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# HOW DOES THE INDIAN JUDICIARY INTERPRET 'LIKELIHOOD OF CONFUSION' IN TRADEMARK CASES?

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## ABSTRACT

The concept of 'likelihood of confusion' is pivotal in trademark law, serving as a crucial standard for adjudicating disputes over trademark registration and infringement. In the Indian judiciary, the interpretation of 'likelihood of confusion' in trademark cases is a critical aspect of intellectual property law, ensuring the protection of brands and consumers alike. The courts have established a nuanced approach to determine whether a trademark is likely to deceive or cause confusion among the public, which is a key factor in deciding the registration of a trademark. The burden of proof rests on the applicant to demonstrate that their proposed trademark does not infringe upon the existing trademarks and will not mislead the public. The Registrar's role is to assess the circumstances of each case to ascertain the potential for deception or confusion. This assessment is not limited to a mere side-by-side comparison of the marks in question but extends to understanding the perception of an average person with ordinary intelligence and their likely association with the mark.

By exploring the evidentiary burden on the parties involved and considering the impact of globalisation on trademark disputes, the research aims to provide valuable insights into the likelihood of confusion, how different dilution is from the concept of likelihood of confusion, comparison with other jurisprudence, current practices, recommendations and suggest improvements to enhance the clarity and predictability of trademark law in India.

**Keywords:** TradeMarks, Likelihood of Confusion, Indian Courts, Trade Marks Act, 1999, Dilution, International Jurisprudence, Remedies

## INTRODUCTION

Trademarks are not merely symbols of commercial origin or brand identity; they are vital assets that can dictate the success or failure of businesses in a competitive market. “A trademark is a recognisable sign, design, or expression that identifies products or services of a particular source from those of others. It can be a word, phrase, symbol, logo, or combination thereof that distinguishes the goods or services of one entity from those of others in the marketplace. The protection of trademarks is essential to maintain consumer trust, prevent unfair competition, and uphold the integrity of markets.<sup>1</sup>” In the realm of Indian trademark law, the judiciary plays a pivotal role in interpreting and applying the principles that govern the likelihood of confusion between trademarks. The concept of 'likelihood of confusion' is a cornerstone in trademark disputes, as it determines whether a trademark can be registered or if its use constitutes infringement of an existing mark. The Indian judiciary's interpretation of this concept is rooted in the Trade Marks Act, of 1999, and is further refined through a plethora of case law. The Trade Marks Act, 1999, under Section 11<sup>2</sup>, specifically addresses the grounds for refusal of registration based on the similarity of marks and goods or services, and the likelihood of causing confusion. The Act mandates that a trademark shall not be registered if it is identical or deceptively similar to an existing registered trademark and is to be used for goods or services similar to those for which the existing trademark is registered, thereby potentially causing confusion on the part of the public.

The Indian judiciary has developed a nuanced approach to assess the likelihood of confusion, which involves a multifactorial analysis. This analysis is not merely a side-by-side comparison of the marks in contention but a thorough examination of various factors that contribute to the overall impression created by a trademark on the consumer's mind.

The courts consider the visual, phonetic, and conceptual similarities between the marks, the nature of the goods or services, the similarity of the trade channels, the class of purchasers, and the use of the marks in the market. The Indian judiciary interprets the 'likelihood of confusion' in trademark cases through a comprehensive evaluation of various factors that influence a consumer's perception. The courts strive to balance the interests of the trademark owners with those of the public, ensuring that trademarks serve their primary purpose of indicating the

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<sup>1</sup> *What is a trademark?*, United States Patent & Trademark Office, <https://www.uspto.gov/trademarks/basics/what-trademark#:~:text=A%20trademark%20can%20be%20any.>

<sup>2</sup> The Trade Marks Act, 1999 § 11

origin of goods or services without causing deception or confusion. This judicial interpretation plays a crucial role in shaping the contours of trademark protection in India and in maintaining the integrity of the trademark system.

## LITERATURE REVIEW

### 1. **“Likelihood of Confusion—The Basis for Trademark Infringement by David V. Radack<sup>3</sup>**

This article discusses the fundamental aspects of trademark law, focusing on the concept of preventing consumer confusion through trademark protection. It emphasizes the importance of trademarks in identifying the source of goods or services and ensuring consistency and trust for consumers. The article highlights the key elements involved in determining the likelihood of confusion between trademarks, such as the similarity in appearance, pronunciation, and meaning of marks, the relatedness of goods or services, and the sophistication of purchasers. It emphasizes that no single factor is determinative, but rather a combination of factors is considered by courts in assessing the likelihood of confusion.

### 2. **"Trademark Dilution: Indian Approach" by T. G. Agi<sup>4</sup>**

It is a comprehensive book that delves into the concept of trademark dilution within the framework of Indian trademark law. It explains how dilution refers to the erosion of the distinctiveness or uniqueness of a famous trademark due to its unauthorized use by others, even in unrelated contexts. This book focuses on how Indian courts interpret and apply the concept of dilution to protect the integrity and reputation of famous trademarks.

### 3. **Likelihood of confusion: the irrational basis of trade mark protection Get access Arrow<sup>5</sup> by Daniel R Bereskin, QC**

The article "Likelihood of Confusion: the Irrational Basis of Trademark Protection" by Daniel R. Bereskin, QC, likely explores the argument that the current framework for determining

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<sup>3</sup> David V. Radack, *Likelihood of Confusion—The Basis for Trademark Infringement*.

<https://www.tms.org/pubs/journals/jom/matters/matters-0212.html> [Accessed 25 Apr. 2024].

<sup>4</sup> Agitha, T. G. "TRADEMARK DILUTION: INDIAN APPROACH." vol. 50, no. 3, Journal of the Indian Law Institute, 2008, pp. 339–66.(Accessed 22 Apr. 2024)

<sup>5</sup> Daniel R Bereskin, *Likelihood of confusion: the irrational basis of trade mark protection*, Vol 14, Journal of Intellectual Property Law & Practice, Issue 3, March 2019, Pages 223–229

trademark infringement based on the likelihood of confusion may have inherent flaws or inconsistencies. Bereskin may argue that the criteria used to assess the likelihood of confusion, such as similarity in appearance, pronunciation, meaning, and relatedness of goods or services, may not always align with consumer behaviour or expectations. He might suggest that the concept of likelihood of confusion could lead to overly broad or unjustified protection for trademark owners, potentially stifling competition and innovation. Overall, the article may challenge the conventional wisdom surrounding trademark protection and offer alternative perspectives on how trademarks should be safeguarded in a dynamic marketplace.”

## **LEGAL FRAMEWORK GOVERNING TRADEMARKS IN INDIA**

### **A. The Trademarks Act, 1999**

The Trade Marks Act, of 1999, is the cornerstone of trademark law in India, providing a legal framework for the registration, protection, and enforcement of trademarks. The Act was enacted to meet the international standards set by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and to ensure that Indian trademark law aligns with global practices. It defines what constitutes a trademark, the process for its registration, the rights conferred upon the trademark owner, and the mechanisms for enforcement against infringement and passing off. The Act is designed to protect the interests of trademark owners, consumers, and the public at large by preventing confusion and deception in the marketplace. It ensures that trademarks serve their primary purpose of indicating the origin of goods or services and guaranteeing their quality. The Act also provides for the recognition of well-known trademarks and offers remedies such as damages, injunctions, and criminal penalties for infringement.

### **B. Key Provisions Related to 'Likelihood of Confusion'**

The concept of 'likelihood of confusion' is central to trademark law as it protects consumers from being misled about the origin of goods or services. The Trade Marks Act, of 1999, addresses this concept in several key provisions: Section 11<sup>6</sup> of the Act deals with the relative grounds for refusal of registration. It states that a trademark shall not be registered if, because of its identity or similarity to an earlier trademark and the identity or similarity of the goods or services, there exists a likelihood of confusion on the part of the public, which includes the

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<sup>6</sup> The Trade Marks Act, 1999 § 11

likelihood of association with the earlier trademark. Section 29<sup>7</sup> defines what constitutes infringement of a registered trademark. One of the grounds for infringement is when a mark that is identical or similar to a registered trademark is used in relation to goods or services for which the trademark is registered, and such use is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trademark. These provisions are designed to prevent the registration or use of a mark that is likely to cause confusion among the public, thereby protecting both the trademark owner's rights and the consumer's ability to make informed choices.

### **C. Role of the Registrar of Trademarks**

The Registrar of Trademarks plays a crucial role in the administration of trademark laws in India. The Registrar's office is responsible for the registration of trademarks, maintenance of the Register of Trademarks, and various other functions as prescribed under the Act. The Registrar has the authority to assess the registrability of a trademark, which includes evaluating the 'likelihood of confusion' with prior marks. The Registrar's decisions can be challenged before the Intellectual Property Appellate Board (IPAB) and subsequently in higher courts.

### **D. Burden of Proof in Trademark Disputes**

In trademark litigation, the burden of proof typically rests on the party challenging the use or registration of a trademark. When a claim of infringement is made, the plaintiff must establish that the defendant's mark is deceptively similar to their own and that there is a likelihood of confusion among the relevant segment of the public. The defendant, on the other hand, may counter the claim by proving dissimilarity, lack of deceptive resemblance, or absence of confusion. The courts often rely on direct or circumstantial evidence to determine whether there is a 'likelihood of confusion.' This may include consumer surveys, expert testimony, and evidence of actual confusion. The courts also consider factors such as the similarity of the goods or services, the similarity of the marks, the distinctiveness of the plaintiff's mark, the marketing channels used, and the degree of care likely to be exercised by consumers.

## **PRINCIPLES OF 'LIKELIHOOD OF CONFUSION'**

In the context of Indian trademark law, the principle of 'likelihood of confusion' is a critical

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<sup>7</sup> The Trade Marks Act, 1999 § 29

factor in determining whether a trademark infringes upon another. The assessment of confusion is guided by several criteria, and the courts have developed a nuanced approach to protect consumers and the rights of trademark owners. Let's delve into these principles:

### **A. Criteria for Assessing Confusion**

The assessment of confusion in India involves a multifaceted approach. The courts consider various factors to determine whether the use of a mark is likely to cause confusion among the public. These factors include:<sup>8</sup>

- The nature of the marks (word, label, composite, etc.)
- The degree of resemblance between the marks, both phonetic and visual.
- The nature of the goods or services for which the marks are used.
- The similarity in the nature, character, and performance of the goods or services of the rival traders.
- The class of purchasers who are likely to buy the goods or services.
- The mode of purchasing the goods or services.
- Any evidence of actual confusion.

### **B. Phonetic, Visual, and Conceptual Similarity**

The comparison of marks in India is not limited to a side-by-side comparison; it extends to the overall impression created by the marks in the minds of the consumers.

### **C. The assessment includes:**

Phonetic Similarity: How the words sound when spoken, which is particularly relevant in a diverse linguistic landscape like India.

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<sup>8</sup> Administrator, A. (n.d.). *A deep dive into trademark confusion*. Asia Ip, 31 July 2023 <https://asiaiplaw.com/article/a-deep-dive-into-trademark-confusion#:~:text=The%20factors%20to%20be%20taken> [Accessed 22 Apr. 2024]

Visual Similarity: The visual representation and appearance of the marks, including their stylization, colour scheme, and font.

Conceptual Similarity: The ideas or concepts conveyed by the marks and whether they are likely to be confused by the average consumer.

#### **D. Importance of Distinctiveness and Prior Use**

Distinctiveness and prior use are pivotal in determining the strength of a trademark and its ability to be distinguished from others.

1. Distinctiveness: A mark that is inherently distinctive or has acquired distinctiveness through extensive use is afforded a wider scope of protection. Distinctive marks are those that are capable of distinguishing the goods or services of one party from those of others.

2. Prior Use: The prior use of a trademark can establish a strong association between the mark and the goods or services in the minds of the public. Prior users of a trademark generally have superior rights over subsequent users in the same field.

The principles of 'likelihood of confusion' in India are designed to balance the interests of trademark owners with the need to protect consumers from deception. The assessment is context-specific and takes into account a range of factors, including the characteristics of the average consumer in the relevant market. Phonetic, visual, and conceptual similarities are scrutinized, and the distinctiveness and prior use of a mark are considered to be of paramount importance. Indian courts have developed a robust framework to adjudicate these matters, ensuring that trademark law serves its purpose of indicating the origin of goods or services while preventing unfair competition and consumer confusion.

### **JUDICIAL APPROACH TO 'LIKELIHOOD OF CONFUSION'**

The judicial approach to the 'likelihood of confusion' in India is well-illustrated through several landmark judgments. These cases have established guiding principles for assessing whether a trademark is likely to cause confusion among the public. Let's explore these judgments and their implications:

#### **A. Landmark Judgments and Their Principles**

### **1. Corn Products Refining Company vs. Shangrila Food Products Limited (1959)<sup>9</sup>**

In this case, the Supreme Court of India dealt with the similarity between the trademarks 'Glucovita' and 'Gluvita'. The Court held that the two marks were not visually or phonetically similar enough to cause confusion. The decision emphasized the importance of considering the marks as a whole and the perception of the average consumer.

### **2. Cadila Healthcare Limited vs Cadila Pharmaceuticals Limited (2001)<sup>10</sup>**

This case is significant for its detailed analysis of the 'likelihood of confusion' in the pharmaceutical industry, where the standard of care is higher due to the potential impact on health and safety. The Supreme Court laid down several factors to be considered when assessing confusion, such as the nature of the marks, the class of buyers, the sophistication of the goods, and the similarity in the packaging. The Court agreed with the view that the marks 'Falcigo' and 'Falcitab' were similar, and given the nature of the pharmaceutical industry, there was a higher likelihood of confusion.

### **3. Amritdhara Pharmacy vs. Satya Deo (1962)<sup>11</sup>**

This case involved the trade names 'Amritdhara' and 'Lakshmandhara' for medicinal preparations. The Supreme Court held that the suffix 'dhara' was not sufficient to distinguish the products and that there was a likelihood of confusion. The Court underscored the importance of considering all the surrounding circumstances and the overall impression created by the marks on the average consumer.

### **4. K.M. Knitwear vs. Registrar of Trademarks (2023)**

The Madras High Court held that the likelihood of confusion must be appreciated from the perspective of a person of average intelligence and imperfect recollection. The Court also noted that the anti-dissection rule should be applied, meaning that the marks should not be broken down into their constituent parts for comparison but should be considered as a whole.

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<sup>9</sup> AIR 1960 SC 142

<sup>10</sup> 2001 (5) SCC 73

<sup>11</sup> 1963 AIR 449



## B. Analysis of Judicial Reasoning

The judicial reasoning in these cases reflects a comprehensive approach to determining the 'likelihood of confusion'. The courts have consistently emphasised the importance of the overall impression that a mark creates on the average consumer. The analysis is not limited to a mere side-by-side comparison but extends to the context in which the marks are used, including the nature of the products, the consumers' level of attention, and market conditions. The courts have also recognised that in certain industries, such as pharmaceuticals, a higher standard of care is required due to the potential implications on consumer health. This has led to a more stringent assessment of the likelihood of confusion in such cases.<sup>12</sup>

## C. Consideration of Consumer Perception

Consumer perception plays a pivotal role in determining the likelihood of confusion<sup>13</sup>. The Indian judiciary takes into account the knowledge and awareness of the average consumer likely to use the goods or services. Factors such as the level of attention the average consumer is expected to give to the mark, the prevalence of similar marks in the market, and the purchasing conditions are considered. For products that are purchased with care, such as pharmaceuticals, the threshold for the likelihood of confusion is higher. The Indian judiciary has developed a comprehensive framework for assessing the likelihood of confusion in trademark cases. The courts take a holistic view, considering a range of factors from the similarity of the marks to the perception of the average consumer. This multifactorial approach ensures that both the interests of the trademark owners and the public are balanced, fostering an environment that protects intellectual property rights while also promoting fair competition and consumer protection.

## D. The Role of Expert Witnesses and Surveys

Expert witnesses and consumer surveys can play a crucial role in trademark litigation, particularly in complex cases where technical expertise or market data is required to assess the 'likelihood of confusion'. Experts in the field of marketing, linguistics, or consumer behaviour

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<sup>12</sup> Fhima, Ilanah, and Dev S Gangjee, 'Assessing Likelihood of Confusion', *The Confusion Test in European Trade Mark Law* (New York, 2019; online edn, Oxford Academic), <https://doi.org/10.1093/oso/9780199674336.003.0006>, Accessed 24 Apr. 2024.

<sup>13</sup> *Likelihood of Confusion in Trademark Law*, Keegan & Donato, <https://www.keegandonato.com/resources/likelihood-of-confusion-trademark-law.html>, Accessed 24 Apr. 2024.

may provide insights into how the average consumer perceives certain marks. They can also offer opinions on the distinctiveness of a mark or the similarity between products. Consumer surveys are often used to provide empirical evidence of confusion in the marketplace. Surveys must be carefully designed to avoid leading questions and to ensure that they accurately represent the views of the relevant consumer population. The Indian judiciary has developed a nuanced and context-specific approach to the 'likelihood of confusion' in trademark law. Landmark judgments have established key principles that guide the assessment of confusion, taking into account a variety of factors and the overall impression of the average consumer. Expert witnesses and surveys can augment the judicial process by providing specialised knowledge and empirical data. The ultimate goal is to protect consumers from deception and to maintain the integrity of trademarks as indicators of origin.

## **DILUTION AND LIKELIHOOD OF CONFUSION**

In trademark law, the concepts of 'dilution' and 'likelihood of confusion' are pivotal in the protection of trademarks and the adjudication of related disputes. The Indian judiciary has developed a sophisticated understanding of these concepts, tailoring its interpretation to fit the unique socio-economic and cultural landscape of India.

### **A. Likelihood of Confusion**

The 'likelihood of confusion' refers to the probability that an average consumer may mistake one product for another because of similarities in the trademarks. Indian courts have consistently held that the test for the likelihood of confusion is not merely a side-by-side comparison of the conflicting marks but a holistic assessment of various factors that could influence a consumer's perception.

The Indian judiciary interprets 'likelihood of confusion' by considering several factors, including:

1. **The Nature of the Marks:** Courts look at the visual, phonetic, and conceptual similarities between the marks. The comparison is based on the overall impression created by the marks in the minds of the consumers, including any distinctive or dominant elements.
2. **The Similarity of the Goods or Services:** The similarity in the nature, use, and channels of trade of the goods or services associated with the marks is scrutinized. If the goods or

services are closely related, the likelihood of confusion increases.

3. The Class of Purchasers: The level of attention expected from the average consumer of the goods or services plays a role. For instance, consumers purchasing expensive or life-impacting products like pharmaceuticals are presumed to be more discerning.

4. Actual Confusion: While not a prerequisite, evidence of actual confusion in the marketplace can be a strong indicator of the likelihood of confusion.

5. Market Presence and Duration: The extent and duration of the use of the mark, market share, and the geographical area of market penetration are also relevant considerations.

## B. Dilution

Dilution, on the other hand, is a concept that protects the uniqueness and distinctiveness of a famous trademark from being whittled away by the unauthorised use of non-competing goods.<sup>14</sup> There doesn't need to be a likelihood of confusion; dilution can occur even when the goods or services are entirely dissimilar, and there is no competition between the parties. The Indian judiciary recognizes two types of dilution:

1. Blurring: This occurs when the famous mark's distinctiveness is blurred by its association with other products. Over time, the mark loses its ability to serve as a unique identifier of the original product.

2. Tarnishment: This happens when the famous mark is associated with inferior or unsavoury products, thereby harming its reputation.<sup>15</sup>

Indian courts interpret dilution by considering:

1. Fame of the Trademark: The mark must be well-known and recognized by a significant part of the public for the goods or services it represents.

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<sup>14</sup> LII / Legal Information Institute. (n.d.). *dilution (trademark)*.

[https://www.law.cornell.edu/wex/dilution\\_\(trademark\)#:~:text=In%20law%2C%20dilution%20refers%20to.](https://www.law.cornell.edu/wex/dilution_(trademark)#:~:text=In%20law%2C%20dilution%20refers%20to.)

<sup>15</sup> International Trademark Association. (2020). *Trademark Dilution (Intended for a Non-Legal Audience)*. November, 2020 <https://www.inta.org/fact-sheets/trademark-dilution-intended-for-a-non-legal-audience/>

2. **Distinctiveness:** The inherent or acquired distinctiveness of the mark is a key factor. The more distinctive the mark, the stronger the protection against dilution.
3. **Use of the Mark:** The use of the mark by the infringer must be shown to cause dilution by blurring or tarnishment.
4. **Intent:** While not always necessary, the intent to trade off the reputation of the famous mark can be a factor in establishing dilution.

### **Cases:**

#### **1. Mattel, Inc. v. Jayant Agarwalla & Anr. (2008)<sup>16</sup>**

In this case, the Delhi High Court recognized the dilution of the famous trademark "Barbie" by its unauthorized use in the online game "Scrabulous." The court held that the use of the mark "Barbie" in connection with a game unrelated to Mattel's products could dilute the distinctiveness and reputation of the mark, despite the absence of likelihood of confusion.

#### **2. Daimler Benz Aktiengesellschaft vs Hybo Hindustan 1994<sup>17</sup>**

The concept of dilution played a significant role. This case, heard by the Delhi High Court, centred around the unauthorized use of the famous trademark "Mercedes-Benz" in a manner that could potentially dilute its distinctiveness and reputation. The Delhi High Court ruled in favour of Daimler Benz. The court's decision was guided by the principle of dilution, which seeks to protect famous trademarks from any unauthorized use that could diminish their uniqueness or dilute their reputation, regardless of the absence of likelihood of confusion.

## **COMPARATIVE ANALYSIS WITH INTERNATIONAL JURISPRUDENCE**

### **A. Similarities and Differences with Other Jurisdictions**

Indian law has been greatly influenced by its colonial past, particularly by British law. The Indian legal system is based on a common law system similar to that of the UK, which includes the doctrine of judicial precedent, whereby the decisions of higher courts bind lower courts. However, there are significant differences as well. For instance, Indian law has been adapted

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<sup>16</sup> 2008 (153) DLT 548

<sup>17</sup> AIR 1994 DELHI 239

to cater to its own cultural and societal needs. Unlike the UK, India has a written constitution that is the supreme law of the land, and it establishes a federal structure with clear demarcation of powers between the central and state governments. Comparatively, civil law jurisdictions such as France or Germany operate on a different premise, where codified statutes predominate and judicial decisions have less precedential value. Indian law, while primarily common law, also incorporates a variety of civil law concepts, particularly in areas like administrative law.

### **B. Influence of International Treaties and Agreements**

India is a signatory to numerous international treaties and agreements, which influence its domestic law. The Constitution of India mandates that international law must be in harmony with domestic law. Article 51(c) of the Indian Constitution<sup>18</sup> directs the state to foster respect for international law and treaty obligations. This has led to the incorporation of various international norms and standards into Indian legislation. For example, the Protection of Human Rights Act, of 1993, was enacted in line with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. However, international treaties do not automatically become part of Indian law upon ratification. They must be transformed into domestic law through legislation. This dualist approach ensures that international obligations are carefully scrutinized before being implemented within the national legal framework.

### **C. Lessons from the European Union and the United States**

The European Union (EU) presents a unique legal system where supranational laws coexist with the national laws of member states. The EU's legal principles, particularly in the realm of human rights, competition law, and environmental law, have influenced Indian jurisprudence. The concept of 'direct effect', which allows individuals to invoke EU law in national courts, is not applicable in India. However, the EU's emphasis on human rights and its enforcement mechanisms have inspired similar protections in Indian law, such as the establishment of the National Human Rights Commission. From the United States, India can learn about the robust protection of fundamental rights. The U.S. Constitution's Bill of Rights has influenced the interpretation of fundamental rights in India. Moreover, the U.S. Supreme Court's extensive jurisprudence on free speech, due process, and equal protection has been cited by Indian courts.

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<sup>18</sup> India Const., art. 51 (c)

However, the Indian Constitution provides for a broader range of fundamental rights, including socio-economic rights, which are not explicitly recognized in the U.S. Constitution. The U.S. federal structure has also been influential. While both India and the U.S. are federal systems, there are differences in the distribution of powers. The U.S. follows a more rigid separation of powers between the federal government and the states, whereas India has a more flexible system characterized by a strong central government with the ability to legislate on state matters under certain circumstances.

## **CHALLENGES IN DETERMINING 'LIKELIHOOD OF CONFUSION'**

Determining the 'likelihood of confusion' in trademark disputes is a pivotal aspect of intellectual property law. This determination is crucial in protecting consumers from being misled and in preserving the goodwill associated with established trademarks. However, several challenges arise in this assessment, primarily due to subjectivity in judicial interpretation, the evolving nature of trade and commerce, and the impact of digital commerce and technology.<sup>19</sup>

### **A. Subjectivity in Judicial Interpretation**

The assessment of the 'likelihood of confusion' is inherently subjective, as it relies on predicting the perceptions of the average consumer. Judges are tasked with the difficult job of stepping into the shoes of consumers to evaluate confusion, which can lead to varying interpretations. Factors such as the similarity of the marks, the similarity of the goods or services, the distinctiveness of the marks, and the likelihood of expansion in product lines are considered. However, the weight given to each factor can differ significantly from case to case. Judicial discretion plays a significant role, and different judges may arrive at different conclusions under similar circumstances. This subjectivity can lead to unpredictability in trademark litigation, making it challenging for businesses to assess the risks of trademark infringement proactively.

### **B. Evolving Nature of Trade and Commerce**

Trade and commerce are dynamic, with new products, services, and business models emerging

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<sup>19</sup> Lin, V. (2017). *Likelihood of Confusion: How to Win the Not Similar Argument*. [online] Patent Trademark Blog | <https://www.patenttrademarkblog.com/what-is-likelihood-of-confusion/> [Accessed 24 Apr. 2024].

constantly. This evolution complicates the 'likelihood of confusion' analysis. For instance, the expansion of a brand into new markets or product lines can create new opportunities for confusion that did not previously exist. Additionally, the convergence of different industries, such as technology and healthcare, can blur the lines between previously distinct categories of goods and services, making it harder to assess consumer perceptions. Globalisation has also expanded the marketplace, introducing cross-border trade issues and the challenge of considering confusion across different cultures and languages. A mark that is distinctive in one country may be generic or descriptive in another, affecting the analysis of confusion.<sup>20</sup>

### **C. Impact of Digital Commerce and Technology**

The rise of digital commerce and technology has significantly impacted the 'likelihood of confusion' analysis. Online marketplaces have made it easier for consumers to encounter a vast array of trademarks, potentially increasing the chances of confusion. At the same time, the internet allows consumers to conduct more thorough research on products and services, which might reduce confusion. The use of algorithms and search engine optimisation (SEO) practices can also influence consumer perceptions. For example, similar trademarks might appear next to each other in search results or online advertisements, heightening the risk of confusion. Moreover, the use of trademarks in domain names and on social media platforms presents new challenges, as the context in which a mark is used online can significantly affect the likelihood of confusion. Furthermore, advancements in technology have led to new forms of trademarks, such as sound marks, motion marks, and holograms. These non-traditional marks do not fit neatly into the traditional frameworks for assessing visual or phonetic similarity, requiring courts to adapt their analytical approaches. The determination of the 'likelihood of confusion' in trademark law is fraught with challenges. The subjectivity inherent in judicial interpretation means that outcomes can be unpredictable, which can be problematic for businesses seeking to navigate the trademark landscape. The evolving nature of trade and commerce requires a flexible approach to the assessment of confusion, taking into account the changing ways in which goods and services are marketed and consumed. Finally, the impact of digital commerce and technology introduces new variables into the equation, necessitating a modernised approach to trademark law that can accommodate the complexities of the digital age.<sup>21</sup> As the

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<sup>20</sup> Id

<sup>21</sup> Id

marketplace continues to evolve, so too must the legal frameworks and methodologies used to assess the 'likelihood of confusion.'

The judiciary needs to stay informed about changes in consumer behaviour and technological advancements to ensure that trademark law remains effective in its goal of preventing consumer confusion and protecting brand identity.

## RECENT DEVELOPMENTS AND TRENDS

The Indian judiciary's approach to the likelihood of confusion in trademark law has been evolving, reflecting the dynamic nature of commerce and technology. This evolution is evident in recent judgments that consider the complexities introduced by globalisation and digitalisation.

### A. Evolution of Judicial Approach with Cases

Recent cases have seen Indian courts delve deeper into the nuances of trademark law, particularly concerning the likelihood of confusion. The courts have been increasingly mindful of the context in which marks are used and the realities of consumer behaviour.

1. Contextual and Holistic Analysis: Courts have moved towards a more nuanced and contextual analysis rather than a simplistic comparison of marks. In *Bigtree Entertainment Pvt. Ltd. vs. D. Sharma*,<sup>2223</sup> the Delhi High Court considered the overall business context while assessing the likelihood of confusion between the 'Bookmyshow' and 'Bookmysports' marks.
2. Recognition of Well-Known Marks: The judiciary has also been proactive in recognising and protecting well-known marks, even beyond their registered categories. In *Toyota Jidosha Kabushiki Kaisha vs. M/s Prius Auto Industries Ltd.*,<sup>24</sup> the Supreme Court considered the reputation of the 'Prius' mark globally, even though it was not well-known in India at the time of its adoption by the defendant.
3. Internet and E-commerce: With the rise of e-commerce, courts have had to consider the likelihood of confusion in the online marketplace. In *Kent RO Systems Ltd. & Anr vs. Amit*

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<sup>22</sup> AIR ONLINE 2019 DEL 411

<sup>23</sup> (73) PTC 1



Kotak & Ors.,<sup>24</sup> the Delhi High Court recognised the importance of domain names and the potential for confusion online, which could be as significant as that in the physical marketplace.

4. Trans-Border Reputation: Indian courts have increasingly acknowledged the concept of trans-border reputation, where a foreign brand not directly operating in India can claim protection if it can prove that its reputation extends to the Indian market. This was upheld in the case of Milmet Oftho Industries & Ors vs. Allergan Inc.<sup>25</sup>

## **B. Impact of Globalisation and Digitalisation**

Globalisation and digitalisation have had a profound impact on how courts interpret the likelihood of confusion in trademark cases:

1. Global Marketplace: As brands expand globally, Indian courts have recognised that the likelihood of confusion must be assessed in the context of a global consumer base. This has led to a more liberal approach in recognising the rights of foreign trademark holders in India, as seen in cases involving trans-border reputation.

2. Digital Platforms: The proliferation of digital platforms has changed how consumers interact with trademarks. Courts have had to consider new forms of confusion, such as keyword advertising and search engine results. In Consim Info Pvt. Ltd. vs. Google India Pvt. Ltd.<sup>26</sup>, the Madras High Court dealt with the issue of trademark use in ad keywords, recognizing the potential for confusion in the digital space.

3. Social Media Influence: Social media's influence on consumer perception has also been a consideration. Courts have recognised that social media can rapidly amplify the presence of a mark and, consequently, the likelihood of confusion. The courts have been tasked with balancing the need for brand protection with the realities of social media marketing.

4. Online Trade and Domain Names: The increase in online trade has led to a rise in disputes over domain names and the potential for confusion they create. Indian courts have

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<sup>24</sup> (2017) 240 DLT 3

<sup>25</sup> 2004 CLC 884 (SC)

<sup>26</sup> 013 (54) PTC 578 (Mad)

been active in adjudicating such disputes, often relying on principles of passing off to prevent misuse of similar domain names.

5. **Standard of Consumer Awareness:** With increased access to information, the standard of consumer awareness is presumed to be higher. Courts have taken note of this while assessing the likelihood of confusion, often expecting a more discerning consumer, which can influence the outcome of trademark disputes.

## **REMEDIES AVAILABLE FOR THE LIKELIHOOD OF CONFUSION**

When there is a likelihood of confusion due to trademark infringement, the Trademarks Act, of 1999 provides several remedies to the aggrieved party. These remedies are designed to prevent unfair competition and protect the interests of consumers as well as the rights of the trademark owner. Here is an overview of the remedies available:

1. **Injunctions:** The most immediate remedy sought in cases of trademark infringement is an injunction. An injunction is a court order that either restrains the infringing party from using the disputed mark (interim injunction) or permanently prohibits them from using the mark (permanent injunction). The grant of an interim injunction is based on the prima facie case, balance of convenience, and irreparable harm that may be caused to the trademark owner if the injunction is not granted.
2. **Damages or Account of Profits:** The trademark owner may claim damages for the losses suffered due to the infringement. Alternatively, the owner may claim an account of profits, which is a demand for the infringer to surrender the profits made from the use of the infringing mark. The choice between damages and an account of profits is at the discretion of the plaintiff.
3. **Delivery up and Destruction of Infringing Goods:** The court may order the infringer to deliver up for destruction any goods, labels, packaging, etc., that bear the infringing mark. This is to ensure that the infringing goods are removed from the market and do not cause further confusion or deception.
4. **Costs of Legal Action:** The court may order the infringing party to pay the legal costs incurred by the trademark owner in pursuing the action. This is a compensatory measure for the expenses borne by the plaintiff.

5. Criminal Remedies: Under Sections 103 and 104 of the Trademarks Act, 1999<sup>27</sup>, trademark infringement is a cognisable offence, and criminal proceedings can be initiated against the infringer. This may result in imprisonment, fines, or both.
6. Anton Piller Order: This is an extraordinary remedy where the court allows the plaintiff to search the premises of the defendant and seize evidence without prior warning. This is granted in exceptional cases where there is a grave risk of evidence being destroyed.
7. Mareva Injunction: Also known as a freezing order, it prevents the infringer from transferring assets out of the jurisdiction to avoid paying damages.
8. John Doe Order: This is an order against a person whose identity is not known at the time of the issuance of the order. It is useful in tackling infringement where the infringer is operating anonymously or under a pseudonym.
9. Rectification or Cancellation of the Infringing Mark: If the infringing mark is registered, the trademark owner may seek to have it rectified or cancelled from the Trademark Registry.
10. Border Measures: The trademark owner can also take border measures to prevent the importation of infringing goods. The Customs Act, 1962, read with the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007, allows the trademark owner to record their registered trademarks with the customs authorities to prevent the importation of infringing goods.

In assessing the likelihood of confusion, Indian courts consider various factors such as the similarity of the marks, the similarity of the goods or services, the distinctiveness of the mark, the possibility of association with the other mark, and the likelihood of expansion of product lines.

It is important to note that the relief granted by the court is based on the facts and circumstances of each case. The courts have wide discretion in granting remedies and often take into account factors such as the conduct of the infringer, the scale of infringement, and the impact on the public. The remedies for trademark infringement in India are comprehensive and designed to

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<sup>27</sup> The Trade Marks Act, 1999 § 103 & 104

provide robust protection to trademark owners against the likelihood of confusion. They serve not only to compensate the aggrieved party but also to deter potential infringers and uphold the integrity of the trademark system. The multiplicity of remedies—from civil to criminal—ensures that trademark owners have several avenues to address infringement effectively. The Indian judiciary, while adjudicating such matters, strives to balance the interests of the trademark owner with those of the public and the market at large, ensuring that the outcome serves the principles of justice and equity. In practice, the effectiveness of these remedies also depends on the trademark owner's vigilance in monitoring the use of their marks and taking prompt action against any infringement. The proactive steps by trademark owners, combined with the legal mechanisms in place, create a formidable defence against the unauthorised use of trademarks and the likelihood of confusion in the marketplace.

## **RECOMMENDATIONS FOR CLARITY AND PREDICTABILITY IN FUTURE**

### **A. Need for Clear Guidelines or Tests**

The administration of justice is fundamentally reliant on the clarity and predictability of the law. Clear guidelines or tests are essential to ensure that the law is applied consistently and fairly. The absence of such guidelines can lead to arbitrary decision-making, which undermines the rule of law and erodes public confidence in the legal system.

To enhance clarity, legislative bodies should strive to draft laws with precision, using unambiguous language that can be easily understood and applied. This includes defining terms, setting out the scope of the law, and providing detailed criteria for its application. For instance, in the context of administrative powers, the law should specify the circumstances under which such powers may be exercised, the procedures to be followed, and the rights of those affected.

Moreover, regulatory bodies should be tasked with creating comprehensive rules and procedures that align with legislative intent. These rules should be made readily available to the public to ensure transparency and accountability.

### **B. Role of Precedent in Shaping Future Decisions**

The doctrine of stare decisis, which means "to stand by things decided," is a cornerstone of common law systems, including India's. It ensures that similar cases are decided consistently, providing predictability and stability to the law. Precedents set by higher courts are binding on

lower courts, ensuring hierarchical coherence in judicial decisions. However, the role of precedent is not merely to perpetuate past decisions. Courts must also be mindful of evolving social norms, technological advancements, and contemporary challenges. While respecting the need for consistency, courts should not shy away from overruling or distinguishing precedents that are no longer relevant or just. Judicial training programs should emphasize the importance of precedent while also encouraging critical analysis of past decisions. This will ensure that judges are equipped to balance the need for consistency with the imperative of justice in a changing society.

## **CONCLUSION**

The Indian judiciary's interpretation of the 'likelihood of confusion' in trademark cases is a testament to its commitment to the delicate balance between protecting intellectual property rights and preventing consumer deception. The conclusion of such cases rests on a multifaceted analysis that goes beyond mere visual or phonetic comparison, delving into the psyche of the average consumer and the contextual backdrop against which the trademark is to be perceived. In determining the 'likelihood of confusion', Indian courts have consistently emphasised the importance of the perspective of an 'average man of ordinary intelligence'. This hypothetical consumer is neither overly cautious nor indifferent but possesses a reasonable level of awareness and makes assumptions based on general experiences in the marketplace. The courts assess how this average consumer would react to the trademarks in question, considering the overall impression created by the marks, including their distinctive and dominant components. The judiciary has also recognised that the 'likelihood of confusion' is not a static concept but one that evolves with the changing dynamics of the market, consumer behaviour, and trends in branding. As such, the courts have been careful to consider the contemporary context in which trademarks operate, including advancements in technology, the proliferation of advertising, and the increasing sophistication of consumers. In landmark judgments, the Indian judiciary has laid down several principles for assessing the 'likelihood of confusion'. These include the comparison of the goods or services in question, the similarity of the dominant features of the competing marks, the channels of trade, the class of purchasers, and the use of the marks in the market. The courts have also taken into account the possibility of imperfect recollection, where consumers may not remember a trademark in its entirety but only its predominant features. The Indian judiciary has also been mindful of the need to protect well-known trademarks from dilution and has been stringent in cases where a new mark bears resemblance to an established

mark with a high reputation. In such instances, the threshold for 'likelihood of confusion' is lower, given the potential for a well-known mark to be associated with a wide array of products. Moreover, the judiciary has been proactive in acknowledging the dynamic nature of language, especially in a diverse country like India, where the connotation of words can vary significantly across different regions and languages. This sensitivity to linguistic nuances is crucial in assessing the 'likelihood of confusion' in a multilingual society. The Indian judiciary's approach to interpreting the 'likelihood of confusion' in trademark cases is comprehensive and adaptive. It is grounded in a pragmatic understanding of consumer behaviour and market practices. The courts have shown a propensity to err on the side of caution, favouring consumer protection and the integrity of the marketplace over the interests of individual trademark applicants when the potential for confusion is high.

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