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**DECEPTIVE SIMILARITY IN TRADEMARKS: BALANCING  
DISTINCTIVENESS AND PUBLIC PROTECTION**- Sharda Patidar & Jigyasa Agarwal<sup>1</sup>**ABSTRACT**

Indian trademark law actively protects distinctiveness and prevents consumer deception as fundamental objectives, a mandate that underpins the doctrine of deceptive similarity. It refers to such a degree of resemblance between two marks as is likely to cause confusion or deception among ordinary consumers with respect to the source, origin, or commercial affiliation of the goods or services concerned. The determination of deceptive similarity is therefore not confined to a literal, visual, or textual comparison of competing marks, but entails an assessment of their likely perception by an average purchaser exercising ordinary prudence and possessing imperfect recollection in prevailing market conditions. Through sustained judicial exposition, Indian courts have increasingly endorsed a holistic mode of analysis, according greater weight to phonetic similarity, surrounding trade circumstances, and the overall commercial impression conveyed by the marks, rather than to meticulous or side-by-side dissection. This analytical framework has been further refined through the evolution of multifactor tests, enabling courts to tailor the application of the doctrine to the nature of the goods, the class of consumers, and the realities of the marketplace. Also, in sectors where the consequences of consumer confusion are particularly grave, most notably in relation to pharmaceutical products, courts have applied a heightened threshold of scrutiny in deference to public health considerations. This research highlights that deceptive similarity in Indian trademark law operates as a flexible, context-sensitive, and consumer-oriented standard, calibrated to balance proprietary rights with the imperatives of fair competition and the protection of the public interest.

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**KEYWORDS:** Deceptive similarity, Indian trademark law, distinctiveness, market conditions, public interest

## INTRODUCTION

Trademark is one of the areas of Intellectual property that aid us in recognizing a product by differentiating it from other goods and services belonging to the same class. It means the visual symbol in the form of a word, a device, or a label which is applied to the articles of commerce with the sole objective to specify to the consumers that the goods are those manufactured by a specific person and can be very well differentiated from the goods which are manufactured or produced by others. It is applicable to the services that are available to the consumers. Thus, to avail protection, it is very much crucial that a trademark must be distinguishing in nature and should not mean to form any kind of misperception as to the origin of goods or services. In *Colgate Palmolive Company v. Anchor Health and Beauty Care Pvt.*,<sup>2</sup> it was held that “the difference in the style of the appearance of words on the container or packing which identifies its manufacturers by way of style, colour combination or textures or graphics is definitely substantial or relevant for ascertaining the overall imitation of the container but when a product is having distinguishing colour combination, style, shape, and texture has been present in the market for decades as in this case it is in the market since many years it leads to unavoidable implication of having attained secondary meaning on account of its repute and goodwill earned at huge cost.”

## MEANING AND SCOPE OF DECEPTIVE SIMILARITY

Upon registration of a trademark, the proprietor—whether an individual or a corporate entity—secures an exclusive statutory right to use that mark in relation to the goods for which it is registered. This exclusivity operates as a legal safeguard against unauthorized use by third parties. Consequently, where another person employs a mark that is identical or so closely resembles the registered trademark as to cause deception or confusion, the registered proprietor is entitled to invoke infringement proceedings. Through such an action, the proprietor may seek judicial protection of the mark, including the grant of injunctive relief to restrain the infringing use.<sup>3</sup> Thus, the basis for shielding the trademark is that no mark shall

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<sup>2</sup> 2003 (27) PTC 478 Del

<sup>3</sup> AIR 1965 SC 980

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be registered which is likely to delude the public or which confuses the public in respect to the 'origin' or source of goods or services. The expression 'deceptive similarity' as defined under Section 2(1)(h) of the Trademarks Act, 1999 says that the similarity or resemblance ought to be such as it would be likely to deceive or cause confusion.<sup>4</sup>To establish whether one mark is deceptively similar to another, the extensive and crucial features of the two are to be considered. There is no need for them to be placed side by side to ascertain whether there is any distinction in their design. A side-by-side comparison of two marks is not a sound test for determining deceptive similarity. The real question is not whether a person would be confused when both marks are seen together, but whether an ordinary consumer, on seeing the later or proposed mark alone and relying on a general or imperfect recollection of the earlier mark, is likely to be misled. Such deception may occur in different ways, including confusion about the nature of the goods, their commercial origin, or the existence of any trade connection between the parties.<sup>5</sup>

### **TYPES OF SIMILARITY: THE THREE FACTORS**

The main factors to be considered for establishing similarity are as follows:

- **The Visual Similarity of the Marks:** This includes the length of the respective marks, using prefixes, suffixes, common syllables, and shared elements of shape.
- **The Oral Similarity of the Marks:** This similarity is turned on when the marks are pronounced. It relies upon the length of the marks, the number of syllables, and the pronunciation of the marks. Phonetic and visual similarity implies the reference to the ear as well as to the eye.
- **The Conceptual Similarity of the Marks:** Certain marks might not look or sound alike, but may be alike in concept. The pertinent point is to largely see the message of the mark.

### **MISREPRESENTATION**

In trademark law, misrepresentation arises when the defendant, through words or conduct, expressly or impliedly conveys that their goods or services originate from, or are associated with, the claimant, when this is not the case. Over time, the scope of such actions has

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<sup>4</sup>AIR 1977 Mad 237

<sup>5</sup> Anamika Bhandari, Trademark: Infringement and Passing Off 1(1) RSLR 133.

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expanded to cover not only false representations about the goods or services themselves but also representations that create the impression of a commercial link or association between the claimant and the defendant.<sup>6</sup>

The intention of the defendant is not relevant, as the focus is on the effect of the defendant's actions and how they impact the public. When a person dishonestly or falsely copies a trademark belonging to another, it amounts to a false representation to consumers, and the law seeks to protect the public from such deception. Courts have taken a flexible approach in determining whether the required misrepresentation has been made. Such misrepresentation may arise through words or conduct. Most commonly, it occurs through the use of words, whether spoken or written. In certain situations, misrepresentation may also arise from the defendant's actions, such as when goods are made to resemble those of the claimant or when misleading representations are created through the registration or use of names on the internet.

Misrepresentation may relate to the origin, quality, or control and responsibility over goods or services. Courts have recognised that misrepresentation can arise when the defendant's conduct creates the impression that the defendant has control over or responsibility for the goods or services. However, merely suggesting some form of connection with the claimant does not automatically amount to passing off. Such a connection becomes relevant only when the misrepresentation implies that the claimant has responsibility for or control over the defendant's goods or services. Passing off also occurs when goods of a particular type or quality associated with the claimant are presented as belonging to another, or when inferior or second-hand goods are sold as new. Further, passing off includes the misuse of the claimant's goods to sell other products, such as by refilling and reusing the claimant's containers.

### **LEGAL ARCHITECTURE RELATED TO DECEPTIVE SIMILARITY**

Trademarks act as indicators in the marketplace by identifying the source of goods or services, assuring a certain level of quality, and helping consumers make quicker purchasing decisions. Indian trademark law protects this function by preventing the registration and use of marks that are deceptively similar to existing marks. This principle is important not only at the stage of registration, under the relative grounds for refusal, but also in cases of

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<sup>6</sup>Lionel Bently & Brad Sherman, Intellectual Property Law 692 (Oxford University Press 2003)

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infringement and in the common law action of passing off. Over the years, Indian courts, especially the Supreme Court, have developed a strong and flexible test to assess deceptive similarity, taking into account the conditions of Indian markets, varying levels of consumer awareness, and common buying habits. While the doctrine has evolved to address modern developments such as trade dress, online platforms, and reputation extending across different classes of goods, its primary focus on protecting consumers has remained unchanged.

The legislative framework defining deceptive similarity as a ground for refusing trademark registration is reflected in statutory provisions that broaden the scope of the concept and identify features likely to mislead or confuse the public. These provisions are contained in Sections 9 and 11 of the Trade Marks Act, 1999.

#### **A. Section 9 of the Trade Marks Act, 1999**

Section 9 fixes the absolute grounds for refusing a trademark. In contrast to relative grounds, these relate exclusively to the nature of the trademark itself, regardless of other existing marks. The law bars registration of marks that are deprived of uniqueness, are completely descriptive, disingenuous, offensive, or opposed to public policy. This section is principally significant for startups and businesses when choosing a name or logo, as it can help evade filing for characteristically unregistrable marks.

- **Section 9(1)(a): Lack of Distinctiveness-** A trademark ought to perform as a badge of origin, aiding consumers to recognize a product or service relating to a particular source. Contrary to relative grounds, Section 9(1)(a) forbids marks that are unqualified of differentiating one business's goods or services from another's. General terms, frequently used expressions, or basic symbols fail this elementary test of distinctiveness.
- **Section 9(1)(b): Descriptive Marks-** Unlike 9(1)(a), which emphasizes genericness, Section 9(1)(b) aims at marks that directly illustrate the product's qualities—its kind, quality, quantity, objective, geographical origin, or features. The law averts businesses from monopolizing terms that competitors might require to illustrate their own products equitably in the marketplace.

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- **Section 9(1)(c): Customary in Trade-** Section 9(1)(c) prevents marks that have become habitual in the current language or recognized trade practices. Even if such marks were once distinguishing, they might lose protection over time due to extensive public use—a phenomenon termed as *genericide* (loss of trademark rights via generic use).
- **Section 9(2)(a): Deceptive Marks-** Marks that are fundamentally deceptive or expected to deceive the public are exempted under Section 9(2)(a). This comprises marks that deceptively indicate qualities, geographical origins, or endorsements that the goods or services do not in fact own.
- **Section 9(2)(b): Offensive or Religious Sensitivities-** Trademarks that hurt religious feelings or improperly use sacred names or symbols are not allowed. Given India's diverse social and cultural setting, this restriction is particularly important.
- **Section 9(2)(b): Scandalous or Obscene Matter-** Marks encompassing offensive, vulgar, or outrageous matter are barred under this provision to preserve public decency. Even stylized logos with indicative graphics can cause objections.
- **Section 9(2)(d): Prohibited Under Other Laws-** Trademarks encompassing elements barred under other laws (e.g., Emblems and Names Act, 1950) cannot be registered. This comprises national symbols, government insignia, and names of prominent personalities.
- **Section 9(3): Shape-Based Restrictions-** Section 9(3) excludes from registration any mark consisting completely of:
  - a. Shapes stemming from the nature of the goods.
  - b. Shapes essential to accomplish a technical result.
  - c. Shapes that enhance considerable aesthetic or commercial value.

## B. SECTION 11 OF THE TRADE MARKS ACT, 1999

Section 11 of the Trademarks Act, 1999 establishes relative grounds for refusal, which talk about possible conflicts between a new trademark application and existing rights. Distinct from absolute grounds under Section 9 (which talks about the nature of the mark itself), Section 11 emphasizes on whether the new mark could:

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- a. Puzzle consumers about the source of goods/services
  - b. Infringe previous trademark rights
  - c. Damage the uniqueness or reputation of established marks
- **Section 11(1): Likelihood Of Confusion-** This provision does not allow the registration of trademarks that are the same as or similar to an earlier mark if their use on similar goods or services is likely to confuse consumers. The law also recognises indirect confusion, where consumers may believe that there is some connection or association between the two brands.
  - **Section 11(2): Protection Of Well-Known Trademarks Beyond Their Goods/Services-** Section 11(2) gives defence to recognized trademarks even in distinct product or service classes. A mark identical or similar to an established trademark will be declined if its use:
    - a. Would take wrong advantage of the famous mark's repute (*free-riding*), or
    - b. Damage its uniqueness or repute (*dilution*), and
    - c. The applicant cannot verify "due cause" for adopting the mark.
  - **Section 11(3): Conflicts with Unregistered Rights or Copyright-** This provision prohibits registration where the proposed mark's use in India could be prohibited by the law of passing off (protecting unregistered marks used in commerce), or infringes a current copyright.
  - **Section 11(4): Consent From Proprietor-** This clause provides an exception where the proprietor of an earlier trademark gives consent to the registration of a mark that is identical or similar. In such situations, the Registrar is empowered to permit registration, treating the consent as a special circumstance under Section 12.
  - **Section 11(6) & 11(7): Factors for Well-Known Position-** When assessing if a trademark is previously established, the Registrar contemplates:
    - a. Public acknowledgement of the mark (even if attained via global advertising).
    - b. Duration, extent, and geographical area of use and promotion.
    - c. History of successful enforcement by courts or trademark offices
    - d. Reach within actual/potential consumers, distributors, and business circles.
  - **Section 11(9): No Mandatory Conditions-** Notably, the Registrar cannot require:

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- a. That the mark has been used or registered in India.
- b. That the mark is acknowledged by the public at large in India.

This concludes that international brands can be protected as “well-known” in India even without prior use or registration in the country.

- **Section 11(10): Registrar’s Duties-** The Registrar ought to protect established marks from identical/similar registrations across all categories and contemplate bad faith in applications or oppositions.
- **Section 11(11): Good Faith Registration Protection-** Section 11(11) defends trademarks that were registered or used in good faith prior to the commencement of the Act. It clarifies that even where such marks resemble a well-known trademark, their registration will not be invalidated, provided they were adopted honestly, and all material facts were fully disclosed to the Registrar.

### C. INFRINGEMENT

Section 29 sets out the various circumstances in which infringement of a registered trademark occurs. It safeguards proprietors against the unauthorised use of identical or similar marks in relation to identical or similar goods or services where such use is likely to cause confusion, including cases where confusion is statutorily presumed. It also extends protection to reputed marks against uses involving dissimilar goods or services where such use takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the mark.

Section 27 prohibits infringement actions in respect of unregistered trademarks, but expressly preserves the common-law remedy of passing off. The enforcement framework under Sections 134 and 135 provides for civil proceedings, specifies jurisdiction, and outlines available reliefs such as injunctions, damages or accounts of profits, and orders for delivery up of infringing goods.

### D. PASSING OFF

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Passing off safeguards the goodwill attached to an unregistered mark against misrepresentation that results in damage to the claimant. Its operation is governed by the well-established triple test of goodwill, misrepresentation, and damage. Unlike infringement, which centres on a statutory comparison of marks and, in certain situations, allows presumptions of confusion, passing off is more flexible in scope. It extends to the overall get-up, trade dress, and broader forms of misrepresentation, but at the same time requires the claimant to affirmatively establish the existence of goodwill and a likelihood of deception. In practice, courts often assess similar factors in both actions; the real distinction lies in the evidentiary burden and the absence of registration-based presumptions in passing off claims.

### E. LANDMARK CASES

- *Amritdhara Pharmacy v. Satya Deo Gupta*: The Court declined registration of the mark “Lakshmandhara” for medicinal preparations due to its similarity with the earlier mark “Amritdhara,” placing particular emphasis on phonetic resemblance and assessing the likelihood of confusion from the standpoint of an average consumer with imperfect recollection.<sup>7</sup>The Court warned against careful, side-by-side comparison; the inquiry is about the overall effect on likely purchasers, many of whom might be illiterate or semi-literate and buy orally in crowded bazaars.
- *Parle Products (P) Ltd. v. J.P. & Co., Mysore*: In a wrapper-to-wrapper dispute concerning “Glucovita” biscuits, the Court reaffirmed that trademarks must be assessed in their entirety rather than by dissecting them into individual elements. It held that where the essential features of a mark are appropriated, the likelihood of confusion is high, famously observing that the average consumer is not “gifted with the powers of observation of Sherlock Holmes.”<sup>8</sup>
- *Ruston & Hornsby Ltd. v. Zamindara Engg. Co.*: The Court found the mark “RUSTAM” to be infringing the earlier mark “RUSTON,” rejecting the argument that the addition of the word “India” was sufficient to distinguish the two. It emphasised

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<sup>7</sup> AIR 1963 SC 449 (SC)

<sup>8</sup> AIR 1972 SC 1359 (SC)

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that the decisive test is the likelihood of deception, and that the use of prefixes or suffixes which do not materially change the overall phonetic identity of the mark cannot absolve the infringer.<sup>9</sup>

- ***Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.***: The Supreme Court’s landmark decision in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* articulated the modern multifactor test for assessing deceptive similarity, with particular stringency in the context of medicinal products, where even a minimal risk of confusion can have serious, and potentially life-threatening, consequences.<sup>10</sup> The Court highlighted a set of relevant factors to be considered, including: (a) the nature of the marks, whether word marks, label marks, or composite marks; (b) the degree of resemblance in terms of visual appearance, phonetic similarity, and overall idea; (c) the nature of the goods; (d) the similarity in the character, quality, and performance of the competing goods; (e) the class of purchasers, taking into account their level of education and intelligence; (f) the mode of purchase; and (g) other surrounding circumstances. Applying these factors, the Court adopted a more stringent standard for pharmaceutical products, observing that even a minimal likelihood of confusion may have fatal consequences.
- **Nandhini/Nandini**: In *Nandhini Deluxe v. Karnataka Co-operative Milk Producers Federation Ltd.*, the Supreme Court permitted the registration of “NANDHINI DELUXE” for restaurant-related goods in Classes 29 and 30 (excluding milk and milk products), notwithstanding the respondent’s prior mark “NANDINI” for milk products. The Court stressed that goods falling within the same Nice Classification are not automatically similar; what matters is the nature and use of the goods in question. In the absence of evidence establishing the earlier mark as well-known, and without satisfying the requirements of Section 11(2)—namely, reputation in India, use without due cause, and unfair advantage or detriment—the registration was held to be permissible.<sup>11</sup>

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<sup>9</sup> AIR 1970 SC 1649 (SC).

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

<sup>11</sup> AIR 2018 SC 3516 (SC)

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- **National Bell Co. v. Metal Goods Mfg. Co.:** The Supreme Court here treated differentiation of ordinary numerals (“50”/ “FIFTY”) with caution, prompting that common or descriptive signifiers assert a slimmer penumbra.<sup>12</sup> Where marks depend on weak components (colours, shapes, laudatory terms), small variations might avail to evade deception, but not where trade dress or overall get-up efficiently copies the senior’s “signature.”
- **Midas Hygiene:** On the question of interim injunctions, the Supreme Court in *Midas Hygiene Industries (P) Ltd. v. Sudhir Bhatia* held that where the adoption of a mark appears to be prima facie dishonest, mere delay on the part of the plaintiff should not bar interim relief. In such cases, courts ought to grant injunctions to restrain continued deception and protect the integrity of the trademark.<sup>13</sup>

#### **F. ONLINE MARKETPLACES AND INITIAL INTEREST CONFUSION**

As business increasingly moves online, courts also consider preliminary interest confusion, which refers to short-term confusion that attracts a consumer to the later user’s goods or services. Courts, particularly Division Benches, have taken a stricter approach in cases where the marks are very similar and are used through overlapping channels, such as in disputes involving sportswear or athleisure brands. This reflects a growing awareness of issues like keyword advertising and online stores that closely resemble established brands.

#### **G. COMPARATIVE ADVERTISING AND NOMINATIVE USE**

Indian courts allow comparative advertising as long as it is honest and based on true comparisons. Deception arises when such advertising uses another’s trademark in a way that causes confusion about the source or endorsement of the goods, or when it unfairly harms the reputation of a competitor’s products. Although this is not a typical case of deceptive similarity, the same focus on consumer confusion applies, and Section 29(8) treats misleading advertising as an infringement of a registered trademark.

#### **H. UNFAIR COMPETITION**

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<sup>12</sup> 1971 AIR 898; (1970) 3 SCC 665 (SC)

<sup>13</sup> (2004) 3 SCC 90 (SC).

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The unauthorised use of a well-known trademark enables the user to capitalise on the goodwill and reputation associated with that mark, and such conduct amounts to unfair competition. While classical trademark law is primarily concerned with preventing consumer confusion, many jurisdictions extend protection to well-known marks through the doctrine of dilution within unfair competition law. This approach recognises that the misuse of a well-known mark, or a closely similar one, may not necessarily confuse consumers, yet still erodes the distinctiveness or reputation of the mark and unjustly exploits its accumulated goodwill, thereby constituting unfair competition.

### **CONTEMPORARY CASE NOTES AND TRENDS**

Recent decisions indicate that courts continue to take a strict view against sound-alike marks and near-identical trade dress. High Courts have granted interim injunctions where similarities in visual appearance, phonetic elements, and overlapping trade channels establish a prima facie real likelihood of confusion, including in cases involving apparel and sportswear brands. In the FMCG sector, established brands have actively enforced their rights against lookalike packaging and colour combinations, and courts have shown readiness to restrain the use of entire trade dress ensembles, rather than confining relief to the logo alone. Media-reported enforcement actions by well-known brands against “deceptively similar” new entrants highlight the continuing deterrent effect of Indian trademark law, reinforcing its role in discouraging imitation and protecting established goodwill.

### **CONCLUSION**

The primary function of a trademark is to identify the source or origin of goods and services. This function, however, is guided by two key principles. First, the mark must satisfy the conditions prescribed under the Trademarks Act, 1999, most importantly that it be distinctive. Second, the mark must not be of a nature that deceives or confuses the public regarding the source or origin of the goods or services. Both conditions are essential before determining whether a mark qualifies for legal protection.

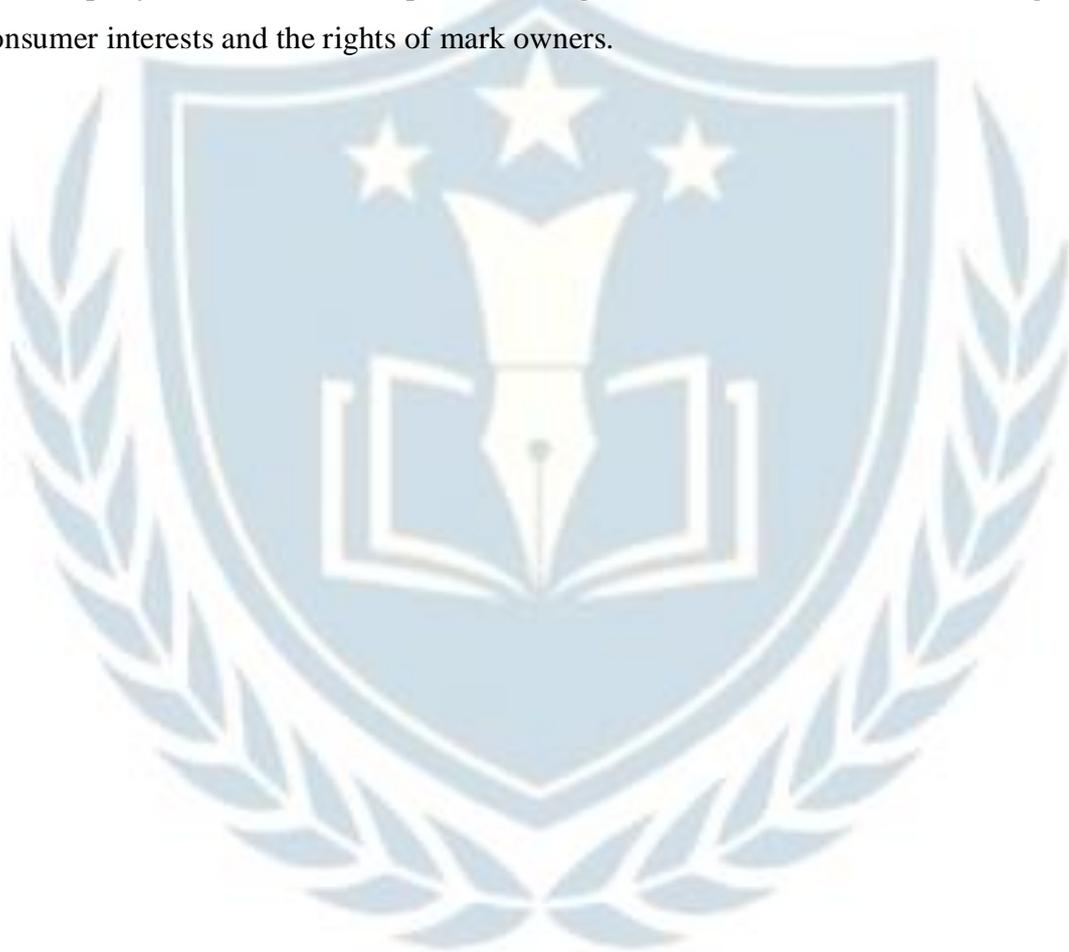
Deceptive similarity is a central ground for refusal of trademark registration under the Act, supplemented by related provisions addressing confusion and misrepresentation. Notably, proof of intent is not required; whether a mark is deceptively similar is a question of fact,

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assessed based on the specific circumstances of each case. Indian courts have played a pivotal role in evaluating the likelihood of deception, applying principles of consumer perception, similarity in sound, appearance, and idea, and other contextual factors.

In conclusion, a proprietor cannot adopt or use a mark that: (a) belongs to another proprietor, (b) is likely to cause confusion or deception among the public, (c) is a well-known trademark, or (d) falsely suggests that goods originate from the proprietor when they actually originate from another party with established reputation and goodwill. Trademark law thus safeguards both consumer interests and the rights of mark owners.



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