

TRADING THE COPYRIGHT AND COPYING THE TRADEMARK: IS IT POSSIBLE?

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ABSTRACT

When an original word, mark or a work is registered and used as a Trademark and different entities respectively enjoy the exclusive right to use a Trademark as well as the Copyright in it. However conflict between the two rights is likely to arise in situations when seemingly similar art work is claimed by one person as their Copyright while another person asserts their right over it as a Trademark.

As can be seen in cases involving conflicts between the Trademark right and Copyright, such cases usually are characterized by two circumstances: using another person's mark, either registered or unregistered in one's work which may give rise to Trademark right affirmation scenario in layman terms a situation of 'copying the Trademark'; and the other circumstance being, use as a mark of a work in which another party enjoys its Copyright which may give rise to Copyright infringement scenario or in other words a situation of 'trading the Copyright'.

In this article I intend to discuss the issue regarding their potential conflict, from the perspective of a valid Copyright holder, whose rights are infringed or threatened by a Trademark applicant. I would be discussing the tests to be applied to bring out the real conflict, defenses that can be raised and the possible counter claims, if any that may be raised by a Trademark applicant.

Key Words : Copyright, Infringement, Trademark, Trading

1. Introduction

The Indian Trademark Law provides that any mark capable of distinguishing the goods of one natural person, legal person or any other organisation from those of others, including a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof may be applied for the registration of a Trademark³. The works under the Indian Copyright Law refer to intellectual creations in the field of literature, art and science that are original and reproducible in one form or another.⁴ When an original word, mark or a work is registered and used as a Trademark and different entities respectively enjoy the exclusive right to use a Trademark as well as the Copyright in it. However conflict between the two rights is likely to arise in situations when seemingly similar art work is claimed by one person as their Copyright while another person asserts their right over it as a Trademark.

Although Copyright does not belong to the traditional category of industrial properties, it does share certain similarities with Trademark right. Being an intellectual property, both a Trademark and Copyright, are intangible and yet both protect a certain *art work* which grants exclusive rights to its owner. Nonetheless both the rights are starkly different in the sense that Trademark right is granted to encourage the traders & producers to guarantee quality of their goods and build a reputation in the market; whereas the Copyright seeks to encourage creativity thereby contributing in development of art as a whole. The key difference between the two is that Copyright exists in the work itself whereas for a Trademark the goods/services are essential part of the right as a symbol which is registered as a Trademark and it ought to be associated with some goods/services which are endorsed by it. In that sense, the creation of a Trademark requires a higher pedestrian and which is probably the reason that it must be registered for maintaining an action of infringement. On the other hand, a Copyright may or may not be registered and still the creation can be 'claimed' by the creator. Ofcourse the biggest

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³ S.17 of the Trademark Act, 1999. Also see S. 2(m) definition of 'mark'.

⁴ S. 2(y) of the Copyright Act, 1957 defines 'work' as any of the following works, namely:—(i) a literary, dramatic, musical or artistic work; (ii) a cinematograph film; (iii) a sound recording.

advantage which Trademark possesses over Copyright, or for that matter every other intellectual property, is its perpetual existence and all that the law mandates is a mere application for periodical renewal⁵. Copyright on the other hand is a limited right⁶ in terms of the years of exclusive protection it grants to the creator over its creation, after which the work itself becomes part of public domain.

Yet as can be seen in cases involving conflicts between the Trademark right and Copyright, such cases usually are characterised by two circumstances: using another person's mark, either registered or unregistered in one's work which may give rise to Trademark right affirmation scenario in layman terms a situation of 'copying the Trademark'; and the other circumstance being, use as a mark of a work in which another party enjoys its Copyright which may give rise to Copyright infringement scenario or in other words a situation of 'trading the Copyright'. In India, as far as Trademark is concerned, the exclusive right are conferred only upon registration of Trademark and hence a mark applied for registration or in process of being registered is of a different legal character if it is in conflict with another party's prior Copyright. Whereas in case of Copyright in India, registration is not compulsory and therefore grant of Trademark right over a work in which another person's unregistered Copyright subsists, may create an interesting case for study. For this sole reason, in this article I intend to discuss the issue from the perspective of a valid Copyright holder, whose rights are infringed or threatened by a Trademark applicant, the tests to be applied to bring out the real conflict, defences that can be raised and the possible counter claims, if any that may be raised by a Trademark applicant and that is the limited scope of discussion of this article.

2. Analysing the Conflicts

a) *Works in which Copyright subsists*: As the conflict is most likely to arise between a Trademark and a Copyright in respect of an artistic work it is most important to understand what exactly is the meaning of a Copyright. Copyright is a bundle of rights given by the law to the creators of literary⁷, dramatic, musical and artistic works and the producers of cinematograph films and sound recordings. The rights provided under Copyright law include the rights of reproduction of the work, communication of the work to the public, adaptation of the work and translation of the work. The scope and duration of protection provided under copyright law varies with the nature of the protected work. Of all the fields which Copyright covers, artistic work becomes of significant relevance, while discussing the possible conflicts between a valid Copyright and an aspiring Trademark. Thus in the context of artistic work⁸, the Act provides that Copyright means the exclusive right to do or authorise the doing of any of the following-(i) to reproduce the work in any material form including: (a) the storing of it in any medium by electronic or other means; or (b) depiction in three-dimensions of a two-dimensional work; or (c) depiction in two-dimensions of a three-dimensional work; (ii) to communicate the work to the public; (iii) to issue copies of the work to the public not being copies already in circulation; (iv) to include the work in any cinematograph film; (v) to make any adaptation of the work; (vi) to do in relation to adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv). Therefore an act of 'using' the work in which Copyright subsists as a Trademark would constitute infringement⁹.

b) *Remedies available*: Let's start with the possible remedies available in the scenario where a mark is sought to be registered as a Trademark which is using a 'work' in which a Copyright of another

⁵ See S. 25 of the Trademark Act, 1999.

⁶ See Chapter V, Ss.22 to 29 of the Copyright Act, 1957.

⁷ S. 14 of the Copyright Act, 1957 provides that for the purposes of this Act, "Copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-(a) in the case of a literary, dramatic or musical work, not being a computer programme,— (i) to reproduce the work in any material form including the storing of it in any medium by electronic means; (ii) to issue copies of the work to the public not being copies already in circulation; (iii) to perform the work in public, or communicate it to the public; (iv) to make any cinematograph film or sound recording in respect of the work; (v) to make any translation of the work; (vi) to make any adaptation of the work; (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

⁸ S.14(c) of the Copyright Act, 1957.

⁹ As defined under S. 51 of the Copyright Act, 1957. Whereas an 'infringing copy' has been defined under S. 2(m) (i) of the Act to mean in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;

person subsists. In such cases, the law provides for remedial procedure whereby the Copyright holder may file opposition to registration of the Trademark.¹⁰ In order to avoid future disputes and further complication, the law has incorporated this provision so that after the publication¹¹ and before registration, public at large can raise their objections to grant of registration to such Trademarks which are in violation of their exclusive Copyright. Nonetheless the Indian law also covers situations where opposition/objection can be raised to a registered Trademark as well¹². Hence before registration, the creator of a work may oppose the registration of a mark as Trademark on the ground that it materially violates his Copyright or even after the grant of registration of Trademark the same can be sought to be cancelled by the creator of the work.

c) *Specific areas of overlap*: Though Copyright protects various forms of *art work*, such as cinematographic film, computer program et cetera, certain works may be more likely to be in conflict with a Trademark in comparison to others, hence these fields require some special attention in our discussion. In this context copyrighted literary, artistic or even musical work are most susceptible. Literary works may subsist in novels, poetry, academic papers. Typically, a slogan cannot be protected under Copyright law as Copyright does not protect short phrases.¹³ A short phrase can be protected in conjunction with an illustration or it may be protected in some cases, if it is taken from a larger well-known work, such as taking a dialogue¹⁴ from a movie.

Whereas artistic work refers to two or three dimensional art work composed of lines or colours, or in other ways, having aesthetic appeal, such as works of painting, drawing, engraving, photograph, work of architecture and any other work of artistic craftsmanship¹⁵. This type of conflict can be said to be the common type of conflict between a Copyright and a Trademark, as it is most likely that an artistic work is used as a mark to represent one's goods. While the provision to Copyright architectural plans and layouts has been around for quite some time, 'Trademarking' buildings and other architectural designs has been a recent advancement in the field of Trademark law. India's Trade Mark Registry has assigned an image Trademark to Mumbai's Taj Mahal Palace hotel.¹⁶

The possible conflict between a musical work¹⁷ and Trademark is of a much recent origin. The Trade Mark Rules, 2017, which came into effect on 06.03.2017 have taken a further step by including

¹⁰ S.21(1) of the Trademark Act, 1999 provides that (1) Any person may, within three months from the date of the advertisement or re-advertisement of an application for registration or within such further period, not exceeding one month in the aggregate, as the Registrar, on application made to him in the prescribed manner and on payment of the prescribed fee, allows, give notice in writing in the prescribed manner to the Registrar, of opposition to the registration.

¹¹ S. 20(1) of the Trademark Act 1999, provides that when an application for registration of a trade mark has been accepted, whether absolutely or subject to conditions or limitations, the Registrar shall, as soon as may be after acceptance, cause the application as accepted together with the conditions or limitations, if any, subject to which it has been accepted, to be advertised in the prescribed manner:

¹² By making an application under S.50 of the Trademark Act, 1999 and making out a case under sub-section (1)(c)(i) & (ii) which provides that the registration of a person as a registered user may be cancelled by the Registrar on the application in writing in the prescribed manner of any person on any of the following, grounds, namely: (i) that the registered user has used the trade mark otherwise than in accordance with the agreement under clause (a) of sub-section (1) of section 49 or *in such way as to cause or to be likely to cause, deception or confusion*; or (ii) that the proprietor or the registered user misrepresented, or failed to disclose, some fact material to the application for registration which if accurately represented or disclosed would not have justified the registration of the registered user;

¹³ In the case of Godfrey Phillips India Ltd. vs. Dharmpal Satyapal & Anr, [2012 (51) PTC 251] the Delhi High Court held that the slogan were common words and not protectable as Copyright under literary work.

¹⁴ As held by the Calcutta High Court in the case of Venkatesh Films Pvt. Ltd vs. Vipul Amrutlal Shah [(2010) 1 CalHN 818]

¹⁵ S. 2(c) of Copyright Act, 1957.

¹⁶ Indian Trademark Application Nos. 3386350 and 3386351. Granted on 13.10.2016.

¹⁷ S.2(p) of the Copyright Act, 1957 defines 'musical work' to means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music.

"sound marks" within the ambit of what may now qualify as a Trademark provided that the sound will need to be represented "graphically" in the form of musical notations¹⁸.

Thus, besides the obvious field of artistic works, even the above-mentioned fields of art are gradually coming within the ambit of overlap between a Trademark and a Copyright. But before jumping to a conclusion that a Copyright has been infringed by a prospective Trademark, it is important to analyse first as to whether the Copyrighted work is original.

d) *Test of Originality*: In case of alleged infringement of registered Copyright, the task of a Court is simpler. The law¹⁹ mandates that in respect of an art work which is used or is capable of being used in relation to any goods or services, the application for registration of Copyright shall include a statement to that effect and shall be accompanied by a certificate from the Registrar²⁰ of Trade Marks to the effect that no Trademark identical with or deceptively similar to such artistic work has been registered, or applied for registration, under that Act in the name of any person other than the Applicant. Thus before getting a work registered under the Act, there is a mechanism in place to ensure that such overlapping work in conflict with a prior and existing Trademark right is not registered at all. Though the section specifically provides only qua registration of artistic works, in my view, the provision should be, in spirit applicable, to all forms of works whether it be literary or musical works as discussed above, wherein a possible conflict with another person's mark may originate. To that effect, in my view the Copyright law needs an amendment, whereby the said requirement of getting a certificate should be made applicable to all forms of works and not just artistic work.

However, the test of infringement becomes complex in case of an unregistered Copyright. Determination of originality is a comprehensive analysis or examination of the quality and quantity of intellectual creation. But legislation can only subject it to the minimum extent of originality required of a work and it is impossible to specify the specific quantitative standard for creativity. In my view, mere consideration of whether the mark is original or not is not a key issue. A mark should be compared with a prior work to see whether the part of intellectual labour in the prior work was used in the mark that is, a comprehensive examination should be made on the basis of determination of work under the Copyright law protection and substantial similarity between them.

e) *Prior right*: It is sine qua non that Copyright ought to be in force at the time when an alleged mark is created infringing the Copyright. Hence a Copyright which has already lived its life and is now in public domain²¹ cannot restrict a new Trademark from using the said work and getting registered. Thus for instance, in case of published artistic work, Copyright protection will not subsist beyond sixty years from the date of its first publication, making it part of public domain and hence anyone may 'adopt' such an artistic work into its mark. This would similarly apply to registered and unregistered works.

Apart from the basic requirements as discussed above, regarding the fact that Copyright should validly subsist in a work in the sense that it is a 'work' in accordance with the requirements of Copyright law and that it is prior in time, in a suit for infringement of Copyright by a mark, the author will have to first prove similarity between the work and the mark.

f) *Determining Tests*: Copyright is automatically generated when a work is created and belongs to the author thereof. This is the general principle governing the attribution of ownership of the Copyright. Since an author often creates a work in private, it is very difficult for him to prove the process of his creation of work if required. Hence, instead of undertaking this arduous task of proving the authorship of work, it would be comparatively convenient to establish the 'similarity' between the work and the mark and in rare cases 'likelihood of access' can also be established to put the case beyond doubt.

Test of Similarity: Whereas the Madras High Court²² applying the test of resemblance observed as follows (at pp. 112-13) : "*Applying this test, the degree of resemblance between the two pictures, which is to be judged by the eye, must be such that the person looking at the respondent's picture must get the suggestion that it is the appellant's picture. In this sense, the points of similarity or*

¹⁸ Rule 26 of the Trade Mark Rules, 2017 provides for submission of an application for registration of a sound mark "...in the MP3 format not exceeding thirty seconds' length, recorded on a medium which allows for easy and clearly audible replaying accompanied with a graphical representation of its notations".

¹⁹ Proviso to S. 45 of the Copyright Act, 1957.

²⁰ Referred to in S. 3 of the Trade Marks Act, 1999

²¹ See Chapter V, Ss.22 to 29 of the Copyright Act, 1957.

²² C. Cunniah and Co. vs. Balraj and Co.[AIR 1961 Mad 111]

dissimilarity in the picture assume some importance !..... We agree that this could not be the sole test, though, incidentally, the points of resemblance and dissimilarity assume some importance in the case of finding out whether, taken as a whole, the respondents' picture produces the impression in the mind of any observer, which amounts to a suggestion of the appellants' picture". Further it went on hold that "One picture can be said to be a copy of another picture only if a substantial part of the former picture finds place in the reproduction".

The Calcutta High Court²³ while laying down the necessary concomitants of a colourable imitation observed that *"The question, therefore, is whether a colourable imitation has been made. Whether a work is a colourable imitation of another must necessarily be a question of fact. Similarity is a great point to be considered in this connection but mere similarity is not enough as it may be due to any one of four hypotheses as Copinger points out at p. 134, Edn. 6, viz., (1) to mere chance, (2) to both works being taken from a common source, (3) to plaintiff's work being taken from the defendant's and (4) defendant's work being taken from the plaintiff's and each case must depend upon its own circumstances".* Further it was observed that *"It has to be determined whether in a particular case the work is a legitimate use of another man's publication in the fair exercise of a mental operation deserving the character of original work."*

The Apex Court in the case of *RG Anand vs. Delux Films*²⁴ has very well explained the process of determining the similarity between two works and has held that similarity must be in the 'essential features' of the said works:

[15] Moreover, it seems to us that the fundamental idea of violation of Copyright of imitation is the violation of the Eighth Commandment: "Thou shalt not steal" which forms the moral basis of the protective provisions of the Copyright Act of 1911. It is obvious that when a writer or a dramatist produces a drama it is a result of his great labour, energy, time and ability and if any other person is allowed to appropriate the labours of the Copyrighted work, his act amounts to theft by depriving the original owner of the Copyright of the product of his labour. It is also clear that it is not necessary that the alleged infringement should be an exact or verbatim copy of the original but its resemblance with the original in a large measure, is sufficient to indicate that it is a copy. In Art. 418 Copinger states thus:- "In many cases the alleged infringement does not consist of an exact, or verbatim copy, of the whole, or any part, of the earlier work, but merely resembles it in a greater or lesser degree." In Art. 420 the author lays down the various tests to determine whether an infringement has taken place and observes as follows:- "Various definitions of 'copy' have been suggested, but it is submitted that the true view of the matter is that, where the court is satisfied that a defendant has, in producing the alleged infringement, made a substantial use of those features of the plaintiff's work in which Copyright subsists, an infringement will be held to have been committed; if he has made such use, he has exercised unlawfully the sole right which is conferred upon the plaintiff."

Therefore, the question of similarity depends really, on the effect produced upon the mind by a study of the work and of that which is alleged to be a copy of it, or at least of its design. Being substantially similar, means that upon comparison between two works the average person believes that the two works are so similar that it is impossible to give any other reasonable explanation besides holding reproduction of original work. Ofcourse when two works are compared with each other, ideas of the work not under the Copyright protection and expressions falling within the public domain should be excluded. Comparison must be made only of the original parts of the two works, and only when those parts are substantially similar, the works are similar.

Substantial similarity can be tested under an extrinsic test that is the process of filtering of unprotectable elements such as ideas, facts, scènes à faire et cetera and measuring the external, objective factors which merely focuses on unlawful appropriation; or intrinsic test that is by measuring the internal, subjective factors and applying the test of 'whether the ordinary, reasonable audience' would find the works substantially similar in the 'total concept and feel of the works'.

Likelihood of access: If a work is independently created, it enjoys the independent Copyright even if it is substantially similar to another work. The prior Copyright owner may also prove that the Trademark applicant had access or likely to have access of the work. Courts in America follow the

²³ Mohani Mohan Singh vs. Sita Nath Basak [AIR 1931 Cal 233]

²⁴ [(1978) 4 SCC 118]

‘inverse ratio’ rule²⁵ which states that when a high degree of access to Copyrighted work is proven, less degree of similarity between allegedly infringing work and Copyrighted work will be required to prove infringement. However in a recent judgment²⁶ American Court held that the rule only assists in proving copying and not unlawful appropriation. Both these elements must be proven to establish a case of infringement. In India as well the need to prove access has been watered down. In a recent judgment the Bombay High Court²⁷ held that “*The question of access plays a material, though not determinative, part in the assessment of any action of Copyright of infringement. Simply put, if the Plaintiff is able to show that the contesting Defendants had access to his work and is also able to show substantial similarity between the two works, sufficient to meet legal requirements, then the Plaintiff must succeed. It is, however, also possible for the Plaintiff to urge that irrespective of whether the 1st Defendant can be proved to have had access, if the similarities shown are so extensive as to eliminate any possibility of the rival work being original, then, too the Plaintiff’s claim for injunction must be granted.*”

Hence it can be concluded that Courts in India place more reliance upon the test of ‘similarity’ rather than that of ‘likelihood of access’.

3. Counterclaim

Let us now discuss the possible defences or counterclaim by a prospective Trademark applicant may raise in a suit for infringement filed by the Copyright owner.

- i) *Copyright has expired*: An expired Copyright is no longer protected under the Copyright law. An exception to this rule are the special rights²⁸ of authors whereby the author has a right to claim the authorship, independently of the term of the Copyright and notwithstanding that the Copyright has expired. Further the author also has, what is famously known his moral rights, a right to restrain or even claim damages in respect of any distortion, mutilation, modification, if the same would be prejudicial to their honour or reputation. But barring these, the work as such would be part of public domain and hence in his defence the defendant Trademark holder may successfully plead that the Copyright is no longer subsisting. For example Mona Lisa would be in public domain within seventy years²⁹ of death of its great creator Leonardo Da Vinci.
- ii) *Subject matter does not constitute ‘work’*: As already discussed above, the law specifically defines what is meant by work³⁰. Thus it is essential that subject matter under contention falls with the four corners of the definition provided by law. That would in turn imply that the work ought to be original. The word "original" does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought³¹, and in the case of literary work, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author; and as regards compilation, originality is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation.³²
- iii) *Prior use*: As in the case of registration of a Copyright, a Trademark can also not be registered in case it is in conflict with a pre-existing Copyright. The relative grounds of refusal of registration,³³ categorically provides that a Trademark shall not be registered if, or to the extent

²⁵ Prarthana Patnaik “On How the Stairway to Heaven Dispute Dealt with Proof of Access and the Inverse Ratio Rule”. <https://spicyip.com/2018/10/on-how-the-stairway-to-heaven-dispute-dealt-with-proof-of-access-and-the-inverse-ratio-rule.html>

²⁶ Court of Appeals for the Ninth Circuit in *Skidmore v. Led Zeppelin*

²⁷ *Mansoor Haider vs. Yashraj Films Pvt Ltd* [(2014) 59 PTC 292]

²⁸ S. 57 of the Copyright Act, 1957

²⁹ 17 U.S.C. § 302

³⁰ S. 2(y) of the Copyright Act, 1957

³¹ The work must be in a tangible form as fixation is a fundamental rule of Indian Copyright law which is in consonance with Art.9(2) of the TRIPS Agreement and Art.2 of the WIPO Copyright Treaty, 1996 which provide that copyright does not subsist in ideas and it only protects original expressions of the idea.

³² *Eastern Book Company vs. D.B. Modak* [(2008) 1 SCC 1]

³³ S. 11(3)(b) of the Trade Marks Act, 1999

that, its use in India is liable to be prevented by virtue of law of Copyright. But the scenario may be different if the defendant pleads prior use without registration. To that extent there is a void in the legislation. Whether an unregistered but long time user of a mark can successfully defend a suit for infringement filed by a registered Copyright holder is question on which no judicial pronouncements are available. However by virtue of the law of passing of, in my considered opinion, prior use would be a valid and legal defence. This argument of mine also finds force from Art.16 of the Trade Related Intellectual Property Rights (TRIPS) Agreement wherein while making provision for exclusive rights of a registered Trademark, it is specifically mentioned that such right 'shall not prejudice any existing prior rights'.

- iv) *Independent creation*: Copyright is a form of intellectual property which allows multiple persons to own the rights in identical or substantially similar works provided that those works have been independently created. In fact, independent creation is one of the foundations of Copyright law. Copyright, at the time of the creation of a protectable work, only prohibits the reproduction or copying of a pre-existing protected work.

In the case of *Star India Private Limited v. Leo Burnett (India) Private Limited*³⁴, which dealt with films, for example, the Bombay High Court held that there was no infringement where the production of the impugned film was independent. In its decision, the Court quoted paragraph 7.98 of Copinger and Skone James on Copyright (Fourteenth Edition) where the authors stated:

"It is an infringement of the copyright in a film to make a copy of it, or a substantial part of it, whether directly or indirectly and whether transiently or incidental to some other use. This includes making a photograph of the whole or any substantial part of any image forming part of the film. As with a sound recording, it is not expressly stated that copying of a film includes storing it by electronic means but again it is suggested that it does. Again, the copyright in a film is infringed if the recorded moving images are directly or indirectly copied but not if the same or similar images are recorded independently, for example by s the subject matter of the film. Again, however, underlying works such as the screenplay may be infringed by such means."

Therefore, if an author were to independently create a work which bore a striking resemblance to a protected work already in existence, without reference to the pre-existing work, he can own the Copyright in the subsequent work which he had created.

4. Conclusion and Suggestions

Thus as can be seen from the above discussion the Indian Copyright Act, 1957 and the Trade Marks Act, 1999, both protect the prior registered right, however in the case where the prior right is unregistered and in absence of its prima facie proof, the tests elaborated above are used by the Courts to decide as to whether the prior right holder can successfully prevent the latter's registration and even sue for infringement.

Though both the legislations recognise unregistered Copyright and Trademark respectively, neither make any provision for protection of prior use. Both legislations only afford protection to prior registered right, which in my view requires amendment. To that extent S. 45 of the Copyright Act, 1957 and S. 11(3)(b) of the Trade Marks Act, 1999 require an amendment so that the legislation itself protects prior right whether it is registered or unregistered.

Further as already discussed, with the advent of new forms of Trademarks, it is necessary to amend the proviso suitable, may be by adding an explanation clarifying that the term 'artistic work' used therein would include all forms of works protected under the Copyright Act, 1957.

³⁴ [(2003) 2 BCR 655]