

## UNIT 5

**Design Thinking for Customer Delight:** - Understand Design Thinking as a problem-solving process. Describe the principles of Design Thinking. Describe the Design Thinking process.

**Sales Skills to Become an Effective Entrepreneur:** - Understand what customer focus is and how all selling effort should be customer-centric. Use the skills/techniques of personal selling, Show and Tell, and Elevator Pitch to sell effectively.

**Managing Risks and Learning from Failures:** - Identify risk-taking and resilience traits. Understand that risk-taking is a positive trait. Learn to cultivate risk-taking traits. (Practical Application) Appreciate the role of failure on the road to success, and understand when to give up. Learn about some entrepreneurs/risk-takers. (Practical Application).

**Are You Ready to be an Entrepreneur:** - Let's ask "WHY" Give participants a real picture of the benefits and challenges of being an entrepreneur. Identify the reasons why people want to become entrepreneurs. Help participants identify why they would want to become entrepreneurs.

### Design Thinking

Design thinking is a process by which designers approach problem solving. It incorporates analytical, synthetic, divergent and convergent thinking to create a wide number of potential solutions and then narrow these down to a “best fit” solution.

### Understand design thinking as problem solving process

Design Thinking is a problem solving framework. The goal of improving lives is an important endpoint to the process of design thinking. In fact, it's what design thinking is all about: finding fresh, creative solutions to problems, but in a way that puts people and their needs first.

By embracing design thinking in our approach to problem-solving, we step outside the box and encounter two realisations:

1. Problems aren't always solved the first time. ...
2. Design doesn't describe an ending, it defines a process. ...
3. Outline the problem. ...
4. Cultivate a number of ideas. ...
5. Develop the best ideas. ...
6. Execute.

The design thinking process needs to answer four questions — What is? What if? What wows? What works? — each representing a different stage of a design experience. “What is” refers to the present. “What if” builds on the present to envision a new future. “What wows” helps teams focus on solutions that stand out and “What works” tests possible solutions with actual users in the real world.

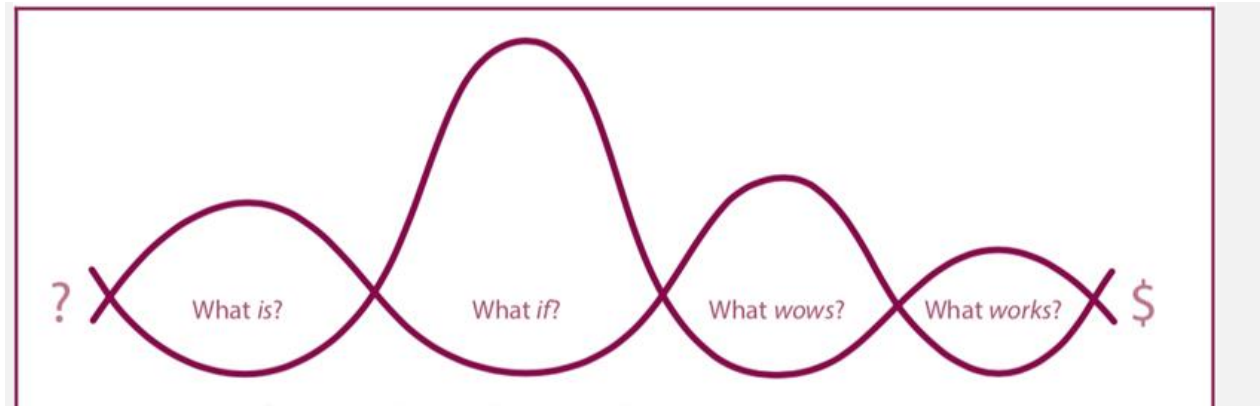


Figure 1, Innovative ways companies are using design thinking

At a glance, the journey from “What is” to “What works” may seem linear. However, as in any design thinking framework, it is iterative. Pivoting and self-correcting guide the process as unknowns become knowns. Design tools such as customer journey mapping, mind mapping, brainstorming and rapid prototyping serve to the purpose of helping designers and researchers uncover hidden truths, hence making a seemingly linear process become a feedback loop — “Build, Measure, Learn” focused on swiftly improving the existing solution.

Humans use basic reasoning patterns to solve problems by comparing different settings of knowns and unknowns:

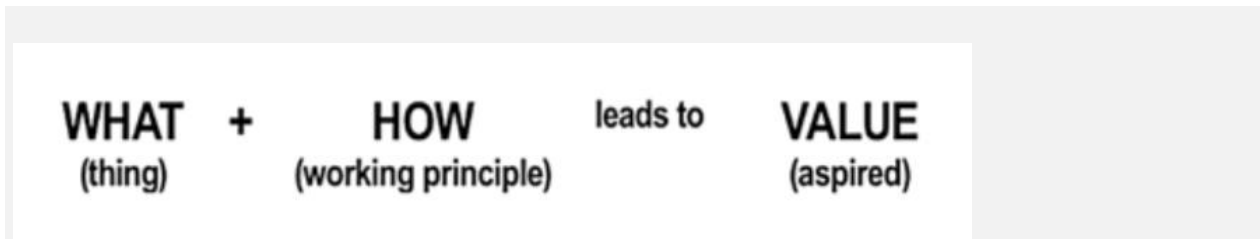


Figure 2, the core of design thinking and its applications

The above figure represents what he defines as “Deduction”: by knowing the “what” and the “how” the result is predictable. In another method — “Induction” — there is a missing variable, which is the “how.” To affirm that this form of reasoning is the way hypotheses are created and that researchers and scholars set out critical experiments and rigorous tests to falsify them.

A design-driven approach, however, requires an alternative process. To prove that value is created through problem-solving, “Abduction” method is used, which is subdivided in two: Abduction-1 and Abduction-2. The former is more conventional and objective as both the “value” and the “how” are known. The latter is more complex since the only known variable is the “value”:

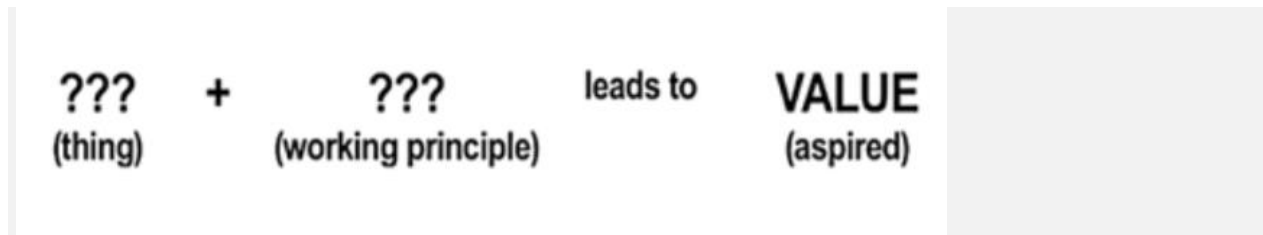


Figure 3, the core of design thinking and its applications,

Abduction-2 allows designers to focus on the problem as they understand that the need for a new solution derives from an aspiration. The primary challenge lays in identifying the working principle that leads to creating the value. As an example, one may argue that going to the supermarket to purchase groceries is exhausting and time-consuming. Identifying such problem, both startups and traditional businesses created value to customers by offering groceries delivery through online shopping. In said example, the “value” is the convenience of receiving your groceries at home, the “how” is online shopping, and the “what” is a smartphone app or a website. As noted, to tackle this problem designers worked backward, starting from the known variable: the “value.”

Interestingly, as technology and human needs evolve, known variables can become unknown, creating a problem-solving loop. Using the same example, as people use online services to purchase groceries, much has been said about the constraints of the convenience mentioned above as receiving groceries at their doorsteps no longer suffice. People do not want strangers picking the fruits and vegetables they will eat. They want both the convenience and the experience. As a consequence, the equation is back to its initial stage. Identifying the opportunity, a few entrepreneurs in Silicon Valley are building self-driving grocery stores to solve the new equation. Customers request a self-driving store through a mobile app, and when it arrives, the vehicle opens its doors as customers approach. They pick the desired items and instantly pay for them. This is innovation and problem-solving at its finest.

### **Ethics in design thinking**

Deontology: a right action is the result of one’s moral obligation and duty;

- Communicative ethics: rational speech defines what is right and rational people understand each other;
- Virtue ethics: a method focused on one’s moral character — someone of high moral character acts right;
- Consequentialism: outcomes are more important than the process;
- Casuistry: acting right depends on the particulars of a problem — cases are resolved based upon comparison with similar cases.

# Principles of Design Thinking

## 1. Problem Solving Attitude

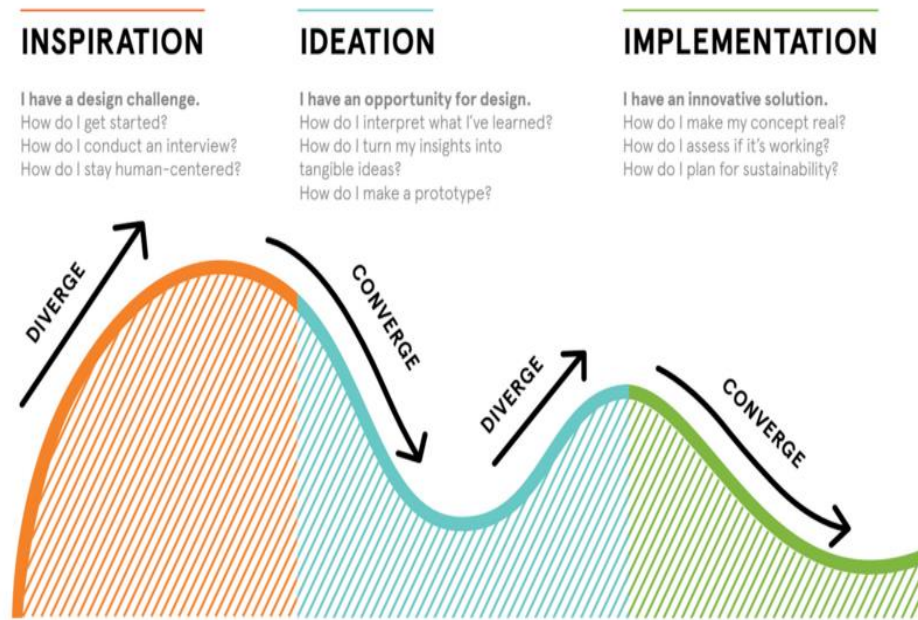
The ultimate aim of the design thinking methodology is to **intercept problems and develop the best solution for each of them**. With this approach the context is observed and studied, problems are intercepted and possible solutions are drawn. These are then made in prototype and tested with the user, then reviewed based on the feedback received. With this approach, we face problems of different magnitudes, even very complex ones. The focus remains on solving the problem. In this a lot also plays the **creative component**, and the involvement of inexperienced people who, as we will see in the next pills, manage to make a contribution that is not contaminated by the conformism of the sector experience (what often leads to saying) it is always like this and it went well, why change? ).

## 2. Human-Centered Design

This is the most popular feature of Design Thinking. With a “**people-first**” approach it is possible to intercept the real needs of the user, usually not visible to management. In an **empathic** way, we observe and analyze what is called the **pains** and the **gains** of the user, that is his frustrations, but also his interests. This **bottom-up approach**, which starts from the end-user to study the best implementation for achieving the business objective, also brings with it a **strong user engagement** value. They feel valued, important. And having participated directly in the solution design phase, the **training phase for the adoption of the final solution will also be easier (if not useless)**.

## 3. Iterative Approach

The principle of cyclic iteration sees the alternation of three main phases: **Inspiration**, **Implementation**, and **Ideation**. For each phase, it is possible to identify **divergent** (exploratory) moments and **converging** moments (of “grounding”). The iterative feature allows you to review and refine the designed solution up to the “optimal” one.



## Process Of Design Thinking

### 1. Empathize

Empathy, by definition, is the intellectual identification with or vicarious experiencing of the feelings, thoughts or attitudes of another.

The first stage is that Empathize the user. This is where you'll sit with real consumers and end-users to understand their point of view. Empathy requires **understanding the pain points** and the day by day truth of your target audience. It additionally requires some information about learner's motivations and needs, which probably won't be self-evident.

Designing with empathy incorporates doing the majority of that and going an additional step. It requires really envisioning the experience of work, learning, and critical thinking from the audience's point of view. Empathy gaining is often described as '**need-finding**' in that you are discovering people's explicit and implicit needs so that you can meet those needs through design. A need is a physical, psychological or cultural requirement of an individual or group that is missing or not met through existing solutions.

### 2. Define

The second stage is Defined as a **problem**. Empathize help to define the problem. Therefore, This stage-based on What you have learned about your customers and the context. Therefore, This is the place you will examine your **perceptions and integrate** them so as to characterize the centre issues that you and your team have distinguished as yet. Designers in your team assemble incredible plans to set up highlights, functions, and whatever other components

that will enable them to take care of the issues or, at any rate, enable users to determine issues themselves with the base of trouble.

### 3. Ideate

In this third stage Ideate. It is **Brainstorm** and comes up with the new creative solution. In this stage, the team should be starting to “*think outside the box*” to identify the new creative solution. Ideating is about **inventiveness and fun**. In the ideation stage, the amount is supported. Consequently, No thought is too fantastical and nobody’s thoughts are rejected. Brainstorm and Worst Possible Idea sessions are commonly used to invigorate free speculation and to grow the issue space.

### 4. Prototype

After the ideation, then move on to the Prototype Stage. Design thinking is that you won’t have any answers about the **feasibility of your idea** until you test it with real users. This is the purpose of prototyping. A prototype can be a sketch, model, or a cardboard box. But depending on your resources, there are many ways for you to get creative in this step, using found materials or setting creative limitations on budget. The prototype is built to **think** and **answer** questions that get you closer to your final solution. Two common categories of prototypes used by designers include the **Concept Prototype** and the **Working Prototype**.

### 5. Test

The final stage of the Design Thinking process is Test. The purpose of testing is to learn **what works and what doesn’t and then iterate**. Start building, Don’t spend too long on one prototype, Build with the user in mind. For example, prototyping can be attempted at an opportune time in the task — in front of ideation — so as to find increasingly about the user. Basic models can be created, test thoughts, yet to see increasingly about how users work once a day.

From here, specific teams or directors may further refine thoughts or even make the last move to choosing a real idea with which to push ahead. Regardless, it’s basic to team up **transparently** with customers and end-users. Be that as it may, in an iterative procedure, the outcomes produced during the testing stage are regularly used to reclassify at least one issues and advise the comprehension regarding the users, the states of utilization, how individuals think, act, and believe, and to sympathize.

## **Sales Skills to Become an Effective Entrepreneur**

Selling is an art largely associated with the behavioral skills of the sales personnel of a sales organization. In a competitive marketplace selling is performed using scientific methods of product presentation, advertising and various approaches drawn to take the customer into confidence.

### **Customer Centric Selling**

Customer Centric selling can be a beneficial approach to implement. The Customer Centric sales methodology promotes meaningful conversations with prospects to identify their needs and find solutions that solve their challenges. The salesperson targets key decision makers and asks questions to understand their situation, align with their needs, and offer relevant solutions.

Customer Centric behaviour hinges on eight tenets:

#### ***1. Converse situationally instead of making presentations.***

Customer Centric selling rests on prioritizing empathy for the customer above all else. That means understanding where they're coming from and the specific situations they might be dealing with. One-size-fits-all presentations aren't personal enough. With this methodology, one needs to be able to adapt and converse based on the customer's individual needs and experiences.

#### **2. Ask relevant questions instead of offering opinions.**

Again, empathy is the operative concept with Customer Centric selling. Sales person wants customers to listen to him and customer should feel like the sales person is genuinely concerned with their best interest, and understand that he is thinking about solutions specific to their individual needs. If the sales person is dominating the conversation with opinions and not considering their perspective, then the sales person is not engaging in Customer Centric selling.

#### **3. Focus on the solution instead of the relationship.**

The key to Customer Centric selling is to understand that the sales person's priority isn't selling — it's solving. The point of the whole process is to understand a specific situation for an individual customer and offer a fitting solution. If the sales person can do that, a solid relationship should follow. But, simply building that relationship can't be your main priority.

#### **4. Target decision-makers instead of users.**

Customer Centric selling is focused on how a product is used and what specific problems it can consistently solve. It's less about the product's features and more about what day-to-day use of it looks like. That kind of selling is tailored towards the people that can make vendor selections and free up unbudgeted funds for a full company as opposed to individual users who might be more interested in fancy bells and whistles.

#### **5. Promote product usage to garner interest instead of the product alone.**

This point ties into the one above. Customer Centric selling revolves around showing how using the product you're selling will make life easier for your prospect. Instead of discussing a product's features and assuming your potential customer will figure out how to apply them on their own, show what the product can do and demonstrate how it can solve their specific problems.

## **6. Strive to be the best seller rather than the busiest.**

Quality over quantity — that's the name of the game when it comes to Customer Centric selling. According to this methodology, it's better to apply your effort toward finding solutions for fewer individual customers than to spread yourself thin and halfway-commit to several.

## **7. Close on the buyer's timeline rather than the seller's.**

The whole concept of Customer Centric selling is selling based on the customers best interests and specific dilemmas. Getting there isn't always going to be easy, quick, or straightforward. Don't press the customers to stick to your schedule. Ideally, you'll be able to help your customer come to a resolution on a schedule that works for both of you. But ultimately, it's *their* solution. It's *their* business. So, it's going to have to happen on *their* timeline.

## **8. Empower buyers to buy instead of convincing them.**

The fundamental reason for every instance of Customer Centric selling is simple — the customer has a problem. The job of a salesperson, is to empower them in their effort to solve it. Salesman's priority should be to show how the product fits that solution — not how awesome the product happens to be in general.

In sales, the prospect is the priority. Their success should be the focal point of any deal you make. Every sales transaction should enable a buyer to achieve a goal, solve a problem, or satisfy a need.

Finding the sales methodology that allows one to consistently fulfil those ends is central to creating meaningful sales efforts that will build productive, mutually beneficial relationships with loyal customers.

## **Personal Selling**

Personal selling is a distinctive communication form because it is a two-way communication that involves social interaction with prospective buyers. It has been the oldest form of marketing that started when peddlers moved from door to door to sell their products. Personal selling declined during the first quarter of the twentieth century because of heavy demand by the public.

### **Definitions of personal selling**

1. Philip Kotler defines personal selling as —a face-to-face interaction with prospective purchasers for the purpose of making sales.
2. Irving J.Shaprio defines personal selling as —an art of successfully persuading prospects or customers to buy products or services from which they can derive suitable benefits, thereby increasing their total satisfaction.
3. Personal selling is an oral presentation of goods to one or more prospective customers to promote sales.

It helps in the transfer of the title a face-to-face interaction between the sales person and the buyers. The sales people become aware of the problems of the buyers and suggest suitable products or services to satisfy their wants.

### **Significance of personal selling**

The significance of personal selling are as follows.

- a) Personal selling is an important ingredient in the promotion mix.
- b) It has been observed that twenty percent of the sales are affected through personal selling.



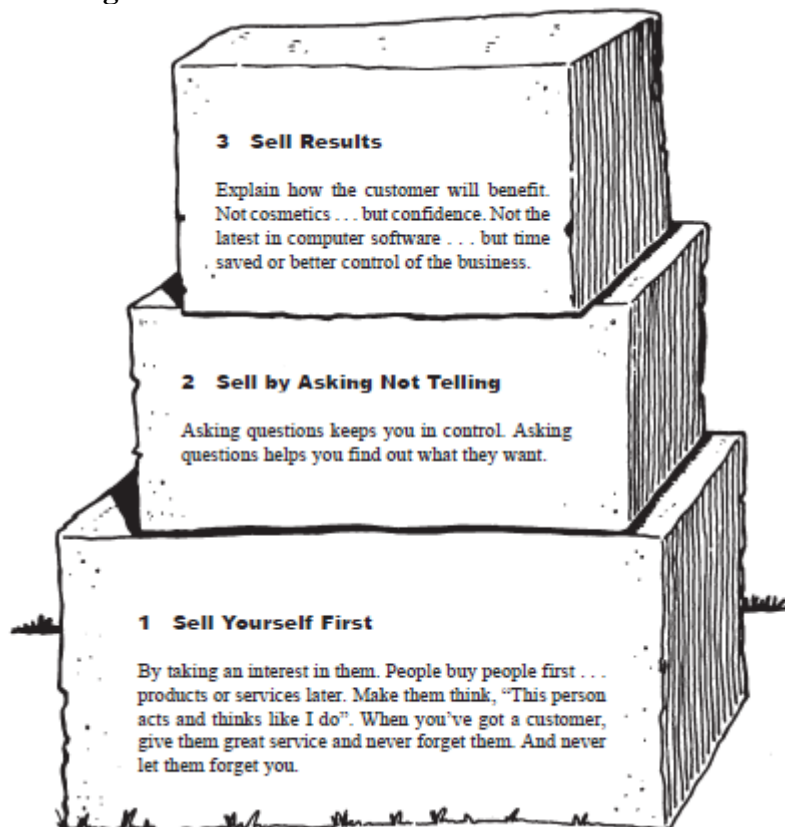
- c) By personal selling the salesman reaches the prospective buyers whom other promotional measures cannot reach.
- d) Personal selling is flexible, as it can adjust to the immediate reactions of the potential buyers.
- e) Feed back of sales efforts is possible in personal selling.
- f) Personal selling is the easy way to find the target consumer.

### **Limitations of personal selling**

The limitations of personal selling are as follows:

- a) Personal selling involves substantial costs of travel, literature publication, samples, surveys, management and control.
- b) It is less attractive for small companies.
- c) Sales people do not take much interest in sales promotion, they waste their time and shift to other.
- d) Personal selling cannot become effective without proper training and adequate motivation of sales persons.

### **Building blocks that Lead to Sale**



### **1. Sell Yourself First**

#### **How You Look**

Think how you should look and act before you actually begin selling.

The easy way to find the answer is to reverse things. Look at it from your customers' point of view. If you were in the market for the product or service that you provide, what would you expect?

## **The Right Attitude**

To succeed in selling, you need a combination of:

- product knowledge
- selling skills
- the right attitude.

How important do you feel these three factors are relative to each other? Is *your* success mainly due to product knowledge? Or to selling skills? Or to attitude?

### ***Attitude is more important than ability.***

This does not mean that product knowledge and selling skills are unimportant. They are vitally important. However, in order to get the best results, you have to think right.

You need a positive mental attitude.

Ten factors that make salespeople more successful:

- Enthusiasm
- Ability to close the sale
- Product knowledge
- Looks after the customer
- Plans use of time well
- Good listener
- Answers objections better
- Makes a good first impression
- Good talker
- Has better contacts.

## **2 Sell by Asking Not Telling**

Why? Well, who knows more about the customer's needs - you or them?

Ask questions. Listen.

- It avoids mistakes and arguments
- It helps you discover what will motivate them to buy
- You control the conversation
- They feel important
- And they are talking about a topic that they find fascinating. What is it?

## **3 Sell Results**

People do not buy things.

People buy what things *do* for them.

This is an absolutely vital point and, without a total understanding of it, you will not make many sales!

- People don't buy boxes of matches, they buy a box of flames, ie *what matches do for them, not what they are.*
- People don't buy make-up or curling tongs, they buy confidence, ie *what things do for them, not what they are.*
- People don't buy a box with a cathode ray tube in it, they buy entertainment, ie *what a television does for them, not what it is.*

## **Show and Tell – Selling Skill**

The most successful companies are those that go back to the kindergarten basics of Show & Tell, and effectively integrate the "Sell" component. Today, multimedia technology allows companies to show their products more effectively than ever. Computer-based multimedia is everywhere - the Internet, trade shows, motion pictures and television. Interactive media platforms such as Macromedia Director, Macromedia Flash and Colorado's own Anark Studio have brought multimedia to the masses, making it easier for companies to better show their worth, tell their tale and close a sale.

The power of interactive media is simple: to show something in an engaging, powerful and often entertaining way. Nevertheless, just as giving a man a scalpel does not make him a surgeon, giving a man multimedia tools does not necessarily make him a better marketer or salesperson. With that in mind, how do you best utilize the Show & Tell & Sell strategy to maximize your sales and marketing efforts? In the world of marketing, it is well known that the fundamental framework of good copywriting is Attention, Interest, Desire and Action - AIDA. Although the AIDA framework was designed for telling an audience about a product in written copy, it is made even more powerful by adding "show" and "sell" components in a multimedia environment.

- First, you must grab the audience's "Attention." In the written word, this is accomplished through exciting headlines and great lead sentences. Show & Tell & Sell scenario can be made even more effective because, what you show can create an experience that evokes emotion. The key to the attention stage is to captivate your audience with something they have never seen before. Then, tell them what they saw and how your product or service made it possible. Finally, sell the concept with an attention-getting phrase such as, "Once you try our product, you'll wonder how you ever did your job without it."
- To build "Interest," when using the written word, do it primarily with a list of benefits. In the Show & Tell & Sell world, you must show how your product or service makes your prospective customer better, smarter, more competitive, etc. Then tell them how it is possible. Finally, try to sell them again with interest-building language such as, "Learn the secrets to success."
- The "Desire" part is critical. Once you have grabbed your audience's attention and piqued its interest, you need to show something that will build desire. Maybe it's a competitive edge or the ability to do something that couldn't be done before. Or it might be the ability to ease a real business pain. Whatever it is, show something that creates that desire, tell them how your product or service will satisfy that desire, and then sell them again. This time, however, the sell needs to be emotion-driven such as, "Now you can avoid one of the most expensive mistakes you could ever make."
- The "Action" part comes last and should be the easiest step if you have been using the Show & Tell & Sell formula from the beginning. All you need to do is show your audience where and at what price to buy your product. Then tell them about the offer (such as a limited time discount), and the selling part will take care of itself. It is important to remember the cold, hard facts of sales. The manufacturer is no longer in control of the point of purchase of its products. The customer is. Customers demand the flexibility and convenience of purchasing products where

they want them. In today's business environment, the world seems like a complicated place. But when it comes to good marketing and selling, we need to remember the basic skills we learned in a simpler time: Show & Tell ... & Sell.

## **The Show and Tell - Sales Leadership**

As a sales leader in your organization, one of the most critical functions you perform is to help young producers learn and refine their sales skills. Selling is a skill, not a personality trait. As that sales leader, it's critical for you to understand how to help your team realize their potential and become the most effective salesperson their potential areas. There are four critical steps.

### **1 .Tell**

An effective sales process is one that can be replicated. Take the time to explain:

- each step in detail,
- what it is meant to accomplish,
- and (most importantly) WHY it is necessary.

### **2.Show**

As the teacher in this process, it is critical for you to demonstrate for your student how to execute the sales process. This is the first step in moving beyond theory and putting the process into practice. And, since no two sales situations are the same, it is important that you show them the process in various settings. Show them in the safe environment of the office and then show them how it works in front of a prospect.

### **3.Watch**

Now it's their turn. You watching them practice is the only way you will be able to offer them the constructive criticism that is necessary for them to get it right. It is important that they are allowed the time to build their confidence. Watch them execute in the safety of the office, but also go along to watch them perform in front of a real prospect. Not only will it allow for that constructive criticism afterwards, they will be more confident for having you along.

### **4.Allow**

Follow the first three steps and you will know for sure when they are ready to go out and perform on their own. However, to truly stay sharp, you need to take them back to the previous steps from time to time. Going through this process with experienced producers offers a few important opportunities:

- make sure that bad habits don't slip in
- start introducing additional sales skills
- continue refining them into more and more effective sales people

To be able to follow this formula, two things have to happen.

- a. You have to develop a well-defined and repeatable sales process.
- b. As the sales leader, you have to develop the skill yourself to effectively execute the middle two steps.

There's an old saying that those who can, do, and those who can't, teach. If you're skipping the two middle steps, this likely describes you. Commit to all four steps and you become one of the most valuable resources in your organization.

## **Elevator Pitch**

An elevator pitch is a brief and highly persuasive speech that is intended to spark further interest from the receiving party. An elevator pitch is one of the most basic and essential tools in any successful salesperson's repertoire. A great pitch is short, straight to the point and can be a key factor for landing a sales opportunity. This can be in the context of who you are, what you do, what you're trying to sell, or almost any message in which you are trying to quickly convey a high degree of value. In the context of sales specifically, it's intended to be in the value proposition of your organization or a specific product/service offering. A true elevator pitch will also meet all of these criteria:

- It should be roughly 30 seconds (never longer than 90);
- it should be easy to understand;
- it should come across as exciting;
- it should convey all of the key brand/product attributes;
- it should be tailored for your audience;
- and lastly, it should have some type of hook to push the conversation further.

It concisely describes your product, its benefits, and how you're different from the competition. Here are five elements to include:

### **1. Relate to their problem**

When you start a pitch, the first thought in your audience's mind is: Why should I care? To address this issue, begin by describing a problem that your prospect is facing.

If you're selling a complex product, your product likely solves many different problems. You want to distill them down to the big, overarching problem that your product solves. At the same time, specificity is necessary. The problem can't be so broad that you risk over-selling. Your product is not absolute magic.

Figure out a way to describe the problem in a single, succinct sentence. If you can find a way to personalize your description, that can be helpful. Example: "When your company is adding a dozen new employees a month, it's tough to maintain the same company culture you once enjoyed."

## **2. Explain the solution**

Now that you've masterfully identified their problem, you must explain how your product solves it. Your explanation of the solution needs to closely match your description of the problem. Don't discuss a different problem or go off on a tangent on additional product features. Focus on the core of what your product does and how users benefit from it. You should be able to cover this part of your pitch in just a few sentences.

When describing your solution, avoid filling it up with empty adjectives like "innovative." Instead, describe what your product does in concrete terms. Does it reduce time-consuming workflows or provide useful data? For help in coming up with this part of the pitch, consult your company's website and marketing materials.

Example: "Our employee engagement platform helps you identify your employees' interests and then organize social events in response. With the data we gather through the app, you can personalize the events to your employees' preferences and then measure their effectiveness."

## **3. Detail why your product is unique**

If you've done the opening to your pitch correctly, you've convinced the prospect that your product can solve a problem they're experiencing. However, that still leaves prospects with a big question: Why should I choose your product rather than other options?

That's why you need to explain your product's Unique Selling Proposition (USP). Your USP is what makes your product stand out among the competition. If you're in an over-saturated market it might be a little more difficult to figure out. Focus on your brand messaging to distinguish your product's place. It can also be helpful to learn from customers who switched to your product from one of your competitors. Why did they switch? What do they like about your product that they weren't getting from the other option?

This part of the pitch can be accomplished in a few sentences. It is usually not necessary to directly reference your competitors, although it's okay to allude to them.

Example: "Unlike other solutions, our software features an algorithm that automatically generates social outings. It's an all-in-one platform."

## **4. Personalize the message**

Once you have made clear the value of your product, you can now show that you've done your research. By acknowledging the prospect's unique circumstances, you can earn major points. Do at least a half-hour of research on the prospect and their company before engaging in a pitch. Any relevant information such as a contact or alumni in common makes for an easier introduction. Information that relates to a company's current business status or client profile will help establish your credibility towards the end of the pitch.

Example: “Oh and congratulations on the recent series A funding! Now that it’s a time for celebration I wouldn’t hesitate to consider solutions that can continue to take your business further.”

## 5. Craft a compelling call-to-action.

No matter how good your elevator pitch is, it’s not helpful unless it concludes with a clear and engaging call-to-action. Setting up a meeting is the logical next step. If you sense that the prospect may not be ready for that much commitment, ask for a phone call instead. A good call-to-action is direct. Instead of “can we set up a meeting sometime?” you need to ask, “would you like to schedule a meeting for next week?” Ask the prospect a direct question and avoid vague phrases. “Let’s talk later” does not give the prospect a chance to truly opt-in to future contact.

Example: “Are you available to meet next week so we can discuss how our platform can help you improve your company culture?”.

Delivering an effective elevator pitch is a challenge. It will probably take you several tries before landing on one that really works. Practice, ask for feedback and experiment with variations. When you do find the pitch that works for you, the results will be well worth the effort.

## THE CHALLENGE OF ENTREPRENEURSHIP

An *entrepreneur* is one who creates a new business in the face of risk and uncertainty for achieving profit and growth opportunities and assembles the necessary resources to capitalize on those opportunities.

While we may not be able to teach entrepreneurship, we can teach the skills of small business management. This is an important distinction to make to students.

Noted psychologist David McClelland characterized high achievers/entrepreneurs as possessing these traits:

1. Desire for responsibility
2. Preference for moderate risk (*risk eliminators*)
3. Confidence in their ability to succeed
4. Determination
5. Desire for immediate feedback
6. High level of energy
7. Future orientation (*serial entrepreneurs*)
8. Skill in organization
9. Value of achievement over money

Other characteristics of entrepreneurs include:

- High degree of commitment

- Tolerance for ambiguity
- Flexibility
- Tenacity

### **The Benefits of Entrepreneurship**

The primary *benefits* entrepreneurs enjoy include the opportunity to:

- Opportunity to create their own destiny
- Opportunity to make a difference
- Opportunity to reach their full potential
- Opportunity to reap impressive profits
- Opportunity to contribute to society and be recognized for your efforts
- Opportunity to do what you enjoy and have fun at it

### **The Potential Drawbacks of Entrepreneurship**

With these potential rewards, entrepreneurship also presents *risk and uncertainty*. Entrepreneurs may experience:

- Uncertainty of income: “The entrepreneur is the last one to be paid.”
- Risk of losing their entire investment
- Long hours and hard work
- Lower quality of life until the business gets established
- High levels of stress
- Complete responsibility
- Discouragement

### **Behind the Boom: Feeding the Entrepreneurial Fire**

The rapid increase in entrepreneurs has been a result of:

- Entrepreneurs as heroes
- Entrepreneurial education
- Demographic and economic factors
- Shift to a service economy
- Technological advancements
- Independent lifestyles
- The Internet and cloud computing
- International opportunities

There is not a set “profile” for entrepreneurs. This is a group that is diverse in every way and appreciating these types of entrepreneurs illustrates this variety of people and lifestyles.



## **The Ten Deadly Mistakes of Entrepreneurship**

Studies have indicated that there are common reasons for new business ventures to fail. These causes of small *business failure* may include:

1. Management mistakes
2. Lack of experience
3. Poor financial control
4. Weak marketing efforts
5. Failure to develop a strategic plan
6. Uncontrolled growth
7. Poor location
8. Improper inventory control
9. Incorrect pricing
10. Inability to make the “entrepreneurial transition”

## **How to Avoid the Pitfalls**

These same studies have indicated that entrepreneurs can *increase* their chances for success if they:

1. Know their business in depth.
2. Develop a solid business plan in writing.
3. Manage financial resources.
4. Understand financial statements.
5. Learn to manage people effectively.
6. Set your business apart from the competition.
7. Maintain a positive attitude.

## **Conclusion**

Entrepreneurs are a key part of America’s free enterprise system, and as we will discover, are changing the business of the world as well. Their contributions are as many and as diverse as the businesses themselves. There are steps that entrepreneurs can take to enhance the probability of their success.

Here are six genuine reasons why people become entrepreneurs:

### **1. Their creativity doesn’t fit the corporate environment.**

You may find that you simply don’t fit in. Sometimes that can feel frustrating, however, if you learn to embrace not fitting into a corporate culture the way many of your friends and family do, you can discover something beautiful.

Steve Jobs perhaps summed this idea up best when he said: “When you grow up you tend to get told that the world is the way it is ... Life can be much broader once you discover one simple fact: Everything around you that you call life was made up by people that were no smarter than

you. And you can change it, you can influence it ... Once you learn that, you'll never be the same again."

Your creativity simply may not be cut out for the limitations of corporate life.

## **2. They want a lifestyle that isn't bound to nine to five.**

There's a lot of hype about having a flexible lifestyle but the truth in entrepreneurship is that you're going to work really hard and really long, so don't choose this way of life if you're thinking it's a shortcut. That being said, you will work hard, but there's much more flexibility to the entrepreneurial lifestyle than the traditional nine to five and two weeks of vacation time that corporate life permits.

As the old adage goes, entrepreneurship is living a few years of your life like most people won't so that you can spend the rest of your life like most people can't. It is hard work but with that effort comes the ability to shape your life how you see fit.

## **3. They're passionate about learning.**

Learning should never stop. Many people equate age, status or certain achievements with the end of their education, but to learn is to be alive. Entrepreneurs are never satiated with the knowledge they have -- they are always seeking more. If you find that learning interests you, from formal education to on-the-job discoveries, and that you can never know enough about the things that excite you, then you have identified one of the genuine reasons individuals are driven to be entrepreneurs.

As mega-successful entrepreneur Michael Gerber says: "The entrepreneur in us sees opportunities everywhere we look, but many people see only problems everywhere they look. The entrepreneur in us is more concerned with discriminating between opportunities than he or she is with failing to see the opportunities."

## **4. Their ideas are unconventional.**

Entrepreneurship takes imagination and perhaps even a dash of insanity. Entrepreneurs are the ones who change the world. They see the world as they want it to be, not how it is. From the genius idea that drove the Wright Brothers to create a flying machine to the madness that drove Steve Jobs and Bill Gates to develop personal computers, entrepreneurs pursue the ideas that others deem crazy. Albert Einstein said, "Logic will get you from A to B. Imagination will take you everywhere." Entrepreneurs intrinsically understand that logic is limiting but unconventional ideas can change things.

## **5. They want to do things.**

Entrepreneur Guy Kawasaki said, "The best reason to start an organization is to make meaning -- to create a product or service to make the world a better place."

The exploration of meaning and doing work that changes the world is something that drives every entrepreneur. If you find yourself unsatisfied with a life that relegates you to the sidelines or the background, entrepreneurship may well be the right path for you. Entrepreneurs learn by doing and explore with a voracious appetite. If the status quo is too simple for you, you understand one of the genuine reasons people choose entrepreneurship.

## 6. They want to change the world.

Entrepreneurs don't just want to change their lives -- they want to change the world. Mark Twain explained the lure of entrepreneurship best when he wrote, "Twenty years from now, you will be more disappointed by the things that you didn't do than by the ones you did do. So throw off the bowlines. Sail away from the safe harbor. Catch the trade winds in your sails. Explore. Dream. Discover."

These online videos may enhance class discussion and provide additional insight for the chapter topics. You may consider searching "entrepreneur," "small business" along with more specific topics.

- Eye to Eye: Richard Branson 7:10 minutes  
<http://www.youtube.com/watch?v=Q6hILGfbqSg&feature=Playlist&p=3BE9FC907D0E88E9&index=33>
- Growing a Woman's Security Biz 3:40 minutes  
<http://money.cnn.com/video/fsb/2008/10/13/fsb.makeover.picore.smb/>
- Profiles of Success 6:01 minutes  
<http://www.sba.gov/strategiesforgrowth/success/index.html>
- Real American Stories – Fireworks 10:15 minutes  
<http://www.realamericanstories.com/fireworks/>
- Richard Branson on Business: Advice to Entrepreneurs 1:06 minutes  
<http://www.openforum.com/idea-hub/topics/the-world/video/branson-on-business-advice-to-entrepreneurs-inside-the-entrepreneurial-mind-series>
- Teen 24 – Young Entrepreneurs 4:23 minutes  
<http://www.youtube.com/watch?v=IQ3kGkDUcqM&feature=related>
- Teen Millionaires ... How did they do it? 8:11 minutes  
<http://www.youtube.com/watch?v=MZXHILQGquQ&feature=related>
- The American Dream 1:25 minutes  
<http://www.openforum.com/idea-hub/topics/the-world/video/cardmember-profile-olga-adler-interiors-share-your-story>
- Top 10 Mistakes Made by Entrepreneurs 1:06 minutes  
<http://www.youtube.com/watch?v=gtHZUr3mdlY>



## Unit II

### Trade Marks

#### Introduction

Trademarks existed in the ancient world. As long as 3000 years ago, Indian craftsmen used to engrave their signatures on their artistic creations before sending them to Iran. Later on, over 100 different Roman pottery marks were in use, including the FORTIS brand that became so famous that it was copied and counterfeited. With the flourishing trade in the Middle Ages the use of trademarks increased. Today trademarks (often abbreviated as TM in English) are in common usage and most people on the planet could distinguish between the trademarks for the two soft drinks Pepsi-Cola\_ and Coca-Cola\_. The growing importance of trademarks in commercial activities is due to the increased competition among companies undertaking trade in more than one country. Trademarks have been used to simplify the identification by consumers of goods or services, as well as their quality and value. Thus, a trademark may be considered as a tool of communication used by producers to attract consumers.

There are basically two main characteristics for a trademark: it must be distinctive and it should not be deceptive.

Therefore a formal definition of the term trademark could be:

**“A trademark is defined as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from the goods and services of the competitors.”** To be able to be registered as trademark, a mark should be distinctive and should be capable of graphical representation.

The different kinds of trademarks include:

**Logo:** It refers to the pictorial representation. Objects like animals, birds, landscape buildings fall within this category. A collection of devices may become distinctive (logo of bamboo grove or expression ‘Bans ka Jungle’ consider distinctive whereas logo of a bamboo for extract prepared out of a particular bamboo is considered descriptive) Examples: MacDonald’s double arches, Apple computer’s bitten apple.

**Letter:** It is a mark which is the identity created out of letter forms and has its inbuilt strength of distinctivity and individuality. Examples: IBM, GM, LG

**Numerals:** These can be registered as trademark upon evidence of user. Examples: 555

**Symbol:** A symbol is a visual depiction of a manufacture or a company and gives an identity to it. Examples: B.M.W, Benz etc.

**Brand:** It refers to those kinds of marks which are branded on the goods or services a process of applying mark on goods constituting the trademark. It implies that the symbol itself constitutes the trademark.

Example: Cycle brand agarbathi, home or ship brand for matches.

**Label or ticket:** Means a composite mark containing various features including devices, words, usually painted on paper and attached to the goods themselves. Example: Coca cola label on the soft drink bottle.

**Name:** Is the word signifying a name, surname or a personal name or an abbreviation thereof or the name of a sect, caste or tribe. Yes, in a similar way a particular name also signifies a product or service as TM. Example/; Cadbury, Nokia

**Colour:** Under Section 2 of 1999 Act provides a trademark can be granted over a colour or combination of colours. However, such protection is possible only if the colour does not describe the nature of the product. For example GREEN for eco-friendly products may not be registrable because of its descriptive nature but green for head phones would be protectable. For protecting a colour, a written description of the colour might be required by the trademark registry.

**Sound:** A sequence of chime-like musical notes which are in the key of C and sound the notes G,B,C, the G being the one just below the middle C, and the C, and the C being middle C was registered in the name of National broadcasting corporation for its services of broadcasting. In 2001 IBM unveiled a sound signature for its e-commerce business centers. The sound trademarks are becoming popular.

**Smell:** registration of smell is debatable. However there are instances of smell being granted the trademark. Example: the smell reminiscent of Roses Applied to tyres, was registered as trade mark by Sumitomo tyres.

## **DIFFERENT FORMS OF TRADE MARKS**

### **Collective Marks**

A collective mark distinguishes the goods or services of members of the Association which owns the mark from those of others. Members of the Association are the authorized users of the mark, and the use of the mark by the members of the Association is considered as the use by the proprietor. A collective mark cannot be registered if it is likely to deceive the public, or confuse the public that the mark may be something other than a collective mark. In such a case the Registrar may require that the mark may carry some indication that it is a collective mark. The Association registered as the proprietor of a collective mark can file a suit for infringement. A collective mark can be removed from the register on following additional grounds (Refer 5.6):

- The manner it has been used is liable to mislead the public; or
- The proprietor has failed to observe, or to secure the observance of the regulations governing the use of the mark.

### **Certification Marks**

Certification trademarks certify goods in respect of origin, material, mode of manufacture, quality, accuracy or some other characteristics of the goods, which bear them. They distinguish goods so certified from competing goods which do not carry the certification mark. Thus, these marks benefit the consumer. The trading community is not always enthusiastic about these marks. Some examples of certification trademarks are ISI, Agmark, Woolmark, Sanforized.

Because certification trademarks are functionally different from other trademarks, which distinguish a trader's/producer's goods from those of others, several provisions of the Trade Marks Act, 1999, do not apply to these marks. These provisions pertain to absolute grounds of refusal of registration:

A certification mark need not be distinctive for registration. Similarly, the provision denying registration to a mark if it consists exclusively of marks or indications which have become customary in the current language or in the bona fide and established practices of the trade is not applicable to certification marks.

- Application for registration, advertisement of application and opposition to it.
- The procedure as applied to other trademarks is different in the case of certification marks.

- Rights conferred by registration, infringement, limits on the effect of registered trademark, assignment or transmission, removal from register and limitation on ground of non-use, registered users, power of registrar for variation or cancellation of registration as registered user, right of registered user to take proceedings against infringement, registered user not to have right of assignment or transmission.

### **Registration of Certification Trademarks**

A certification mark cannot be registered in the name of a person who carries on a trade in goods of the kind certified. For registration, the proprietor makes an application in a prescribed manner to the Registrar, accompanied by the regulations governing the use of the certification trademark, which are to be deposited with Trademarks Registry. Acceptance of the application, withdrawal of acceptance and incorporation of any correction or amendment is to be done as provided for other trademarks subject to the restriction on the persons who could be the proprietor of a certification mark as stated earlier.

While accepting the application the Registrar takes into account the following matters:

- Whether the applicant is competent to certify the concerned goods;
- Whether the draft of regulations governing the use of the mark is satisfactory;
- Whether the registration would be to the public advantage in all the circumstances.

If the acceptance and approval would require modification or imposition of conditions/limitation the Registrar shall not decide the matter without giving the applicant an opportunity to be heard. On acceptance, the application shall be advertised, as in the case of other trademarks, and opposition, if any, for the registration of the certification mark shall have to be considered and decided before proceeding to registration.

### **Well Known Marks:**

Some companies have successfully established, via their trademarks or service marks, worldwide renown. Subsequently, consumers can, without effort, recognize and identify their goods and services, their qualities and their features without referring to the location of the company in question. These trademarks are called well-known marks or famous marks. Examples: Sony, Versace, Louis Vuitton, etc. As there may be companies which intend to take unfair advantage of those well-known marks by creating marks that are similar or that would create confusion with the well-known ones, thus misleading consumers. To overcome this problem, the Paris Convention, the TRIPS Agreement, as well as many national laws, have provided for a special



protection of well-known marks. There is no straightforward definition of a well-known mark. What must be defined, however, are the factors to be considered in determining whether a mark is well known or not. These factors include the degree of knowledge or recognition of the mark in the relevant sector of the public and the duration, extent and geographical area of any use of the mark.

### **Characteristics of a Good Trademark**

A trademark should be distinctive. Distinctiveness may be inherent or acquired. An invented word may be inherently distinctive as a trademark e.g. RIN. Other trademarks may have acquired distinctiveness through usage e.g. TATA, Reliance, Revlon. Most brands acquire distinctiveness through use. A brand may depend on the class of goods e.g. Hawkins and Prestige are two distinctive brands in pressure cookers. If the trademark is a word, it should be short and easy to spell, pronounce and remember; if it is a device it should be expressible in a word. The word should be preferably an invented word. Zen, Avon, RIN, Flex are all fine examples. The mark can be denied if it is not considered distinctive. A trademark consisting of parts of a chain wheel and chain to cover a business in chains and chain wheels is not considered distinctive. However, distinctiveness alone is not sufficient for registration of a trademark. It may also depend on whether other traders, without any improper motives, want to use the same mark.

### **REGISTRABILITY OF TRADEMARK**

A trademark which consists of at least one of the following essential characteristics can be registered.

1. The name of a company, individual or firm represented in a particular or special manner;
2. The signature of the applicant for registration;
3. One or more invented words;
4. One or more words having no direct reference to the character or quality of the goods except the exceptions listed in the next section;
5. Any other distinctive trademark; and
6. A trademark which has acquired distinctiveness by use over a prolonged period of time.

A part of trademark can be registered separately in addition to a whole trademark if it satisfies the requirements of registration of a trademark. The Act also provides for registration of the same or similar trademark by more than one proprietors in the case of honest concurrent use or

other special circumstances.

The Act lays down absolute grounds for refusal of registration, as also the relative grounds for such refusal.

## **NON-REGISTRABLE TRADEMARKS**

The act debars a trademark from registration if it is not distinctive, or consists exclusively of marks or indications which have become customary in the current language and practice. It cannot be registered if 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. Also, a mark falling in any of the following categories is not register able:

- A mark which is identical with or deceptively similar to a trademark already registered in respect of the same goods or goods of the same description as to deceive the public or cause confusion;
- A mark the use of which would be contrary to any law or which would be disentitled for protection in a court of law;
- A mark comprising or containing scandalous or obscene matter;
- A mark comprising or containing any matter likely to hurt the religious susceptibilities of any class or section; and
- A word which is declared by the World Health Organisation (WHO), and notified by the Registrar as an international non-proprietary name, or a word which is deceptively similar to such name.

Shape trademarks attract prohibition from registration in certain conditions which may arise in a very limited number of cases, and it would be difficult in those cases to satisfy the distinctiveness criterion.

A mark cannot be registered as a trademark, if it consists exclusively of the goods

- Which results from the nature of goods themselves? For example, shape of an apple used for apples or their packaging;
- Which is necessary to obtain a technical result? An exclusively technical shape will be the one if no other shape will perform its function;
- Which gives substantial value to the goods? There may be difficulty in interpreting this

provision.

The word exclusively is to be noted here. If a mark has a shape of any of the descriptions given above but has other additional features, it could be considered for registration subject to other essential qualifications for a trademark. Also, an unregistered trademark can continue to have a shape of a description that makes it ineligible for registration.

A trademark, save in rare circumstances as of honest concurrent use, to be decided by the Registrar shall not be registered, if it is identical with an earlier trademark, or if it is similar to an earlier trademark and covers identical goods and services so as to cause confusion in the mind of the public.

If a trademark has similarity or identity with an earlier well-known trademark but is sought to be applied to a different category of goods, it will still not be registered, as it seeks to exploit a well-known brand for an unfair advantage or may harm the reputation of the earlier, well-known trademark.

If a trademark violates any law, in particular the law of passing off protecting an unregistered trademark, or the law of copyright, it is not registered.

Additionally, the following categories of marks are also not registrable:

- a word which is the commonly used and accepted name of any single chemical element or single chemical compound; and
- a geographical name or a surname or a personal name or any common abbreviation thereof or the name of a sect, caste or tribe in India.

The Act provides for registration of same or similar trademark by more than one proprietor in case of honest, concurrent use, if in the opinion of the Registrar it is proper to do so in the special circumstances.

Where the proprietor of the trademark claims to be entitled to the exclusive use of any part of the trademark, he may apply to register the whole and the part as separate trademarks.

## **PROCEDURE FOR REGISTRATION OF TRADEMARKS:**

In India an office of the Registrar of Trademarks has been established for the maintenance of the Trademark Registry. Controller General of Patents and Designs is also the Registrar of

Trademarks. The Register of Trademarks contains the record of all registered trademarks, with names, addresses and description of proprietors and users, assignments and transmissions, and conditions and limitations and the name of registered users.

Any person who claims to be a proprietor of a trademark can apply to the Registrar of Trademarks for its registration. The application may be made in the name of an individual, partners of a firm, a Corporation, any Government Department, a trust or joint applicants claiming to be the proprietor of the trademark. For registration of a trademark the nature of goods or services in relation to which the trademark is to be used has to be specified.

### **Application**

- [1] Application in the prescribed form has to be filed in the office of the Trademark Registry within whose territorial limits the principal place of business in India of the applicant, or the first applicant in the case of joint applicants, is situated. The Registrar is required to classify goods and services in accordance with the international classification for registration of trademarks. A single application is sufficient for registration of a trademark for different classes of goods and services; however, the fee is payable for each class separately. If the applicant or any of the joint applicants does not carry on business in India, the application shall be filed in the office of the trademark registry within whose territorial limits the place mentioned in the address for service in India lies.
- [2] Every application for registration of a trademark shall contain a representation of the mark in the place provided in the form for the purpose. Five additional representations of the mark have to be supplied with the application.
- [3] The application can either be accepted completely or accepted subject to amendments or rejected. It is possible that an application is accepted and later, before registration, the acceptance is found to be in error. In such a case the Registrar, after hearing the applicant may withdraw the acceptance.

### **Advertisement**

Soon after acceptance, the application as accepted, together with the conditions or limitations, if any, is advertised in the Trademarks Journal to provide the public an opportunity to oppose the registration. Any person may, within three months from the date of the advertisement or within such further period not exceeding one month, as the registrar may allow, give notice in writing to the Registrar of opposition to the registration. A copy of the notice of opposition is given by the registrar to the applicant to file a counter-statement, etc. The Registrar decides the issue giving both parties due hearing, if required, or after considering their respective views.

If the person giving notice of opposition of the applicant neither resides nor carries on business in India, the Registrar may require him to give security for the cost of proceedings and if such security is not given the Registrar may treat the opposition (or the application) as abandoned. When the procedure for registration, including the opposition, if any, is satisfactorily complete, the Registrar is mandated to register the mark with effect from the date of application.

### **Time Period**

The registration of a trademark is for a period of ten years, but it may be renewed indefinitely on the payment of the prescribed renewal fees.

Registration is prima facie evidence of validity of the trademark. A registered trademark shall not be held to be invalid on the ground that it was not registrable under the Act except upon evidence of distinctiveness. However, if it is claimed and proved that the trademark had become distinctive due to use by the proprietor at the date of registration, it can be contended that such evidence was not submitted to the Registrar at the time of registration. If a trademark has been registered, even if it lacked distinctiveness, it shall not be declared invalid if, in consequence of the use made of it, it has acquired a distinctive character in relation to the goods or services for which it is registered, between its registration and commencement of the legal proceedings challenging its validity.

### **DECEPTIVELY SIMILAR TRADEMARKS**

The word similar is not defined in the Act. However, a trademark is said to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion. The deceptively similar mark includes not only confusion but deception also. Near resemblance is mentioned in the Act in connection with registered trademarks in the name of the same proprietor which may closely resemble each other, so as to deceive or cause confusion in the mind of a user. The Registrar may require them to be registered as associated trademarks.

The following factors are to be taken into consideration when deciding the question of similarity:

- The nature of the marks;
- The degree of resemblance;
- The nature of goods in which they are likely to be used as trademarks;
- The similarity in nature, character and nature of goods in which it is used;
- The nature of the potential class of consumers; and

- The visual and phonetic similarity.

## **RIGHTS OF THE OWNER OF THE TRADEMARKS**

Registration serves as evidence of adoption and selection of the trademark for specified goods & services. The proprietor of a registered trademark enjoys the following rights by virtue of the registration:

- i. An exclusive right to the use of the trademark in relation to the goods or services in respect of which it has been registered; if the trademark consists of several parts, the exclusive right pertains to the use of the trademark taken as a whole; if the trademark contains matter common to trade and is not of a distinctive character, there is no exclusive right in such parts.
- ii. Registration entitles the proprietor to obtain relief in case of infringement when a similar mark is used on (a) same, or similar, goods or services, (b) dissimilar goods or services.
- iii. Registration forbids other persons, except the registered, or unregistered permitted user to use the registered trademark or a confusingly similar mark in relation to the same goods or services, (or the some description of goods and services) in relation to which the mark is registered.
- iv. Once a trademark is registered, the same or confusingly similar mark cannot be registered for the same or similar goods or services. In case of well-known trademarks, it cannot be registered even for dissimilar goods and services.
- v. A registered trademark shall not be used by any one unauthorized in business papers and in advertising. Use in comparative advertising should not be contrary to honest practices and should not harm the distinctive character or reputation of the trademark.
- vi. Import of goods and services bearing a mark similar to a registered trademark can be restricted by the registered proprietor.
- vii. A right holder has a right to restrain the use of his registered trademark as trade name or part of a trade name or name of business concern dealing in the same goods or services.
- viii. A registered trademark continues to enjoy all the rights available to an unregistered mark, emerging from common law like passing off action.
- ix. Registration confers the right to assign or transmit the trademark to another person by the registered proprietor.

## **Exception to Rights**

There are exceptions to these rights in certain situations where considerations like vested rights and concurrent use come into play.

### **Rights of the prior user**

If a person A gets registration for a trademark and uses it and another person B has been using the trademark from an earlier time, the right of B to use it is not affected after A's registration, even if B had not opposed it. However, B's growth of business may be affected. But if B's business has got great reputation, A can even be restrained from using the trademark despite registration.

### **Rights to use one's own name**

Registration does not confer a right on the proprietor to interfere with the business of another person who is using, in a bona fide manner, his own name, or that of his place of business or any description of the character, quality of goods or services.

### **Concurrent use**

A mark which has been in concurrent use in the same jurisdiction on the same, similar, dissimilar or different goods is not affected by the registration of the same mark by another person.

It may be reiterated that there is no exclusive right (i) in parts of a trademark and (ii) in non-distinctive or other matter common to trade. A matter is said to be common to the trade when it is in common use in the trade, or when it is open to the trade to use. It could be a word or a symbol or a get-up which any trader in the trade can use and nobody can claim as his own.

## **REGISTRATION OF ASSIGNMENTS AND TRANSFER**

A person entitled by assignment or transmission to a registered trademark shall apply in the prescribed manner to the Registrar to register his title. The Registrar must be satisfied as to proof of his title before registering him as proprietor of the trademark.

Assignment of a registered trademark may sometimes necessitate certain alteration in the mark such as a change in the name of the proprietor.

### **Licensing of trademarks:**

As is in the case of assignment a licensing too has to be in writing and oral licensing is no licensing. However trademark licensed ceases to be valid if there is no connection in the course of trade with the registered proprietor or otherwise becomes deceptive by the act of registered owner.

### **Difference between assignment and license**

there are some basic differences between assignment and license is that assignment is a permanent transfer whereas license is a temporary transfer. Assignment is with or without the assignment of the good will and is preferable to have licensing with control over the quality than to assign without good will. License is revocable whereas assignment is not revocable.

## **INFRINGEMENT**

Trademark infringement is a violation of the exclusive rights attaching to a registered trademark without the authorization of the trademark owner or licensee. Infringement may occur when the infringer, uses a trademark which is identical or confusingly similar to a registered trademark owned by another person, in relation to products or services which are identical or similar to the products or services which the registration covers. The owner of such registered trademark may commence legal proceedings against the infringer.

### **Passing Off**

Passing off occurs in the case of unregistered Brand Names. Here, the owner or to say Brand holder has the preferred right over the Brand owing to long and continuous use though the Brand being unregistered (under the Trademark Act), an action of Infringement cannot be initiated. A Passing Off action can be brought in by the original owner or user of a Brand against another person, who in the course of trade, misrepresents to its prospective or ultimate customers about its goods or services in a manner so as to show that they are connected to the goods or services of the original owner and this is done in a calculated fashion to injure the business or goodwill of the original owner or to earn benefit at the cost of the original owner. It is also important that actual deception and actual damage has to be proved for any relief of passing off. It has been settled in catena of authorities that essential characteristics of a passing off action are as follows:

- Misrepresentation
- Made by a person in the course of Trade Mark
- To prospective customers of his or ultimate consumers of goods or services supplied by him
- Which is calculated to injure the business or goodwill of another trade



- Which causes actual damage to a business or goodwill of the trade by whom, the action is brought or we'll probably do so.

## **Jurisdiction**

One of the most important practical benefit given under Section 134 of the Trade Marks Act, 1999 is that a suit for infringement can also be instituted before a District Court / High Court (enjoying Ordinary Original Civil jurisdiction such as High Court of New Delhi, Mumbai, Kolkata or Chennai), within the local limits of whose jurisdiction, at the time of the institution of the suit, the person instituting the suit, actually and voluntarily resides or carries on business or personally work for gain. The person includes the registered proprietor and the registered user. On the other hand the suit for passing off can only be instituted before a District Court, within the local limits of whose jurisdiction The Defendant is residing, working for gain or carrying on its business; or the cause of action has arisen.

## **Remedies**

In case of infringement / passing off trademark, a criminal complaint can also be filed. The Courts can grant injunction and direct the custom authorities to withhold the infringing material / its shipment or prevent its disposal in any other manner, to protect the interest of the owners of intellectual property rights. This legal proposition can be enforced with / without involving the concerned authorities as a party in the suit.

The relief which a court may usually grant in a suit for infringement or passing off includes permanent and interim injunction, damages or account of profits, delivery of the infringing goods for destruction and cost of the legal proceedings. The order of interim injunction may be passed ex parte or after notice. The Interim relief's in the suit may also include order for:

- a. Appointment of a local commissioner, for search, seizure and preservation of infringing goods, account books and preparation of inventory, etc.

- b. Restraining the infringer from disposing of or dealing with the assets in a manner which may adversely affect plaintiff's ability to recover damages, costs or other pecuniary remedies which may be finally awarded to the plaintiff.

## **CASE STUDIES:**

### **Rights & Remedies of a Trade Mark Owner-**

The owner of a registered trademark may commence legal proceedings for trademark infringement to prevent unauthorized use of that trademark. However, registration is not required. The owner of a common law trademark may also file suit, but an unregistered mark may be protectable only within the geographical area within which it has been used or in geographical areas into which it may be reasonably expected to expand.

Two types of remedies are available to the owner of a trademark for unauthorized use of his or her mark or its imitation by a third party. These remedies are:

- an action for infringement' in case of a registered trademark; and
- an action for passing off' in the case of an unregistered trademark

While former is a statutory remedy, the latter is a common law remedy. In an action involving infringement or passing off, a court may grant relief of injunction and/or monetary compensation for damages for loss of business and/or confiscation/destruction of infringing labels and tags etc. Although registration of trademark is prima facie an evidence of validity of a trademark, yet the registration cannot upstage a prior consistent user of trademark, for the rule is 'priority in adoption prevails over priority in registration`.

### **Cases of Trade Mark Violation in India-**

Trade mark infringement especially among the corporate classes in India is rising on an alarming rate. Few of the notable cases have been described in brief.

***1. Pantaloon dragged to court by Shoppers' Stop and Lifestyle; Westside also contemplates similar action, (July 14th, 2008).***

Shoppers' Stop and Lifestyle have dragged their rival Pantaloon to court as they were miffed with an advertisement issued by the flagship company of Kishore Biyani owned Future Group that offered 10% extra discount to their loyal customers vide an advertisement issued

in The Times of India, New Delhi, dated 28th June, 2008. The complainant retailers have accused Pantaloon of trademark violations and unfair business practices, says a Live Mint report. All the three parties operate department store format store chains in lifestyle segment.

Even Westside has taken objection to the ad saying, “We have sent a notice to them to which they have not responded,” said Smeeta Neogi, Head (Marketing) Westside.

Pantaloon’s ‘Central’ mall at Gurgaon had offered 30% discounts to its customers over the weekend. Loyalty card holders of competing retailers like Shopper’s Stop, Lifestyle and Westside, were lured by Pantaloon by offering an additional 10% discount on select brands of apparel. The advertisement asked such customers to: “Present your membership card to avail this offer.”

Loyalty cardholders are mainstay of business for most retailers. Shoppers’ Stop has a highly popular loyalty card programme branded “First Citizen.” According to analysts, more than two-thirds of Shoppers’ Stop’s apparel business is accounted for by its loyal customers.

“They (Pantaloons) are luring my customers by using my name in an unfair manner,” said Sandeep Mittal, the lawyer representing for both the petitioners.

The Honorable Delhi high court has issued an injunction restraining Pantaloons from using names of its rivals in the ads until the next hearing in the matter fixed for 31st July.

Taking potshots at these competitors is not new for Pantaloons. Last year, its Big Bazaar chain had put up hoardings, asking customers to “Keep West a Side,” “Shoppers! Stop” and “Change Your Lifestyle. Make a Smart Choice.”

## ***2. Amul wins trade mark case in Gujarat High Court, (Sep 24, 2007)***

Amul has won the trade mark case in Gujarat High Court and no one else can use it.

The Kaira District Co-operative Milk Producers’ Union Ltd. and GCMMF had filed trade mark infringement cases, against two local shop owners ? Amul Chasmaghar and its partners and Amul Cut Piece Stores in the District Court, Anand. The District Court, Anand passed an order dated 25 April 2007, ruling that it was a clear case of infringement and restrained the two from using the Amul trademark.

Amul Chasmaghar had challenged this interim injunction in the Gujarat High Court. The Gujarat High Court ruled the decision in favor of Amul, terming the order passed by the trial court as true, correct, legal and in consonance with the facts of the case, as well as in accordance with the provisions of the Trade Marks Act 1999.

### ***3. Trade Marks Disputes Involving Pharmaceuticals Industry in India-***

#### **A. Beecham Group Plc. vs. S.R.K. Pharmaceuticals 2004 (28) PTC391 (IPAB)**

The appellant was using the mark 'AMOXIL' in India since 1990. This mark was registered in India in 1972 in Class 5 in respect of Pharmaceutical goods. The respondent started using the mark 'LYMOXYL' in India from 1985. The respondent filed the application for registration of the mark in 1987 in India in the same class with respect to similar goods.

The appellant brought an action against the respondent stating that the mark is deceptively similar. The only difference between the two marks is in the prefix 'LY' and 'M'. The rival marks are phonetically and deceptively similar and the goods are pharmaceutical goods under Sec. 12(1) of the Act.

The Intellectual Property Appellate Board (IPAB) held that the respondent dishonestly adopted the mark by copying it from the appellant who had got the mark registered long ago. Hence the respondent cannot claim honest concurrent use, by virtue of earlier use. The Appellate Board delivered a judgment prohibiting registration of the Trade Mark 'LYMOXYL'.

#### **B. Ranbaxy Laboratories Limited vs. Anand Prasad & 4 Others 2004 (28) PTC 438 (IPAB)**

The appellant was the registered proprietor of the mark 'FORTWIN' and had been using the mark since 1975. The respondent applied for registration of the mark 'OSTWIN'. Both the marks related to pharmaceutical compositions in respect of treatment of bones.

The appellant brought an action against the respondent stating that the mark is deceptively similar. The IPAB held that the prefixes are 'FORT' and 'OST' while both the marks end with the suffix 'WIN'. It was further held that since the rival goods are also pharmaceutical goods it might lead to serious consequences due to deception or confusion in the minds of the public. Hence on the possibility of harm being caused to common person the appeal was allowed.

#### **C. Wyeth Holdings Corp. & Anr. vs. Sun Pharmaceuticals Industries Ltd. 2004 (28) PTC 423 (Bom)**

In this case the plaintiff whose former name was American Cynamid Company and who was the proprietor of the trademark 'PACITANE' registered the mark in Class 5 of Pharma goods. The respondent was using the mark 'PARKITANE' with respect to similar goods. The plaintiffs filed a suit for infringement and passing off and sought various reliefs including interim injunction against the defendant for using the mark 'PARKITANE'.

The Court held that in both the cases the goods are similar, being pharmaceutical preparations for treatment of Parkinson's disease, the customers buying these goods are the same and the trade channels are the same. Since the defendants did not show any search of the Register before adopting the impugned mark, prima facie adoption of the mark was not honest. Further, the Court held that despite protests, if the defendants have chosen to continue to sell the products, it cannot be said to be acquiescence by the plaintiff. Therefore the Court held that injunction is to be granted in favour of the plaintiff.

The Court further held that in case of pharmaceutical products, the test is of possibility of confusion and not probability of confusion. The plaintiffs have been in the field since 1950 and as such the balance of convenience is in their favour. The Court granted injunction in favour of the plaintiffs.

**D. Hoechst Aktiengesellschaft vs. Artee Minerals & Anr. 2004 (28) PTC 470 (IPAB)**

The appellant was the registered proprietor of trademark 'ARELON'. This mark was registered in class 5 with respect to pharmaceutical goods relating to preparation for killing weeds and destroying vermin. The respondent filed an application for registration of the mark 'ARTEELON' in the same class with respect to pharmaceutical goods.

The appellant opposed the application for registration of trade mark filed by the respondents on the ground that the registration of the impugned mark would be contrary to provisions of Sections 9, 11, 12(1) and 18 of the Trade and Merchandise Marks Act, 1958.

The IPAB held that the rival goods were same and the only difference was the letters 'TE'. The Appellate Board further held that the possibility of confusion and deception is not ruled out and hence affirmed the order rejecting the application for registration filed by the respondent.

The IPAB further held that the benefit of use under Section 54 is given only in case of rectification proceedings when use of an associated trademark is deemed to be use of the registered trademark against which rectification proceedings are initiated for non-use of the mark.

# Trade mark infringement / 'passing off' case in Malaysia

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## Background

A British manufacturer of biscuits has been selling cookies in Malaysia for more than 20 years, and has had a registered trade mark 'ChipsMore' for these goods during that time.

Two years ago a Malaysian company started manufacturing and selling cookies under the brand 'ChipsPlus.'

## Advice

The British company was advised that they could sue the Malaysian company for trade mark infringement and also 'passing off', which can be used to enforce unregistered trade mark rights and exists in Malaysia as it is a Common Law country.

For trade mark infringement, the British company had to prove that the Malaysian company's brand so nearly resembled their own that it was likely to deceive or cause confusion in the course of trade in relation to their own products.

For 'passing off' the British company had to prove that the Malaysian company was misrepresenting their goods as being connected with the British company. They also had to prove that their own brand had acquired 'goodwill' and reputation in the marketplace, and that they would suffer damage as a result.

## Outcome

The Malaysian court held that 'ChipsPlus' was an infringement of 'ChipsMore' as they were similar marks for identical goods and likely to deceive or cause confusion. In particular, the 'Chips' part was phonetically identical, the suffixes 'More' and 'Plus' have a similar meaning, and the formatting of the words was similar.

In addition, the claim for 'passing off' was successful. The British manufacturer had been selling cookies in Malaysia for over 20 years and therefore had no difficulty in demonstrating substantial goodwill and reputation in the brand. The appearance of the 'ChipsPlus' product was held to be strikingly similar to the 'ChipsMore' product, including similar colours, fonts and other aspects of the composition, which was indicative of misrepresentation. The court determined that the British manufacturer would therefore suffer damage (loss of business) if the Malaysian company was allowed to continue.

## Lessons Learnt:

- Register your brands as trade marks in Southeast Asia
- A brand does not have to be identical to infringe a trade mark
- Some countries provide a Common Law right of 'passing off' (but the burden of proof is higher)