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Research Article

Brand as Legal Asset: Trademark Law and the Architecture of Brand Protection Strategy in Contemporary Marketing

Sourabh Batar[1*]
[1]Assistant Professor, Teerthanker Mahaveer College of Law and Legal Studies, Teerthanker Mahaveer University, Moradabad, India

***Corresponding Author**
Dr. Sourabh Batar
(battarsourabh@gmail.com)

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Abstract: Marketing scholarship is the thinking that regards the brand as an intangible asset that is created by establishing a consistent position, associative memory structures and trust of the consumer. Signs and associations that overlap in their purport constitute a “substantial” copyrightable property right according to law. The paper explores at the intersection of the two fields Indian trademark law as the legal tool that has been used to protect, license and enforce brand equity created upon marketing. It outlines the statutory framework of the Trade Marks Act 1999, the doctrinal test for deceptive similarity posited by the Supreme Court of India and the enhanced restrictions accorded well-known trademarks and trade dress before exploring how these doctrinal markers apply to common marketing strategies: brand naming and clearance, co-branding and licensing, comparative advertising and influencer marketing. Finally it examines new or less well-litigated issues algorithmic keyword advertising, generative-AI brand content and virtual goods / metaverse items as yet poorly addressed by existing doctrine. The paper culminates with a holistic brand/legal audit model designed for marketing and legal use.

Keywords: Trademark Law, Brand Protection, Trade Marks Act 1999, Passing Off, Well-Known Marks, Brand Licensing, Comparative Advertising, Influencer Marketing

INTRODUCTION

Brand equity, as discussed in marketing literature by academics like Aaker and Keller, is most commonly defined as the differential impact of brand on consumer reactions to a marketing action; the price consumers will pay for or preference for, this type of product just because of the brand attached to the product. These all describe what, if not the actual same phenomenon, is nevertheless the subject matter of trademark protection: registered and/or, through use, well-known marks are entitled to trademark protection because they have come to indicate to the appropriate consuming public source, consistency and quality and because a competitor's use of the confusingly similar mark poses a threat to the appropriation of those factors in the absence of the competitor's having created them. In other words, the brand is a marketing creation with a legal shadow: how much equity will be created by marketing is as much dependent on how it is designed and named as it is on how it is enforced.

This paper will explore that legal shadow. First, it outlines the statutory and doctrinal context of the scope of protection of a trademark in India and then its engagement with marketing practice in relation to the aspects of naming and clearance, licensing and brand extension, comparative advertising and collaboration with influencers. Then it assesses a set of practices (on the horizon): Keyword advertising, AI-generated content, virtual goods, where the prevailing doctrine offers limited answers.

The Legal Framework

The Trade Marks Act, 1999 defines a trademark under Section 2(1)(zb) to mean a mark capable of being represented graphically and of distinguishing the goods or services of one person from those of others; a definition which is wide enough to include words, logos, packaging, styling as marks, as well as non-traditional marks including distinctive shapes, colour combinations and sounds. From the point of view of registrability, Section 9; which considers such absolute grounds as whether the mark is inherently distinctive, whether it has become distinctive by use and whether the mark is descriptively of the goods to which it is applied and Section 11; which considers relative grounds as whether another mark is identical or deceptively similar to an earlier mark for identical or similar goods and whether such similarity is likely to cause confusion are applied [1].

The core enunciation of the doctrine of Indian trademark law is the test for deceptive similarity propounded in Cadila Health Care Ltd v Cadila Pharmaceuticals Ltd [2] which stated a multi-factor inquiry: the nature of the marks; the extent to which the marks tend to be deceptively similar; the nature and composition of the goods; the class of consumers purchasing the goods and the care they exercise; and the manner in which they purchase the goods. This follows the earlier articulation of Amritdhara Pharmacy v Satya Deo Gupta [3], where an analysis of the relevant comparator was not thought to require an ongoing side-by-side comparison of marks; rather the comparison would be 'the average man of imperfect recollection'.

In addition to the registered right, Section 27(2) continues to expressly provide for the common law action for the passing off which can be exercised even if the mark or get-up was not registered and which protects the goodwill that a business has established in an unregistered mark or get-up from misrepresentation likely to cause damage. Well-known marks receive extended protection under Section 2(1)(zg) and Section 11(6)-(9), which allow the proprietor of a mark recognized as well-known among the relevant public to prevent its use even on unrelated goods or services, on the theory that such use would suggest a connection or dilute the mark's distinctiveness; a doctrine applied in India as early as N.R. Dongre v Whirlpool Corporation [4], which protected the WHIRLPOOL mark against a domestic user despite limited direct sales in India at the time, on the strength of trans-border reputation [5]. Domain names have likewise been brought within the trademark framework: The Supreme Court's decision in Satyam Infoway Ltd v Sifynet Solutions Pvt Ltd. [5] held that the principles governing trademark and passing-off actions apply equally to domain names, following the Delhi High Court's earlier reasoning in Yahoo! Inc v Akash Arora [6]. Trade dress and packaging get-up have been protected on similar principles, as in ITC Ltd v Britannia Industries Ltd. [7] concerning the packaging of competing biscuit products.

Marketing Practice and the Legal Architecture of Brand Strategy

Naming and clearance. The point at which marketing and legal strategy most directly converge is brand naming. A comprehensive clearance search; checking proposed names and logos against the Trade Marks Registry database, common law usage and relevant domain name registrations; is, in effect, the legal analogue of the marketing concept-testing process and ideally should run concurrently with it rather than after a name has already been used in market testing or soft-launched on social media, by which point switching costs (both commercial and reputational) rise sharply.

Licensing and brand extension. Trademark licensing under Sections 48 to 53 of the Act provides the legal vehicle for co-branding, franchising and brand-extension strategies that are central to modern portfolio marketing. Because a licensed mark's continued validity can depend on the licensor exercising quality control over the licensee's use, licensing agreements that are drafted purely as commercial or marketing instruments; without adequate quality-control and inspection provisions; can, in principle, weaken the licensor's later ability to assert exclusive rights, making the trademark license a document that marketing and legal teams should negotiate together rather than in sequence [8].

Comparative advertising. Indian courts have generally permitted a competitor to be named or clearly identified in comparative advertising and to claim that its own product is better, provided the advertisement does not denigrate or disparage the competitor's product or make false claims about it; a distinction drawn in a series of disputes between fast-moving consumer goods companies, including litigation between Hindustan Unilever and Gujarat Cooperative Milk Marketing Federation over Amul's advertising and between other major FMCG competitors over comparative health and taste claims. The doctrinal line; permissible puffery and truthful comparison on one side, disparagement and trademark infringement through denigrating use of a competitor's mark on the other; gives marketing teams meaningful room for competitive advertising but requires that comparative claims be capable of substantiation before publication, echoing the substantiation requirement discussed in the companion analysis of misleading advertisement regulation [9].

Influencer marketing. Brand collaborations with social media influencers bring about a different distinctive set of trademark challenges; when an influencer goes rogue in using a brand and publishing the brand's products out of scope of the collaboration agreement, when the image of the brand as shown by the influencer is inconsistent, and, most serious, the publication of counterfeit products by social media influencers who are unaware of or indifferent to the source of the products. For this reason, it is best to draft influencer agreements as tightly as traditional retailer licensing agreements, to include specific parameters and expectations for use of the trademark (such as which marks can and cannot be used, where placement is permitted, etc.), as opposed to simply treating the relationship as an ordinary commercial relationship that does not involve a licensing agreement. The judicial attention to the dilemma of online marketplace liability in respect of third party counterfeit listings is also noteworthy here; see Christian Louboutin SAS v Nakul Bajaj, which looked at when a marketplace's involvement in a sale (such as fulfilment, packaging or promotion) made it more than a passive intermediary so that it lost its safety-harbour protection) [10].

Dilution beyond confusion. Section 29(4) of the Trade Marks Act provides a distinct infringement route for well-known and reputed marks that does not require proof of a likelihood of confusion at all: Use of an identical or similar mark on dissimilar goods or services can infringe where such use, without due cause, takes unfair advantage of or is detrimental to, the distinctive character or repute of the earlier mark. This dilution doctrine is of particular relevance to marketing strategies built around brand licensing into unrelated categories; a fashion house licensing its mark for home fragrance, for instance; because it protects the brand owner's ability to control category extension even where no consumer would actually confuse the licensed product with the original, on the theory that unauthorised extension by a third party would blur the mark's distinctiveness or free-ride on its reputation without the brand owner's consent [11].

Emerging Challenges

India has various practices which are related to the current marketing strategy still are up for discussion doctrinally. Where proposed bids are for a competitor's trademark as a search-engine keyword in order to trigger the advertiser's ad, a considerable amount of litigation has resulted in other jurisdictions, the most prominent body being a set of cases in the United States and the EU about whether such use amounts to "use in the course of trade" and whether there is a likelihood of confusion if any advertiser ad is clearly a search engine ad but not an organic search result. The Courts in India have not yet evolved a consistent set of rules and principles on this issue and marketing teams which routinely practice 'competitor-keyword bidding' in performance-marketing campaigns are left without any clarity on the firewall between competition and trademark infringement/dilution.

Generative AI now offers the ability to generate content that goes hand in hand with brands product prototypes, marketing copy, AI synthesised video content about known brands at a scale and speed that is beyond the reach of the traditional review process, creating questions around infringement and dilution where AI-generated content mimics or simply reproduces a protected mark or trade dress, either in the concepting phase or, worse, when produced and published externally on social media and other platforms. In principle, existing infringement doctrine will apply to alleged uses of this kind; however, there is much that Indian courts have yet to test about claims of authorship, the threshold for finding substantial similarity when a significant amount of content is generated by a machine and platforms' liability to host such content. Likewise, the Nice Classification system under which goods are classified for trademark registration has not caught up with commercial practice and there continues to be uncertainty about whether a trademark registration for physical goods will be adequate to secure protection for the virtual or NF-T version of the same branded goods; a matter which has been litigated overseas but for which there are no strong precedents in India.

The other, more pressing challenge is that of trademark law and the platform-specific aspects of social media marketing in general. Fan art featuring a brand and parody accounts created by users as well as unauthorised use of a trademark in merchandise fall somewhere in between the extremes of dilution by tarnishment and free expression and Indian courts have more often than not been hesitant to extend trademark protection to obviously non-commercial, parodic speech while at the same time remaining vigilant towards protecting the trademark against uses which cause actual confusion as to sponsorship or endorsement. The need for brand teams to determine whether the UGC is tolerable or usable as an organic marketing tool or whether it is actionable confusion or tarnishment has grown even as the volume of UGC is increasing on social media compared to how instantly replies to the cee'd are overseen by legal counsel who have always taken a traditional approach to the cee'd on a case-by-case basis [12].

Recommendations: An Integrated Brand-Legal Audit Framework

You cannot (and will not) take steps of branding and legal protection as sequential either. These should reinforce the licensing chain and ensure quality control through step-by-step application of this guidance in practical audit processes: a clearance protocol conducted as part of, not after, concept testing and social media soft launches; a licensing-checklist template built into each co-branding, franchising or brand-extension agreement with the same level of detail as placed on traditional retail or distribution partners; a substantiation file kept for all comparative advertising claims prior to publication; and a regular process of monitoring the marketplace to detect any unauthorised or counterfeit use of the brand's marks on ecommerce platforms and social media. On the doctrinal side, guidance is warranted for Indian courts and the Trade Marks Registry on how to deal with keyword advertising and how physical goods registrations can be extended beyond physical to virtual or AI-mediated brand representations, which are now commonplace in marketing activities but have so far only been analogized by courts and the Registry.

CONCLUSION

Trademark law is not just a defensive jump-start to marketing policies but the legal structure by which marketing created brand equity obtains some legal stability. The doctrinal essence of Indian trademark law-the deceptive similarity test, well known marks and trade dress and the still surviving common law action for passing off-correspond with core marketing concepts of "brand recall", "brand extension" and "brand consistency" with greater fidelity than it is realized by both sets of practitioners. What is now clear is that, rather than more aggressive post-infringement litigation, brand owners will shine greatest when involving the lawyers at a more integrated level at the naming, licensing and influencer-collaboration stage because the scope of the legal protection at the end of the day will be defined by marketing decisions made early in the process.

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