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Descriptive Trademark: The Tussle for Registration

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ABSTRACT

This paper examines the registrability of descriptive trademarks, a category of marks that directly conveys the nature, character or quality of the goods or services to which they are applied and therefore ordinarily lacks the distinctiveness that trademark protection presupposes. It explains why descriptive marks are not, as a rule, registrable, and the circumstances in which descriptiveness ceases to be an impediment, namely where the mark has acquired distinctiveness or a secondary meaning. Drawing on the parallel jurisprudence of the United Kingdom, the United States and India, the paper traces the rationale for refusing any trader the exclusive right to appropriate words that describe the characteristics of goods or services, and distinguishes descriptive marks from generic and suggestive marks. It concludes that a descriptive mark may be registered only where it is capable of distinguishing goods and services and has acquired a secondary meaning, and that the judiciary, through this delineation, continues to advance the object of the Trade Marks Act, 1999.

Keywords: *Trademark, Descriptive Mark, Descriptiveness, Acquired Distinctiveness, Secondary Meaning.*

I. INTRODUCTION

In modern law, every person owns that which they create. The immaterial product of the human mind may be as valuable as land or goods. The law therefore confers a proprietary right in it, and its unauthorised use by another person amounts to a violation of that ownership. Intellectual property assets fall into two broad categories. The first is commercial, and the second is product based. Commercially based intellectual property covers trademarks, trade names, brands and geographical indications. Such commercial assets have no independent existence apart from the product or service in connection with which they are used; they are not products in themselves. The second category covers patents, copyrights and designs. No consolidated legislation governs all intellectual property rights in India; instead, they have been codified through

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piecemeal legislation. Among these is the Trade Marks Act, 1999, which governs the registration and working of trademarks.¹

A trademark means a mark capable of being represented graphically and capable of distinguishing the goods or services of one person from those of others, and may include the shape of goods, their packaging and a combination of colours. Such a mark includes a device, brand, heading, label, ticket, name, signature, word, letter or numeral. Registration of a trademark confers a valuable right. The original function of a trademark, namely to identify the personal origin or ownership of the goods to which it is affixed, has undergone considerable change with the complex methods of marketing in use today. Its function is now understood not only in terms of creating goodwill for the manufacturer, but also as an anonymous guarantee to the purchaser that the product is satisfactory, thereby securing future sales. It is natural that this development of the trademark function has brought it within the principles of the law of unfair trading, for the pirating of a trademark or trade name affects the goodwill and selling power of a business as much as other recognised acts of unfair trading.² The person in whose name a trademark is registered may take action against any person who passes off goods as those of the registered owner. Registration confers an exclusive right to use the trademark in relation to the goods in respect of which it is registered, and this right is assignable, whereas an unregistered trademark is not.

There are, however, certain tests and criteria that a mark must satisfy to be registered. The most important is distinctiveness or the acquisition of a secondary meaning.³ Distinctiveness must be judged as on the date of the application for registration. Certain marks, terms and symbols directly represent the nature and characteristics of goods and services; these are called descriptive trademarks. Because such marks are common to the trade and non-distinctive in nature, registration cannot be granted, nor can exclusive rights be conferred.

The Trade Marks Act, 1999, sets out absolute grounds for refusing the registration of a trademark, which include marks that are unable to demonstrate distinctiveness from the marks of other undertakings, that is, marks common to the trade; such marks shall not be registered. Where, however, a mark that is not distinctive at the time of registration subsequently acquires a secondary meaning and distinctiveness, protection may be granted to it. This is analogous to a common word adapted to distinguish.

¹ Thomas K. Fisher, *Trade Marks and Trade Names: Descriptive Terms: "Shredded Wheat" Not Capable of Exclusive Appropriation as Trade Name*, 37 MICH. L. REV. 1288, 1288-93 (1939).

² *Id.* at 1288-93.

³ *Kellogg Toasted Corn Flake Co. v. Quaker Oats Co.*, 235 F. 657 (6th Cir. 1916).

II. CONCEPT OF DESCRIPTIVENESS IN INDIA, THE UNITED KINGDOM AND THE UNITED STATES

Descriptiveness is the information derived from words about the appearance, nature, characteristics and sound of something. It deals with relatively specific indicators of one or other quality of a product or service. Any word that may be used to describe the character or quality of goods and services may be used only for that purpose, and not to distinguish the goods and services of one person from those of another. One of the essential elements of a good word or device mark is therefore that it should be non-descriptive. The more apt a word is to describe the goods of a manufacturer, the less apt it is to distinguish them. Words that are descriptive of goods are accordingly not regarded as *prima facie* capable of distinguishing.

A. United Kingdom

In the United Kingdom, trademark law has developed and evolved through common law remedies. Certain marks are excluded from registration on the ground that they consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, intended purpose, value, geographical origin, the time of production of the goods or of the rendering of the services, or other characteristics of the goods and services. The system recognises the tortious liability of passing off. The United Kingdom has been efficient in the protection of trademarks and other intellectual property. Within the European region, the member states were required to align their national law with European law. The current United Kingdom trademark statute is the Trade Marks Act, 1994, which incorporates the European Trade Mark Directives. There are various grounds for refusing a trademark, which include a lack of distinctiveness and descriptiveness. The following case law illustrates the law relating to descriptive trademarks in the United Kingdom.

In the *Perfection* case,⁴ although the word had been used as a trademark for soaps for a long time, registration was refused on the ground that the word "perfect" was laudatory and could not be monopolised.

In *Trakgrip*,⁵ registration was initially refused on the ground that the mark was descriptive of the goods, rubber tyres, as "track and grip". On appeal, however, the decision of the Registrar was reversed, the appellate authority holding that it was not a mark used by other traders in the ordinary course of business.

⁴ *Crossfield & Sons Ltd.'s Application (Perfection)*, (1909) 26 R.P.C. 837 (U.K.).

⁵ *Dunlop Rubber Co.'s Application (Trakgrip)*, (1942) 59 R.P.C. 134 (U.K.).

In *Update*,⁶ the mark was held to be descriptive of printed materials, as it reflected the term "up to date".

In *Century*,⁷ the mark was held to be descriptive of machinery and tools, since machines could be described as "marvels of the century".

In *Glasscan*,⁸ registration was refused in respect of glass beverage containers, since the word was descriptive and not capable of distinguishing the applicant's goods.

In *Surf Unlimited*,⁹ the words "Surf Unlimited" were held to be descriptive of internet services, since "surf" denotes the activity of visiting websites.

B. United States of America

The Lanham Act, 1946,¹⁰ governs trademark law in the United States. Like trademark laws elsewhere, it embodies the concept of distinctiveness. The concept of descriptiveness was developed from it in a decision of the United States Court of Appeals for the Second Circuit.¹¹ In that decision, the court identified four kinds of trademark recognised in United States trademark law: generic, suggestive, descriptive, and arbitrary or fanciful. It was in this decision that the court deliberated upon the descriptive mark.

The idea of the descriptive mark in the United States is similar to that in other countries. No registration is available for trademarks that are descriptive of the nature, character or quality of goods and services, but once a mark acquires distinctiveness it may be registered. United States trademark law also specifically recognises the term "misdescriptive",¹² which means that a trademark cannot be registered if it describes the nature of the goods wrongly and falsely represents their characteristics.

As the Supreme Court recognised in *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*,¹³ the incontestability provisions of the Lanham Act permit a seller to monopolise a descriptive trademark. This is a significant departure from the common law, which refused to grant property rights in trademarks unless they were inherently distinctive or had attained distinctiveness by acquiring a secondary meaning. The common law rule recognised the informational value of trademarks and the disadvantages of allowing a seller to arrogate to itself the informational

⁶ *Update Trade Mark*, (1979) R.P.C. 166 (U.K.).

⁷ *Century Trade Mark*, (1906) 23 R.P.C. 38 (U.K.).

⁸ *Glasscan Trade Mark*, (1994) R.P.C. 23 (T.M.R.) (U.K.).

⁹ *Telewest Communications plc's Trade Mark Application (Surf Unlimited)*, (2003) R.P.C. 26 (U.K.).

¹⁰ Lanham Act, ch. 540, 60 Stat. 427 (1946) (codified at 15 U.S.C. §§ 1051-1127).

¹¹ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976).

¹² 15 U.S.C. § 1052(e)(1).

¹³ *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189 (1985).

benefits of the natural meanings of words. Monopolisation of descriptive marks by particular sellers would seriously disadvantage their competitors by creating formidable informational barriers between the competitors and their potential customers. The common law's distinctiveness requirement for property rights in a trademark reflects this fact. The withdrawal of descriptive marks from the public domain, whether through incontestability or otherwise, can therefore be justified only by demonstrating some compelling countervailing interest.¹⁴

C. India

Indian trademark law has undergone many developments over the past century, and the governing statute has been replaced thrice. Initially, only the common law remedy of passing off was available to an injured person, but in 1940 the Trade Marks Act, 1940, with provisions similar to those of United Kingdom law, was enacted. In 1958, that Act was repealed by the Trade and Merchandise Marks Act, 1958, which incorporated provisions drawn from other legislation. Finally, in 1999, in compliance with the TRIPS Agreement, the Trade Marks Act, 1999, was enacted with a view to providing protection of larger interests, including the protection of unregistered trademarks and the facility of filing multi-class applications.

The concept of descriptiveness has been incorporated into the Trade Marks Act, 1999. Section 9(1)(b) of the Act, which provides for absolute grounds of refusal, states that a mark shall not be registered where it consists exclusively of marks or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service, or other characteristics of the goods or service.¹⁵

III. NATURE OF THE DESCRIPTIVE TRADEMARK, PAST AND PRESENT

Where registration has been granted in the past, it does not confer an exclusive right in any matter forming only a part of the whole of the trademark so registered.

¹⁴ Suman Naresh, *Incontestability and Rights in Descriptive Trademarks*, 53 U. CHI. L. REV. 953, 953-92 (1986).

¹⁵ The Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999, § 9(1)(b) (India). See *Hindustan Unilever Ltd. v. Three N Products Pvt. Ltd.*, 2003 (27) P.T.C. 213 (Ker.) (in rectification proceedings the burden lies on the person challenging the mark; the "Ayur" mark was struck off the register as descriptive in nature); *Cadila Healthcare Ltd. v. Gujarat Co-operative Milk Marketing Federation Ltd.*, 173 (2010) D.L.T. 141, 2010 (44) P.T.C. 318 (Del.) (the Division Bench held the mark "Sugarfree", in respect of low-calorie sugar in Class 5, to be descriptive of the nature of the goods and formed by combining two ordinary words, and not a coined word that could be used by the respondent in good faith); *Britannia Industries Ltd. v. PepsiCo Inc.*, 2013 (55) P.T.C. 605 (IPAB) (the Intellectual Property Appellate Board, Kolkata, held "Snax" to be directly descriptive of the nature of the goods, with phonetic similarity to "snacks", and thus not registrable); *Marico Ltd. v. Agro Tech Foods Ltd.*, 174 (2010) D.L.T. 279, 2010 (44) P.T.C. 736 (Del.) (the mark "Losorb" for edible oil, being essentially a combination of common English words, was descriptive, and no monopoly could be claimed); and *Dabur India Ltd. v. Real Drinks Pvt. Ltd.*, 2014 (57) P.T.C. 213 (Del.) (the mark "Real" for juice was held not descriptive but suggestive of the freshness of the juice).

A given product has only so many attributes that interest buyers. If one producer is permitted to appropriate the word that describes such an attribute, that producer will obtain rents measured by the higher price received for the brand, because it is so costly for rivals to inform their customers of the attributes of their own brands without using the descriptive word that has been appropriated.¹⁶

The Trade and Merchandise Marks Act, 1958, included descriptiveness as a ground for refusing a trademark. It provided that a trademark shall not be registered in Part A of the register unless it contains or consists of one or more words having no direct reference to the character or quality of the goods.¹⁷

Although descriptiveness was a ground of refusal, there were lacunae in its enforcement. In the pre-TRIPS era, the approach of the trademark granting authority was liberal, and so the treatment of the descriptive mark differed from that of the present.

In *S.B.L. Ltd. v. Himalaya Drug Co.*,¹⁸ the court held: "Reverting back to the facts of the case, from the documentary evidence filed we are satisfied that there are about 100 drugs in the market using the abbreviation 'Liv' made out of the word Liver, an organ of the human body, as a constituent of names of medicinal or pharmaceutical preparations with some prefix or suffix, mostly suffixes meant for treatment of ailments or diseases associated with the liver. Liv has thus become a generic term and publici juris. It is descriptive in nature and common in usage. Nobody can claim an exclusive right to the use of 'Liv' as a constituent of any trade mark. The class of customers dealing with medicines would distinguish the names of the medicines by ignoring 'LIV' and by assigning weight to the prefix or suffix so as to associate the name with the manufacturer. The possibility of deception or confusion is reduced practically to nil in view of the fact that the medicine will be sold on medical prescription and by licensed dealers well versed in the field and having knowledge of medicines. The two rival marks Liv 52 and LIV-T contain a common feature Liv which is not only descriptive but also publici juris; a customer will tend to ignore the common feature and will pay more attention to the uncommon features, that is, 52 and T. The two do not have such phonetic similarity as to make it objectionable."

In *Hindusthan Development Corporation Ltd. v. Deputy Registrar of Trade Marks*,¹⁹ the Calcutta High Court held that the words "character" or "quality" of the goods meant their nature, peculiarity or quality, and not merely their composition.

¹⁶ Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 759-800 (1990).

¹⁷ The Trade and Merchandise Marks Act, 1958, No. 43, Acts of Parliament, 1958, § 9(1)(d) (India).

¹⁸ *S.B.L. Ltd. v. Himalaya Drug Co.*, A.I.R. 1998 Del. 126.

¹⁹ *Hindusthan Development Corporation Ltd. v. Deputy Registrar of Trade Marks*, A.I.R. 1955 Cal. 519.

At present, following the Act of 1999, the registry is charged with the duty of examining the registration of trademarks, which has enabled a more thorough treatment of the registration of a mark. The registry construes each mark in a strict sense, having regard to its implications for the trade of other competitors. Although a mark that is descriptive of the nature, characteristics and quality of the goods cannot be registered, the registry, after examining all the relevant points and issues, may register such a mark where it finds that the mark has acquired a secondary meaning.

IV. DIVERGENCE FROM THE CONCEPTS OF GENERIC AND SUGGESTIVE MARKS

A descriptive trademark differs from the concepts of generic and suggestive marks. Generic marks are those which, although they relate to the place or region where the goods were originally produced or manufactured, have lost their original meaning and have become the common name of such goods, serving as a designation for, or indication of, the kind, nature, type or other property or characteristic of the goods.

Suggestive marks, by contrast, are those which merely suggest something about the goods. A suggestive trademark tends to indicate the nature, quality or a characteristic of the products or services in relation to which it is used, but does not describe that characteristic, and requires imagination on the part of the consumer to identify it. Suggestive marks invoke the consumer's perceptive imagination. A term is suggestive if it requires imagination, thought and perception to reach a conclusion about the nature of the goods. Suggestive terms, such as Weight Watchers and Playboy, have an informational component as well as potential source-identification functions.²⁰ The informational component of suggestive terms is, however, relatively weak and is overshadowed by the source-identification attributes. Moreover, because the number of suggestive terms is bounded only by human imagination, there is little reason to be concerned whether competitors can find terms that are equally suggestive of product characteristics. From a competitive-market perspective, therefore, there is no reason to deny immediate protection to suggestive terms.²¹

There is a slight difference between descriptive and suggestive marks. Suggestive trademarks are not barred from registration, nor can their entries be removed from the register. A party able to prove that a trademark is suggestive will accordingly be able to retain it. A mark, though descriptive of the nature of goods, may be granted protection where it is wholly different in

²⁰ *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 486 F. Supp. 414, 420 (S.D.N.Y. 1980); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259 (S.D.N.Y. 1990).

²¹ Lee B. Burgunder, *Trademark Protection of Product Characteristics: A Predictive Model*, 16 J. PUB. POL'Y & MKTG. 277, 277-88 (1997).

common trade. The differentiation between descriptive and suggestive marks rests on a subjective analysis of the trademark. If the trademark conveys a connotation different from the nature and characteristics of the goods, it is a valid trademark and not a descriptive one. Such marks differ from generic terms, since they do not portray or signify a single specific class of goods but constitute marks common to the trade.

In recent years, the judiciary has lowered the evidentiary threshold for marks that fall into the suggestive category rather than the purely descriptive or laudatory categories. A landmark shift occurred in *Ashim Kumar Ghosh v. Registrar of Trade Marks*.²² The Delhi High Court overturned a refusal of the word mark "SoEasy" for teaching materials. The Trade Marks Registry had argued that the mark was purely descriptive and laudatory, and had rejected it because it was filed on a "proposed to be used" basis without acquired distinctiveness.

The High Court clarified, however, that if a mark merely suggests an outcome, for example that a learning process is easy, rather than directly describing the structural characteristics or ingredients of the product, it qualifies as an inherently distinctive suggestive mark. This ruling establishes that "proposed to be used" marks do not require immediate proof of a secondary meaning if they successfully invoke the consumer's imagination rather than state a literal product attribute.

V. REGISTRATION TEST

To determine whether a word is descriptive, three points are considered with the utmost importance. First, the word must be considered in relation to the goods; the test is to conjoin the mark with the goods and consider what the word would mean to the average purchaser concerned with the goods. Secondly, the speed of the purchaser's mental reaction to the word must be considered. Thirdly, regard must be had to the particular customers concerned with the goods, that is, whether the goods are bought by the general public or by a select and restricted class of very knowledgeable purchasers.²³

A further consideration is the competitor's need test. Heavily weighed in recent Indian jurisprudence, courts now explicitly ask whether other traders in the same market will legitimately need to use the exact term to describe their own products. If the answer is yes, the mark is deemed merely descriptive and barred from registration in order to maintain market

²² *Ashim Kumar Ghosh v. Registrar of Trade Marks*, C.A. (COMM.IPD-TM) 48/2025 (Del. H.C.).

²³ STEPHEN PERICLES LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION vol. I (Harvard Univ. Press 1975).

equity. If other traders can easily describe their goods without using that specific phrase, the objection under Section 9(1)(b) is significantly weakened.

The plaintiff must show more than a subordinate meaning that applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer. This primary significance test, which was formulated to determine whether an originally descriptive term had acquired a secondary meaning, has since been used as the standard test for genericness even in cases involving originally valid non-descriptive trademarks. Thus, if a word or device is found to be non-descriptive or arbitrary, it would be perfectly justifiable to register it as a trademark.

As an alternative to the primary significance test, an effect-on-competition test would directly assess the effect on competition of allowing the continued use of a particular term as a trademark. That test involves the determination of the relevant genus, the determination of the character of the mark, and a weighing of the impact on competition.²⁴

VI. IMPORTANCE OF ACQUIRED SECONDARY MEANING

Such marks are capable of registration, but only once a secondary meaning has been derived from the mark, name, symbol or graphical representation.²⁵ These should be coined terms or should acquire a different connotation, and their use should be consistent with that secondary meaning. The secondary meaning gives the mark its distinctiveness.

Secondary meaning, as applied to goods or services, thus means public recognition of the term as an indication of a single source for the goods or services.²⁶ Secondary meaning, as applied to business or commercial names, defines the market within which the name is identified by the public with the particular business. Difficulty arises when a court becomes confused and is willing to protect a technical trademark, which by definition requires no secondary meaning, only in a market in which it has achieved recognition, that is, a secondary meaning in the other sense of that term.²⁷

Secondary meaning is typically established by several evidentiary factors, including advertising expenditure, sales volume, unsolicited media coverage, requests for licences, the duration of exclusive use, and consumer surveys. As regards advertising expenditure, the degree to which

²⁴ John F. Coverdale, *Trademarks and Generic Words: An Effect-on-Competition Test*, 51 U. CHI. L. REV. 868, 868-91 (1984).

²⁵ The Patents Act, 1970, No. 39, Acts of Parliament, 1970, § 9(1) proviso (India).

²⁶ *Trade Name Protection: Relaxation of the "Secondary Meaning" Requirement and Its Implications*, 1962 DUKE L.J. 307, 307-18 (1962).

²⁷ Sidney A. Diamond, *Untangling the Confusion in Trademark Terminology*, 65 A.B.A. J. 1523, 1523-26 (1979).

the promotional efforts emphasise the word or attribute as a mark is important, although the sheer size of the budget alone can be sufficient. As regards consumer surveys, courts normally expect that a substantial portion of the relevant consuming public understands the source significance of the mark. The percentage of respondents required varies and depends on the strength of the other evidentiary factors as well as on the descriptiveness of the mark. Indeed, secondary meaning can be demonstrated without any consumer surveys at all. As a general rule, however, percentages of more than 50 per cent are preferable, although 50 per cent can clearly be enough,²⁸ and less than 50 per cent may suffice in special circumstances. As might be expected, survey design is often a crucial aspect whenever surveys are used to demonstrate secondary meaning.²⁹

This implies the possibility that certain words, although primarily descriptive of the character or quality of the goods and services, may, by reason of use, lose their descriptive meaning and acquire a secondary, distinctive meaning, so that they indicate that the goods and services in connection with which they are used are made by a particular manufacturer.³⁰

A mark is said to have acquired a distinctive character or secondary meaning where it fulfils the following requirements. First, the mark must have been used by an undertaking as a means of identifying the trade origin of the goods. Secondly, the effect of that use must be that the relevant public, or a significant proportion of it, has come to rely upon the mark, in the course of trade, as a means of identifying the trade origin of the goods. Thirdly, where the mark is but one of a number used by the undertaking to identify the trade origin of the goods, the competent authority must be satisfied that the mark applied for has, by itself, come to foster a concrete expectation among the relevant public that goods bearing that mark originate from, or under the control of, a single undertaking.³¹

A descriptive mark may be entitled to protection if it has assumed a secondary meaning which identifies it with a particular product or as being from a particular source.³²

²⁸ *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1127 (Fed. Cir. 1985); *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 381 (7th Cir. 1976).

²⁹ Burgunder, *supra* note 21, at 277-88.

³⁰ *Living Media India Ltd. v. Jitender V. Jain*, 2002 (25) P.T.C. 61 (Del.) (concerning the validity of the mark "AAJ TAK", the Delhi High Court granted an injunction, observing that, although the words "AAJ" and "TAK" may individually be descriptive dictionary words that cannot be monopolised, their combination is protectable as a trademark where it has been in long, prior and continuous use in relation to particular goods and has thereby become identified with a particular person).

³¹ *Duckham & Co.'s Trade Mark Application*, (2004) R.P.C. 28 (U.K.).

³² *Unfair Competition: Descriptive Words: Secondary Meaning*, 4 VA. L. REV. 418 (1917).

VII. THE DOCTRINE OF COMPOSITE MARKS

Modern registration practice has adapted to favour composite marks, even where they feature descriptive terms. The Delhi High Court has intervened to protect registrations in which a generic or descriptive word, such as "STORE", forms part of a larger unique layout, label or composite brand name. The court has ruled that the presence of a descriptive word within a composite trademark should not result in automatic disqualification or cancellation under Section 9(1)(b), provided that the mark, viewed as a whole, possesses distinctive visual arrangements or combinations.

VIII. CONCLUSION

In the modern world, there exists cut-throat competition among business corporations. At times, in order to gain an advantage, they ride on the goodwill of their competitors, or they adopt techniques by which they describe the nature and characteristics of the goods. Those aspects of trademark law that extend protection of a mark beyond the particular geographic market within which the firm uses the mark, if it uses the mark at all, rest on the assumption that the set of better marks is infinite, so that the appropriation by the first entrant of one mark does nothing to increase a second firm's cost of entry into the market. Given the preference of many firms for fanciful marks that have been tested by marketing research, or for marks that are not fanciful but instead call to mind some quality of the product, that assumption ought to be regarded as more controversial than it currently is.³³ Time and again, the descriptive trademark should not be monopolised through registration, in order to maintain a fair and healthy market environment. The purpose of excluding such marks is to prevent the registration as trademarks of signs or indications that are no different from the usual way of designating the relevant goods or services or their characteristics, and that cannot fulfil the function of identifying exclusively the undertaking that markets them. Such marks are thus devoid of distinctive character. Although registration may be granted upon proof of acquired distinctiveness or a secondary meaning, the proof of such acquisition takes into account the increase in total sales and revenue and the expenditure on advertising.

It may be observed that, in the United States, the United Kingdom and India, the law and the views on descriptiveness are almost the same. All these nations have included descriptiveness as a ground for refusing or removing a mark from registration. This has been expressly codified in the United States, while India and the United Kingdom give effect to the principle through

³³ Carter, *supra* note 16, at 759-800.

judicial interpretation and decisions. There exists a very thin line of difference between a suggestive mark and a descriptive mark; it is a subjective analysis that determines the nature of the mark and, ultimately, its registrability. It should be noted that the purpose of granting relaxation to descriptive marks is to make the consumer aware of the product; it is not fair to other entities in the same trade for a person to appropriate a descriptive mark in a manner that hampers the interests of other traders.
