

Passing Off and Infringement Action Under the Trade Mark Act, 1999: A Critical Analysis

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ABSTRACT

This paper aims to check one of the most important intellectual properties, namely trademarks, as well as their infringement and passing off actions. A trademark is defined as something connected³ to a particular good or service in order to the recognition and identification of that good or service, thus it can be anything that identifies and recognizes any product or service. The term trademark is defined under Section 2(1)(zb) of the Trademark Act, 1999. This paper basically talks about infringement of trademark and passing off which includes their elements, defenses, reliefs, and few important case laws.

Keywords: *Infringement, Passing off, Defenses, Remedies*

Trademark law requires the support of the government, judiciary, authorities, and last but not least, members of society at large.

Any human being strives to own their properties. If we see in this modern world, the most valuable as well as essential asset for any individual on this planet is property. Property gives its owner dignity, respect, and status. Other than the physical and tangible assets, there are also intangible property/assets; there is yet another type of property that exists in almost every country in the world, and that this is brain property, or intellectual property which is basically an incorporeal, intangible and abstract type of property. Ideas, inventions, originality, and creativity are all part of intellectual property. It also refers to our ability to think creatively, as well as some knowledge or abilities in medicine, culture, business, customs and traditions, arts, invention in various sectors and also in various walks of life. The human brain is the source of such intellectual property, and it has existed since prehistoric and Stone Age civilizations, though it has recently risen in relevance and value. For many years, intellectual property like tangible and physical property has been protected by various laws. These rules have lately evolved in order to fulfil the demands of global community.

As per the legislation Artistic work, such as sculpture, art, music, literature, and painting, as well as trade secrets, Internet domain names, trademarks and service marks, inventions, traditional and indigenous knowledge, computer programs, Plant Varieties and Knowhow, Biodiversity, Geographical indiscrimination, Artistic work, Design, which may encompass

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³ P. Narayanan, *Intellectual Property Law*, 145-146 (Eastern Law House Pvt. Ltd., New Delhi, 3rd edn., 2017).

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design of goods or packaging, or industrial design, and may include layout design of integrated circuits, and so on, are examples of Intellectual Properties⁴.

The goods producer or supplier ensures that, while the items he produces are identical to those manufactured by others, their distinguishing marks are distinct. Only until the Industrial Revolution, when large-scale production, distribution, and publicity through various media became possible, at that time the importance of trademarks was acknowledged. In this regard, a critical role has been played by trademarks in today's commercial marketplace.

A unique trademark has caused a change in trademark law in the modern era, which presents a significant challenge to the team drafting the nation's legislation. The majority of trademarks are registered on a territory basis; therefore, the global validity of such new marks may not be achievable⁵.

CONCEPT OF TRADEMARK

When a mark is able to graphically depicted as well as it can distinguish between the goods/services of one and the goods/services of another. Also, this type of mark has the capacity to be the packaging of the goods, colour combination, or shape then this form of a mark can be called as Trademark⁶.

However, it is pertinent to say that any of the mark which can graphically express itself qualifies as a trademark, and it must have the capacity to differentiate goods/services of one from the goods/services of other trademarks. A trademark is similar to movable property since it confers status on the owner.

In "*Koonerji Bechari Lal v. Firm Adam Pir Mohammed*"⁷ the High Court of Sindh stated in 1994 that a trademark becomes the firm's property, when a firm uses a trademark to represent to a particular purchaser that the mark belongs to his/ her goods. Also, it belongs to his/ her successors in the trade in which his/ her goods are manufactured/sold. Hence, the law protects the trademark owner's right to own property in such a mark.

INFRINGEMENT

Generally, the phrase infringement refers to violating, or disobeying a particular Law or rule as well as disregarding it. When we talk about trademark/service mark infringement, we basically mean that someone is utilising another person's trademark without their consent so as to sell goods/provide services for some monetary benefit. In India as well as in other countries, infringement of trademark and its violation occur in two ways:

- A. Registered Trademarks has been Infringed®
- B. Un-Registered Trademark has been Infringed™

The term Trademark is not defined in the legislation separately. Section 29 of the Trademarks Act, 1999⁸ defines infringement of a registered trademark in India, which states that A person

⁴ WR Cornish and Llewellyn, Intellectual Property- Patent, Copyright, Trademarks and Allied Rights 3-5 (Universal Law Publishing Co., Delhi, 2nd edn., 2001).

⁵ Annand, and Kemp, L., 2011. Global Registration- Where are we now. TR, 101(1), P. 94-99

⁶ Dr S.R. Myneni, Law of Intellectual Property (Asia Book House, Hyderabad, 2nd edn., 2003)

⁷ AIR1944 Sind 21

⁸ Sec.29 "A registered trade mark is infringed by a person who, not being a registered proprietor or the registered user, uses in the course of trade, a mark which is identical or deceptively similar in relation to the same goods or services in respect of which the trade mark is registered".

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who uses a mark that is identical to, confusingly similar to, or identical to a registered trademark in the course of business in relation to goods and services for which the trademark is registered but who is not the registered proprietor of the mark or who is not a person authorized by the owner for its use is said to be infringing the trademark.

Elements of Infringement

- **Registered Trademark:** If a plaintiff intends to sue someone for trademark infringement, the trademark of the Plaintiff has to be registered under the trademarks act. However, this is the basic condition so as to initiate a suit for trademark infringement under the trademarks act.
- **Unauthorized Use:** If the plaintiff has not granted any power to the defendant, then he/she has the right to sue the registered trade mark owner but in the viceversa the plaintiff loses his right to sue under the act. For instance, if the plaintiff granted the defendant permission to use the plaintiff's trademark pursuant to a contract and the defendant later violates or fails to comply with some of the terms of the contract, the plaintiff cannot sue the defendant for trademark infringement under the trademarks Act because he was already given permission to use it, but the plaintiff has the right to sue the defendant under the specific relief Act and the contract Act.
- **Identical or deceptively similar trademark:** To sue the defendant for trademark infringement, the defendant must use a trademark that is either deceptively similar or identical. The Delhi High Court in "*Horlicks Ltd. & Ors v. Kartik Sadhukan*"⁹ barred the defendant from using the trademark 'Horlicks' for confectionery products because this trademark was deceptively similar that to the plaintiff's registered trademark 'HORLICKS,' which produces food products for infants, energy-boosting foods, biscuits, and other products.
- **Trademark used in the Course of business/trade:** In order to be infringement, the defendant must be using the infringing mark for goods and services that are identical to or comparable to those for which the plaintiff's mark is registered.
- **Representation of the trademark:** The defendant must make some type of representation while using the mark. The representation can be in the form of invoice, issuance of bills, advertising and publicity campaign.
- **A trademark should only apply to a specific category of products or services:** If the Plaintiff wants to file the suit for infringement, then the plaintiff's mark must be one that deals with business and fall into one of the classifications; otherwise, the plaintiff will be unable to first register his/her mark, and then there will be no right to file an infringement suit under the act¹⁰.

Different Ways of Infringement

According to judicial pronouncements, the following are the numerous ways of trademark infringement:

- **Identical mark for identical goods/services:** Infringers may use a similar mark for similar services/goods. For an illustration, an infringer may use the mark Philips to produce electrical appliances. Then he/she is liable for infringement action by Philips Company, who is the registered owner for the item that falls in that category, because

⁹ 2002 (25) PTC (125) DEL

¹⁰ Sec. 7 of Trade Marks Act 1999 provides that the "Registrar shall classify goods and services for the purpose of registration of trademarks. Trade Marks Act has adopted Nice Classification of goods and services for registration of trademarks in India. There are all together 45 classes of which, class 1 to class 34 covers Goods and class 35 to class 45 covers Services".

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he/she is utilising the same Philips Company Mark.

The burden of proof rests with the plaintiff to show that the defendant's use of the trademark in the business of goods is confusingly similar to the plaintiff's registered trademark, according to the Hon'ble Supreme Court of India's ruling in the case of “**Kaviraj Pandit Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories**”.¹¹

- **Similar mark for identical goods/services:** In other cases, the infringer can use a deceptively similar mark for identical services or goods, for e.g. making locks with the mark 'Goldrij', the infringer in this instance utilises a mark that is deceptively similar to Godrej's mark. Then this will also amount to infringement, and Godrej Company has all the rights to sue the offender for violation of their registered trademark. The Delhi High Court in “**Lakme v. Like Me (Subash Trading)**”¹² barred the defendants from using the trademark “Likeme” because it is deceptively similar and causes confusion as it can be seen that it is phonetically similar that to the plaintiff's registered trademark, and the range of products used by both is the same. Therefore, results in infringement.
- **Identical mark for similar goods/services:** Another kind of infringement is when an infringer of a trademark uses a identical mark for similar services/goods, such as when an offender uses the Godrej mark to manufacture entrance gates. The Delhi High Court held in “**Atlas Cycles Industries v. Hind Cycle Ltd**”¹³ that in the proceedings of trademark infringement, the plaintiffs must establish that identical feature/resemblance of the defendant's copied mark either phonetically, or in some other way, and that infringed mark have the capacity so as to create confusion in regard to the Plaintiffs registered trademark.
- **Similar mark for similar Goods/Services:** There is another situation where an infringer uses a similar mark to provide similar services or goods, such as using “Goldrij” to create entrance gates.
- **Likelihood of confusion:** As per the Supreme Court of India, the likelihood of confusion must be assessed through the perspective of unwary consumers with average intelligence and imperfect recollection ability. The court took the typical common man into consideration when developing the test of likelihood of confusion since the average common man may/may not be able to differentiate the two marks in detailed form, therefore the threshold was determined with the help of an average common man¹⁴.

Burden of proof:

- i. The applicant who basically applied for registration of the mark, carries the burden of proof that the mark will not cause deception or confusion if it is registered.
 - ii. If there is a risk of deception or confusion because of the applicant's trademark registration, then the onus of proof shifts to the opponent, whomust establish to the court that there is a risk of deception/confusion in the trademark application of the applicant.
- **Test for similarity of ideas:** There is also a possibility that the infringement will duplicate the concept stated in the trademark label¹⁵. For example, if the plaintiff's energy drink label features an image of young teens studying and the defendant's energy drink label features a similar style of studying youth picture, then the defendant is infringing on plaintiff's mark and is therefore liable for suit of infringement by the plaintiff.

¹¹ 1997PTC(17)(DB)779

¹² 1996 PTC (16) (567) Del

¹³ ILR (1973) (393) Del

¹⁴ Supra note 1 at 198, 199.

¹⁵ Dr. B.L. Wadehra, Patents Trademarks Copyrights Designs And Geographical Indication 206-207 (Universal Law Publishing Co. Pvt. Ltd. Delhi, 3rd edn., 2006).

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In “**Kiran Gupta v. Pizza Hut International**,”¹⁶ the Hon'ble Court has ruled that the appellant's trademark "Pizza Ghar" is misleadingly similar to the idea of the respondent's well-known trademark "Pizza Hut."

Liability under Trademark Act

The Trademark Act holds an infringer accountable for a number of steps to prevent him from profiting from someone else's goodwill and reputation, which have been earned through integrity and diligence.

It is important to note that, unlike in a Passing off case, the plaintiff in an there is no need of the Infringement suit to show the reputation of his/her trademark till the time the owner of the mark has registered it with the Trademark Registry and has the certificate of registration. In addition, trademark regulation protects the rights of prior users.

PASSING OFF

As per the Cambridge dictionary, Selling a product that is identical to a trademark that has previously been legally protected by another company is known as passing off¹⁷.

Passing off is a tortious conduct in which a person, while producing/selling products/providing services, creates a false impression that the goods or services belong to someone else. Typically, whomever passes off does so by directly using another's trademark, such as by using an identical mark, or indirectly, such as by using deceptive similarity through visual or phonetic means, etc.

If a person violates intellectual property rights by copying another person's registered or unregistered brand, they may be held liable through a tort known as passing off, which was created by common law. By explicitly stating in the provision that nothing in the Act will affect an unregistered trademark owner's right to file a passing off action in the event that its unregistered trademark is violated, trademark legislation from 1940 to the current Act of 1999 has always recognized and accorded due respect to the passing off action of the genuine unregistered trademark owner. The trademarks legislation acknowledges and treats this with respect even though it is not a formal action and is not defined by the Act.

The Supreme Court found in “**Bengal Waterproof Ltd. v. M/s Bombay Waterproof Manufacturing Co. and Anr**”¹⁸ that the Respondent's use of the trademark 'DACKBACK' constituted an act of passing off since it was similar to the trademark, 'DUCKBACK' which is the Appellant's trademark.

Elements of Passing off

The UK Court established the following three things that are significant in passing off actions in the landmark case “**Jiff Lemon Case: Rekitt & Colman Ltd. v. Borden Inc**”.¹⁹ They're referred to as the Classic Trinity Principle. In India, same principles are used to some extent in passing off case. The following are key elements:

- i. **Goodwill:** Plaintiff must demonstrate his goodwill. And this is a force that attracts consumers and potential customers to the product, and this passing off action right can be claimed only by using the product, because the passing off right is not in the property of

¹⁶ 2004 (28) PTC (279)

¹⁷ Cambridge dictionary, available at: <https://www.dictionary.cambridge.org>

¹⁸ AIR 1997 SC 1938

¹⁹ (1990) 1 All E.R. 873

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the good, but in the use of the same, which builds goodwill for the same, and that goodwill can only be protected by using it. The essence of goodwill is territorial.

- ii. **Misrepresentation:** Plaintiff must establish that the defendant misled the public into believing that the products or services he offers are those of Plaintiff. This has to do with the deception. The business or product in question may be different and not identical, but if the items are identical, the case will almost certainly be strong.
- iii. **Damage:** Plaintiff must additionally establish that defendant's actions have caused or are likely to cause damage to Plaintiff's goodwill. Due to the defendant's actions, there has been a loss of sales as well as dilution of the goods or services.

Trans- Border Reputation Doctrine

A product's trans-border reputation refers to its reputation outside of a country's borders or geographical limits. The distinctiveness of this doctrine is that, even if a trademark proprietor's goods or services are not made or sold in India, such trademarks are extremely popular in India due to extensive publicity and advertising of such things. Even though such products' trademarks are not registered in India, the owner of the trademark can object to the registration of an identical or deceptively similar mark for such internationally renowned goods. Such highly reputed trademarks with trans-border reputation are accorded the protection that unregistered trademarks in India would ordinarily have. TMA 1999, as well as the Madrid Protocol and India's status as a signatory to the TRIPS Agreement, protect Indian trademarks for goods and services on an international level, therefore we must appreciate the Indian Parliament's efforts to preserve trademarks originating in India in the global marketplace.

The Supreme Courts Division Bench in the Landmark case "*N. R. Dongre & Ors v. Whirlpool Corporation & Ors*"²⁰ upheld a Passing off Action against an owner with a registered trademark, the court held that the trademark's registration is irrelevant in a passing off action. And no new right develops as a result of registration, other than one that already exists under Common Law rights and exists even without registering the mark. Before statutory enactment, reputation and goodwill were rights that were considered in the common law. Before the law was established in India, the only way to acquire a trademark was only by usage. The statutory enactment has no effect on this right, which is protected and conserved by Section 27(2) and Section 33 of the Trademarks Act 1999²¹.

The Whirlpool Case is a landmark decision that established the Trans-border Reputation theory. In this case, the Delhi High Court issued an injunction, which was supported by the Supreme Court.

REMEDIES FOR INFRINGEMENT AND PASSING OFF ACTION

In India, since the corporate world has evolved both domestically and internationally, trademark infringement has increased significantly. To combat the risk of infringement, multiple remedies are provided in India under various laws and judge-made laws for the protection of both registered and unregistered trademarks. The numerous remedies for infringement and passing off actions are listed below.

²⁰ 1996(16) PTC 476 DEL(DB)

²¹ Ibid; In this case the Court has taken the view that even advertisement of trade mark without existence of goods in the market is also to be considered as use of the trade marks.

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Civil Remedies

Followings are the reliefs that the court can grant in the cases of passing off and infringement.

Injunction

This is the most significant relief that any authentic trademark owner would seek in order to prevent the infringer from infringing on his or her trademark in the future. This is usually the final step of the court process, where the court makes a judgement after giving both sides a fair hearing and checking over the documents and evidence to ensure that neither litigant is treated unfairly²².

i. **Perpetual Injunction:** If an infringement action is brought, the court may permanently prohibit a defendant from infringing on the plaintiff's trademark. This injunction is usually granted after the case has been settled. Typically, an injunction is issued after the interim order or even if no such temporary order has been issued at all. The legitimate trademark owner desires to stop the infringer from engaging in the infringement wrong for all time, hence anyone who files a lawsuit alleging infringement or passing off requests a permanent injunction. The plaintiff doesn't care how much the lawsuit will cost; what matters is that the defendant will never again be allowed to use the plaintiff's trademark in an unauthorized manner.

Rupa Co. was awarded an injunction for using the "Don" mark and violating Dawn Mills' registered trademark "Dawn," according to the Gujarat High Court in "**Rupa & Co. Ltd. v. Dawn Mills Co. Ltd.**"²³ The court also noted that this was a very strong case for taking legal action. The pronunciation seems to be the same, which is more of a case of phonetic likeness.

ii. **Temporary Relief/ Interim Relief**

When there is a chance that the infringement suit could drag on for a long time, the Plaintiff will always seek Interim remedy. Many a times in India, a court would not determine a matter urgently because it must follow the principles of Natural Justice and decide the case on its merits, taking into account the facts and evidence of each case. So, in such a circumstance, the Court may grant a temporary injunction to prevent the defendant from committing further wrong, but if the defendant successfully convinces the court that such defendant has some rights in the disputed trademark, such temporary injunctions may be revoked.

iii. **Interlocutory Injunction/ Ex parte order**

Ex-parte injunctions are available under the governing act of trademark in certain genuine cases to avoid delays in action. For example, when someone infringes or passes off a pharmaceutical trademark or a trademark for insurance or finance firms, or a trademark for food and drink items, the court evaluates the urgency of the situation and grants an ex-parte order of injunction or other remedy.

The Delhi High Court held in "**Prabhu Shankar Aggarwal v. Anand kumar and Deepak Kumar**"²⁴ that when exercising the power to issue an ex-parte injunction, the court must proceed cautiously.

²² The trademark 'Destro' and 'Destrol' were held to be deceptively similar and hence Injunction was granted. See also, Vijay Grover v. Biocure Laboratories [2002(24) PTC (438) DEL: (2002) (95) DLT (614)]

²³ AIR (1998) Guj. 247

²⁴ 2002(24) PTC (292) DEL

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iv. Mareva Injection

When a court order is passed, the defendant may attempt to disperse its own assets in order to defeat the court's ruling²⁵. However, the plaintiff must convince the court that there is a prima facie reason for the same and that there is a great danger and threat that the defendant will destroy, dispose, dissipate or deal its own assets in order to weaken the court's judgement or order to recover costs or remedies against such defendant.

The defendant's bank account was frozen from selling WWE products online by the Delhi High Court in "*WWF v. Vinayak S*".

CRIMINAL REMEDY

Since 1889, all trademark legislation passed in India has included 'criminal' and 'penal' remedies. A similar remedy is possible under various sections of the Act of 1999. It's interesting to study that, in addition to civil and administrative remedies, the law's framers included a provision for criminal penalties in the event of trademark infringement.

Penal Provisions are contained under Trademarks Act (TMA)

This is India's trademark law, and it provides for criminal penalties in the event of infringement in the following ways:

Under Chapter 12 of the Trademarks Act 1999, there are remedies for pursuing criminal charges for trademark infringement and passing off.

When a person who has been harmed seeks criminal action, it aims to have the infringer penalised. The following are the provisions from Section 101 to Section 104 and Section 115 of the trademark act, as well as the punishments as per the legislation.

Section 101 of the act talks about the "meaning of applying trademarks and trade descriptions" Sec. 102 of the act talks about the falsely applied and falsifying trademarks. This section states that when a person produces or uses a mark identical or deceptively similar to that of the plaintiff without his consent, or when a person falsifies a legitimate trademark by change, addition, or application to goods, services, or packaging then the Defendant bears the burden of proving that the person had the approval from the owner of that trademark.

Section 103 of the Trademarks Act basically deals with the falsifying or falsely applying of trademarks or trade descriptions.

The Criminal Remedy and Penalty are discussed in Section 104 of the Trademarks Act 1999. It states that the Imprisonment of 6 months, which can be extendable to three years and that person is also liable for fine of Rs 50000, which can be extended upto Rs 2 Lakhs.

Sec. 115 of the Act provides for the authority of search and seizure, which is carried out by the police, but only with the approval of the Registrar of Trademarks.

Section 120 of the act talks about punishment for abetment in India of acts committed outside India.

²⁵ Sec. 135(2)(c), Trademarks Act, 1999

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Police Action

As per section 156 of Code of Criminal procedure (hereinafter referred as CrPC) the Police is given the authority to take a Cognizable Action.

Filing of the Complaint with Magistrate

The party who was harmed can approach the Magistrate under the CRPC if the police refuse to take action, such as filing a FIR.

Although there is no explicit mention of the offenses as being cognizable in the Trademark Act, Section 190 of the CRPC states that the offenses in the Trademark Act are nonetheless recognized as cognizable under the CrPC 1973. In this act the punishment is up to 3 years²⁶.

Sec. 115(4) of the TMA.1999 states that the registrar's opinion is required for a criminal action, which is sometimes not possible due to other reasons, and there is no obligation on the registrar's part to do so. As a result, filing a complaint before a magistrate is more convenient for the party who is being wronged because the magistrate can try the person who is violating the said trademark by issuing summonses to such person. Therefore, it is not required in this situation to seek the registrar's view.

Sections 93 and 94 of the Criminal Procedure Code of 1973 discuss the action of an unknown party. Regardless of whether the infringer's identity is known or not, this clause enables one to take legal action against an infringer through a search and seizure. Hence, this is a key advantage that a criminal prosecution has over a civil lawsuit. Criminal activity is undeniably highly effective in its nature.

Remedies provided under Indian Penal Code (IPC) 1860

Under the case that a trademark has been infringed, there are provisions under the Indian Penal Code (referred to as IPC above) that can protect the legitimate owners of that trademark. Some of the key sections under IPC have been selected and briefly explained in this context.

- i. **Cheating:** The topic of cheating is covered in Section 415 of the code. If someone uses another person's trademark without their consent or authorization and uses it for financial gain it means that person has committed trademark infringement. Hence, Infringement also consists of the element of cheating. Thus, in this case this infringer can be prosecuted under Section 415 of the IPC.
- ii. **Forgery:** Section 463 of the said code applies to the offense of trademark infringement for goods or services.
- iii. **False Property Mark:** Basically using someone else's trademark to sell goods and services is the same as applying a false mark, it is punishable under Section 481 of the aforementioned code as well as if an act of infringement is committed. This is because using someone else's trademark to sell goods and services is the same as applying a false mark because the mark in question is actually their legitimate trademark.
- iv. **Counterfeited Property Mark:** Section 483 of this code punishes anybody who sells products using a counterfeited property mark. This provision applies to the offense of infringement since it involves the selling of goods using a counterfeit mark.

²⁶ Code of Criminal Procedure 1973 The First schedule table 2 "any offence which is punishable with imprisonment for 3 years is cognizable, non-bailable offence and triable by the Magistrate of First Class.

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CONCLUSION

The current Indian trademark legislation, the Trademark Act 1999, is the result and beneficial development of all previous legislation made during their era. Because India is a signatory to TRIPS and other international treaties and conventions, we can argue that today's trademark legislation is on par with international standards.

If we research and analyses the current trademark laws, we can see that it is very good in that it covers and considers most aspects of trademarks, including the 'Service' mark, which was not included in earlier Indian legislation. Even if the same prior user's mark is unregistered, the rights of the former user are protected. The Act also recognizes the right of an unregistered prior user to bring an action against anyone who infringes on their trademark.

Adopting sound legislation is one thing; putting it into practice is quite another. The Trademark Act is incredible, but it is not being implemented as intended by the government, courts, stakeholders, and the general public.

After performing extensive research in the field of trademark law, the researcher wrote a paper titled "Critical Analysis of Infringement and Passing off under Indian Trademark Law."

Because the TMA 1999 contains all necessary provisions to stop and prevent fraudulent and infringing trademarks from being registered, it is a positive aspect that the country has protective laws against trademark infringement and passing off in the areas of goods and services that are both statutory and common law. The same advantage should be positively utilized by the different stakeholders in society to make these laws more effective and useful. In addition to India's compliance and commitment to international treaties and conventions, the courts have also had a considerable impact on how infringement and passing off are defined from both an Indian and global perspective.

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Conflict of Interest

The author declared no conflict of interest.

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