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TRADEMARK DILUTION: A COMPARATIVE ANALYSIS OF LEGAL FRAMEWORK IN INDIA VIS-A-VIS THE UNITED STATES

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INTRODUCTION

A trademark serves as a distinctive mark, symbol, image, design, or a phrase affiliated with a particular product, in order to differentiate from similar goods or services offered by competitors and facilitating identification of its origin. Upon Registration, the manufacturer gains legal ownership of the trademark, granting them the authority to enforce their rights andtake legal action against any infringement. Consequently, safeguarding trademarks becomes imperative for manufacturers to ensure legal protection of their intellectual property.

In an effort to enhance the protection of goods and services against fraudulent imitations, the Indian Parliament enacted the Trademarks Act, 1999, replacing the earlier Trade and Merchandise Marks Act, 1958. This legislative update aimed to fortify the legal framework surrounding trademarks, introducing novel provisions to combat trademark dilutioneffectively.

TRADEMARK DILUTION

Dilution refers to a legal concept in trademark law that aims to protect the uniqueness and distinctiveness of a famous or well-known trademark from being weakened by unauthorized use or association with inferior products or services. In essence, individuals are not entitled toreplicate any established trademark or exploit the reputation of such trademark.

HISTORY OF TRADEMARK DILUTION

The origin of trademark dilution can be traced back to the year 1927. The concept of trademark dilution was initially propounded by Frank Isaac Schechter in his article titled "*The Rational Basis of Trademark Protection*," first published in the Harvard Law Review. Schechtercontended in his article that the protection of a trademark should not solely focus on addressingissues related to public deception but should also encompass preventing individuals from undermining the

originality and distinctiveness of the mark. Frank Schechter is popularly known as the 'father of dilution' owing to his groundbreaking work, which laid the foundationfor the doctrine of dilution. The introduction of the concept of trademark dilution marked a significant shift in the understanding of intellectual property rights, emphasizing the importance of protecting the intangible value associated with famous trademarks. This recognition of dilution as a distinct legal concept has had a lasting impact on trademark lawand enforcement practices.

TYPES OF TRADEMARK DILUTION

BLURRING

Blurring refers to the situation where the unauthorized use of a trademark by another party weakens the distinctiveness of the original mark. This can happen when a well-knowntrademark is used in a way that creates confusion among consumers about the source of the goods or services. For example, if a lesser-known company starts using a famous trademark ina different industry, it can dilute the original mark's strength and uniqueness over time. Blurringcan gradually erode the strong association consumers have with the original trademark,impacting its ability to uniquely identify the source of goods or services. One notable exampleis "Kodak." Originally known for its photography-related products, the brand name "Kodak" became so well-known that it was used to market various unrelated items, such as Kodak batteries and Kodak bicycles. This dilution of the brand's association with photographyproducts led to blurring, as the distinctiveness of the mark became less clear and diminished over time.

TARNISHMENT

Tarnishment occurs when an unauthorized party uses a well-known trademark in a way that damages or negatively impacts the reputation or image associated with the mark. Tarnishing can significantly weaken the strength and value of a well-established trademark. When a trademark is tarnished through association with substandard products or offensive content, it can lead to a loss of consumer trust, brand loyalty, and overall market value. This erosion of the trademark's positive image can have long-lasting repercussions for the brand owner. For instance, if a controversial or unsavoury product is marketed using a famous trademark, it can tarnish the original mark's reputation by association. Tarnishment can harm the goodwill and positive brand image that the original trademark has built over time, affecting consumer perceptions and trust in the mark. An example of tarnishing is the case of "Tiffany & Co.," renowned for its high-quality jewellery. If another company were to produce low-quality, counterfeit jewellery under the name "Tiffany & Co.," it would tarnish the reputation of the original brand. Similarly, if a fast-food chain were to

use the name "Tiffany & Co." for its restaurants, it would create a negative association with the luxury brand, leading to tarnishingof its image.

DOCTRINE OF TRADEMARK DILUTION

The concept of trademark dilution refers to a legal principle aimed at safeguarding a trademarkfrom any form of weakening or erosion. According to this doctrine, to demonstrate trademarkdilution, the burden lies on the plaintiff to establish two key points: firstly, that the alleged infringer has employed a junior mark that bears significant resemblance to the well-known mark, with the intention of implying or establishing a connection between the former brand and the infringing brand; and secondly, that this usage has resulted in economic harm by depreciating the value of the well-known mark. A registered trademark is infringed-

1. If a trademark, resembling or identical to one already recognized and esteemed in India, is utilized for goods or services dissimilar to those registered under the trademark.
2. When an individual exploits a well-known or uniquely identifiable trademark to their unjust gain.

There is confusion and criticism surrounding the concept of dilution. Critics argue that the mainissue lies in the conceptual understanding of dilution rather than its precise definition. Some critics believe that the dilution doctrine's weakness lies in its conceptual ambiguity, making itchallenging, if not impossible, to provide a clear and concise definition.

CHALLENGES IN DEFINING DILUTION

The imprecision and difficulty in proving the existence of dilution or harm make it a contentious legal concept. This implies that demonstrating dilution in a legal context can be complex and subjective. Due to these challenges, it is generally advised to apply the dilution doctrine cautiously, indicating that legal practitioners and scholars approach cases involving dilution with care and thorough analysis. Even supporters of the dilution concept are not entirely clear about its exact scope. This lack of clarity may stem from the complexities and nuances involved in determining what constitutes dilution in different scenarios. It is suggestedthat individuals or entities advocating for the protection of their brand's goodwill through advertising may overlook the legal limitations and constraints associated with the dilution doctrine.

In the context of trademark law, the terms "well-known" and "famous" are often used interchangeably, leading to confusion among legal practitioners and courts. While these termsmay seem similar, they hold distinct legal significance in the protection of trademarks. It is quite

evident that Indian courts have not clearly distinguished between "well-known" and "famous" marks. This lack of differentiation has resulted in the application of fame standards meant for well-known marks to dilution cases as well, which may not align with internationaltrademark practices.[1]

On the other hand, The Dilution Theory in US Law applies only to famous marks. This theoryaims to protect the uniqueness and distinctiveness of highly renowned marks from any form ofdilution or tarnishment, emphasizing the need for a higher level of recognition and reputation.

There is a perspective that "famous" marks represent a specialized category within well-known marks, denoting trademarks with an even greater level of reputation and recognition. These marks are traditionally believed to warrant broader protection due to their exceptional standingin the market. Given their heightened reputation, famous marks are deemed to deserve a widerscope of legal protection. This extended protection encompasses safeguarding against unauthorized use of the mark on goods or services that are not directly competitive, aiming to preserve the distinctiveness and goodwill associated with the mark.

DILUTION PROTECTION UNDER US LAW

Due to their widespread recognition among consumers, famous trademarks are susceptible to various forms of actionable harm, such as confusion, dilution, tarnishment, and other damages affecting brand equity. Acknowledging the significance of renowned trademarks and the necessity for comprehensive federal protection, Congress enacted the Federal Trademark Act,commonly referred to as the Lanham Act, in 1946. Initially, the Lanham Act focused on safeguarding trademarks by prohibiting a broad range of actions likely to cause confusion, deception, or mistake in the marketplace. However, it did not address the issue of "dilution," which involves the erosion of a mark's distinctiveness or the tarnishing of its positive associations.

Recognizing the inadequacy of federal law in fully preserving the goodwill and exclusive associations developed by trademark owners, twenty-seven states implemented their own dilution statutes. The absence of federal protection was addressed on January 16, 1996, when President Clinton signed the Federal Trademark Dilution Act of 1995 into law. This legislation, which introduced section 43(c) of the Lanham Act, marked federal acknowledgment of the dilution doctrine and the corresponding imperative to safeguard the goodwill inherent in the distinctiveness

[1] T.G. Agitha, Trademark Dilution: Indian Approach, Journal of the Indian Law Institute, vol. 50, no. 3, pp. 339- 366 (July-September 2008), stable URL: https://www.jstor.org/stable/43952160.

and commercial appeal of well-known marks. According to this act, for a mark to be protected from dilution, it must be a "famous mark" which means it should be distinctiveeither inherently or through acquired distinctiveness. The mark must also be widely recognized by the general consuming public in the US as a source identifier for the goods or services associated with the owner of the mark. Under the Lanham Act in the US, dilution can occur through two main mechanisms: dilution by blurring and dilution by tarnishment. Dilution by blurring refers to the weakening of the distinctiveness of a famous mark due to its unauthorizeduse on unrelated goods or services. On the other hand, dilution by tarnishment occurs when a famous mark is associated with inferior or negative qualities, thereby harming its reputation.

Under the FTDA, owners of famous marks are entitled to seek injunctive relief against individuals using a mark or trade name in commerce likely to dilute the distinctiveness of the famous mark, irrespective of actual or likely confusion, competition, or economic harm (15 U.S.C. Section 1125(c)). A mark is considered famous if widely recognized by the general U.S.consumer public. Factors determining the level of recognition include the duration, extent, andgeographic reach of the mark's advertising and publicity, sales volume and geographic extent,and actual recognition (15 U.S.C. Section 1125(c)(2)(A)). Importantly, to pursue a dilution claim, the mark must have achieved fame before the commencement of use of the allegedly diluting mark or trade name.

SCOPE OF SECTION 43(C) OF THE LANHAM ACT

The legislative history of Section 43(c) clarifies that its primary objective is to safeguard famous trademarks from subsequent uses that could blur their distinctiveness or tarnish their reputation, even in the absence of a likelihood of confusion. This highlights the proactive natureof the statute in preserving the integrity and uniqueness of well-known marks.

Liability is imposed under the federal dilution statute on individuals or entities under the federallaw concerning dilution of famous marks. The statute outlines the conditions under which a trademark owner of a famous mark can seek an injunction against another party's commercialuse of a mark that causes dilution. The terms used in Section 43(c) are akin to those found in section 13 of the amended Model State Trademark Bill. This similarity ensures consistency and alignment between federal and state laws regarding the protection of famous marks from dilution. The term "dilution" in this context refers to the diminishing of the unique identifying and distinguishing characteristics

of a famous mark.[2] It emphasizes that dilution can occur irrespective of whether there is direct competition between the owners of the famous mark and other parties or the likelihood of confusion, mistake, or deception. One significant difference between the federal dilution statute and most state dilution statutes is that, to qualify for protection under Section 43(c), a mark must be famous. This fame requirement ensures that only widely recognized marks are afforded the specific protections against dilution provided by the federal law. Liability under Section 43(c) is activated when a junior user employs a markin a manner that creates a mental association between their mark and the senior user's mark. This mental connection weakens the senior user's mark's ability to uniquely identify their goodsor services, as the public now also links that designation with a different source.

COMPARISON OF INDIAN LAW WITH US ANTI-DILUTION LAW

The situation in India is more serious due to the liberal requirement of knowledge among the "relevant sector of the public" under the Indian definition. In accordance with the WIPO/Paris Union Joint Recommendation, Indian law specifies that if a trademark is determined to be well-known by at least one section of the public in India, as determined by a court or registrar, it shall be deemed as well-known. This narrows down the group responsible for determining thefame of the mark, thereby weakening the safeguards intended to provide the level of exclusivityensured by the doctrine of dilution. Therefore, interpreting these provisions to encompass casesof dilution could lead to disastrous consequences.

A safer interpretation suggests that the Trademarks Act primarily focuses on protecting well-known marks or marks with a trans-border reputation, with a limited scope in comparison to the protection offered under the doctrine of dilution. This interpretation could result in non-compliance with international agreements, such as the TRIPS agreement which incorporates Article 6 of the Paris Convention[3], and offers protection only in cases of confusion. Furthermore, Article 16.3 of the TRIPS agreement specifies that Article 6 bis applies to dissimilar goods and services only if the use of the trademark would create a connection between those goods or services and the owner of the registered trademark, and if the interestsof the owner of the registered trademark are likely to be damaged by such use. These requirements differ from those of dilution, making the scope of protection under the TRIPS provisions narrower than that constituted

[2] Miles J. Alexander & Michael K. Heilbronner, Dilution under Section 43(c) of the Lanham Act, Law and Contemporary Problems, vol. 59, no. 2, pp. 93-129 (Spring 1996), stable URL: https://www.jstor.org/stable/1192072.
[3] WIPO Lex, Paris Convention for the Protection of Industrial Property, available at https://www.wipo.int/wipolex/en/text/288514#P147_20484.

under the doctrine of dilution.

Another provision within the Trademarks Act of 1999 that attracts consideration is section 29[4], which states that the infringement of a registered trademark with a reputation in India occurs when an identical or similar mark is used, even on dissimilar goods, by a party in the course oftrade. This infringement is established if such usage lacks due cause and results in the unfair exploitation or detriment to the distinctive character or reputation of the registered trademark. Unlike other provisions addressing infringement, this section does not necessitate proof of confusion. This provision is somewhat confusing as it aims to prevent the usage of marks on 'dissimilar goods or services' that have attained reputation in India, provided such use lacks due care as well as exploits or damages the distinctive character or reputation of the registeredmark. It is a broadly formulated provision.

Some excluded provisions from the scope of infringement are Section 29 (8)(b) & (c), which requires amendment. These clauses state that any advertisement of a "registered trademark" is deemed detrimental to its distinctive character if it is harming the reputation of the trademark. Essentially, these provisions prohibit comparative and fair use of all registered trademarks. This is in contrast to provisions in other jurisdictions that explicitly allow fair use, including comparative advertising that permits consumers to compare services, or identifying andparodying, criticizing, or commenting on famous marks. Such provisions expand the absolutepproperty rights of trademark owners, potentially leading to absurd outcomes. Moreover, there'sa concern that Section 29 (8)(b) & (c) might be misused to restrict freedom of expression in future. If these provisions are intended to restrict infringement proceedings related to comparative advertising to acts contrary to honest practices in commercial matters, then clauses (b) & (c) should be removed from subsection 8 of Section 29.

The extensive range of US cases where defendants successfully raised the defense of parody by using similar or identical marks of the plaintiff's marks highlights the strength of such a defense and the limitation it imposes on dilution claims.[5] This underscores the challenge facedby the Indian judiciary under the current law when confronted with similar situations.

[4] Trademark Act 1999, Section 29, available at https://www.indiacode.nic.in/show-data?actid=AC_CEN_11_60_00004_199947_1517807323972&orderno=29#:~:text=(1)%20A%20registered%20trade%20mark,the%20trade%20mark%20is%20registered.

[5] T.G. Agitha, Trademark Dilution: Indian Approach, Journal of the Indian Law Institute, vol. 50, no. 3, pp. 339- 366 (July-September 2008), stable URL: https://www.jstor.org/stable/43952160.

CASE ANALYSIS

In *Charles Smith v. Wal-Mart Stores*[6], the federal court ruled in favour of Charles Smith, affirming that his use of terms like "Walocaust" and "Wal-Queda" to market anti-Wal-Mart merchandise constituted parody and did not infringe on the retail giant's trademarks. Smith's merchandise featured slogans such as "WAL" and "OCAUST" separated by a star, printed on various items like mugs and bumper stickers, and sold through online retailer CafePress. WhenWal-Mart learned of Smith's activities in 2005, it demanded the cessation of the merchandise'smarketing, prompting CafePress to remove all related items from Smith's site. Subsequently, Smith filed a lawsuit seeking a declaratory judgment to affirm his right to sell the merchandise,which also included "Wal-Qaeda" items in protest. Wal-Mart counterclaimed, alleging trademark infringement, unfair competition, and trademark dilution by tarnishment.

The court determined that Wal-Mart lacked trademark rights to its use of a yellow smiley face, impacting its claims in the case. It then assessed whether Smith's use of "Walocaust" and "Wal-Queda" qualified as successful parodies, finding them to be so. Although the court acknowledged the need to also establish the absence of consumer confusion, it found flaws in Wal-Mart's consumer research studies intended to measure such confusion.

Further analysis included examining the strength of Wal-Mart's trademark, the similarity of marks, products, sales methods, and advertising, as well as Smith's intent. Despite Smith's commercial intent, the court deemed his primary motive to be non-commercial speech aimed at critiquing Wal-Mart's practices. Consequently, Smith's parodic work was considered non- commercial, exempting it from claims of dilution by tarnishment.

Ultimately, the court issued a declaratory judgment in favour of Smith, affirming his right to maintain domain names using the "Walocaust" and "Wal-Qaeda" names and to resume sellinghis merchandise.

In *Moseley V. Victoria's Secret Catalogue Inc.*[7], V Secret, the owner of the Victoria's Secret trademarks, sued alleging that the name "Victor's Little Secret" diluted its famous marks under the Federal Trademark Dilution Act (FTDA). The District Court and Court of Appealsruled in favour of V Secret, finding evidence of dilution despite the absence of actual harm. The Supreme Court

[6] Smith v. Wal-Mart Stores, Inc., 537 F. Supp. 2d 1302 (N.D. Ga. 2008)
[7] Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003)

unanimously held that the FTDA requires objective proof of actual dilution, rejecting a presumption of harm based on subjective likelihood. Justice Stevens, writing for the Court, emphasized the need for evidence showing a lessening in the ability ofthe mark to identify and distinguish goods or services. Justice Scalia did not join the portion discussing legislative intent, while Justice Kennedy filed a concurring opinion. Ultimately, the Court ruled in favour of Moseley, emphasizing the importance of demonstrating actual dilution rather than relying on subjective likelihood[8].

India's courts began supporting the doctrine of trademark dilution as early as 1993, without much debate. Hybo Hindustan[9] adopted a "Three-Pointed Human Being in a Ring" mark for undergarments, which Daimler Benz claimed infringed their well-known "Three-pointed starin a circle" device. The Delhi High Court acknowledged Mercedes Benz's widespread reputation, asserting that such an iconic symbol should not be available for use by any business, regardless of industry. Despite Hybo Hindustan's attempts to evoke the defense of "honest and concurrent use" and argue that "Benz" is a common German surname, the court rejected these defenses. It granted an injunction to halt the infringement of Daimler's mark, highlighting the importance of considering a brand's global reputation and rejecting claims that undermine its distinctiveness.

This case marked one of the early instances where the court recognized a brand's reputationbeyond national borders, even though its presence in the Indian market was limited.

Additionally, the court implicitly addressed trademark dilution concerns, although the termitself was not expressly used, by emphasizing the need to protect the distinctiveness of trademarks across different product markets. showing pride in protecting prestigious markslike "Mercedes Benz" from being misused on products like undergarments.

In *Aktiebolaget Volvo v. Volvo Steels Limited*[10], the plaintiffs' products had negligible sales in India, and there were clear distinctions between the activities and products of the plaintiffs and defendants. Despite this, the court abruptly concluded that the case warranted protection against dilution of the plaintiffs' brand name "Volvo." Remarkably, the court did not delve into the concept of dilution or analyze its scope, meaning, or extent, as observed in previous cases. Despite the lack of significant sales in India, the court found dilution of the plaintiffs' trademark solely based on

[8] Brajendu Bhaskar, Trademark Dilution Doctrine: The Scenario Post TDRA, 2005, 1 NUJS L. REV. 637 (2008).
[9] Daimler Benz Aktiegesellschaft v. Hybo Hindustan, AIR 1994 DELHI 239
[10] Aktiebolaget Volvo Of Sweden vs Volvo Steels Ltd. Of Gujarat (India) on 16 October, 1997

their global reputation and a prima facie presence in India. Insteadof assessing the distinctiveness of the mark, the court questioned the defendants' motives for adopting the word "Volvo." However, this line of inquiry seems irrelevant given that the plaintiffs' mark lacked substantial fame among the Indian public, making it unclear how thedefendants' use of the word "Volvo" could create an association with the plaintiffs in the minds of consumers.

In various cases such as *Glaxo India Ltd. & Anr v. Drug Laboratories*[11] and *Honda Motors Company Limited v. Charanjit Singh and Others*[12], Indian courts have frequently applied the concept of dilution without delving into its specific meaning. A detailed examination of thesecases indicates that the courts often overlook the conceptual distinctions between trademark infringement, passing off, and trademark dilution. Furthermore, the courts seem content with establishing the requirement for a mark to be well-known to satisfy the dilution criteria. This approach suggests that the Indian judiciary displays a general lack of concern for understanding the broader implications of dilution and its potential impact on Indian trade and industry. This stands in contrast to the approach adopted by the judiciary in the United States, where a more nuanced understanding and application of dilution law is observed.

RECOMMENDATION & CONCLUSION

Does the concept of trademark dilution extend to the point of suggesting that trademarks are solely intended to safeguard the economic interests of their owners, achieved not through quality assurance but through persuasive advertising? The trademark dilution doctrine, coupled with unrestricted trademark alienation, may lead to the complete commodification of trademarks, relieving them of the responsibility to prioritize consumer interests. The rationalebehind restricting the free transfer of trademarks is closely linked to the objectives of trademark law, which aim to prevent consumer confusion and encourage investment in product quality. Allowing trademarks to be freely assigned undermines these goals, as consumer associations with trademarks and products are weakened by such transfers.

Therefore, while advocating for maximum protection against trademark dilution, permittingliberal rules for trademark assignments and licensing appears contradictory and paradoxical.

It is suggested that if courts adopt the concept of dilution, its application should be limited to

[11] 2002 (25) PTC 105 (DEL)
[12] 2003 (26) PTC 1 (DEL)

instances where marks do not compete, as traditional trademark law offers remedies for competing marks. Even for non-competing marks, courts examine whether actual dilution orthe potential for dilution exists. If a reasonable consumer is unlikely to associate the subsequent mark with the user's mark, dilution is not applicable. Not all uses of a famousmark need to be prohibited under the dilution doctrine.

Section 29 of the Trademarks Act, 1999 necessitates immediate amendments. Sub-section 4of this section, which considers the use of a registered trademark with a reputation in India, even on dissimilar goods, as infringement without requiring confusion, is excessively broad.Since India is not obligated to acknowledge trademark dilution, this provision could be interpreted to safeguard well-known marks without the need for proving confusion.

Furthermore, treating the taking of unfair advantage as trademark infringement stretches the boundaries of trademark law unjustifiably and should be removed from the section.

Additionally, clauses (b) and (c) of sub-section 8[13] hinder fair use and comparative advertising techniques, permitted in countries like the US, thereby stifling healthy competition and should be eliminated. Regarding the acknowledgment of trademark dilution in Indian law, there is no international pressure for India to adopt such an extensive concept. Hence, India should refrain from introducing provisions recognizing it, especially considering the American judiciary's rejection of efforts to enhance protection against dilution.

[13] Trademark Act, 1999