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Legal Position of Naked Licensing in Trademarks: A Comparative Legal Study between India and The US

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This paper attempts to present a deeper understanding of the practice of naked licensing in the field of trademark law. The paper traces the development of trademark licensing in India and correlates it with the concept of quality control of licensing. It presents the legislative and judicial standing with respect to quality control provisions associated with trademark licensing in India.The paper looks at the standards for determining adequate quality control and the implications of non-compliance in India *vis-à-vis*the Law of the United States. The paper attempts to weigh and critique the feasibility of the alternatives available to the court in deciding the outcome of a finding of naked licensing, keeping in mind the consequences of each action, and attempts to suggest solutions to the same.

Keywords Naked Licensing, Trade Marks, Quality Control, Unregistered Licensee, *Barcamerica*, *Rob Mathys*, Bare Licensing, Close Working Relationship, Abandonment of Mark

A 'licence' in common parlance is a permission given by an owner to a proposed user to use the owner's property, contingent on conditions imposed on its usage, if any.[1] This definition has also been extended to the practice of trademark licensing over time. Public perception of trademark licensing has come a long way around the world, with perception of the concept changing from derision to it being deemed a necessity in today's hyper-connected business frenzy. Laws in different countries, including India, have over time adapted to the changes that have taken place in the field. However, with the spread of every such radical concept always comes a set of fundamental issues that plague its implementation– the issue of naked licensing is one such problem. Broadly speaking, a naked licence is a licence under which a licensor allows the licensee to use trademarks of the licensor without integrating provisions of quality control in the licence agreement or enforcing such provisions.

In other words, it is a legal phenomenon where a trademark owner licenses his trademark to another party, but does not stipulate or maintain adequate quality control and standards over the use of trademarks by the licensee.[2] The terms 'licensing in gross' and 'bare licensing' are used interchangeably to describe this phenomenon.[3] The concept of bare licensing, in light of the short explanation given, may be an interesting concept to look into – but first, it is important to understand the development of the fundamental concept of licensing.

Development of Trademark Licensing Law

The concept of trademark licensing was historically thought to be fundamentally impossible since a major function of a trademark was to signify its source, and was looked down at across the world. The House of Lords of England and Wales, back in 1914, in *Bowden Wire Ltd* v *Bowden Brake Co Ltd,*[4] held that *"the object of the law is to preserve for a trader the reputation he has made for himself, not to help him in disposing of that reputation as of itself a marketable commodity, independent of his goodwill, to some other trader."* This statement was representative of the now largely defunct 'source theory' of trademarks.[5]

However, the importance of licensing began to be well recognized as globalization and economic development took a firmer hold in the global economy and geopolitics. In India, after the introduction of the New Economic Policy of 1991, an injection of foreign investment resulted in the increased role of licensing as an important way for foreign entities to enter the market, since such

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investment extends the geographic and product range of the trademark and acts as an effective business catalyst in the expansion of territory and the nature of the business.[6] The possibility of manufacturers, in markets in which the product did not exist, making use of the absence of this good and passing off their goods as those manufactured by the brand, by pirating the trademark and putting up counterfeits, made apparent the need for licensing.

The concept of trademark licensing itself has stable legislative backing in Indian law, though the word 'licence' is used sparingly in dealing with the concept. Section 2(r) of the Trademark Act, 1999 defines 'permitted use' of a registered trademark as use of the trademark by either a 'registered user' (a licensee whose name is recorded in the Registrar of Trademarks) or'a person other than a registered proprietor and a registered user', i.e., an unrecorded or common law licensee, who enters into a written licensing agreement with the proprietor after the registration of a trademark, in Clause (i) and (ii) respectively. With regard to the entities involved in the process of licensing, Section 48 of the Trade Marks Act talks specifically of a registered 'proprietor' and a registered 'user', and authorizes a person other than the proprietor as a user of the trademark associated with any or all of the goods or services with regard to which the trademark is registered.

Quality Control Provisions (or the lack thereof) in Law

> *"..... It is not all dealing with a trade mark for money that is objectionable, since it has always been accepted that it is permissible to sell a trade mark together with the goodwill of the business in the course of which the trade mark has been used."*[7]

Although the above quote addresses the sale of trademarks, it is also eminently applicable to the practice of licensing. The goodwill of a business and value of the trademark lies in the quality that it has consistently delivered to its clients, and it is this "quality" that ensures the continued patronage of the consumers of this good, service, or business. It is thus necessary to ensure that the licensee emulates the same level of quality.[8] Since the rise of licensing of trademarks has been encapsulated to an extent, it is important to discuss the concept of quality control in the context of licensing, which forms the bulk of the subject of this work.

The production or delivery of a good or service by a licensee signifies that the source of the good or service in question lies elsewhere than in the owner of the trademark. Cursorily examined, this act itself would be deemed to be falsely or deceptively representing the true source of the product involved to the consumer.[9] However, this practice has been accepted in light of the shift in academic opinion on the importance of trademark from the aforementioned source theory to the quality theory, which perceivesthat consumer did not identify products by their source but by their quality. It is also clear from a reading of the provisions of the Act, like Section 48(2) (which states that the permitted use of a mark will be assumed to be by the proprietor and no one else) that the practice of licensing focuses on preserving the ownership and quality of the trademark by the proprietor.

The uncertainty associated with licensing and the quality of the resultant good can be considerably reduced if the licensor remains in control of the nature and quality of the goods that are produced by the licensee under license, a purpose that quality control provisions in licensing agreements serve. This concept of quality control is reflected in this observation of the court in *Schott Glass India* v *Kapoor Glass*:[10]

> "(A function of trademark licensing is to) ... *assure the consumer predictable quality with respect to the goods bearing the trademark, and to enhance the visibility of the brand of the trademark owner. The condition central to a valid trademark license is that the licensor control the nature and quality of the goods or services sold under the trademark. Without the requirement of quality control, the products bearing the trademark might no longer signify the requisite standard and it is therefore that a trademark license typically includes provisions dealing with quality control, whereby the licensor has rights to inspection and monitoring."*

The position regarding quality control in a registered user's licence is fairly clear – Section 49(1)(b)(i) of the Trade Mark Act, 1999 states that in an application to be registered as a registered user, there must exist an affidavit made by the registered proprietor, detailing the relationship between the proprietor and proposed user, including the degree of control over the permitted use of the good or service, as conferred by this relationship.

However, with respect to a common law licensee, the situation is more unclear. The Act does provide, in Section 2(1)(r)(ii)(c) and (d), that there must be a written agreement entered into between the proprietor and the common law licensee, and that this licensee must comply with any conditions to which such user and the trade mark registration are subject. The inclusion of Section 2(1)(r)(ii) may have been influenced by the Supreme Court judgment in *Cycle Corporation of India Ltd.* v *T. I. Raleigh Industries Pvt. Ltd. and Ors*.,[11] in which the court held that failure to register a licensee as "registered user" did not take away the rights of a proprietor in his trademarks, and in the *Gujarat Bottling Co.*[12] case, in which it was held that a trademark licensed by an unregistered licensee would be governed by common law.

Thus, the use of a mark by a common-law license (like a 'permitted user') has been held to have the same legal force and to be subject to the same restrictions and limitationsas use by a 'registered user'. The Bombay High Court has expressed in *Malhotra International Pvt. Ltd. and Ors.* v*Vidyut Metallics Ltd.*[13] that the validity of a common law trademark would also depend on whether the owner keeps control over the trademark with regard to quality and misuse. This would come within the ambit of naked licensing as aforementioned in the definition, since naked licensing includes not only the absence of quality control provisions but also their non-enforcement. However, there yet persists the possibility that quality control provisions do not even exist in the first place in the licensing agreement, the consequences of which shall be discussed later on.

Since this work relies heavily on jurisprudence from the United States on the topic of quality control due to the amount of attention that its courts have paid to it, it is useful to take a brief look at the presence of provisions relating to the same topic, if any. The Lanham Act, 1946 is the primary Federal statute that governs trademarks, service marks, and unfair competition in the United States. This statute does not contain provisions specifically dealing with quality control, naked licensing and its implications. However, the concepts are deemed implicit in the Act's explanation for *'Abandonment of mark'.*[14] In the word of the legislation, a mark is deemed to be 'abandoned':

> *"When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark."*

There are two parts to this provision – 1) the act or omission of the owner, and 2) the effect of the same. The failure to include or enforce quality control provisions in the licensing agreement would amount to an act of omission on the part of the owner. As to the "effect", in the context of naked licensing, the mark is losing its significance as a representative of the quality of the goods and services that it represents because of this omission of the mark. Thus, in totality, this provision can be said to cover situations of naked licensing or lack of adequate quality control. The consequences of abandonment of a trademark under US Law shall be further discussed over the course of this work.

Standard of Determining Presence of Quality Control Provisions in an Agreement

There is a need for the inculcation of cohesive standards of determining quality control in order to provide a more reliable basis for the judiciary to uphold the trust of the customer in the product and the reputation of the producer. This need has been addressed in a few judicial decisions.

The Delhi High Court, in *Rob Mathys India* v *Synthes Ag Chur*[15] has held that it is possible that in some cases, the relationship between the licensor and the licenseemayitself signify the presence of a sufficient degree of control, for example, where the licensor specifies that the licensee may manufacture the goods only in consonance with the stipulations and standards of quality imposed.

Similarly, the Court in *Schott Glass*[10] states, in the excerpt quoted previously, that a trademark licence typicallyincludes quality-control provisions, a term that would signify a lack of specific compulsion in general with regard to whether quality-control provisions should be written into agreements. This interpretation, however, possibly goes against what is laid down in Section 49(1)(b)(i), which mandates the presence of particulars showing the degree of control. This demonstrates that there exists a fundamental difference in the treatment of an unregistered licensee *versus* that of a registered licensee, in light of the evident clash with the legislature, and exacerbated by the fact that the licensee in *Rob Mathys*[15] was unregistered. Consequently, this interpretation of difference in treatment of common-law and registered licensees can lead to a dissonance when compared to the legal opinion laid down in *Gujarat Bottling Co.,*[12] where it was held that a common law licence would be subject to the same restrictions as registered use of trademark.

It is useful to look at how courts in the United States have approached the standard of determining presence of quality control provisions. It has been held in *Allianz Asset Management of America L.P.* v *Middlefield Capital Corporation*[16] that a proprietor can govern the quality of the products even in the absence of a written agreement, and an oral licence may stipulate the same. Importantly, it held that a licensing agreement can be inferred from the facts of the case, and retention of control over the trademark can be assumed from the quality of the goods or services being provided. It was held in *Dawn Donut Co.* v *Hart's Food Stores Inc.*[17] that the licensor may *"in fact have exercised control in spite of the absence of any express grant by licensees of the right to inspect and supervise".*

The US Court of Appeals (9th Cir.), in the case of *Barcamerica International USA Trust* v *Tyfield Importers Inc.,*[18] has held, among other observations relevant to this sub-topic, that the lack of an express contractual right to inspect and supervise a licensee's operations is not conclusive evidence of lack of control.It observed that courts have previously upheld licensing agreements where the licensor is familiar with and relies upon the licensee's own efforts to control quality.[19]

In this context, the Court also considered it relevant to point out that the licensor and licensee did not have the type of close working relationship required to establish adequate quality control in the absence of a formal agreement, something which has been accepted as sufficient in a plethora of cases decided in this jurisdiction.[20] The Court in *Taco Cabana Intern., Inc.* v *Two Pesos, Inc.*[21] held that where the parties may justifiably rely on each other's intimacy with standards and procedures to ensure consistent quality, and no actual decline in quality standards is demonstrated, naked licensing may be permitted.

*Barcamerica*is also important since it throws some light on the level of quality control that courts would deem sufficient to repel a ruling of naked licensing. With regard to quality control of an alcoholic product, the court held that a 'minimal effort to monitor quality' is not enough, and frequency, time and circumstances under which such testing is done are important considerations in such cases. The licensor was also shown to not have any knowledge of or reliance on the actual quality control used by the licensee, and to not have demonstrated any 'ongoing effort to monitor its quality' to any extent whatsoever.The contentions of the appellants that the wine had 'occasionally, informally' been tasted by the President of the company were deemed to be nothing more than a minimal but insufficient effort at quality control. In *Freecycle Sunnyvale* v *The Freecycle Network,*[22] the Court held that the defendant had partaken in bare licensing since: a) a specific requirement for member groups (licensees) to adopt the Q.C.(quality control) guidelines set was lacking, and they were free to adopt or reject them; b) the Q.C. provisions in place were not maintaining consistent quality across member groups; c) reliance on licensee's own Q.C. to the absence of stipulated quality control provisions can only be permitted when there exists a close working relationship between the two.

Elucidating on what constitutes a close working relationship, the U.S. Court of Appeal (9th Circuit) in *Hokto Kinoko Co.* v *Concord Farms, Inc.*[23] observed that the licensor, based in Japan ('Hokuto Japan', a Japanese Corporation that produces mushrooms in Japan) and licensee, based in the U.S. ('Hokto U.S.A.', a Japanese corporation incorporated by the licensor as a wholly owned subsidiary to produce and market mushrooms in the US) worked together to develop quality control mechanisms pertaining to the sale of organic mushrooms that the licensee uses in the U.S. Hokuto Japan specially produced initial batches of organic mushrooms that Hokto U.S.A. imported before the facility of Hokto U.S.A. was completed. They also jointly developed special growing conditions that Hokto U.S.A. used at the new facility, and the licensor monitored the quality control of the mushrooms while the agreement was in effect, among other facts. On the basis of these activities, the court held that there was a close working relationship between the two entities.

In *Taco Cabana,*[21] the Court observed that the licensor and licensee could be held to be having a close working relationship on the basis of the fact that, prior to the licensing agreement at issue, they had operated the establishment 'Taco Cabana' for eight years, only later dividing the use but providing in the agreement that both groups could use the 'Taco

Cabana' trade dress. The Court also pointed out that both parties used similar products and procedures and could be expected to draw on their mutual experience to maintain quality consistency. Similarly, in *Barcamerica,*[18] the Court cited four examples of 'close working relationships' – (a) a close working relationship for eight years; (b) a licensor who manufactured ninety percent of the components sold by a licensee and with whom it had a ten year association and knew of the licensee's expertise; (c) siblings who were former business partners and enjoyed a seventeen-year business relationship; and (d) a licensor with a close working relationship with the licensee's employees, where the pertinent agreement provided that the licence would terminate if certain employees ceased to be affiliated with the licensee.

The precedents advanced thus go some distance in providing an understanding of what would really constitute lack of quality control, and provide context for gauging the presence of quality control in the Indian context. It can be gleaned from the above that, a close working relationship would be only determinable on a case-to-case basis. However, some commonalities can be seen in the rationale adopted, like the period of association of the entities; involvement and knowledge of the licensor with regard to the licensee's production, sale and quality control processes; and relationship between the proprietors of these entities, *inter alia*.

It is worth noting that though Indian courts seem to have hesitated to rule on the validity of oral Q.C. provisions, the courts in the United States have been much more forthright in their observations on the same, unambiguously ruling on their validity, and have elucidated on the standards to follow. It is now necessary to understand what the consequences of a finding of naked licensing would entail.

Implications of Naked Licensing on a Trademark Registration and License

It is clear that naked licensing has the potential to mislead consumers as to the quality of the product and hurt the goodwill and market standing of licensors in the market. It is thus important to look into the legal consequences of undertaking such practices, and how the courts and legislature have dealt with mitigating the impacts of inadequate quality control.

Naked licensing, as explained in the definition given earlier, refers to both the absence and the non-implementation of the quality control provisions. The legislature, taking cognizance of this, contains safeguards covering a registered user - Section 50 of the Trade Marks Act, 1999 provides for cancellation of the registration of a registered user by Registrar on his own motion or on application in writing by a person, if any requirement in the agreement between the Registered Proprietor (R.P.) and Registered User (R.U.) pertaining to the quality of the goods or services produced in connection to the trademark is either not being enforced or complied with. Section 49(1)(b)(i) states as prerequisites for registration as an R.U. the presence of provisions for control. Section 57 of the Trade Marks Act, 1999 provides for the cancellation or variation of the registration of a trademark upon application made by any person aggrieved, on the ground of any transgression or failure to act in accordance with a condition entered on the register in relation thereto, which would implicitly include the contravention of a quality control provision. The answer is relatively straightforward in the context of a registered user. However, the lack of provisions for unregistered licensees is to be noted.

In the words of the Delhi H.C. in *Rob Mathys,*[15] *"Lack of adequate control or lessening of control over a period of time would be fatal to the distinctiveness of a trade mark."* In *U.T.O. Nederland B.V. and Ors.* v *Tilaknagar Industries Ltd.,*[24] the Court observed that the plaintiffs (licensors) had neither exercised any quality control over the product of the defendant, nor had done anything in connection with the products sold by the defendant under the said marks. The court held that, in consequence, this inaction would indicate *"a total absence of connection in the course of trade between the plaintiffs and the products sold by the defendant under the said marks."*

This finding of a total absence of connection in the course of trade between plaintiff (licensor) and products sold by defendants (licensee) is quite relevant to the topic at hand, since Section 2(1)(r)(ii)(a) states that permitted use in relation to a registered trademark by a person other than a registered user would be use of a registered trademark in relation to goods or services with which the licensee is 'connected to in the course of trade'. The usage of the word 'and' after the clause signifies that this clause is not merely suggestive but a requirement to constitute permitted use by a licensee, and not complying with this requirement would lead to, at the very least, non-compliance with permitted use.

Such non-compliance, by extension, would constitute an infringement of a trademark under Section 29(2) of the Act. Section 29(2) states that a registered trademark is infringed by a person, who, *"not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark"* which because of its identity/similarity with the trademark and goods/services covered by the trademark is likely to cause confusion in the minds of the public. Thus, a person who is neither a registered proprietor nor, being a common law licensee, permitted to use a trademark due to violation of the stipulation of trade connection under Section 2(r)(ii)(a), would be considered to be infringing the trademark under Section 29.

For a further understanding of the phrase 'connection in the course of trade', the case *Fatima Tile* v *Sudarshan*[25] may be referred to, in which the Court, when considering the scope of the aforementioned phrase, observed that though the proprietor of a trademark may not manufacture related products or apply the mark, he still retains the power to direct activities of the licensee; or to ensure conformance with manufacturing specifications or standards of quality that he sets, and doing so would ensure a sufficient connection in the course of trade with the goods. It is to be noted that the respondent in the *Rob Mathys*[15] case was an unregistered user/licensee, thus pointing to the conclusion that the lack of quality control provisions in agreements concerning unregistered licensees would also constitute an infringement of trademark, as explained hereinbefore.The above judgments suggest cancellation of the registration of the trademark itself, if there does not exist a connection in the course of trade between the proprietor and licensee.

It is also useful to discuss the issue of trademark trafficking at this juncture. In *Re Holly Hobby,*[26] the House of Lords held that *"trafficking in a trade mark context conveys the notion of dealing in atrade mark primarily as a commodity in its own right and not for the purposes of identifying or promoting merchandise in which the proprietor of the mark is interested."* On the same lines, the House of Lords laid down that the lack of a real trade connection ('a connection in the course of trade') between the proprietor of the mark and the licensee or his goods would signify that the grant of a licence in such a condition would be trafficking in the mark.

The House of Lords in *American Greetings Corp.'s Application,*[27] echoing much of what has been held in *Holly Hobby*ultimately concluded that the absence of quality/supervisory control by the proprietor over licensee and lack of connection in course of trade, *inter alia,* would constitute trafficking of such a trademark. It is also the opinion of the author that the problems of trademark trafficking and quality control problems have similar consequences, in that both lead to a sense of disillusionment in consumers as to the quality of the goods that they have come to expect from the brand that the good is associated with.

An analysis of the solutions presented by Kunal Ambasta, in his paper[28] on trademark trafficking is useful for the purposes of this discussion. The author points out that the outlook of the courts, which has been to invalidate the trademark itself, may be problematic, since the invalidation of a trademark would not automatically mean that consumers using the product are alerted of this revocation.This would lead to the possibility of uncontrolled passing-off of the good in question, and result in even less quality control than before, since the entity who was the owner of the now-defunct trademark has no way at all of exercising even minimal quality control.

The other alternative, perhaps suitable for registered users, would seem to be a revocation of the licence of, or de-recognizing the rights of the licensee. However, Indian law suffers from a 'dichotomy of status', per the author, between registered and unregistered licensees (as also elucidated in the present work), and such a revocation would not affect, or curtail the activities of, a common-law licensee. Although it shall not be looked into in this essay, another implication of naked licensing under Indian law is that the proprietor may be held liable under the Consumer Protection Act, 2019 under the product liability principle,[29] for failing to maintain quality control provisions.[30]

In the U.S., the consequences of a naked license were touched upon in *Barcamerica*. It was held that where a licensor does not observe adequate quality control over the licensee, a court may rule that the trademark owner has abandoned the mark, and consequently would be estopped from claiming rights over the trademark. Such abandonment is purely an involuntaryforfeiture of trademark rights, since it need not be shown that the trademark owner had any subjective intent to abandon the mark.[19] In *Marshak* v *Green,*[31] the Court held that use of the trademark by the licensee in conflict with the goodwill garnered by the mark would result in a fraud on the consumers who 'reasonably assume that the mark signifies the same thing, whether used by one person or another.'

Looking at legislature-based consequences of naked licensing in US Law, again, there is no explicit mention of the same. However, recognition of the concept can be inferred from a thread of provisions in the Trademark/Lanham Act of 1946. As explained hereinbefore, the definition of "abandonment" in the Act may cover a situation of naked licensing. A petition for cancellation of a trademark may, as explained under Title II, § 14 (15 U.S.C. § 1064),[32] be taken at any time if the registered trademark has been 'abandoned'. This has been recognized in *Thomas Am. Corp.* v *Fitzgerald,*[33] with the Court observing, *'The Lanham Act provides that a trademark registration may be cancelled where the trademark has become abandoned'.*[17] This signifies that naked licensing may lead to cancellation of the very registration of a trademark under United States law.

It is important to note that the United States does not require a trademark licence to be recorded with the United States Patent & Trademark Office.[34]The literature of the Federal Act also does not distinguish between a registered and unregistered user like the Indian Trade Mark Act does – this may be why, in most, if not all, of the US decisions cited above, a finding of lack of quality control has invariably led to a cancellation of the trademark itself, since the licence of an unregistered licensee cannot be 'revoked'.

Conclusion

With a booming consumer base, rising incomes and fast-moving goods, there is no doubt that licensing will continue to be the way forward for firms wishing to expand – the law must adapt to this reality. For trademark invalidation to emerge as a valid legal consequence of naked licensing, the legislation must contain provisions on informing the public of this cancellation of registration, through some communication channel like advertising. Trademark invalidation could theoretically lead to uncontrolled passing off, which could be more fatal to quality control of the associated mark, as explained. Mandatory public declaration of such invalidation of the mark could be imposed on the proprietor of the mark, non-compliance of which may attract a fine. Such invalidation would cause some economic damage to the business of the proprietor, but the interests of the public must gain primacy over such considerations.

It may also be prudent to introduce a provision akin to the aforementioned 'abandonment' provision under Section 45 of the Lanham Act, such that the failure of the proprietor to include or enforce quality control provisions would lead to the abandonment of the trademark and its subsequent cancellation, per *Thomas Am. Corp.*[33] This would place the onus of including and ensuring quality control on the shoulders of the proprietor, and would bypass the confusion arising out of the possibility of differential treatment to registered and unregistered licensees, whereas the current regime in India, being focussed on registered licensees and termination of licensing agreements, does not unambiguously account for unregistered licensees.

In order to further balance out the conflicting interests of customers and the proprietor, a 'partial' cancellation of the trademark may also be considered, i.e., removal of certain specifications of goods or services in relation to which the trademark has been registered. Section 37 of the U.S. Lanham Act[35] permits the 'whole or partial' cancellation of a trademark registration by the Court. The judgment in *Dawn Donut*[17] had used this provision to limit the cancellation of plaintiff's registration to the use of the mark in connection with sale of the finished food products to the consuming public. Such partial removal may be permitted in Indian law *via* Section 57 of the Trade Marks Act, which gives the Registrar the power to make an order to 'vary' the registration of a trademark on the ground of any contravention of condition entered into Register.

The other alternative action to trademark invalidation would be revocation of licence. To consider this a viable alternative, it is imperative to first address the dichotomy between registered and unregistered users in Indian law, even though the same ambiguity also exists in U.S. Law. As elucidated hereinbefore, there seems to be a conflict between the legislature and the implied word of the judiciary as to whether implied quality control is accepted with regard to common law licences, in light of the rulings in the *Gujarat Bottling*[12] and *Rob Mathys*[15] cases.

Additionally, there remains the issue that the revocation of licence would not be possible in case of an unregistered/common law licensee, since the courts do not have recourse to removing such a licence from the Registrar, with the only option in such a scenario being to cancel the trademark registration itself. One way to ensure quality control in this aspect would be to remove the concept of unregistered licensees altogether from legislation. This would give the Registrar more insight into the quality and contents of licensing agreements to ensure better products, and more importantly, the chance to exercise more control over the revocation of the licence, since the Registrar will then be able to better enforce the mandate of including quality control provisions and degree of control of proprietors over Registered Users in licensing agreements as laid down under Section 49(1)(b)(i).

It is true that removal of provisions for unregistered licensees comes with a host of other issues, since the process of formalizing every licensing agreement could come at the cost of ease of doing business. The alternative to such a step lies in educating and raising awareness among businesses about the importance of comprehensive quality control provisions for preserving the reputation of the brand and product, and for preventing public deception and avoiding litigation. More importantly, it also lies in standardizing the requirements for adequate quality control such that parties will be independently able to draft comprehensive quality control provisions tailored to their product, relationship and circumstances, and the need for judicial intervention to ensure the same is reduced. It is the opinion of the authors that regardless of the ultimate outcome of deliberations on the viability of unregistered licensees, such standardization and education would go far in reducing litigation and consumer deception in trademark licensing.

Indian legislation with respect to standardization of quality control requirements, especially with regard to unregistered licensees or implied licences and Q.C. provisions, is rather sparse, perhaps for good reason. Quality control is contingent on too many case-by-case variables to be reduced to a set of standards. In spite of the same, some uniformity is both possible and welcome. As seen above, well-reasoned judicial opinion on this topic emanating from Indian courts does exist, but is perhaps insufficient in light of the vastness of the topic and its relative nascence in the legal atmosphere.

It would thus be useful to refer to the plethora of foreign judgments that delve into the minute standards of requirement to constitute valid Q.C., like *Barcamerica*[18] and *Freecycle.*[22] Though it has been observed in *Rob Mathys*[15] that the relationship between licensor and licensee itself may signify a sufficient degree of quality control, not much more is available in Indian law. Some considerations as deemed appropriate to determine a close working relationship may be gleaned from U.S. Law (specifically the catena of cases discussed, such as *Barcamerica*[18] and *Freecycle Sunnyvale*[22]), such as the period of association of the parties, the involvement of the licensor in the activities and quality control of the licensee, the personal and professional relationship between the proprietors of the entities in question (for instance, if the individual proprietors are relatives), etc., in order to better quantify the presence of a close working relationship between licensor and licensee.

Additionally, general guidelines may be recommended by courts as to procedures for quality control testing, with regard to the frequency and regularity, time and circumstances of the testing, and to quantify to some degree of uniformity as to what would constitute an ‘ongoing effort to monitor quality’. Such guidelines may be suitably general in nature to account for the variance in size, capacity and product type of many licensors, but may also be better tailored to certain types of products or relationships on a case-by-case basis (for instance, quality control and monitoring requirements for precision medical equipment may be more stringent than for other goods, in light of the margin of error and the consequences of defects in terms of loss of life or injury to customers).

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