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TITLE: TRADEMARK AND COLORS

The blog presents a brief introduction of the Indian Trade Marks Act, 1999 while elaborating upon Trademarks and its relation to colours, its authenticity and the legal process related to the same.

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1. Introduction.

Human eye can distinguish between one million different colors and too no one's surprise, companies exploit that ability to the fullest. Research has shown that association with colours have a potential of increasing brand recognition as much as by 80%¹. Companies are in the lieu of finding their uniqueness for their brand's identity, especially from the consumers' perspective and the usage of particular combination of colours or distinctive shades of colours for their brand's logo, product packaging, the product itself, etc. is an attempt at imprinting the uniqueness of their brand's identity into consumers' minds.

Let us take some real-life examples which would help us to understand how upon repeated exposure we connect particular objects of general use with particular colours, what comes to your mind when you think about green and fuel? Petrol? What comes to your mind when someone says yellow and car? Taxi? These objects are of general use without any underlying distinctive brand connotations but they still have their distinct identity because of their repeated exposure along with the colours which have now come to be associated with them. Now let us take some examples of how we have associated particular brands and/or the products offered by them with particular colours and/or colour combinations, what comes to your mind when someone says purple and chocolate? Cadbury? What comes to your mind when someone says soda and red? Coca Cola? What comes to your mind when someone says red and white toothpaste? Colgate?

The above-mentioned companies have repeatedly exposed their products in a trade dress of such a nature that a normal consumer would instantly connect the colour or colour combination with the product offered by the brand. As companies have successfully secured such a unique identity, they would want exclusive rights over such identity and that's exactly what trademark protection offers.

2. Trademark

Britannica defines trademarks as follows:

¹ White River Design, <https://www.whiteriverdesign.com/brand-and-trademark-colours/> (last visited Jun. 14, 2022)

“Trademark is any visible sign or device used by a business enterprise to identify its goods and distinguish them from those made or carried by others. Trademarks may be words or groups of words, letters, numerals, devices, names, the shape or other presentation of products or their packages, colour combinations with signs, combinations of colours, and combinations of any of the enumerated signs.”²

Definition for a trademark is given under Section 2 (1) (zb) of the “The Trade Marks Act 1999”, it reads as follows:

“trade mark” means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.³

Moreover, the definition of a mark is provided under Section 2 (1) (m) of the “The Trade Marks Act 1999”, it reads as follows:

“mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof;⁴

Now as we have understood the meaning of a trademark in accordance to the statute, let us understand the objective of trademark protection. The objective of trademark protection is two folded, one from the side of the company offering a particular product under a trade dress as it offers companies a protection from unfair competition as it would restrict other companies from implementing the same trade dress for similar products and the other from the side of the consumer as it would protect the consumers from being misled into buying another company’s product rather than the one which the consumer intended to buy.

There are basically two categories of trademarks through which companies establish their unique identity, (1) Traditional and (2) Unconventional. Traditional trademarks are general logos, devices, symbols, etc. Unconventional trademarks are in the form of smells, shapes, sounds, etc. and colours and combinations of colours come under unconventional trademarks.

² Britannica, The Editors of Encyclopaedia. "trademark". Encyclopedia Britannica, 2 Jun. 2022, <https://www.britannica.com/topic/trademark>. Accessed 14 June 2022.

³ The Trade Marks Act, § 2 (1) (zb), No. 47, Acts of Parliament, 1999 (IND)

⁴ The Trade Marks Act, § 2 (1) (m), No. 47, Acts of Parliament, 1999 (IND)

3. Colour Trademark

Section 10 of the “The Trade Marks Act” talks about the limitation as to colour and it states that:

“A trade mark may be limited wholly or in part to any combination of colours and any such limitation shall be taken into consideration by the tribunal having to decide on the distinctive character of the trade mark. (2) So far as a trade mark is registered without limitation of colour, it shall be deemed to be registered for all colours.”

Under the trademark law, a colour is indistinct but a combination of colours with satisfactory acquired meaning can gain distinctiveness and is capable of getting trademark protection. As we have observed above, for such a protection it is necessary that the consumers recognize your product with a particular combination of colour and an evidence of that needs to be submitted by an applicant while filing for a colour trademark.

In case of a colour trademark, the colour is the brand and the use of such colour in a given market sector is protected by trademark. It is also important to note that as there are limited colours, it is not possible to let companies own a colour in itself across all product categories and therefore, it is of paramount importance that they only be granted colour trademark for the cases in which their consumers could get confused with other similar products. For example: Tiffany & Co. only owns their famous tone of blue, “robin’s egg blue” in the situations where the colour could be confused with their products. So someone could still be making a robin’s egg blue coloured soft drink and not be infringing Tiffany’s colour trademark as soft drink and boxes and bags (of which Tiffany’s owns colour trademark) are completely different categories of product which can’t possibly be confused between.

It is also important to note that a colour which portrays functionality for a particular product category cannot be trademarked. For example: green for lawn mowers, red for first aid kits, etc.

Now I would be moving on towards some of the cases surrounding colour and colour combination trademarks decided by the Indian Courts.

One of such cases is of Colgate Palmolive Company v. Anchor Health & Beauty Care Pvt. Ltd.⁵ Colgate had been selling its toothpowder with the trade dress of colour combination consisting of one third red and two third white. Anchor also started selling its toothpowder in the same trade dress. Moreover, the shape of the can offered by Anchor was also similar to that of Colgate's. Colgate alleged that the company has rights over the particular trade dress (the combination of the colours and the shape of the can) for toothpowder and therefore, they sought interim injunction. On the other side, Anchor contended that the said colour combination was neither distinctive nor unique. Moreover, they also contended that the shape of the container cannot be 'monopolised' by Colgate unless it was registered under the Designs Act, 2000. The Delhi HC propounded that the law regarding trade dress is unambiguous which says that the trader's goods are recognised by their general appearance, or "get-up". Therefore, the Court held that resemblance of get-up is an ingredient of passing off (the Law of Passing off prevents one person from misrepresenting his goods and services as that of another). The Court compared the trade dresses and opined that the shapes of the cans and the combination of colours used on both of them looked similar from a layman's perspective. Moreover, Court also added that as trade dresses build consumers' trust on a particular product, another company using a similar trade dress for that product might dissuade consumers into buying the product from a different brand than they intended to. The learned judge also added that toothpowder is generally utilized by illiterate, unwary, and gullible consumers and there are higher chances of such consumers being dissuaded from a similar trade dress.

In the case of Cadbury UK Limited v. The Comptroller General of Patents Designs and Trademarks & Société Des Produits Nestle S.A⁶, Cadbury was successfully able to gain protection for its famous purple coloured (pantone 2865C) chocolate wrappers used for packaging its milk chocolate as they were able to prove that it had gained a distinctive characteristics. However, it is pertinent to note that Cadbury had to submit a public survey to prove such distinctiveness.

It is also pertinent to note that in India, the Courts have been hesitant in handing over trademarks for a single colour even though they would be limited to a particular product. In the case of Christian Louboutin v Abu Baker⁷, the Delhi HC refused the trademark for red colour on the sole of heeled shoes on the contention that the mark was consisting of a single colour red which is not in accordance to the definition provided under Section 2 (1) (m) of the "The Trade Marks Act

⁵ Colgate Palmolive Company v. Anchor Health & Beauty Care Pvt. Ltd. 2003 (27) PTC 478 Del

⁶ The Comptroller General of Patents Designs and Trademarks & Société Des Produits Nestle S.A (Case No: A3/2016/3082)

⁷ Christian Louboutin v Abu Baker CS (COMM) No.890/2018

1999” which talks about combination of colours and not a singular colour. The Court stated that the explicit usage of the word combination of colours portrays the intention of the legislature for not giving trademark protections for singular colours. Moreover, the Court also denied the remedy under the law of passing off which falls under the common law even though the Section 27 (2) of the “The Trade Marks Act 1999” states that nothing in the statute shall affect the rights of a person filing for passing off.⁸

4. Conclusion

Colour trademarks are one of the most important forms trademarks and as companies compete to establish their own unique space in the market arena, this field is going to further evolve. We have observed that the Indian statute relating to trademarks talks about combination of colours and nowhere it talks about trademark protection for singular colours. The Courts have stringently followed that terminology even for remedies under the common law and have denied colour trademarks for singular colours even if they are not functional colours. However, the situation is different in other jurisdictions, we have noticed in the cases of Tiffany & Co. and Cadbury that they have been granted trademark protection for their singular colours at least until some extent. Indian Courts should move on from the current stringent interpretation regarding singular coloured trademark and regard trademarks for what they are, i.e. unique identification mechanism for a particular product offered by a particular under a trade dress and if a product offered by a particular company is identified by a singular coloured and if such identification is distinctive, then that entity shouldn't be put at a disadvantage.

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⁸ The Trade Marks Act, § 27 (2), No. 47, Acts of Parliament, 1999 (IND)