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# **TRADEMARK DISPUTES IN ONLINE MEDIUM AND RESOLUTION**

AUTHORED BY - GOPIKA ANIL

## **INTRODUCTION**

Technology and its use have had a huge impact in the modern era, and the said impact has become evident in our daily lives. As the growth of technology increased its scope and usage also started expanding. In the current times we have witnessed the penetration of technology even into the concept of Intellectual Property. The concept of Intellectual Property presently has become an important aspect in the development and also for the exploitation and use of various computer hardware and software. The present world faces a major threat in the cyberworld through various cyber offences like data theft, phishing, etc. Hence, proper legal remedies are to be provided to prevent such exploitation.<sup>1</sup>

Considering the rights given under Intellectual Property Right, it aids to protect the rights of creator of such intellectual property from various offences, however, such protection is not absolute. By probing into the copyright law, it is evident that computer programs, databases and other works that are stored in computer receives protection. The concept of Copyright has its roots in The Copyright Act, 1957, and various other legislations backing Trademark, Patent, Industrial Design, etc. All these legislations help widen the scope of Intellectual Property, making it applicable even into cyberspace. That is the said legislation through its wide and flexible nature has expanded over the time and has made itself adaptable to the changing world. Even with the introduction of Artificial Intelligence, Intellectual Property Right ensure the protection of such intellectual property even in cyberspace.<sup>2</sup>

The law of confidence also supplements the effect along with the contribution made by Intellectual Property Rights in the cyberspace. The said combination aids to promote research and development helping both layman and professionals alike. The Patent law have under its wings the new computer hardware and its various forms. On the other hand, Trademark law,

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<sup>1</sup> David L. Bainbridge, Introduction to Information Technology Law, 6<sup>th</sup> Edn. (Harlow: Pearson Education, 2008), p. 7

<sup>2</sup> Himani Makkad, "Trademark Law in Cyberspace: Protection to Internet Address", Journal of Legal Studies and Research, Intellectual Property Law Review, Vol. 3, Issue 3, June 2017, p. 40

law of designs, prevents the exploitation of such products including computer hardware and software. Hence, all these laws work together within the cyberworld and prevents such works from being exploited.<sup>3</sup>

However, through the rapid growth of e-commerce and various other social media platforms a new and complex challenge surmounts brand owners, and has become a fertile ground for trademark infringement, rendering the very function of trademark being constantly at test. The Article examines to identify the various forms of trademark infringement and the key challenges in its resolution process.

## TRADEMARK

Trademark includes the protection that is given to certain words, symbols or logos that are associated with a brand or gives a special identity to a particular goods or service. These words, symbols or logos acts as an identification mark and helps giving a special identity to a particular goods or service in the market which enables the consumers in identifying the said brand from other products within the market. Since, globalisation is at its peak, which has facilitated market integration, through trademark a product will be able to stand out from the rest of the products in the market. That is, through trademark goods receive a distinct identity and helps them to be identified within the market. Hence, to constitute trademark it must to able to bring a distinguishable identity to a particular goods or service.<sup>4</sup>

Trademark has, over the years expanded its scope and extends to brand names, collective mark, service marks and certification mark. The concept of trademark has the following functions, that qualifies as its necessities:

- It addresses the origin of the product.
- It portrays the quality of the product.
- It acts as an advertisement to the goods or service.
- It helps create a positive image of the said product or the service it renders.<sup>5</sup>

The ownership of trademark is not just confined to a particular person. Its application can be extended to a company or any legal entity. When the said trademark, is used by a person who

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<sup>3</sup> Infra Note 1

<sup>4</sup> Veena Kumari, Cyber law- 1, University of Lucknow, undrc.lkounir.ac.in

<sup>5</sup> Infra Note 2

does not have the right to do so and through the said usage diminishes its distinctiveness, results in a trademark infringement. That is, when a person who is not authorised, uses the trademark in such a way as to create an adverse effect on the reputation of the said product, results in trademark infringement. In India, the concept of Trademark is protected under the Trademark Act, 1999. It contains conditions as to which Trademark can be acquired and the legal remedies that are available in case of Trademark Infringement.<sup>6</sup>

## TRADEMARK IN DIGITAL ERA

The rise of technology has given a new dimension to the concept of Trademark and has led to a significant shift in revolutionising the said concept. The said change has brought various challenges and opportunity to brand protection and has had a positive impact while, bestowing some testing times, challenging the concept of Trademark. With the growth in e-commerce, traditional concept of trademark infringement has expanded to include various new forms of infringements in the new dimension of cyberspace. That is, the scope of trademark and the brand protection it provides has escalated and has found its way into the cyberspace. The growth of the cyberworld has proved to be beneficial to the owners of Trademark, however, it also poses as an immense threat in the guise of domain name disputes, cybersquatting, etc. Section 29 and 30 of the Trademark Act, 1999 gives basic protection to such Trademarks. However, the protection of marks within the cyberspace still hovers as an ambiguous question that remains unanswered.<sup>7</sup>

The Madrid System, Community Trademark Treaty and The Trademark Law Treaty act as the major treaties protecting trademark. Through the Madrid system, single international registration of trademark is administered which promotes the concept of a single application, from the home country. Further, the Trademark Law Treaty, 1994 has the objective to standardise the Trademark registration procedure across different countries. However, the Community Trademark Treaty focuses on one application to register for Trademark Protection across all of Europe.<sup>8</sup>

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<sup>6</sup> Infra Note 3

<sup>7</sup> Thoi, Christiawan and Wagiman. W, "Trademark Law in Digital Age Challenges and Solution for Branding Protection", (2004), 2(4), Global International Journal of Innovation Research, 713

<sup>8</sup> Lipton J, "Digital Trademark Law: In Rethinking Cyber Law", Edward Elgar Publishing, 72

## CONCEPT OF TRADEMARK IN THE CYBER WORLD

Trademark gets infringed when a person who is not authorised, illegally uses the said trademark to confuse the public with regard to such trademarked goods or services. When the cyberworld started to expand the said concept started to become more and more complex. The basic ingredient that is needed to constitute Trademark infringement include:

- Ownership of a valid Trademark.
- Use of identical or similar trademark.
- The potential of the said act to cause confusion.<sup>9</sup>

The above-mentioned aspect however becomes difficult to be applied in the cyber world, the interactions of the consumers including, the market itself exists in a virtual space and not through a tangible medium. However, the courts, over the time have utilised various approaches in determining the depth of infringement in the said context, by considering factors like the consumer behaviour and interest. As in the context, “Initial Interest Confusion” is an approach used by courts over the time and has proved to be viable in determining the said infringement.<sup>10</sup>

## TRADEMARK DISPUTES IN ONLINE MEDIUM

Trademark disputes usually occurs when one uses the trademark without authorisation in the cyber space and creates confusion, eventually diverting the consumers and diluting the brand. That is when the trademark holder believes that another party is using an identical or confusingly similar mark to theirs, and a dispute for trademark infringement arises. Here, there is a dire need to resolve the said dispute amicably and effectively in order to protect their intellectual property, hence Alternate Dispute Resolution Methods are most commonly used for such disputes.<sup>11</sup>

### TYPES OF TRADEMARK DISPUTES:

- DOMAIN NAME DISPUTE

A concept that is familiar in the cyber space is the concept of domain name. It acts as a unique address in the virtual world. That is, it is a unique name given to an internet address. It is commonly known as ‘Unique Resource Locator’ (URL). Since, the domain

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<sup>9</sup> Thushara C and Vedashree, “Metatags: A New Challenge in Trademark Law”, 2023

<sup>10</sup> Infra Note 6

<sup>11</sup> Karnika Seth, “Computers Internet and New Technology Laws (3<sup>rd</sup> Edn, Lexis Nexis 2019, Reprint 2022), p. 304.

names through its unique nature facilitate an address system, it enables one device to locate another. The Internet Corporation for Assigned Names and Numbers (ICANN), acts as a body that is responsible for harmonising domain names around the World. For business entities and various organisations domain names and its registration is considered highly important.<sup>12</sup>

That is when a person not authorised registers domain name in their account, a domain name dispute arises and will eventually lead to trademark infringement. This is because Trademark has a huge psychological impact on the consumers, as they most commonly, try to link trademark with domain names to create an instant connection. Hence, it becomes absolutely essential to register domain names that directly represents the trademark, so that the consumers can make instant connection and access the website of a Trademarked Company. So, when the customer is ignorant of the exact domain name of the company, they will end up searching the website under the company's name or Trademark. The very same habit of the customers is exploited by cyber criminals, which encourages them to register a website with domain name similar to the registered Trademark of a company.<sup>13</sup>

Disputes regarding domain names are mainly triggered during the registration process. That is because the whole process of registration happens on a first come first serve basis, this principle makes it completely different from the Trademark registration process.

Trademark disputes are not solely triggered by the unauthorised use of the said registered mark or well-known mark that have the potential to confuse the consumers, the concept of disputes further expands to registering domain names that are identical or deceptively similar to Trademark, exploiting the advantage and selling it for higher prices or uses it to divert consumers.<sup>14</sup>

- **CYBERSQUATTING**

This a type of Domain Name Dispute where one person registers a domain name of someone else with the intent to sell the same. The major intend in the said dispute is to prevent the holder from accessing it, that is to divert the consumers from the said website.

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<sup>12</sup> Mamta Pal and Ajaymeet Sigh, "Infringement of Trademark in Digital Domain: A Comparative Study of India, United Kingdom and United States," 5 International Journal of Research Publication and Reviews, P. 321, (2024)

<sup>13</sup> Anirudh Rastogi, Cyber Law: Law of Information Technology and Internet", p. 320 (Lexis Nexis, 2019)

<sup>14</sup> Infra Note 12

In *Tata Sons Ltd v Ramadasoft*,<sup>15</sup> in this case the respondent registered domain names with variations of the domain name incorporating the trademark of TATA, creating various domain names including *tatapower.com*, *tatawestside.com*, etc, even when the Tata had registered the domain name *tata.com*. The court held that the respondent is holding the said names in bad faith and held him liable for cybersquatting.<sup>16</sup>

- **TYPOSQUATTING**

This type of domain name dispute occurs when someone registers a said domain name with certain variations from that of a well-known trademark. That is, certain variations are made to a trademark or an existing domain name through misspelling or adding certain prefixes and suffixes in order to take advantage of the consumers. An example suited for the said dispute is the domain name *googlw.com*, the said domain name uses a well-known domain name and take advantage of typo made by the consumers, who ends up typing 'w' instead of 'e'.<sup>17</sup>

Such misspelling variations in trademark are mostly identified to be “confusingly similar” making it a trademark infringement. Many WIPO cases have identified the same. In the case of *Pfizer. Inc v Enamecorp.com*,<sup>18</sup> the domain name *Pfizere.com* was challenged by Pfizer Inc, as they were the user of the well-known trademark PFIZER. It was noted by the Panel that there was just a slight variation from the well-known mark, which made it confusingly similar from the trademark of the complainant, which was used to purposefully divert the consumers.

- **REVERSE DOMAIN NAME HIJACKING**

This mainly occurs when unethical trademark owners unjustly reclaim online spaces from the legitimate owners, often using a legal platform. This is a bit different from the traditional concept of domain name hijacking, where the malicious actor often legitimately acquires a domain name. The said concept works by exploiting the Uniform Dispute Resolution Policy (UDRP) to acquire the domain name from its legitimate owners. Here, the Uniform Dispute Resolution Policy acts as a double-edged sword. The Policy which is primarily established to protect trademark holders from cybersquatting and various other infringements is misused by the persons leveraging their trademark

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<sup>15</sup> Case No. D 2000- 1713, decided by WIPO Arbitration and Mediation Centre

<sup>16</sup> Infra Note 13

<sup>17</sup> Infra Note 2

<sup>18</sup> Case No. D 200-0791, decided by the WIPO Arbitration and Mediation Centre.

status to wrongfully claim such domain names.<sup>19</sup>

- META TAGGING AND KEYWORD ADVERTISING

Meta tags are HTML code snippets which describes a webpage content, whereas keyword advertising is paying for ads linking specific search terms. In the case of *Interflora. Inc v Mark and Spencer Plc*,<sup>20</sup> the court held that, if the use of a trademark as keyword, hurts the functioning of the trademark as an identifier of origin, only then an infringement is said to occur.<sup>21</sup>

## DISPUTE RESOLUTION UNDER TRADEMARK LAW

In every law, dispute resolution mechanism runs Parallely to ensure justice. In Trademark law also dispute resolution is crucial for promoting fair competition and to protect the trademark owner's interest. The concept of dispute resolution in trademark law mostly favours Alternate Dispute Resolution over the traditional litigation methods, like court cases and administrative proceedings, as they are time consuming and costly. In the commercial world time is money and hence, Alternate Dispute Resolution Methods like mediation, negotiation and arbitration are more popular in resolving trademark disputes. Through these methods disputes can be settled in a cost effective, flexible and speedy manner which helps to bring out amicable outcomes and creative solutions that traditional courts lack.<sup>22</sup>

- DISPUTE RESOLUTION IN US

Under the Lanham (Trademark) Act, 1946, judicial remedies are made available to trademark owners for the unauthorised use of their Trademark. Through the Federal Trademark Dilution Act, 1996 the trademark owners are eligible to injunctive relief for infringement of trademark through dilution. Two forms of dilution are recognised under the Act, dilution by blurring and dilution by tarnishment. Dilution by blurring happens when distinctiveness of trademark is targeted and eventually reduced, and in dilution by tarnishment, the reputation of trademark is harmed.<sup>23</sup>

Anti- cybersquatting Consumer Protection Act, 1999 further provides protection to

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<sup>19</sup> Infra Note 18

<sup>20</sup> (2014) EWCA Civ. 1403

<sup>21</sup> Infra Note 9

<sup>22</sup> Sanjay Kasavan, "Comparative Advertisement and Trademark Infringement: Comparison of India, US and UK Laws", available at: <http://ssrn.com/abstract>

<sup>23</sup> Ibid

trademark owners from cybersquatting making the infringer liable for civil actions if the use of mark was made in bad faith to make profit, or uses identical or confusing marks to confuse the consumers, infringing the right of trademark owner.<sup>24</sup>

- **DISPUTE RESOLUTION IN INDIA**

In *Yahoo! Inc v Akash Arora and Anr*,<sup>25</sup> the defendant's domain name served similar services as the plaintiff's, following their colour and scheme. It was through this case the Delhi High Court extended the scope of the Trademark Act, 1999 into cyberspace addressing domain name disputes, and various other trademark infringement in cyberspace. The court held that the law of Trademark was applicable to services, which expands to the services through websites.<sup>26</sup>

Section 29 of the said Act treats an unauthorised use of registered trademark, even in cyber space as an infringement, if it is identical or confusingly similar to the registered mark which has the potential to manipulate or deceive the consumers.<sup>27</sup>

## **DISPUTE RESOLUTION THROUGH DOMAIN NAME REGISTRARS**

Dispute resolution through domain name registrar is typically managed under various national and international policies, specialised for handling domain names disputes. Most common policies among them include the Uniform Domain- Name Dispute Resolution Policy which deals with disputes on a global perspective, I. N. Domain Name Dispute Resolution Policy (INDRP) which deals with disputes in Indian domain. The remedies that are provided under the said policy is generally restricted to cancellation or transfer of the domain name. From this aspect it can be inferred that, for acquiring relief in the form of damages one must approach the court of competent jurisdiction. Proceedings before a dispute resolution service provider does not act as a bar for instituting court proceedings before a competent court.

- **DISPUTE RESOLUTION UNDER THE NSI**

Before the ICANN, the domain name disputes were handled by the NSI. Before the year 1999, the Network Solution Inc., was given the responsibility to register generic top level domain names (g TLDs). However, due to the increase in the number of

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<sup>24</sup> Infra Note 12

<sup>25</sup> 78(1999) DLT 285

<sup>26</sup> Swetha Sai and Sai Darshini, "Trademark Infringement and Online Environment: Challenges and Legal Remedies", International Journal of Legal Science and Innovation, Vol. 6, 2024, pp. 224

<sup>27</sup> Ibid

disputes, NSI started to develop its own domain name dispute resolution policy. However, the major drawback of the policy was that it failed to recognise basic trademark law like the likelihood of confusion and common law. This led to the creation of the present set of policies under the Internet Corporation for Assigned Names and Numbers (ICANN).<sup>28</sup>

- DISPUTE RESOLUTION UNDER THE ICANN

- Uniform Domain Name Dispute Resolution Policy (UDRP)- This policy implemented by the ICANN is considered as the successor of NSI. The efficiency of UDRP, through various features like cost effectiveness, directly contributed to its successful growth in resolving disputes over domain names. The policy deals with trademark-based domain name disputes along with certain other disputes like cybersquatting. In the case of *Referee Enterprises Inc. v. Planet Ref. Inc.*,<sup>29</sup> the court held that Federal Arbitration Act does not apply to UDRP proceedings.<sup>30</sup>

- Decision by World Intellectual Property Organisation, Arbitration and Mediation Centre

The proceedings under the UDRP can be initiated before any dispute resolution service provider that has been approved by the said policy. This approved service providers include WIPO, National Arbitration Forum, Asian Domain Name Dispute Resolution Centre, etc.

In *World Wrestling Federation Entertainment, Inc v Micheal Bosman*,<sup>31</sup> the said case was the first domain name dispute case before the WIPO Arbitration and Mediation Centre. The Panel in the said case found that the respondent was using the domain name that was identical to the registered trademark of the plaintiff. The fact that the defendant tried to sell the domain name to the plaintiff established his bad faith. Hence, the respondent was ordered to transfer the disputed domain name to the plaintiff.<sup>32</sup>

- There are, various other dispute resolution policy that comes under the ICANN. This includes Charter Eligibility Dispute Resolution (CEDRP), Intellectual

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<sup>28</sup> Infra Note 13

<sup>29</sup> Case No. 00-C-139 (ED. Wis Jan 24, 2001)

<sup>30</sup> Infra Note 2

<sup>31</sup> Case No. D-99-0001

<sup>32</sup> Infra Note 26

Property Defensive Registration Challenge Policy (IPDRCP), Qualification Challenge Policy (QCP), Restriction Dispute Resolution Policy (RDRP), etc.<sup>33</sup>

- **‘.IN’ DOMAIN NAME DISPUTE RESOLUTION POLICY**

The INDRP, is restricted to the .in domain, that is the said policy prescribes the procedures that are applicable for dispute resolution of domain names within the .in domain. The Arbitration process under the said policy complies under the Arbitration and Conciliation Act, 1996. Instead of a service provider, the IN registry appoints an arbitrator on the receipt of a complaint. The procedures of the said dispute will be in accordance to the INDRP Rules of Procedure, 2005. Arbitration proceedings instituted under the INDRP does not act as a bar to court proceedings making the entire procedure more flexible.<sup>34</sup>

## CONCLUSION

The concept of trademark disputes in the online medium portrays a potential clash persisting between brand protection and the borderless nature of the internet. While there are many platforms persisting to address the said disputes and provide relief to the same, challenges still persist. Hence, the need for a combination of traditional remedy with international corporation and proactive digital enforcement strategies are of dire need to mitigate the said challenges and to protect trademark in the digital era. In India, it is high time for an amendment in the Trademark Act, 1999 to explicitly address trademark infringements in online medium like cybersquatting, misuse of brand name advertisements, etc.

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