



INTERNATIONAL LAW  
JOURNAL

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**WHITE BLACK  
LEGAL LAW  
JOURNAL**  
**ISSN: 2581-  
8503**

**Peer - Reviewed & Refereed Journal**

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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## ***ABOUT US***

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **PRIOR USE V. REGISTERED TRADEMARK: AN ANALYSIS**

AUTHORED BY - HIMANI TAK

## **ABSTRACT**

Intellectual property have gained significance in the modern world. It creates value for ideas and creativity. Trademark protects signs, symbols, logos etc that helps customers to distinguish one product or service from another. The concept of prior use and registered user of trademark is important to give rights that are due to prior users of trademark. This research studies the concept of prior use in trademark law and its significance in Indian trademark law. It examines the legal framework and judicial interpretations surrounding prior use doctrine in India.

Section 34 of the trademark act 1999 forms the backbone of this research which safeguards prior user's rights from registered trademark owners. It analyses the principle of "first user policy" in India. Further, the paper explores the application of prior use internationally. It highlights that prior use extends beyond Indian borders, which allows users that have a cross border reputation to claim prior use rights. Such protection adds global perspective to the doctrine of prior use.

The research highlights the importance of prior usage in protecting trademark users, preserving established reputations and differentiating new goods and services from longstanding goods and services, ensuring fair competition and safeguarding intellectual property rights.

## **INTRODUCTION**

In the present scenario, a person can have rights over an intellectual property in the same way he can own a physical property. An intellectual property is the result of a person's intellect and imagination. When a person expresses his idea in a tangible form it will considered as his intellectual property. Under intellectual property rights trademark protects any sign, symbol, logo etc which helps consumers to distinguish any goods or services from another.

The Trademark law of India, is a new legislation as compared to other laws. Prior to the

enactment of trademark law in India, trademarks were dealt under “Specific Relief Act, 1877” or “Indian Registration act, 1908”. The government realised the need for a separate trademark legislation because of growing economy. The current Trademark law, the Trademark Act 1999 was brought in to follow the guidelines of TRIPS agreement which was signed by India.

The Trademark act provides protection for 10 years which could be extended indefinite times. The term “Prior use prevails” has become a common one in the trademark world. The Trademark act recognises prior use of any mark as a valid exemption against the registered trademark. The protection to prior users have been given under section 34 of the trademark act. “Section 34 serves as a exception to section 28” of the act which grants exclusive rights to the user of registered trademark.

The Indian courts ruled that any prior use of registered trademark will stand as a valid exception to exclusive rights of registered trademark users. The courts emphasises that the rights of a prior user shall be greater than the rights of a registered user.

### **RESEARCH OBJECTIVES**

- 1) To understand the concept of prior use and registered trademark;
- 2) To understand legal framework for prior use doctrine in India;
- 3) To analyse judicial interpretations and precedents related to prior use;
- 4) To examine the implication of cross border reputation.

### **RESEARCH QUESTIONS**

- 1) What is the concept of prior use in trademark and how does it relates to registered trademarks?
- 2) How are prior users protected under the Trademark act of India?
- 3) What are the notable judicial precedents that shape the understanding and application of prior use doctrine in India?
- 4) How does the cross border reputation impact the doctrine of prior use?

### **RESEARCH METHODOLOGY**

This doctrinal research involves a comprehensive study and analysis of existing Trademark law of India. It includes the study of provisions related to prior user and registered user of

trademarks. It also includes analysis of various case laws to understand the interpretation of concept of prior use by the Judiciary. The study also aims to understand the impact of cross border reputation on the doctrine of prior use. The research also includes the study material and resources which the researcher used to conduct the research.

## **LITERATURE REVIEW**

### **BOOKS:**

- 1) Lionel Bentley and Sherman, “Intellectual Property Law”, 4<sup>th</sup> ed., Oxford Publication.  
The book comprises of basic concept of trademark and passing off and helped to get a clear idea of how trademark functions.
- 2) K C Kailasam and Ramuvedaraman, “Law of Trade Marks and Geographical Indications”: Law, Practice and Procedure, Second Ed, Wadhava Nagpur (2007).  
The book provides clear understanding of defence of prior use against registered user under section 34 of the trademark act.
- 3) Narayanan P.S., “Law and Trademarks and Passing Off”, 5<sup>th</sup> Ed., Eastern Law House (2000)  
The book explains legal theories given by British courts in the last 200 years regarding trademark and passing off and how they have international applicability. It also explains how other countries are influenced by English ideas of protecting prior users.
- 4) V. K. Ahuja, “Intellectual Property Rights in India”, 1st ed., Volume 1, Lexis Nexis Butterworths Wadhva (2009)  
The book helps in understanding how section 34 of the trademark act serves as an exception and explains what prior user and registered proprietor actually mean.

## **TRADEMARK AS DEFINED IN THE ACT**

The main aim of the trademark act is to protect the identification or reputation of any products or any services. A trademark could be any mark that will help consumers to distinguish between two similar goods or services. The act provides protection to symbols, characters, numbers, shapes, packaging etc of any goods or services. Such symbols may include devices, header, names, signature, logos, words, phrases etc. the Trademark act is based on three elements such as:

- A) Distinctiveness
- B) The nature of commodities

C) Similarities or deceptively similar

The act aims to protect the users of the mark from any deceptively similar or similar marks which are used to tarnish the image of the original user.<sup>1</sup>

**INTERPRETATION OF “SECTION 28 OF THE TRADEMARK ACT”**

Section 28 of the trademark act gives exclusive rights to the registered user of trademark. Also, it is provided in section 28(3) that there can be more than one registered user of the same trademark. In such circumstance the owners would not be able to ascertain exclusivity over the mark. Such trademarks are granted when the goods or services are different in nature. Each of the persons shall have similar rights. The rule have been established that the trademark shall be used for specific goods and services for which it has been granted and not for all the goods and services. While the interpretation of this section two situations could arise.

First, in the case of Kumar Milk Foods<sup>2</sup>, court interpreted section 28 of the Trademark act. For instance ‘A’ and ‘B’ both are the registered owners of a trademark ‘pineapple’, one for “cosmetics” and the other for “chemicals” respectively. The name pineapple can be used by both the owners for goods which they have registered. But when A starts to use the mark ‘pineapple’ for chemicals they will be charged for trademark infringement.

There were similar circumstance in Kumar mill foods case. In the case the plaintiff had a registered trademark “SHREEDHAR” for allied products of milk. The defendant got a registered trademark in the same name “SHREEDHAR” for flour and other things, but the defendants also started using the same for the dairy products. The plaintiff sued them for such usage and requested an interim injunction from the court.

Defendants argued irrespective of class of goods, if both the parties hold registrations for similar or identical trademarks, there will no infringement on their use. The court decided in the favour of the plaintiff. It held that the legislative intent, when providing different classification of goods and that requirement of owners to register under specify classes, reflected that section 28(3) of the act shall apply in 2 conditions:

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<sup>1</sup> “Suvrashis Sarkar, HISTORY AND EVOLUTION OF TRADEMARKS IN INDIA 252, 6 IJAR, 735-736, 2016, [https://www.worldwidejournals.com/indian-journal-of-applied-research-\(IJAR\)/recent\\_issues\\_pdf/2016/November/November\\_2016\\_1492175968\\_\\_242.pdf](https://www.worldwidejournals.com/indian-journal-of-applied-research-(IJAR)/recent_issues_pdf/2016/November/November_2016_1492175968__242.pdf).”

<sup>2</sup> “Kumar Milk Foods v Vikas Tyagi (CS(OS)No 1627 of 2011).”

One, when the two registered marks are identical or resemble each other and second those are registered under same class of goods and services.

Second, in the same illustration 'A' registers a trademark "PINEAPPLE" for cosmetics products, and 'B' also has a registered trademark of "PINEAPPLE" for cosmetics products. So now there are two cosmetic brands in the name co "PINEAPPLE" in the market. According to section 28 of act both of them cannot claim exclusivity over the use of trademark. So, till the mark is ratified both the persons who have rights to use the trademark and the registration would be the evidence of validity.

Similar situations were there in the case of "P.M. Diesels Private Limited V. Thukral Mechanical Works"<sup>3</sup> here there were two registered users of the mark "FIELD MARSHALL" for the same class of goods.

### **THE RIGHTS OF THE "PRIOR USERS" AS SAFEGUARDED UNDER SECTION "34 OF THE TRADEMARK ACT"**

The section<sup>4</sup> protects the rights of the prior user. These prior users have not registered their trademark but have been using such marks before others. It is the exception of "section 28 of the act" which provides rights of exclusive use to the registered owners. There is no provision in the act which gives rights to registered trademark owners over the prior user of any similar or deceptively similar mark. The prior owner should be using the for a long period of time from the date which the subsequent user's first use or the registration of the mark.

It is interpreted as, if any business entity, organisation or any person has been using a mark since a long time and a new user gets a registration for a similar mark or deceptively similar mark, he will not be able to stop the prior user to use the mark. The exclusive user rights would not be granted to the registered user. This concept of trademark act is often referred to as "first user policy".

The main principles behind this provisions are:

- A) The goods or services a person or business entity get the trademark registered should be of same nature of which there is a prior user of trademark;

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<sup>3</sup> "M. Diesels Private Limited vs Thukral Mechanical Works, AIR 1988 Delhi 282, 1988."

<sup>4</sup> "THE TRADE MARKS ACT, 1999, No. 47, Acts of Parliament, 1999 (India)"

- B) The prior user must have a continuous usage of the mark in India;
- C) The mark should have been used since a long period of time.

The word “use” is very important in the interpretation of this section. According to section 34 the word usage would mean a “continued use” and “a consistent behaviour”. The provision provides protection to the prior user of any mark, will dilute impact of trademark registration. The rights of registered trademark users will subside against the rights of prior users.

the Trademark act aims to provide protection to the registered users but the policy makers gave more importance to the prior users. The reasoning behind such importance is that when a person has been using a mark which has gained reputation over the years, just because a new user gets similar trademark registered should not automatically take away all the rights of the prior user. If he loses rights over the usage of his trademark, it will result in monetary loss which would be greater than the losses of a new registered user.

The courts require solid proofs from the parties which claim prior use over any goods and services, to not provide rights of prior use to any false claimant. The user has to prove a consistent history of using the mark prior to that of a registered user. The prior user can provide proofs like marketing plan, advertisement, reputation amongst the customers etc in the court of law. The court while examining cases of prior usage shall try to balance out rights for the both the parties.

### **JUDICIAL INTERPRETATION OF THE CONCEPT OF PRIOR USE**

The courts in India have time and again established the rule that the rights of prior user, if proven in court, will always supersede the rights of registered owner.

In case of “Toyota and Prius”<sup>5</sup>, the plaintiff sued the Prius Auto Industries Ltd. for using the mark PRIUS which Toyota has been using since 1997. It was pointed out by the defendant that Toyota started using the mark “PRIUS” in India after 2010 and the Prius Auto Industries have been using it since 2006. The court gave the judgement in favour of the defendant stating that the defence of copyright cannot be awarded when the passing off action happened in different area and the defendant is in different area.

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<sup>5</sup> “Toyota Jidosha Kubushiki Kaisha v Prius Auto Industries Ltd and Ors, AIR 2018 SC 167”

The case of “Peps Industries”<sup>6</sup> the plaintiff PEPS have been using the trademark “NO TURN” for bedding products since 2008. The mark got its registration in 2011 effecting from 2008. The plaintiff sued the defendant for using the same mark “NO TURN”. The defendant came up with the defence of prior use under section 34 of the Trademark act and claimed the use of such mark since 2007. The questions before the court was whether the defendant was a prior user of the mark and if so is he entitled to protection under the defence of prior use. The court recorded that plaintiff have registered the trademark since 2008 and have been using such trademark continuously. Even though the defendant have been using the mark since 2007, he was not able to prove that he was using it continuously. Such infrequent usage would not attract protection under section 34 of the act. Also, defendant was not able to present adequate documents to prove registration of trademark. However, the use of “NO TURN” by the defendant was descriptive in nature so no interim injunction has been granted.

Another case where prior use was granted protection over registered user by the Delhi High Court is “M/s R J Components and Shafts vs M/s Deepak Industries Ltd”<sup>7</sup>. R J Components was the registered user of “NAW” for gear components and shafts. The plaintiff sued Deepak Industries Limited for using “NAW” for the same nature of goods. The court held the defendant’s use of mark “NAW” as infringing. The court said that the defendant’s use of the mark was not bona fide in nature. The defendant did not have any reason to use similar mark as the plaintiff. Further the defendant cannot take protection under section 34 as they were not the legitimate prior users. They did not use the trademark regularly to get protection under the defence of prior user. They only started using the mark in 2002, whereas the plaintiff was using the mark for several years.

### **PRIOR USE OF TRADEMARK IN INDIA AND ABROAD**

The trademark act of 1999 extends to all of India. With the growing economy India have become a huge market base for multinational corporations. They can gain huge profits from limited outlay of resources from India.

In the famous case of “N.R Dongre v/s Whirlpool”<sup>8</sup> the supreme court held that the cross border reputation of a brand will not be protected under prior use concept in India. N. R. Dongre was

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<sup>6</sup> “Peps Industries Private Limited v Kurlon Limited, 1934, 51 RPC 157.”

<sup>7</sup> “M/s R J Components and Shafts vs M/s Deepak Industries Ltd, CS (OS) 900, 2002.”

<sup>8</sup> “N.R. Dongre and Ors v. Whirlpool Co. and Anr, 1996, 5 SCC 714.”

the plaintiff who used to sell washing machines under the trademark “Whirlpool” in India since 1986. The defendant that is Whirlpool cooperation which is a multinational company started selling their washing machines under the same mark “Whirlpool” in India from 1994. The plaintiff sued the defendant for their trademark infringement. The defendant replied that they have been selling washing machines under the name of “Whirlpool” since 1937.

The court held defendant’s use to be infringement as they have acquired reputation in India only through magazines and advertisements and their use in India was not constant. The reputation build through advertisement would not be recognised as prior use. Court also held that use of any mark outside the territory of India would not be considered as usage in India.

In the case of “Aktiebolaget Jonkpoing v/s Palancichamy Nadar”<sup>9</sup> the Calcutta High Court held that the Trade and Merchandise Marks Act, 1959 is limited to usage in India and not outside India. The plaintiff owns a Swedish company which manufactures and sells matches. The defendant is an Indian company which owns a business which sells goods of same nature. The plaintiff had been using the trademark “MANUS” since 1907 in Sweden, whereas defendant had been using the same mark in India since 1942. The plaintiff sues the manufacturing company in India for using their registered trademark. The court held that defendant’s use of the trademark “MANUS” would not infringe plaintiff’s right as the use outside India cannot be considered as prior use in India.

In the Kores case<sup>10</sup>, the plaintiff that is Kores (India) Ltd was an Indian company which sells stationary products under the name of “KORES” in India since 1936. The defendant that is Whale Stationary Products Ltd is an Austrian company which have been using the same ‘KORES’ mark for his stationary products in Austria since 1920. The defendants then started selling their stationary products in India in 2005, for which they got sued by the plaintiff. The defendants tried to take the defence of prior use under section 34 of the Trademark act. The court rejected their appeal and gave the decision in the favour of plaintiff stating that a prior use outside India will not be a defence against registered user in India.

### **Cross border reputation as an exception**

The trademark law generally doesn’t recognise prior use in foreign countries as defence against

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<sup>9</sup> “Aktiebolaget Jonkpoing Vulcan against V.S.V. Palancichamy Nadar, AIR 1969 Cal 43.”

<sup>10</sup> “Kores (India) Ltd versus Whale Stationary Products Ltd., 2008(36) PTC 463(Bom).”

the registered use of the trademark. But exception to such concept is when any trademark is having a cross border reputation in India. It means that if a trademark user have been using any trademark outside India for a longer period than the registered trademark user India, he can still have a defence of prior usage if he proves in the court of law that he has a goodwill and reputation in India. He will have to prove that he has developed consistent relationship between their products and clients in India. To prove the Trans border reputation he might have to show sales figures from India, surveys, advertisements, marketing campaigns, social media presence etc.

In the case of “Lowenbrau v Jagpin”<sup>11</sup> Breweries Ltd and Others it was established that transborder reputation can be considered as prior art in India. The plaintiff was German company which was using the trademark “Lowenbrau” for beer beverages since 1842. The defendant was an India company that was using the same trademark for beer beverages in India since 2005. The plaintiff claimed to have a transborder reputation in India so, the defendant is infringing their trademark.

The court held that the defendant is infringing plaintiff’s trademark. The court agreed to plaintiff’s claim that they have acquired a transborder reputation in India and been using it in India from a longer time than the defendant.

## **CONCLUSION**

The doctrine of prior use in Trademark law allows users of a trademark who have been using the mark from a long time consistently rights to use their mark even if there is a similar mark that is registered. The person claiming a prior use have prove in the court of law that they have been using the mark from a longer time than the registered user and such use is consistent. Section 34 of the trademark act gives such rights to the prior users. The doctrine protects the rights of the prior user as they have already developed a reputation over such trademark. Mere registration of a similar mark should not take away rights of a prior user.

The doctrine is also important in international trade as there is a globalised use of trademark. The protection to prior users can help the users who have gained a transborder reputation in different countries can claim rights over their trademark in such countries.

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<sup>11</sup> “Lowenbrau AG and Others v. Jagpin Breweries Ltd. and Others, 157(2009) DLT791.”

The doctrine also helps the consumers to differentiate between the goods that have been using since a long time and the goods which are comparatively new.

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