, tags, or labels that are affixed to the products or services.¹⁰ The main justification for a trademark's legal protection is its enormous economic value. Trade mark owners build product differentiation and brand loyalty through effective advertising campaigns working with licensees. As a result, the company gains an enviable goodwill and market power that allow it to stifle competition and create obstacles for new businesses looking to enter that specific industry. There are many different types of trademarks, including logos, moving image marks, pictorial marks, slogans, and more.

History of Trade Marks Law in India

There was no specific legislation pertaining to trade marks in India prior to 1940. Instead, the relevant common law was followed, which was essentially the same as what was in place in England prior to the first Registration Act being passed there in 1875. The Trade Marks Act of 1940 established the initial framework for the registration and legal safeguarding of trade marks in India. In 1958, the Trade and Merchandise Act took the place of this Act. The Trade Marks Act of 1999, which went into effect in 2003, also repealed this Act.

The Trade Marks Act of 1999 brought about significant modifications to the trade mark law. Certain aspects of the law pertaining to unregistered trade marks are codified, while others are still based on common law and require citation to court rulings.

In addition to shielding the buying public from imposition and fraud by legitimate mark infringers, it has been determined that the extensive and intricate statutory rights bestowed by trade mark registration are also necessary to protect the legitimate interests of other traders from litigation and harassment by registered owners of trade marks. As a result, the Act has grown into a convoluted legislative package with numerous cross-references, lengthy sections, and a plethora of provisos and exceptions. Judicial interpretation has clarified the more significant provisions, but certain sections have not yet been the focus of judicial examination and analysis.

In addition to streamlining the law, the current Act of 1999 has added numerous new provisions that benefit both goods consumers and owners of trademarks. Due to historical factors, Indian trade mark law, both common law and statute law, have mostly adopted English law's structure. The UK Trade Marks Act, 1938 and the Trade Marks Act, 1940 were nearly identical, and the latter was the first statute on the subject to be introduced in India. The Trade and Merchandise Act of 1958 later superseded this Act.

In addition to making significant changes to the previous law, this Act combined the Merchandise Marks Act, 1889, with certain trade mark-related provisions from the Criminal Procedure Code, the India Penal Code, and the Sea Customs Act into a single piece of legislation. The Trade Marks Act of 1999 once more repealed this Act.

¹⁰ Carl W Battle, Legal Forms for Everyone(5th edition,Allworth Communications Inc,2006) pg 145.

Definition and concept of Trademarks

As per Section 2 (zb) of the Trade Marks Act, 1999, a trademark is defined as "a mark that can be visually represented and that can differentiate the goods or services of one person from those of others. It can include the shape of the goods, their packaging, and the combination of colours."¹¹

A company or product's quality and brand value are key factors in drawing in customers and encouraging them to make purchases. Trade Mark enters the picture at this point. A trademark is a distinguishing mark or symbol that is affixed to a product to help it stand out from other similar products. Trademarks assist customers in identifying specific products associated with a specific vendor. A trademark is an image, phrase, or combination of colors that is applied to a product and serves as a symbol of its identity. It represents the caliber of the products in the eyes of the buyers, and over time, that brand might become well-known.¹²

A product's trade mark serves as a source of origin indicator. In the event of infringement, a registered trademark is protected by the Trade Marks Act, 1999, whereas an unregistered trademark's rights are upheld by the common law tort of passing off. A trade mark gives its owner the legal protection against others fraudulently using it in the same way by creating a similar confusing mark or symbol. A trademark helps consumers buy products without being misled or confused by providing an identity to the product in relation to its quality.¹³

CONCEPT OF DECEPTIVE SIMILARITY

Upon registering a trademark, an individual obtains significant rights regarding its use in relation to the goods for which it is registered. Furthermore, he has the option to defend his trademark by filing a claim for infringement and obtaining an injunction in the event that his rights are violated by someone else using a mark that is confusingly similar to or identical to his trademark.¹⁴ Therefore, the fundamental tenet of trademark protection is that no mark may be registered that is likely to mislead the public or cause confusion about the "origin" or source of goods or services.

"A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion," states Section 2(h) of the Trade Marks Act, 1999.¹⁵

A trademark that is nearly identical to an already-existing trademark and has the potential to easily trick and confuse consumers is referred to as being deceptively similar.¹⁶

¹¹ The Trade Marks Act, 1999, Section 2(zb)

¹² 4 Lincoln, Trade Mark Funtion-The Changing Landscape, CHRYSILIOU IP (Jan. 2, 2014), <http://www.chrysip.com/trade-mark-funtion-changing-landscape/>.

¹³ 5 Sheetal Chauhan, Concept of Deceptive Similarity under Trademark Law in India and USA, 4 SAJMS. 173, 174-75

¹⁴ Kaviraj Pandit Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories, AIR 1965 SC 980;

¹⁵ The Trade Marks Act, 1999, Section 2(h).

¹⁶ Soumya Bajpai, An Overview of the Concept of Deceptive Similarity In Trademarks, CORPBIZ (Oct. 22, 2020), <https://corpbiz.io/learning/concept-of-deceptive-similarity-in-trademarks/>.

A visually and phonetically similar trademark appears to be very similar to the original trademark, which increases the likelihood of consumers being duped. It also causes financial loss and damages the reputation of a legitimate trademark holder. In trademark infringement, deceptive similarity is one of the contributing factors. Due to misleading similarity, the Registrar of Trade Marks has the authority to reject an applicant's application for trademark registration.¹⁷

To determine whether two marks are confusingly similar, it is necessary to take into account both of their main characteristics. It is not necessary to arrange them side by side to see if their designs differ in any way.¹⁸ The test of comparing the two marks side by side is flawed because it asks whether someone viewing the proposed trademark alone—in the absence of any other trademark—is likely to be misled about what he remembers in general. Rather than whether someone viewing the two marks side by side is confused or not. It is possible for there to be deception regarding the goods, the origin of the trade, or the trade connection.

Nature of Deception in Trademarks

Trademark fraud can take many forms and influence consumer choices. First, goods deception happens when a mark that resembles a registered trademark is applied to other goods, giving consumers the false impression that they are purchasing a product from a reputable company. Second, when consumers recognize a mark and mistakenly believe that the goods originate from a well-known source, they are engaging in deception regarding the trade origin. Finally, misrepresentation of the trade connection occurs when non-identical products have similar trademarks, leading consumers to believe incorrectly that there is a relationship or association between the various brands. These dishonest tactics have the potential to mislead customers about the characteristics, provenance, or affiliation of products, which may affect their decision to buy.

Different Types of Similarity Found in the Marks

Visual Similarity: This entails contrasting the marks' visual components, such as their overall length, shapes, suffixes, prefixes, and shared syllables. This kind of similarity concentrates on how the trademarks seem to the consumer on the visual side.

Phonetic Similarity: This kind of similarity assesses the speech patterns of trademarks. Similar-sounding marks, like "Zegna" and "Zenya" or "Fevikwik" and "Kwikheal," can cause confusion in consumers, particularly when used in oral communication or advertising.

Conceptual Similarity: This resemblance evaluates the ideas or concepts that the trademarks represent. Even when marks are phonetically or visually distinct, they may still cause confusion for consumers if they imply

¹⁷ Ibid.

¹⁸ Man Mohan Sharma v. Manjit Singh, FAO No.4739 of 2016(O&M).

similar ideas or themes. Examples include "Gluvita" and "Glucovita," or "Lakme" and "Likeme," which may cause consumers to associate certain ideas or pictures.

Criteria for determining deceptive similarity

In *Cadila Health Care Ltd .v. Cadila Pharmaceutical Ltd*,¹⁹ Supreme Court provided the grounds for testing “Deceptive Similarity”.

The factors which are to be taken into consideration for determining deceptive similarity are as follows:- “

- i. Nature of mark (word, label or composite mark)
- ii. The degree of resemblance between the marks ,
- iii. The nature of goods (services for which the Trade mark is used),
- iv. The level of care and intelligence exercised by the purchaser while purchasing goods or services,
- v. The mode used by the purchaser to purchase or place the order .
- vi. The similarity in the nature, performance and character of goods of the rival trader”

Deceptive similarity as a ground for refusal of registration

If there is already a registered mark that is identical to or similar to it and if it could confuse the public, a new mark cannot be registered.

If an already-registered trademark is well-known in India and is similar to the proposed mark, it will not be registered.

This is the case because new trademarks have the potential to unfairly capitalize on an established trademark's distinguishing quality or reputation in order to create their own goodwill and brand name at the expense of the established one. In addition to receiving statutory protection for their mark, owners of registered trademarks are granted the sole right to utilize their creation.

Courts have the authority to impose restrictions on any later, similar marks under the legal doctrine of "passing off." Additionally, they cannot be registered under the names of separate proprietors.

Deceptive Similarity in Case of Pharmaceuticals

The public is confused about the product's origin because of the misleadingly similar marks. It goes without saying that when pharmaceutical products are involved, confusion could have major negative effects in addition to costing the customer money and time. When evaluating a customer's level of confusion, one must consider their average intelligence and imperfect memory. When dealing with pharmaceutical products, this

¹⁹ (2001) 5 SCC 73.

requires a more stringent approach. As the Honorable Supreme Court rightly noted in the historic Cadila Health Care Ltd. v. Cadila Pharmaceuticals case²⁰:

“Drugs are poisons, not sweets. Confusion between medicinal products may therefore be life-threatening, not merely inconvenient.”

In cases where the goods in question are pharmaceuticals, the confusing similarity test is altered. When it comes to medicinal products, confusion can cause more harm than good, so more protection is needed than in other situations. It is important to take extra care and attention to ensure that the markings on pharmaceuticals do not lead to deception or confusion because, as we all know, drugs can have negative effects if not taken as directed or if there is confusion due to similar-sounding drugs on the market. In certain cases, these side effects can even be fatal. The court concluded in Wyeth Holdings Corporation and Others v. Sun Pharmaceuticals Industries Ltd. that there is a greater chance of confusion when the trade channel and customers are the same.

In the Cadila Health Care Ltd. v. Cadila Pharmaceuticals case, the Supreme Court declared unequivocally that a more stringent approach and additional caution must be taken when trademarking medicinal products in order to avoid any confusion among the general public. In this instance, the respondent was marketing a medication known as "Falicitab." The appellant claimed that the respondent's medication was confusing consumers by looking suspiciously like his medication "Falcigo," which could result in a passing-off lawsuit.

The court noted that the standard for determining deceptive similarity in situations involving pharmaceuticals ought to be significantly higher than in instances involving non-pharmaceutical products.

When it comes to non-medical products, confusion can only result in monetary loss; however, when it comes to medicinal products, mixing up two seemingly identical products can have far more serious consequences, and in extreme situations, even result in death. The court further noted that because drugs have different compositions, there is a higher likelihood of confusion and risk in situations where misleadingly similar drugs are intended to treat the same illness. In a country like India, where there is a high rate of illiteracy, a sizable rural population, and linguistic differences that increase the likelihood of confusion, the decisions made by English courts cannot be applied.

In Schering Corpn. v. Alza Corpn., it was decided that just because doctors and pharmacists are knowledgeable in their fields, it does not follow that they are immune to being duped by a similar deceptive mark.

Color was taken into consideration in the Cipla Ltd. v. M.K. Pharmaceuticals case, where it was decided that color was not a factor in the decision to buy medication. It is the names, not the color or shape, that make medicines unique. Nobody can claim monopoly status over the color of pharmaceutical products.

²⁰ (2001) 5 SCC 73.

AI and Deceptive Similarity in Trademarks

Trademark law is just one of the many industries being upended by artificial intelligence's (AI) relentless advance. Deceptive similarity is one of the most interesting and possibly troublesome aspects of this disruption. Here, we go into further detail on how AI presents opportunities and challenges for safeguarding trademarks and avoiding consumer confusion.

The application of AI to trademark generation is one area of great concern. Even though AI algorithms are good at coming up with original designs and brand names, they may unintentionally create trademarks that are strikingly similar to already-existing ones. Imagine a business announcing its new logo with great fanfare, only to have a rival file a lawsuit alleging it is an exact replica of their well-known brand mark. This scenario may result in an increase in trademark infringement claims based on accidental similarity, as a result of AI's emphasis on efficiency and pattern recognition.

The increasing use of AI-powered trademark search engines further muddies the waters. These systems have great potential for finding clear conflicts and expediting the search process, but because they rely too heavily on algorithms, there may be blind spots. They might miss subtle cues or design components that are consistent with already-registered trademarks. This might cause businesses to inadvertently register trademarks that are too similar to their products, paving the way for upcoming legal disputes and possibly deceiving customers.

AI's capacity to examine customer data creates a comprehensive picture of how consumers perceive brands. However, when it comes to trademark protection, this very strength can be a double-edged sword. AI-driven marketing campaigns may use consumer data insights to design intentionally similar brand elements. While trying to profit from brand recognition, this deliberate approach may make it difficult for customers to distinguish between homage and imitation, leaving them unsure of the source of a certain good or service.

Even with its difficulties, artificial intelligence has some exciting potential. Systems with AI capabilities are able to analyze large trademark databases very quickly and accurately. This feature could completely change how trademarks are distinguished from one another. Artificial Intelligence (AI) has the potential to be a useful tool for safeguarding trademark rights and guaranteeing consumer clarity by sorting through massive amounts of data and spotting minute similarities that might escape human reviewers.

The majority of current trademark laws are based on human interpretation, with attorneys determining likelihood of consumer confusion based on similarity. But the emergence of AI-generated trademarks calls for a review of these legal systems. It will be crucial to establish precise guidelines for evaluating and assessing AI-generated trademarks for possible infringement. The development of these guidelines will require close collaboration between legal experts, AI developers, and trademark officials to guarantee that the legal system keeps up with the rapidly changing domain of AI-driven trademark creation.

In conclusion, the world of trademarks faces a double-edged sword from AI. Artificial Intelligence (AI) presents opportunities for deceptive similarities detection and search process streamlining, but it also presents challenges in the form of unintentional mimicry and potential consumer confusion. The secret is to responsibly use AI's power and proactively modify legal frameworks to reflect this new reality of technology. In the constantly changing domain of trademarks, we can make sure that AI becomes a force for good by finding a balance between innovation and consumer protection.

CONCLUSION

As we've seen, a trademark is linked to goodwill and is crucial to the establishment of a brand. A mark's misleading similarity may serve as a basis for rejecting a trademark registration application. Therefore, some factors like the type of mark, the kinds of buyers who are most likely to purchase the items, and the method of purchasing the items should be taken into consideration when determining whether or not a mark is deceptively similar.

In the realm of trademarks, deceptive similarity poses a serious risk since it can mislead the average public into thinking that the mark in question is connected to a well-known brand. The judiciary has demonstrated a strong stance in defense of the legitimate trademark holder's rights and has extended the definition of deceptive similarity. The doctrine of deceptive similarity has been employed by courts to provide protection against trademark infringement.

Artificial intelligence (AI) and trademark law represent a dramatic shift in the intellectual property landscape, one that is full of exciting opportunities as well as challenging challenges. Recent developments have shown how artificial intelligence (AI) can enhance trademark administration through the provision of real-time monitoring, efficient searches, and enhanced enforcement capabilities. However, these changes also bring with them challenging legal problems, like disagreements over who is to blame, ambiguous accusations of trademark infringement, and broader ethical and legal implications. Proactive adaptation and collaboration are critical for successfully navigating the evolving trademark landscape in the future. It is imperative for stakeholders to anticipate technological advancements, maintain a balance between innovation and intellectual property protection, and promote the advancement of ethical artificial intelligence.

The delicate dance between artificial intelligence and trademark deceptive similarity poses a difficult problem with broad ramifications. In order to successfully navigate this uncharted territory as AI technology continues its relentless evolution, a multifaceted strategy will be necessary.

It will be crucial to close the gap between legal knowledge, artificial intelligence advancement, and trademark enforcement. To ensure that AI systems for trademark generation are built with clear parameters to minimize the risk of inadvertent mimicry, legal professionals must collaborate closely with AI developers. Clear guidelines for assessing AI-generated trademarks and possible infringement claims must also be developed in cooperation with trademark authorities.

It is critical to encourage openness in the application of AI to the creation of trademarks. Businesses that use AI for this should notify the appropriate authorities of this. Furthermore, giving customers knowledge about the possibility of AI-driven brand similarities can enable them to make wise decisions in the marketplace.

Trademark laws, which have historically relied on human interpretation, will have to change to reflect AI's realities. It may be necessary for courts to create new legal standards in order to evaluate deceptive similarity when it comes to trademarks created by AI. It will also be necessary to address the issues of ownership and liability for trademarks generated by AI. As AI continues to advance, so too should our strategy for handling AI and trademarks. In order to minimize the risk of deceptive similarity, AI systems must be continuously refined, which requires ongoing research and development. Moreover, encouraging innovation in AI-powered trademark search engines can result in more resilient systems that can recognize even the minute similarities, thereby enhancing trademark protection.

Trademark impact from AI is still developing. We can make sure AI becomes a positive force in the trademark industry by promoting cooperation, transparency, adapting legal frameworks, and ongoing innovation. By working together, we can protect consumer confidence, encourage fair competition, and open the door for a time when AI and trademarks coexist peacefully.

