

## The Fight against Fake Food

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A trademark, by definition, is a word/phrase/symbol/design that is capable of distinguishing the source of the goods and/or services (in relation to which it is used) of one party from another. This enables consumers to identify goods/services that originate from a particular brand or business and acts as an indicator of the nature and quality of the good/service they are availing. Such indication can stem from various factors, such as, the name, design, get-up, fonts and colors used in packaging, slogans, etc. In essence, a trademark ties consumer perception with the goodwill and reputation associated with a brand or business, thereby playing a very important role in purchase decisions related to all commercial industries.

One such industry, where a trademark is inherently linked to the quality of the goods and/or services of a brand or business, is the food industry. Given that in the food sector, the health and safety of the public at large is of primary concern, the value of a trusted trademark that instills confidence in the mind of a consumer, increases manifold. Moreover, once consumers are convinced about the reliability of a food brand, they will more often than not return to the brand they are familiar with, even if there are cheaper replacements available in the market. In such a scenario, counterfeit or fraudulent food products not only pose a major risk to the health and safety of consumers, but also act as a major threat to brand owners who are likely to suffer a loss in revenue and reputation.

In India, the regulation and supervision of food products in circulation in the country rests with the Food Safety and Standards Authority of India (FSSAI), which is the apex regulatory body in this regard. The FSSAI was established under the Food Safety and Standards Act, 2006, which covers activities throughout the food distribution chain, from primary production through distribution to retail and catering. In addition to regulating the manufacture, storage, distribution, sale and import of food products, the aforementioned statute also ensures availability of safe and healthy food for human consumption. The FSSAI regulations in India have categorized food products into two categories, namely, **standardized** and **non-standardized** or proprietary.<sup>[1]</sup>

Some pertinent points to note in this regard are:

<b>Standardized food products</b>	<b>Non-standardized/Proprietary food products</b>
Standardized food products <b>have prescribed standards</b> and do not require	Non-standardized/Proprietary food products on the other hand are those for which <b>no identity standards</b> have been
prior approval for manufacture, storage, distribution, sale or import of the same	prescribed in the regulations as they are not known or not yet ascertained
A manufacturer/distributor/importer of standardized food products <b>only requires an FSSAI license</b> to commence business	Whereas, for a manufacturer/ distributor/ importer of non-standardized food products <b>obtaining a license is subject to product approval</b> . Such product approval for non-standardized foods has to be done within <b>ninety (90) days</b> .

- Traditional foods (without any new ingredients/additives) in India **do not** require product approval owing to customary practices;
- The above-noted regulatory regime **is not applicable to exporters** as the exported food products are not being sold to consumers to India;
- As regards importing food products, India is known to have strict packaging and labelling requirements that ensure imported food products carry all the relevant information on the packaging/labelling before entering the market for sale/consumption. For more information on rules relating to packaged commodities, please refer to our articles on Legal Metrology<sup>[2]</sup>

In light of the above, the health and safety risks of ingestion of counterfeit/unregulated food products that are circulating in the market without any rigorous quality control become imperative. In this regard, the Trade Marks Act, 1999, offers remedies to counter infringement and counterfeiting under Section 135, in addition to Sections 102 and 103, which deal with falsification and false application of a trademark. Notably, Section 103 mandates imprisonment of three (3) years and a fine up to two lakh rupees as penalties for counterfeiting and can be employed in cases of fake packaging. Another effective recourse against a counterfeiter of a food product can be taken under the Prevention of Food Adulteration Act, 1954, which prohibits manufacture and sale of “misbranded food” and provides stringent penalties for counterfeiters who are infringing trademark rights. Since charges under multiple statutes can be clubbed into one, these remedies are not mutually exclusive of each other and may be pleaded together.

However, brand owners are now coming up with ingenious ways to combat large scale counterfeiting on their own.

- For instance, in 2017 Cargill Foods India announced that they will be investing approximately INR 2,00,00,000 (USD 279152.20) in anti-counterfeiting technology for its cooking oil brand Gemini.<sup>[3]</sup>
- Brand owners are also increasing consumer reliance on packaging by recognizing it as a fundamental component of source indication for food items. What is required now, is a need for brand owners to think one step ahead and ensure they have all the requisite protections that they can enforce against counterfeiters.

For instance, after acquiring copyright and trademark rights for their packaging/labelling, brand owners can apply to register their trademarks with the Customs Authority of India.