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“The Intersection Of Trademark Law And Photography: Implications And Legal Challenges”

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ABSTRACT:

In the modern digital landscape, photography is not just an artistic medium; it's also a powerful tool for commerce, branding, and storytelling. And therefore, this junction of the creative and the commercial brings photography to many of the problems within trademark law; an intersection that is widely travelled by numerous photographers and businesses. This research focuses on that area where trademark law meets photography, specifically, the implications of making commercial use of trademarked logos, symbols, or designs that appear in photographs.

The fine line between artistic expression and commercial exploitation becomes particularly evident when trademarked content appears in work meant for profit. Whether it be street photography with recognizable brands or commercial photography with products or logos, trademarks in photographs raise not only the issue of legal questions regarding who owns the right, but also the usage rights of such photographs, which could potentially infringe someone's trademark. The concept of “fair use” is discussed in this context, offering insight into when photographers might be protected and when they could face challenges under trademark law.

This article considers the global implications of trademark law for international photographers, as different countries apply varying standards of protection. Through real-world examples, practical advice, and an exploration of global considerations, this article equips photographers with the knowledge to protect themselves while ensuring their work respects intellectual property laws.

KEYWORDS:

Trademark Law, Photography, Intellectual Property, Infringement, Fair Use, Legal Frameworks, Artistic Freedom

INTRODUCTION:

The intersection of trademark law and photography presents a fascinating and complex legal landscape. In an age where creative expression is more accessible than ever, photographers often find themselves navigating potential legal challenges when capturing images that incidentally or purposefully include trademarks. While trademark law aims to protect the commercial identity and reputation of businesses, its application to photography raises questions about freedom of expression and fair use. In India, these challenges are amplified by a lack of explicit provisions that address non-commercial, artistic use of trademarks, creating ambiguity for artists and content creators.

This research delves into the intricacies of how trademark law impacts photography, examining existing gaps and potential solutions to balance intellectual property rights with artistic freedom. By exploring comparative global practices and evaluating the Indian legal framework, this study seeks to propose enhancements that

encourage creativity while maintaining respect for trademark protections. Ultimately, this research invites a deeper understanding of how legal clarity can empower photographers, protect trademark owners, and support a flourishing landscape of creative expression.

BACKGROUND OF THE STUDY:

For decades, the intersection between trademark law and photography has been riddled with legal and creative tensions. Historically, trademark regulations were intended to safeguard brand identification and avoid customer misunderstanding, with little regard for the increasing complexity of modern media. Previously, photographers worked largely in controlled conditions with few concerns about trademark infringement. However, the emergence of photography as a commercial art form in advertising and journalism, as well as the increasing number of public areas covered with corporate logos and designs, began to raise complex legal issues.

Today, the digital era has added to these difficulties, with photos quickly shared and reused internationally via internet platforms and social media. This has blurred the distinction between personal and commercial use, making it more difficult to establish trademark rights. Photographers nowadays are at danger of trademark infringement if they capture photographs that feature protected brands or designs, even accidentally. The balance between a photographer's freedom to artistic expression and a brand owner's right to retain their branded products is frequently contested, resulting in conflicting legal interpretations and confusion.

Future legal frameworks will need to handle these difficulties more extensively in order to keep up with technology improvements and media globalization. With AI-driven picture production and the rise of augmented reality (AR) and virtual reality (VR) settings, the scope of trademark usage in photography is anticipated to grow even further. This change will necessitate clearer, more balanced regulations that preserve intellectual property while also promoting photographers' creative freedom. Addressing these future difficulties will be critical to ensure that photographers may continue to create and share their work without incurring unnecessary legal concerns, while still honoring trademark holders' legitimate interests.

LITERATURE REVIEW:

1. “A Conflict of Rights: Public Photography, Copyright and Innovation”

The author calls for clearer and more uniform 'freedom of panorama' across countries to remove uncertainty in public photography rights. She emphasizes the contradiction between preserving artists' rights and encouraging freedom of speech and creativity. The author's proposal for a regulatory framework that includes all works in public areas aims to stimulate innovation, improve accessibility, and give legal clarity for photographers while guaranteeing that artists' core moral rights are protected.¹ The position is ambiguous due to a lack of case law and clarity, with the Indian Copyright Act covering various works but not explicitly defining 'freedom of panorama.' The need for a clearer framework is emphasized to balance public interests and artists' rights.

2. “Trademark Law as Commercial Speech Regulation”

The paper explores the complexities of trademark law as a form of commercial speech regulation, highlighting the tension between consumer protection and First Amendment rights. It reveals that many trademark cases involve information that can be both useful and misleading, complicating the binary understanding of truth and falsity.² The need for a more nuanced approach to evaluating consumer deception and intent in trademark cases, as current frameworks may inadequately address the realities of consumer understanding and the effectiveness of disclaimers and disclosures in mitigating confusion.

3. “The Role of Creativity in Trademark Law”

The article explores the intersection of creativity and trademark law, particularly how trademark protections can influence artistic expression and innovation. It discusses the balance between protecting distinctive marks and allowing competitors to use descriptive language, emphasizing the role of goodwill in trademark law. Identified is the need for further examination of how expanding trademark protections,

¹ Murthy, S., 2021. *A Conflict OF RIGHTS: PUBLIC PHOTOGRAPHY, COPYRIGHT AND INNOVATION* (Doctoral dissertation, Nalsar University of Law). <https://spicyip.com/wp-content/uploads/2021/08/SB-Essay-Competition-Template-Shrudula-Murthy.pdf>

² Tushnet, R., 2006. Trademark Law as Commercial Speech Regulation. *SCL Rev.*, 58, p.737. <https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=1006018>

such as anti-dilution laws, may impact creativity and competition in the marketplace, as well as the implications of these legal frameworks on artistic works compared to scientific inventions.³

4. “Trademark Doctrines for Global Electronic Commerce”

Burk's 1997 article, Trademark Doctrines for Global Electronic Commerce, examines the challenges of applying traditional trademark laws to the global digital marketplace. It addresses issues such as jurisdictional conflicts, cybersquatting, and infringement via domain names and metatags. While proposing international cooperation and technological solutions to address these challenges, the article highlights the need for reform in national trademark laws to accommodate e-commerce.⁴ Lies in the evolving nature of digital commerce and emerging technologies, which may necessitate further updates to trademark doctrines, especially considering advancements in artificial intelligence, blockchain, and digital platforms not yet covered in Burk's work.

5. “Rethinking Trademark Fair Use”

McGeeveran's 2008 article, Rethinking Trademark Fair Use, challenges traditional interpretations of trademark fair use, arguing for a broader, more nuanced approach. The article critiques the restrictive nature of fair use doctrines and advocates for a more flexible standard that accommodates the evolving needs of digital and media contexts. McGeeveran explores how fair use could be redefined to better balance trademark protection with freedom of expression, particularly in cases involving parody and commentary.⁵ Lies in the need for further exploration into how digital technologies, such as social media and AI, are reshaping fair use in contemporary trademark disputes, an area not fully addressed in the article.

RESEARCH PROBLEM:

The Indian trademark law framework inefficiently addresses the use of trademarks in non-commercial and artistic contexts, particularly in photography. Lack of clarity thus leads to legal uncertainty for photographers, who may unknowingly violate trademark rights while using logos or brand names in their creative works without commercial intent.

RESEARCH OBJECTIVES:

1. To examine the gaps in the Indian trademark law framework regarding the use of trademarks in non-commercial and artistic contexts, particularly in photography.
2. To analyze the legal implications of trademark infringement in photography, focusing on both commercial and non-commercial uses of trademarks in India.
3. To explore international legal standards and best practices related to the use of trademarks in artistic works, and assess their applicability to the Indian legal context.
4. To propose legal reforms/recommendations that could provide clearer guidelines for photographers regarding trademark use in non-commercial and artistic works, balancing trademark protection with artistic freedom.

RESEARCH QUESTIONS:

1. How does the current framework of the Indian **Trade Marks Act, 1999** address the use of trademarks in commercial and non-commercial and artistic contexts, particularly in photography?
2. What are the legal challenges faced by photographers in India when incorporating trademarks into their creative works, and how do these challenges differ between commercial and non-commercial uses?

³Fromer, J.C., 2011. The Role of Creativity in Trademark Law. *Notre Dame L. Rev.*, 86, p.1885. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tndl86§ion=53

⁴Burk, D.L., 1997. Trademark Doctrines for Global Electronic Commerce. *SCL Rev.*, 49, p.695. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/sclr49§ion=37

⁵McGeeveran, W., 2008. Rethinking trademark fair use. *Iowa L. Rev.*, 94, p.49. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/ilr94§ion=5

3. How can Indian trademark law be reformed to provide clearer guidelines and protections for photographers using trademarks in commercial, non-commercial, artistic, and educational contexts without infringing on trademark rights?

RESEARCH HYPOTHESIS:

If Indian trademark law provides clearer guidelines on the incidental use of trademarks in artistic works such as photography, then photographers will have greater legal clarity, reducing the risk of infringement claims while preserving their creative freedom.

SCOPE AND LIMITATION OF THE STUDY:

Scope: This research aims to explore the intersection of Indian trademark law and photography, focusing on the legal implications and challenges that arise when trademarks are used in non-commercial and artistic contexts. The study will examine how the Trade Marks Act, 1999 addresses the issue of trademark infringement, especially in cases where trademarks are unintentionally incorporated into photographs without commercial intent. The research will also compare Indian trademark law with international frameworks, including practices in the United States and the European Union, which provide clearer guidelines on fair use and artistic exemptions for trademark usage.

The scope will cover a detailed analysis of the existing legal provisions under Section 29 (Infringement of trademarks) and Section 30 (Exceptions to infringement) of the Indian Trade Marks Act. The research will assess the legal ambiguities photographers face, particularly regarding the use of trademarks in digital platforms and public spaces. Additionally, it will examine the potential need for legal reforms, such as the introduction of a "fair use" provision for non-commercial and artistic uses, to encourage creative freedom while respecting intellectual property rights.

Limitations: The research is limited by the lack of specific legal precedents in India regarding trademark infringement in photography, which makes it difficult to draw definitive conclusions from case law. Due to the absence of detailed legal provisions for artistic use of trademarks in Indian law, much of the analysis will rely on international case studies and comparative legal frameworks, which may not always align with the Indian legal landscape.⁶

Additionally, the research will mostly concentrate on the legal viewpoint and could not adequately evaluate the societal or economic effects of trademark legislation on India's photographic sector. The research will also be limited to an examination of the Trade Marks Act of 1999, and it may not go further into allied subjects such as copyright or privacy law, despite their potential importance.

TRADEMARK LAW OVERVIEW – PRINCIPLES AND THEIR APPLICATION TO PHOTOGRAPHY

Trademark Law Principles

Trademark law is a branch of intellectual property law that protects the distinctive symbols, logos, words, or other identifiers used by businesses to distinguish their goods or services from those of others. The primary objective of trademark law is to protect consumers from confusion and ensure that businesses maintain exclusive rights over their marks, preserving the integrity of their brand.

In India, trademark law is controlled by the Trade Marks Act of 1999, which includes regulations for trademark registration, protection, and enforcement. According to the Act, a trademark is any symbol that can differentiate one enterprise's goods or services from those of another. Commonly, trademarks consist of phrases, logos, and graphics that customers associate with a certain brand.

The fundamental principles governing trademark law include: **Distinctiveness:** A trademark must be distinctive enough to set a business apart from others. This means it must be capable of identifying and distinguishing the source of goods or services. **Non-Descriptiveness:** A trademark cannot be purely descriptive of the goods or services it represents. For example, a term like "Apple" for fruit would be disallowed for a tech company. **Use in Commerce:** Trademarks must be used in commerce to be protected. This principle ensures that a trademark is not just an idea or a name, but actively associated with goods or

⁶ O'Flanagan, M., 2018. *Photography and the Law: Rights and Restrictions*. Routledge.

<https://www.taylorfrancis.com/books/mono/10.4324/9780429468391/photography-law-michael-flanagan>

services. **Likelihood of Confusion:** A central tenet of trademark protection is to prevent confusion among consumers. If a mark is too similar to an existing one, it may lead to legal disputes regarding infringement.

Application of Trademark Law to Photography

Photographers often encounter trademark issues when they capture images that contain visible trademarks, such as logos, brand names, or products bearing trademarks. Whether it's a photograph of a building with a branded billboard or an image of a product with a company logo, the presence of a trademark in a photo could lead to potential infringement claims, especially if the photograph is used commercially.

Photographers must grasp how trademark law relates to the photos they shoot. According to the Trade Marks Act, if a photographer integrates a brand into their work, they may accidentally violate the trademark owner's rights, particularly if the shot is used for commercial purposes. If trademark owners think that their trademark is being used in an image to generate confusion or degrade their brand identity, they can take legal action.

However, photography as an art form is often granted some leeway in how trademarks are handled. As long as the use of the trademark in a photograph is incidental and not commercial, the risk of infringement may be lower. But when a photograph featuring a trademark is used in advertising, commercial sales, or any other activity that profits from the trademark's recognition, the photographer may face legal challenges.

ANALYSIS OF THE FAIR USE DOCTRINE IN TRADEMARK LAW

The fair use doctrine is a significant aspect of intellectual property law that enables limited use of trademarks without the trademark holder's consent under certain conditions. In trademark law, fair use seeks to strike a balance between trademark owners' rights and the public interest in fostering free speech, creativity, and competition. It establishes a significant exemption to trademark infringement allegations, especially in artistic, educational, or non-commercial circumstances.⁷

Fair use, however, is not a blanket exception. It is typically subject to a case-by-case analysis that considers several factors, including the nature of the use and the potential harm to the trademark's distinctiveness and reputation. This analysis ensures that fair use does not unduly undermine the rights of trademark owners or cause confusion among consumers.

In this analysis, we will explore how the fair use doctrine operates within trademark law, its application in different jurisdictions (especially the U.S. and India), its impact on photographers and artists, and potential reforms to extend fair use protections in the Indian context.

Principles of the Fair Use Doctrine in Trademark Law

The fair use doctrine in trademark law can be broken down into two main categories: nominative fair use and descriptive fair use. Both categories allow limited use of trademarks but apply to different scenarios and purposes.

1. Nominative Fair Use

Nominative fair use arises when a trademark is used to refer to the trademark owner's products or services, especially when the user cannot easily describe the product or service without using the trademark. This type of fair use generally occurs when the use of the trademark does not create confusion about the source or endorsement of the goods or services in question.

For example, if a photographer takes a picture of a famous branded product (like a Coca-Cola bottle) in an artistic work, they may argue that the use of the trademark is necessary to accurately describe the object. As long as the image does not mislead the public into thinking that Coca-Cola endorses or is associated with the photographer's work, the photographer may be able to claim nominative fair use. The key elements of nominative fair use include the use of the trademark is necessary to identify the product or service. The trademark is used in a manner that does not imply sponsorship or endorsement. The use does not affect the value or distinctiveness of the trademark.

⁷ Warnecke, A.M., 1993. The art of applying the fair use doctrine: The postmodern-art challenge to the copyright law. *Rev. Litig.*, 13, p.685. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/rol13§ion=31

2. Descriptive Fair Use

Descriptive fair use involves using a trademark to describe the nature, characteristics, or quality of a product or service, rather than to identify the source of the goods or services. For instance, if a photographer uses a trademarked product in a photograph and the trademark is used as part of a description or commentary, this may be considered descriptive fair use, provided that the use is non-commercial.

For example, a photographer capturing a product in its natural environment, like an advertisement or public space, may use the trademark to describe the scene or subject. If the photograph is used to highlight a particular feature of the product (like its design or function), the use of the trademark could be seen as a descriptive fair use.

The key principles of descriptive fair use include the trademark is used to describe the product or service rather than its source. The use is not likely to confuse consumers or suggest an association with the trademark holder. The use is relevant and does not exploit the trademark for commercial gain.

Application of the Fair Use Doctrine in Trademark Law: U.S. vs. India

U.S. Trademark Law and Fair Use

In the United States, the fair use doctrine is firmly embedded in trademark law. Under the Lanham Act, Section 33(b)(4) provides a statutory fair use defense that allows the use of a trademark in specific situations. The Lanham Act recognizes both nominative fair use and descriptive fair use as legitimate defenses to claims of infringement. Courts assess whether the use of a trademark qualifies as fair use based on a series of factors.

Key factors include **the purpose and character of the use** – Whether the use is commercial or non-commercial. Non-commercial uses are more likely to be deemed fair use. **The nature of the trademark** – Whether the trademark is distinctive and famous. **The amount and substantiality of the portion used** – Whether only a minimal portion of the trademark was used. **The effect on the market** – Whether the use is likely to affect the trademark's value or harm its market position.

U.S. courts have consistently ruled in favor of **artistic expression** and **parody** under fair use, especially where the use of a trademark does not cause confusion or dilute its value. For example, if a photographer uses a trademarked logo in a street scene or as part of an artistic photograph, the use may be permitted under fair use if it serves an artistic, non-commercial purpose.

The difference between commercial and non-commercial use lies in the purpose and intent of the activity. Commercial use refers to activities intended to generate profit or financial gain, typically benefiting a business, individual, or organization monetarily or through a competitive advantage. It includes activities such as selling products or services, using content in advertisements, or incorporating trademarks into commercially sold items like books or merchandise. For instance, a photographer selling a print featuring a trademarked building or licensing a photo with branded elements to a magazine would constitute commercial use. On the other hand, non-commercial use involves activities that are not intended to generate profit, focusing instead on personal, educational, or artistic purposes. Such uses include personal projects, academic or research work, or artistic expression not intended for sale. Examples of non-commercial use include displaying a photograph with a trademarked sculpture in a free public gallery or using a branded element incidentally in an educational documentary.

The main distinctions between the two are their intentions and incidental. Commercial usage seeks monetary rewards and frequently needs permission or license, whereas non-commercial use is devoid of financial motivations and may qualify for exceptions or fair use. In India, the Trade Marks Act of 1999 makes no specific distinction between the two, instead focusing on whether the use creates misunderstanding, undue advantage, or injury to the trademark owner's goodwill. In contrast, states such as the United States provide stronger rights for non-commercial creative usage under fair use legislation, ensuring clearer safeguards for creators.

Fair Use Under Indian Trademark Law

Indian trademark law, governed by the Trademarks Act of 1999, lacks a clear legislative provision for fair use, as does the legal framework in the United States. However, Indian law recognizes a number of defenses and exceptions comparable to the fair use idea, including descriptive usage and comparative advertising. Section 30 of the Indian Trademarks Act outlines permissible uses; however, it is less explicit and forceful than the fair use criteria under US law.

The Indian legal framework tends to focus more on preventing **consumer confusion** and protecting the **distinctiveness** of trademarks. Courts in India have occasionally dealt with cases where artistic use of trademarks in photographs or artworks has been defended based on the **artistic expression** exception, but the **lack of clear guidance** makes this area of law less predictable.

However, Indian courts have acknowledged the value of creative expression as well as the public's interest in free speech. The legal world is becoming increasingly conscious of the need for clearer norms for artists, photographers, and inventors who utilize trademarks for non-commercial or creative purposes.

Challenges in Applying Fair Use in Photography and Art

Photographers and artists often find themselves caught between intellectual property laws and the need for creative expression. While the fair use doctrine can protect photographers using trademarked elements in their works, the application of this doctrine can be inconsistent and unclear. Some of the challenges includes **Lack of clear definitions**: In many jurisdictions, including India, the lack of a clear statutory framework for fair use in the context of trademarks creates uncertainty for photographers. For example, whether the use of a trademarked product in a photograph for artistic or non-commercial purposes would constitute fair use is often left to the discretion of the courts. **Commercial vs. non-commercial use**: A key challenge for photographers is determining whether their use of a trademarked item in an image is commercial or non-commercial. Commercial use is more likely to trigger legal scrutiny and the risk of infringement claims. However, if the work is non-commercial, fair use may be more easily defensible. **Balancing trademark protection with artistic freedom**: The application of trademark law in artistic contexts often leads to a clash between trademark protection and freedom of expression. Photographers may feel stifled by the potential for legal action, even if their work does not cause consumer confusion or harm the brand.

How can Reforming Trademark Law to Support Artistic Expression?

Given the growing importance of digital media, photography, and art, there is a compelling argument for reforming trademark law to provide clearer protections for artistic works that incorporate trademarks. This could include Explicit fair use provisions in Indian trademark law, similar to those found in the U.S. and EU. Recognition of artistic expression and non-commercial use as key defenses in trademark infringement cases. The introduction of a freedom of panorama provision that allows for the incidental use of trademarks in public spaces without the risk of infringement.

CHALLENGES FOR PHOTOGRAPHERS – CASE STUDIES AND ANALYSIS OF REAL-WORLD IMPLICATIONS

Legal Uncertainty in Non-Commercial Use

One of the primary challenges photographers face under current trademark law is **the lack of clarity in the treatment of non-commercial use**. As photography often captures real-life scenes, trademarks may be incidentally present in the background of images. In many cases, these uses do not have any commercial intent, such as in art exhibitions or personal portfolios. However, without a clear exemption for non-commercial use in trademark law, photographers are left uncertain about whether their work could be subject to infringement claims.

For example, consider a photographer capturing street scenes or urban environments where brand logos or products are visible. If these images are published or displayed, even in an artistic context, the presence of a trademark may lead to claims by the trademark owner that the image causes consumer confusion or dilutes the brand. **Indian trademark law** does not currently have a "fair use" provision specifically addressing these types of non-commercial uses, leaving photographers vulnerable to legal action.

Case Study: Street Art Photography and Trademark Infringement

A well-known example of trademark infringement in photography involves the use of branded products in street art or urban photography. Street photographers often feature everyday objects or advertisements in their work, some of which may contain visible trademarks. These trademarks, though part of the urban landscape, are integral to the photograph's theme or commentary.

Consider the case of a photographer shooting a public billboard with a popular product brand in the background. If the image is published in an exhibition or a photography book, the photographer may face an infringement claim if the trademark owner believes that the use of their logo misrepresents or dilutes their brand. This situation illustrates the difficulties photographers face in balancing their artistic expression with the protection of intellectual property.

In commercial use, the situation becomes more complicated. If the photographer licenses the image to a commercial entity—say, for use in advertising—then the trademark owner may argue that their mark is being used without authorization, potentially leading to a dispute over royalties and infringement.⁸

Effect of Trademark Litigation on Photographers

Photographers, particularly those working in commercial photography, must walk a tight line between artistic freedom and trademark violation. Even little trademark infringement might result in expensive and time-consuming litigation. Small or freelance photographers face considerable financial and reputational risks as a result of suspected infringement.

EMERGING LEGAL FRAMEWORKS – COMPARATIVE STUDY OF INTERNATIONAL REGULATIONS

Trademark Law in the United States

In the U.S., trademark law is primarily governed by the **Lanham Act**, which provides a framework for trademark registration, protection, and enforcement. U.S. trademark law is more lenient toward **artistic works**, as **fair use** exceptions exist under **Section 33(b)(4)** of the Lanham Act. This section allows for the use of trademarks in non-commercial and artistic contexts as long as it does not create confusion or imply an endorsement by the trademark holder.

The “**artistic relevance test**” and the “**explicit misleadingness test**” under U.S. law provide a framework that allows artists and photographers to use trademarks without infringing, provided their use is non-commercial and does not mislead the public. For example, a photograph featuring a trademarked product may be permissible if the product’s presence is artistically relevant to the image.

Trademark Law in the European Union

The **European Union (EU)** has similar protections under its **Trademark Directive (2015/2436)**, which harmonizes the laws of member states concerning trademark protection. The EU emphasizes a **balance between trademark protection and free expression**, providing limited exceptions for **artistic uses** under **Article 14** of the Directive. The directive allows for the use of trademarks in works of art without the risk of infringement as long as it is not for commercial purposes and the use does not damage the reputation or distinctiveness of the trademark.

The EU’s focus on **non-commercial use** aligns with a broader understanding of **freedom of expression** in the arts. Photographers in the EU may be less likely to face infringement lawsuits for capturing trademarks incidentally, particularly in non-commercial works.⁹

International Comparisons and Applicability to India

The U.S. and EU frameworks offer clearer guidance for artists and photographers regarding the use of trademarks in non-commercial works. This is a stark contrast to the Indian legal landscape, where **ambiguities in the Trade Marks Act, 1999** create challenges for photographers. A comparative study reveals that India may benefit from adopting provisions similar to those found in the U.S. and EU to provide clearer guidelines and protections for artistic uses of trademarks.

FREEDOM OF PANORAMA AND ITS INTERPRETATION IN THE INDIAN LEGAL CONTEXT OF TRADEMARK

What is Freedom of Panorama?

Freedom of panorama is a legal doctrine that permits individuals to capture images of certain buildings, sculptures, and public art without the need for permission from the copyright or trademark holders, provided these images are taken from a public space. This principle is typically applied to copyright law in many jurisdictions, but it can have important implications for trademark law as well, especially when trademarked buildings or products are depicted in publicly accessible spaces.

⁸ Janke, T., 2003. *Minding culture: case studies on intellectual property and traditional cultural expressions* (Vol. 781). WIPO.

<https://books.google.com/books?hl=en&lr=&id=9vCoAzzVy8MC&oi=fnd&pg=PA4&dq=Street+Art+Photography+and+Trademark+Infringement+casestudy+&ots=A73GvLQ-Ct&sig=W9DUidzsQNv9lbVsSPHIXSVMMp8>

⁹ Laziková, J., 2019. The Notion of the European Union Trademark. *EU agrarian Law*, 8(1), pp.21-31. <https://sciendo.com/article/10.2478/eual-2019-0004>

Under freedom of panorama, photographers and artists are allowed to freely use images of public spaces, even if the subject matter includes trademarked logos, products, or brand names, without the risk of infringing intellectual property rights. The key criterion is that the image should be incidental and non-commercial.

Freedom of Panorama in the Indian Legal Context

In India, the concept of freedom of panorama is not explicitly outlined in the Trade Marks Act, 1999, or in the Copyright Act, 1957. However, it could be interpreted and applied in cases where public images containing trademarked products or logos are captured, particularly when they are used for non-commercial and artistic purposes.

Section 30 of the Trade Marks Act of 1999 allows exceptions to infringement, allowing the use of a trademark in certain situations, such as comparative advertising or in an artistic or non-commercial setting. However, these exclusions are not as clear or comprehensive as the freedom of panorama legislation in other countries, such as the European Union or the United States.

Because India lacks a particular fair use or freedom of panorama clause, photographers who picture public locations with obvious trademarks may suffer legal ramifications if their work is sold. If an image of a branded object is used for advertising or profit-driven purposes, the photographer may face infringement allegations, even if the shot is not mainly intended for commercial use.

Interpretation and Potential for Reform

To align Indian trademark law with international practices, there is potential for reform in the form of introducing **specific exemptions** for artistic and non-commercial uses of trademarks. Such a reform could be inspired by **freedom of panorama principles** adopted in jurisdictions like the **EU** and **U.S.**, where trademarks appearing incidentally in public spaces are allowed to be captured and used freely.

For example, if a photographer takes a picture of a **public building** with a **visible trademarked sign** or **billboard**, under current Indian law, there is ambiguity about whether this would constitute infringement. To resolve such issues, the introduction of a **"freedom of panorama" clause** in the **Trade Marks Act, 1999** could protect the interests of photographers, ensuring that they can freely use trademarks for artistic or non-commercial purposes without fear of legal repercussions.

In conclusion, while **freedom of panorama** is not currently enshrined in Indian trademark law, there is an opportunity for the law to evolve and incorporate clearer guidelines that would allow photographers and artists to create works freely in public spaces without infringing on trademark rights, provided these works are non-commercial and incidental. This reform would balance the rights of trademark owners with the creative freedom of artists, fostering innovation and expression in the artistic community.¹⁰

RECOMMENDATIONS:

1. Introduce a Fair Use Provision in Indian Trademark Law: While the Indian Trade Marks Act, 1999 does not explicitly provide a fair use provision similar to the U.S. Lanham Act, Section 30 outlines some exceptions for descriptive use and non-infringing uses in specific circumstances.

Interpretation: Introducing a clear fair use provision would strengthen Section 30, allowing non-commercial, artistic use of trademarks in creative works, thereby clarifying the rights of artists and photographers.

2. Establish Guidelines for Non-Commercial Use: The Trade Marks Act does not currently provide detailed guidelines regarding non-commercial use in artistic contexts.

Interpretation: Section 30 could be expanded to specifically address non-commercial use of trademarks in artistic, educational, and journalistic works, distinguishing between commercial exploitation and artistic expression.

3. Recognize Freedom of Panorama: Indian trademark law does not currently include a freedom of panorama provision, unlike some other jurisdictions.

Interpretation: The Freedom of Panorama could be interpreted within the broader context of public space usage under Section 30 (permissible uses), allowing incidental inclusion of trademarks in public photographs

¹⁰ Shaikh, S., 2022. Protection of Architectural Design under Intellectual Property Rights. *Jus Corpus LJ*, 3, p.1013. https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/juscrp3§ion=417

or artworks without constituting infringement.

4. Create a Fair Use Defense for Trademark Infringement: The Indian Trade Marks Act provides some defenses in Section 34, such as use in good faith, but it does not clearly recognize a fair use defense for non-commercial, artistic uses.

Interpretation: Incorporating a fair use defense would require a new clause under Section 34, outlining the defense specifically for artistic, non-commercial uses of trademarks, in line with international standards. These recommendations would provide clearer legal protections for artistic works while balancing the interests of trademark holders.

CONCLUSION:

In the colorful dance between creativity and legal frameworks, trademark law and photography find themselves at an intriguing intersection. This research has revealed a vital truth: art thrives on freedom, and law exists to ensure balance. India, with its rich history of artistic expression and complex legal tradition, stands at the edge of an exciting opportunity.

Imagine a world where photographers capture moments without hesitation, where incidental trademarks become part of stories rather than legal roadblocks. Where the law, far from silencing creativity, champions it. By incorporating clearer fair use provisions, embracing the freedom of panorama, and redefining guidelines for non-commercial use, India can step into a future where art and law don't just coexist but flourish together.

But beyond the policies and provisions, this is about acknowledging that the canvas of life is shared between creators and protectors. The way forward? It's an open road—lined with murals of progress, painted with bold strokes of legal clarity and vibrant shades of artistic liberty. Let's rewrite the narrative where the brush of a photographer, the pen of a legislator, and the eye of an artist create a masterpiece that celebrates expression while upholding respect.

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