

**JURISPRUDENTIAL ASPECTS OF UNCONVENTIONAL
TRADEMARKS-WITH SPECIAL REFERENCE TO LABOR THEORY
OF JOHN LOCKE**

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LABOUR THEORY OF PROPERTY

The **labor theory of property** (also called the **labor theory of appropriation**, **labor theory of ownership**, **labor theory of entitlement**, or **principle of first appropriation**) is a theory of natural law that holds that property originally comes about by the exertion of labor upon natural resources. The theory has been used to justify the homestead principle, which holds that one may gain whole permanent ownership of an unowned natural resource by performing an act of original appropriation. In his *Second Treatise on Government*, the philosopher John Locke asked by what right an individual can claim to own one part of the world, when, according to the Bible, God gave the world to all humanity in common. He answered that persons own themselves and therefore their own labor.¹ When a person works, that labor enters into the object. Thus, the object becomes the property of that person. However, Locke held that one may only appropriate property in this fashion if the Lockean proviso held true, that is, "... there is enough, and as good, left in common for others".²

DEFINITION AND MEANING OF TRADEMARK

A **trademark** is a word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods of one party from those of others. A **service mark** is a word, phrase, symbol, and/or design that identifies and distinguishes the source of a service rather than goods. Some examples include: brand names, slogans, and logos. The term "trademark" is often used in a general sense to refer to both trademarks and service marks.

Unlike patents and copyrights, trademarks do not expire after a set term of years. Trademark rights come from actual "use" (see below). Therefore, a trademark can last forever - so long as you continue to use the mark in commerce to indicate the source of goods and services. A trademark registration can also last forever - so long as you **file specific documents and pay fees at regular intervals**³

¹ D.M. Kerly, *Law of Trade Names and Trademarks*, London, Sweet and Maxwell (2005)

² https://en.wikipedia.org/wiki/Labor_theory_of_property

³ <https://www.uspto.gov/trademarks-getting-started/trademark-basics/trademark-patent-or-copyright>

DEFINITION OF TRADEMARK UNDER INDIAN LAW

Sec 2 (1) (zb) “trade mark” means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and—

(i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and

(ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark;

Sec 2(1) (m) “mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof;

Sec 2(1)(q) “package” includes any case, box, container, covering, folder, receptacle, vessel, casket, bottle, wrapper, label, band, ticket, reel, frame, capsule, cap, lid, stopper and cork;

Sec 2(1)(j) “goods” means anything which is the subject of trade or manufacture;

Sec 2(1)(z) “service” means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising; Now we will try to define Unconventional trademarks and will analyze whether it can be fit in to the definition given under the act.

UNCONVENTIONAL TRADEMARKS

The unconventional trademarks are the ones that are perceived by the senses other than the eyes. Accordingly, there are following kinds of marks as Sound Mark, Olfactory Marks, Smell Marks, Touch marks, Taste Mark, Single Color Mark and Motion marks and Holograms. To understand the new feature and functions of the unconventional marks it becomes necessary to understand the essentials and functions of the conventional marks. Therefore, it also deals with the same. The requirement of Graphical Representation has an essential administrative procedure in registering conventional marks and presently it is the main hindrance for the registration of modern marks.

In simple language, conventional trademarks are marks that have traditionally been registered in the past and are part of the legislature as well. They are words, letters, numerals, name, signature etc. These all marks fit into the essential criterion set for a trademark. The true functions of the trademark are to identify a product as satisfactory and thereby to stimulate further purchases by the consuming public. All these marks by fulfilling the registrability criteria have been traditionally fulfilling this rationale behind trademarks put forward by Frank Schechter. To say that a trademark “is merely the visible manifestation of the more important business goodwill, which is the ‘property’ to be protected against invasion” or that “the good will is the substance, the trademark merely the shadow,” does not accurately state the function of a trademark today and obscures the problem of its adequate protection. It is pertinent to mention here that if all the unconventional marks cannot be protected, protection shall be given at least to the well-known trademarks. Now we should discuss what the exact meaning of well-known trademarks is.

WELL KNOWN TRADEMARKS

Well known trademarks means a mark which has become well known to the substantial segment of the public familiar with a particular type of goods or services for which it is used. The use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and person using the mark in relation to the first mentioned goods or services. It is the registrar of trademarks who has got authority to determine whether a mark is a well-known mark or not. The definition clearly indicates that it is the ordinary trademark which may acquire the character of well-known trademarks. When the consuming public on seeing a trademarks on some goods or services, relates it to a trademarks already used on some other goods or services, such a trademarks is considered to be a well-known trademark. The properties of registered well-known marks have been extended right to oppose registration of a similar mark on different/dissimilar goods or services.⁴ There has not been full agreement on the definition internationally and deliberations and consultations to settle the meaning of well-known trademarks have been going on under the auspices of WIPO. The term well-known mark has been in use since 1925 when Article 6 bis was incorporated in the Paris Convention for a better protection to such marks. Article 16 of WTO-TRIPS lays down additional special treatment favouring well-known marks and the definition in Indian Act takes colour and fulfils the obligation in article 16 of TRIPS. In India, the term well-known trademarks is used for the first time in Trade Marks Act, 1999 and has been defined in Section 2(1) (zg).

PROTECTION TO UNCONVENTIONAL TRADEMARKS

⁴ Torremans, Paul and Holyoak, *Intellectual Property Law*, New York, Oxford University Press, 4thed. (2005).

In the late 1990's unconventional trade mark forms such as sounds (audible), tastes (gustatory), touches (tactile) and smells (olfactory) have become more important. The industry seeks to invent new products in order to present more sensory consumer goods to the overwrought customers. They are of common use in marketing and practitioners are familiar with the sensorial as an essential part of an innovative trademark and product strategy. In the WIPO, the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, held in Geneva from 27-31 May 2002, in the eighth session discussed suggestions for the further development international trademark law. In U.S., the Lanham Act's definition of 'trademark' encompasses non-traditional trademarks by not excluding them. As we have already seen that the unconventional trademarks are the ones that are perceived by the senses other than the eyes. Accordingly, there are following kinds of marks as Sound Mark, Olfactory Marks, Smell Marks, Touch marks, Taste Mark, Single Color Mark and Motion marks and Holograms.

LABOR THEORY OF JOHN LOCKE AND PROTECTION TO UNCONVENTIONAL TRADEMARKS

The theory has been used to justify the homestead principle, which holds that one may gain whole permanent ownership of an unowned natural resource by performing an act of original appropriation. Having understood the nature of the UTM and Labor theory in detail, which has been the object, we now will see how provisions of Indian Act support or reject the concept of UTMs. Further we will see if any amendment is required in this respect and if yes then what are those? *There is no harm in following the example of the U.S where the policy is of "everything goes" in the matter of registration of trademarks. At least those unconventional marks that have acquired distinctiveness or are well known by long use can be recognized without trouble.* As a matter of fact, this everything goes policy will also complement the labor theory. The efficacy of any trademark would depend on its ability to create an impact on the minds of the potential customers of that product. If characterization or the representation of the product is unique, it would appeal to people's perception and senses in the very significant manner. This has actually lead to the advent of a number of unusual non-orthodox trademarks by the manufacturers.

Therefore, the definition of mark alone cannot decide the plausibility of registrability of UTM. Not only the Act but Rules also become very relevant at this juncture. As per section 18 of the TMA, 1999 any application for registration of a trademark should be in compliance with the rules. Chapter II of the Trade Mark Rules, 2002 need to be observed carefully and read with the definition of GR. To start, rule 2(1)(k) defines GR as "representation of a trademark...in **paper form**." The requirement of the GR to be on the paper limits the scope or possibility of GR and thus the registration of the taste, smell mark etc.⁵

⁵ K.C. Kailasam & Ramu Vedaraman, *Law of Trade Marks & Geographical Indications*, Nagpur, Wadhwa & Company, 2nd edn.(2005)

In the light of the above mentioned provisions, let us analyze how the sound mark was registered in India. The form of the GR is attached with the application given in the Appendix-B. The question here is whether a person looking at the musical note provided in the required space will get to know what the mark is. I personally feel that a musical note doesn't solve that purpose though it is clear that it fulfills the requirements of the rules 2(1)(k), 28, 25 and 30. Then it becomes as good or as bad as a chemical formula as a GR for the smell mark. Some people may call the formula rather a description than a graphical representation. In our legislation description is not allowed without a GR, which is mandatory. Another issue before the registry is that of distinctiveness. Section 2(zb) read with section 9(1) (a) dictates the condition of distinctive character. So, is a sound mark inherently distinctive? The answer is "no". Let it be any UTM, they are never distinctive and are very likely to cause confusion. Therefore, the reason why the sound mark is registered is that it has acquired distinctiveness. The provision in the TMA, 1999 that permits the secondary meaning is the 'proviso' to section 9(1) that states "a trademark shall not be refused registration if before the date of application for registration it has acquired a distinctive character as the result of the use made of it or is a well-known trade mark." Here, I would like to submit that Yahoo yodel has not only become distinctive with time but also is a well-known mark.

CONCLUSION

Locke argued in support of individual property rights as natural rights. Following the argument, the fruits of one's labor are one's own because one worked for it. Furthermore, the laborer must also hold a natural property right in the resource itself because — as Locke believes — exclusive ownership was immediately necessary for production. Following this *At least those unconventional marks that have acquired distinctiveness or are well known by long use can be recognized without trouble.*