



AN ANALYSIS ON THE CONCEPT OF TRADE DRESS AND ITS IMPACT ON THE CONSUMERS AND COMPETITION IN INDIA

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Abstract

In the realm of intellectual property, the term 'trade dress' may be well recognized but remains unfamiliar to those outside the field. Trade dress refers to the general look of a product or its packaging style. It consists of shapes, patterns, colour mixes, and so on. It serves as a distinguishing mark for a particular product to customers, similar to a trademark. It is easy to copy and display in the marketplace, therefore protection of both the creators and consumers is necessary. This paper focuses on the idea of trade dress in India along with the current laws. Furthermore, it examines how the trade dress affects consumers and present competition in the Indian market thus far. It also focuses on the effectiveness of current trade dress legislation and potential areas for further enhancement. The Trademarks Act of 1999 has aimed to formalize the idea within trademark law, so this paper assesses the impact of the legislation. Currently, many studies on trade dress have been conducted in the US and various other nations. In comparison to India, these countries have implemented different regulations for trade dress, leading to widespread adoption of the concept. In India, they have carried out studies that consider it one of the methods to safeguard product designs. This paper focuses on both the consumers and the competition in India. The information is gathered from secondary sources and it is qualitative research.

Key Words: Trade dress, Competition, Consumers, Protection, Trademark

Introduction

The concept of trade dress is mentioned in The Trademarks Act 1999 under Section 2 (zb) which states the definition of a trademark. As per the Act, a trademark is a mark that is represented graphically and is capable to distinguish goods and services from others. This includes shape of goods, packaging of the goods and combination of colours. Trade dress simply means, the visual appearance of a product or the type of packaging that indicate the source of the product to the consumers. The objective to protect the trade dress of a product is to minimize the confusion among the consumers so that they can identify the proper source of the product with the help of its appearance.

The business world is threatened by the crimes of forgery, counterfeiting of products and infringing of IPR in the national and international level. Earlier trade dress was presumed to consist of packaging of a product like appearance of wrappers, labels, containers. At present, the whole look of a product and its packaging along with the design and shape is included. The overall impression of the product and its source is confined in the concept of trade dress. There are instances where the competitors can copy the trademarks of prosperous goods and services and confuse the consumers into buying their products as original and they make huge profits because of this misconception.

The trade dress infringement is determined if it affects the overall impression of the product including its packaging and advertising. The original product and the counterfeit will be compared and if the trade dress of the latter is like that of the former and the consumers are likely to get confused between the original and counterfeit products, then the trade dress of the original product has been infringed. This may cause an unfair competition in the market as it causes confusion among the consumers. In India, a common law principle, the law of passing off is being followed where reputation and goodwill of a brand is protected from misrepresentation of their goods and services by others.

In India, importance is given to the total appearance of the product as the consumers are systematically drawn towards the visual appeals when purchasing a product. If there are marked differences in shape of the products, the extent of confusion among the consumers is reduced.

Literature Review

A DETAILED ANALYSIS OF TRADEMARK LAW WITH THE ANSWER OF DOES IT HAVE AN IMPACT OF UNFAIR COMPETITION ON IT? (2023) - Mihika Pandey

This paper deals with trademarks and its types and about non-conventional trademarks and how can it be protected. It also states the unfair competition in trademark law and use of it for trademark protection.

Passing off and the Law on 'Trade Dress' Protection: Reflections on Colgate v Anchor (2005) - Anu Tiwari†

This paper deals with the review of the judgment given in Colgate v Anchor and its impact in India. It also states the law of passing off and its evolution in unfair trading and scope and protection of trade dress.

Piracy of Trade Dress and the Law of Passing off: National and International Perspective (2006) - Shantanu Sahay

This paper deals with the scope of trade dress and measures against its infringement and protection with law of passing off in the US by various courts and the review of India in this respect.

THERE IS MORE THAN ONE WAY TO SKIN A COPYCAT: THE EMERGENCE OF TRADE DRESS TO COMBAT DESIGN PIRACY OF FASHION WORKS (1996) – SP Bharathi

This paper deals with the evolution of trade dress in the field of fashion works against design piracy. This also states the various international conventions regarding this.

TRADE DRESS PROTECTION: ANALYSIS OF INDIA & US POSITION (2022) - Aleena Placid

This paper analyses the position of India and US in the concept of trade dress and the respective laws. It also deals with the comparison of the US and Indian laws for the same and its infringement.

Protection of Trade Dress under the garb of Trademark Act, 1999: An Analysis with reference to India (2021) - DR. YASH TIWARI

This paper examines the scope of trade dress protection in the Indian scenario, its relevance and its validity under the Trade Marks Act, 1999 with the help of recent judicial pronouncements.

Research Problem

The scope of trade dress has been dealt with largely in India and other countries. The protection of trade dress in the Indian and the US laws and its infringement has been discussed. This paper discusses about the impact of trade dress infringement on the businesses, consumers, and competition and how much importance is given in India and if the existing law is sufficient to protect the trade dress of a product.

Research Objective

To analyse the existing law regarding trade dress.

To analyse the impact of trade dress on the consumers

To analyse the impact of trade dress on the competition

Research Question

Whether the existing law of trade dress is sufficient?

Whether infringement of trade dress affects the consumers?

Whether infringement of trade dress affects the competition?

Scope And Limitation

This research paper deals with the concept of trade dress in India and how prevalent it is today. It analyses the impact of the infringement of trade dress on consumers and competition based on the current market in India. This paper also discusses about the impact of infringement in the business world. This paper assesses the position of trade dress rights in India with various judgments.

Research Methodology

This study follows the doctrinal research methodology that is predominantly conceptual and

literature-based. It examined research papers, legislation, books, and newspaper articles. The Trademarks Act 1999 has been analysed.

Research Method

This research paper has adopted the doctrinal method. This paper focuses on the systematic analysis and interpretation of various statutes, legal principles, judicial precedents, and scholarly commentaries. Our research analysis relies on both primary and secondary data sources. This paper has examined various legislations and judicial decisions to interpret how the current laws provide protection against trade dress infringement.

What is trade dress

Trade dress is a concept included in the ambit of trademarks as the distinctiveness of a product. A product can be identified and differentiated based on its physical appearance. Each product manufactured will have a different appearance and colour which is called trade dress. It is included under Section 2 (zb) of The Trademarks Act 1999 which defines a trademark as graphically represented and able to differentiate between products from others including its shape, size and colour. No specific definition for the term has been provided. A brand is valued most by the people round the world because of its quality and uniqueness. Most of the people are attracted by the physical appearance of a product and purchase it and if it satisfies them, then they make it a habit to purchase the same brand. A trade dress of a product directs the consumers to the source of the product.

Earlier the packaging of goods was in the primary stage as there was insufficient materials for packaging. The packaging wrappers used were hardly available and was of limited colours due to the unavailability of different colours. After the development of trade and commerce, there was increase in the production of goods and the consumers were challenged with different choices by various brands. As such external appearance were deemed important and sometimes even dominated the identity of the products. For this reason, law relating to this is needed to protect the reputation of the traders. In *Hoffman-la Roche & Co V DDSA Pharmaceuticals Ltd*¹, the plaintiff contended that the defendant infringed their patent rights by producing and selling a similar product to their patented drug. The court ruled in favour of the plaintiff by granting an injunction to the defendant to prohibit them from producing and selling the infringed product. Lord Justice Harman observed that goods of a specific appearance get attached to their origin as if they had a specific name for them. It is known that when the goods are sold under a particular appearance for a long time, the public recognises the goods as that of the manufacturer.

The objective of it is to not confuse the consumers by having the similar appearance of a product. This also affects the business who originally produces the product creating an unfair competition in the market. For a trade dress to be accepted, it should be distinctive and unique. Even the colours in the product can be differentiated. If the market has products of similar or same features, it confuses the consumers to decide which product is the best and which is needed for them. In India trade dress is given less importance as it was thought that legalizing and registration of trademarks is significant for trade and business. Most of the products attract consumers by the quality and by their appearance so the manufacturers had to enhance the quality and appearance of their products to avoid unfair competition in the market. So, trade dress is also important along with the trademark for a product. In *Colgate*

¹ *Hoffman-la Roche & Co V DDSA Pharmaceuticals Ltd* 1972 RPC 1

*Palmolive and Co v Anchor Health & Beauty*², the plaintiff sought an injunction against the defendant at the Delhi High Court for using the red and white colour combination which was claimed to be distinctive and for using the shape of the can of their toothpowder for the defendant's business. The defendant argued that the colour combination was not distinctive and the shape of the container cannot be monopolized by the plaintiff. The court stated that both the cans looked similar in the eyes of a layman when compared and it granted the injunction in favour of the plaintiff. It also stated that the test for such cases was the likelihood of deception and confusion by the consumers, irrespective of the dissimilarities in the trade names.

When a trade dress is infringed, certain things are considered. The overall impression of a product is considered like the visual similarity between the two products and it should be confusing among the consumers. The trade dress should be inherently distinctive by using extensively in the market. The trade dress should be of such a kind where it does not affect the product's performance or utility also known as non-functionality. The plaintiff must prove that their trade dress has become a part of their reputation through continuous use in the market and the consumers identify it as the source of the product. The plaintiff also has to prove that the products used by the defendants created unfair competition in the market and deceived the consumers causing harm to their business.

In *Cadbury India Ltd v Neeraj Food Products*³, the plaintiff filed an injunction suit against the defendant for using deceptively similar chocolate in the market. The plaintiff had launched a milk chocolate product called 'GEMS' which attracted many customers including children. The defendant had launched a product with similar trade dress to that of the GEMS called as 'JAMES BOND' which will likely to cause confusion among the customers. The court held in favour of Cadbury granting the injunction to the defendant stating that the product was deceptively similar to that of the plaintiff which could cause confusion in the market and damage the plaintiff's reputation.

Law of passing off

A person who deals with goods and services acquires a reputation and goodwill that is valuable. That reputation or goodwill is considered as an incorporeal property of the person according to law which he is intended to protect. If any other person uses that goodwill or reputation to his own advantage for profit and causes loss to the original person, then the aggrieved person can act against such person under the law of passing off. This is incorporated so that no person can knowingly or unknowingly represent their goods and services as that of the other. The protection of the goodwill and reputation of a business is of paramount importance along with protection against consumer deception.

In *J G v Samford*⁴, a clothier, J G gained great reputation for his cloth identified by his unique mark in the market. The defendant was accused for passing off his goods as that of the plaintiff. This misled the consumers and damaged the plaintiff's reputation. The court ruled in favour of the plaintiff and set a precedent to protect the trade dress of the

² *Colgate Palmolive and Co v Anchor Health & Beauty* 2003 VIII AD Delhi 228, 108 (2003) DLT 51, 2003 (27) PTC 478 Del, 2004 (1) RAJ 214

³ *Cadbury India Ltd v Neeraj Food Products* (142 (2007) Dlt 724, MIPR 2007 (2) 269, 2007 (35) PTC 95 Del)

⁴ *J G v Samford* [2024] EWHC [2478] (IPEC)

products and the reputation of the owner from unauthorized use by others. This case has been one of the most early instances of law of passing off.

Remedies for infringement of trade dress

For the infringement of trade dress, it should have affected the overall image of the product, its packaging and advertising. The original product is compared with the product of the defendant and if the latter is like the former which will create confusion among the consumers, then there is infringement of trade dress of the original product. There are certain remedies for such infringement like providing injunction, monetary settlement, handing over the profits, etc.

Injunction: If the trade dress of the original product and the infringing product causes confusion to the consumers, then the court can order to stop the use of the original product's trade dress.

Monetary settlement: The owner of the trade dress of a product can recover monetary damages from the infringer for any losses suffered by the former. If it is proved that the infringement is wilful, then three times the existing damages should be paid.

Handing over the profits: If the infringer has gained any profits from infringement of the trade dress, then he should hand over the profits to the respective owner.

Correction in advertising: In certain cases, the infringer should correct the advertisement of the product to reduce the confusion among the products.

In *Novartis AG v M/S Wanbury Ltd & Anr*⁵, the plaintiff is a Swiss company where a cough syrup called TRIAMINIC was produced and sold. The defendant sold a product under the name CORIMINIC which appeared similar to that of the plaintiff. Both the medicines were used for cough so the plaintiff sought an injunction against the defendant. The court stated that the colour, font, style, letters, composition, and packaging of the syrup CORIMINIC was different from TRIAMINIC. So, the court refused to grant the injunction to the plaintiff as there was no similarity between the products.

In *Gorbatschow Wodka Kg v John Distilleries Limited*⁶, the plaintiff marketed one of the world's top fifteen premium vodka brands in a bottle with distinctive shape. The defendant was about to launch their vodka under the mark "Salute" in a deceptively similar shape of the bottle. The court stated that the plaintiff has proved that they had

⁵ *Novartis AG v M/S Wanbury Ltd & Anr* 121(2005) DLT316, 2005(3) PTC75(DEL)

⁶ *Gorbatschow Wodka Kg v John Distilleries Limited* 2011 (47) PTC 100 (Bom)

established a reputation and if the defendant was allowed to launch their product, it would be a irreparable damage to the plaintiff's reputation and goodwill. So, the court issued an injunction against the defendant to not use deceptively similar objects or bottles to the plaintiff's products.

Impact of trade dress on the competition

Trade dress protection encourages businesses to be unique and distinct in their product designs. It can help the consumers to identify different brands and trust them for fair competition. The connection between trade dress and competition is in preventing the consumer confusion and unfair competition in the market. When the trade dress of a product is deceptively similar to other products, it may mislead the consumers as they can believe that the products had come from the same source. This can lead to unfair competition among the manufacturers which can be addressed by the law of passing off where the owner of the product can make the infringer liable. So, protecting the trade dress of a product helps to maintain fair competition and ensure that the businesses cannot benefit from the already established goodwill and reputation of others unfairly. Over protection of trade dress creates monopoly in the market as it limits competition by restricting others from using similar designs even if there is no intention or likelihood to confuse the consumers.

Impact of trade dress among the consumers

Trade dress establishes an identity of a brand which makes the consumers associate mentally with the unique appearance of the product. The consumers often relate appealing and quality packaging with high quality products which can influence their decision for choosing one product over the other. The consumers will show brand loyalty if there is a positive perception towards trade dress of a product and it leads to repeated purchases by them and the chance to recommend it to others. Mostly, fascinating, and impressive trade dress can lead to impulse buying as it catches the consumers attention. Nevertheless, when the competitors use similar trade dress of an existing brand, it creates confusion among the consumers and can purchase the wrong product assuming it is of the same brand they trust. The presence of similar trade dress in the market for a long time may reduce the distinctiveness of the original brand which gradually reduces consumer's trust. So, the design and appearance play a crucial role in influencing consumers. In *Parle Products Pvt Ltd v JP & Co*⁷, the defendant produced a brand of biscuits similar to Parle G. The packaging of both the products were similar with respect to its colour, size, and design. The court held that it had deceptive and misleading similarity and causes confusion to the consumers. So, the court ordered in favour of the plaintiff prohibiting the defendant from using their colour, size, or design.

Key differences between US and India in trade dress

In the US, trade dress is considered as a separate provision in the Lanham Act but in India there is no specific provision rather it is considered a part of trademark itself. In the US, the trade dress is protected under specific requirements but in India as it is not considered as a word it is not protected. India is developing in this concept. The

⁷ *Parle Products Pvt Ltd v JP & Co* AIR 1972 SC 1359

US have an established provision for protecting the visual appearance of a product while in India, it is more of an implicit in nature and can be hard to enforce consistently. In the US, trade dress is registered which provides a strong legal basis for its protection. In India, registration of trade dress is not explicit and mainly depends on the passing off claim.

Recommendations and Suggestions

Trade dress is as important as a trademark for a product. It must be treated separately from trademarks. The law of passing off is influenced from the Common Law in which there are ambiguities. India does not have any specific laws relating to trade dress which leads to inconsistency and ambiguity in enforcement. The visual appearance of products may vary from person to person and the process of proving consumer confusion leads to difficulty in enforcing trade dress rights. So, strong laws regarding trade dress need to be implemented to help the businesses prove the consumer confusion without any ambiguity and save their reputation from tarnishing.

Conclusion

Effective trade dress builds a brand recognition and loyalty and it can also lead to challenges like confusion in the market if it is not managed carefully. While it encourages innovation and trust from consumers, it should be ensured that there is no obstruction to competition or creation of unfair monopolies. There should be a balance between protecting authentic trade dresses and restricting monopolistic practices.

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