

TRADEMARKS, BRAND ENGAGEMENT AND PANDEMIC 2020: A NEED OF NEW APPROACH

Shraddha Damle¹ and Santosh Aghav^{*2}

¹Symbiosis Law School, Pune

²Symbiosis International (Deemed University), Pune, India

*E-mail:² saghav@symlaw.ac.in

Abstract

In this current pandemic situation, the businesses are affected globally. In such circumstances it is essential that trademark owners are vigilantly monitoring use and abuse of their marks by third party and by themselves as well. The present situation has changed the entire ball game of advertisement/branding. This has forced the brand owners to adopt new marketing strategy to attract their consumers. The use of digital platform is becoming preferred mode for advertisement. When we say brands it's not only trademark, but the holistic approach of a company towards society, consumers and the trust and values invested in the goods and services rendered therein. The aim of the article is to compile the information of branding/advertisement in current pandemic on Indian markets in light of recent cases and capture the possible future trends in trademark use and branding. Author has referred recent cases and news items as source of information and also highlighted the need of reforms for regulation of advertisement sector for maintaining harmonious balance between all stake holders (traders – consumers – advertisers).

Key words: Advertisement, Brands, Brand engagement, Comparative advertisement, Covid, Indian cases, Pandemic, Trademark.

Introduction

In current pandemic, the Covid-19 spread across globe has brought world to the standstill. Be it an individual or a company everyone is experiencing economic slowdown. But healthcare sector and few FMCG are an exception to this, as there has been increase in demand for their goods and services. Most of the people prefer to stay at home due to safety concerns and that's actually need of an hour to prevent the spread of virus. From business point of view, this situation has hampered buying capacity of public and hence sales are low in many businesses. People have confined their needs to basic necessity, and focus is on primary needs. To adjust with this change, even the businesses are revamping their marketing approach and policies to suit the on-going situation. Most of the people are now ordering daily essentials from online stores. The Covid has taught people to find a way out in extreme situation. The brands in real or online world are identified by the trademarks/tradename. Thus, the trademarks are not only the source indicator but also assurance of quality which is barely visible by naked eyes. That's the reason, Trademarks has more importance in businesses of any size than any other Intellectual Property (IP). It's only IP with perpetual existence if renewed periodically.

Trademark are a silent salesman which facilitate the trade between the trademark owner and the consumer (Agitha, 2008). The economic importance of trademarks was not realised in initial phase of development. Gradually, as trading practices started evolving after opening of the economy which slowly shifted the function of trademark. The basic function of trademark (origin of goods) was extended to branding wherein emotions also got associated. There has been study as well which revealed how advertising agencies made use of trademark in conceptualising brand identity and developed modern age branding techniques. Gradually, advertisement has become one of the important functions of the trademark. The goodwill is an invisible power of a trademark which entices customer. It has also become an essential economic factor.

The Trademark law is one of the important branch of commercial law across the world. This law has undergone great transformation to stay in consonance with the varying trade practices. So, protection of trademark is not only in interest of consumers and traders but also essential to promote fair competition. The term '*brand*' and '*trademark*' is often used interchangeably. The Trademark Act, 1999, defines trademark under section 2(1) (zb)

but there is no explicit definition for the term 'brand'. Though, the definition of 'mark' under section 2(1) (m) includes the term 'brand' but it relates to kind of a symbol branded on the goods. The term 'brand' is more of marketing jargon which includes corporate identity also.

Brand Engagement

At present, most of the companies are strategizing their 'Brand engagement' model which is essential parameter for maintaining connection with their consumer base. There is no precise definition for 'brand engagement'. But as gathered through viewpoints of various market experts it can be described as follows, '*real emotional engagement with the brand.....because real emotional engagement correlates very, very, very highly with positive consumer behaviour, sales, and profitability*' (Forbes, 2013). At present most of the brand owners are just focusing to stay connected with their customer base irrespective of sales figure. It may be through their Twitter handle like for example as adopted by Amul and Fevicol. The move is basically to be in touch with the consumers and market via advertisement focused on social awareness and safeguard measures for fight against Covid -19. Below are few illustrations of brand engagement through social media like Twitter.

Illustrations 1:

The Amul girl who is Trademark and Copyright protected and an important IP of the company is known to depict social messages or current political issues in bold and humorous manner. In the figure below the image is chuckle some illustration of hygiene to be followed in current pandemic.



Fig 1 - Image Source: (Twitter, 2020)

Illustrations 2:

The image below is worth noticing which is by Pidilite company for its Fevicol brand. The message of 'social distancing' is smartly portrayed through the well-known elephant character of its logo.



Fig 2-Image Source:(Twitter, 2020)

In addition to above illustration, many brands have re-styled their logos to portray social message and make them in consonance with the current pandemic situation. Below are the few examples of logos which are

tweaked like mermaid of Starbucks a coffee brand is wearing a mask, Goodyear a tyre brand and LinkedIn services an online professional networking platform re-phrased as Bad Year and Linked Out respectively.



Fig 3: Starbucks Logo Fig 4: Good Year Logo Fig 4: LinkedIn mark

Image Source: ([AdAge, 2020](#))

This trend of re-designing the logo/trademark is termed as '*fluid trademark*'. The brand owners are inclined to this concept as its gaining fast attention on digital platform. These forms of trademark are becoming popular and might open new legal era in Trademarks law globally.

Legality of Advertisement in India with regard to (use of competitor's) Trademark

As rightly stated by Leo Burnett who is legend for advertising industry globally that one need not be natural in their approach while advertising. To get notice one need not necessarily indulge in any unacceptable practices. Advertisements have a crucial role in business and its importance has exponentially risen in present digital era. With the digital marketing the competition is getting worse and the consumers are falling prey to predatory advertisement tactics. It's not only hampering interest of the consumers but also the honest competitor whose trademark is misused in form of disparaging advertisements.

In India there are plethora of laws which are sector-specific regulations but they lack uniformity. There is no central authority to overlook at entire advertisement sector. The Advertising Standards Council of India (ASCI) which is a self-regulatory body is operational since 1985. Recently, they have partnered with All India Radio, Food Safety and Standards Authority of India (FSSAI), Department of Consumers Affairs and few more in list with an intention to create awareness and prevent mal-practices through advertisements in various sectors. There is recent amendment wherein compliance of ASCI code is made mandatory under rule 7(9) of the Cable Television Networks (Regulations) Act, 1995. The government also have requested to run a scroller on television channels with an information for reporting misleading advertisements. This is to create a consumer awareness. In spite of these initiatives, ASCI has not been able to regulate advertising sector as its non-statutory body and the decision are not binding on the parties.

Considering the present scenario, it can be observed that the interest of traders, consumers and honest competitors are at stake with regard to various concerns of advertisements. It recreates a necessity to have comprehensive regulatory system to have judicious and harmonious balance of the all the relevant stakeholders with regard to advertisement sector.

As mentioned therein above, the function of trademark has stretched to advertising in the globally. The menace of infringement of trademark by way of advertising is also increasing wherein the trader mention the trademark of a competitor to manifest superiority of his products and defame the competitor's trademark based on data which was either partially true or irrelevant. The use of competitor's trademark is permissible to the extent it is in accordance to fair market practices and based on true factual data/information. When it comes use of trademark in advertisement by third party, then the Trademarks Act, 1999 comes into action. As per the international treaties, registration of trademark is not mandatory. But the registration of trademark gives exclusive right to use the trademark and obtain relief in case of infringement. However, with regard to unregistered trademark the protection is under common law by way of passing off where only accounts of profit can be claimed.

The sections 29 to 30 of the Trademarks Act, 1999 are related to advertisement. The primary objective of Ss 29(8) and 30(1) was explained in the case of Havells India Ltd. (Havells India Ltd. v. Amritanshu Khaitan , 2015) wherein the court stated that, legislative intend in allowing comparative advertisement is based on honest use of the competitors trademark. To ascertain if the use is honest or not, the standard practices adopted by the members of respective sector shall be taken into consideration. It is not bound on the courts to investigate the codes of conduct laid down by industry. Thus, legislative intent is clear after analysing the above provisions, that the Trademark Act permits comparative advertising provided it is in consonance with the honest industrial practices as mentioned under section 30 of Trademark Act, 1999. But what are '*honest industrial practices*' is most of the time a contentious point. It is evident from numerous case laws on this subject pending before the courts.

Advertisement and Constitution of India, 1950

The advertisement is a form of an expression of commercial speech. It may be through any media(print/social). The freedom of speech and expression is granted to its citizen u/a 19(1) (a) of the Constitution of India. So, the point to be analysed is, whether a competitor can take a defence u/a 19 (1)(a) in the case of comparative advertisements. In the view of this, it becomes essential to first understand the relationship between constitutionality and advertisement.

There are few landmark cases wherein Supreme Court has scrutinised the freedom of expression and advertisement and the same stands true even today.

First among them was the case of (Hamdard Dawakhana v. Union of India, 1960) in which the Supreme Court held that, the advertisement would not get immunity under u/a 19 (1)(a). This is for the reason that Article 19(2) permits reasonable restrictions on the freedom of speech and expression guaranteed under Article 19(1) of the Constitution. It stated that although advertisements constituted a form of speech, but they were not constitutive of the concept of '*free speech*' as they were guided by the object of commercial gain in order to promote trade and commerce.

The decision of Hamdard Dawakhana was in 1959. There after economic liberalisation gradually started which obviously had an impact on the trading practices in market place. In 1995, the question with regard to advertisement and freedom of speech was again raised in the case of (Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd, 1995). There was substantive shift in the approach of Supreme Court considering circumstantial situation.

In this, the Supreme Court held that freedom of speech includes commercial speech and even the businessmen are entitled to claim protection. It further observed that advertisements were beneficial to consumers as it facilitated the free dissemination of information, resulting in greater public awareness in a free market economy'. The decision in Hamdard Dawakhana was reversed. The courts where of the view that freedom of speech and expression includes a right to receive the "commercial speech" as it also serves as a means of dissemination of information for the available goods/service. The economic system in a democracy would be handicapped without there being freedom of "commercial speech".

These views were affirmed in recent case of (Marico Limited v/s Abhijeet Bhansali , 2020). Wherein it was held that, fundamental right to freedom of speech and expression is not an unfettered right. It is essential to maintain judicious balance between the enjoyment of freedom of speech and restriction on it. The decision was noteworthy that one has a right to advertise its product and praise about its quality. Thus, it can be inferred from above judgements, that advertisement being a commercial speech forms a part of the freedom of speech guaranteed under article 19(1) (a) of the Constitution and is subject to limitation imposed restricted under Article 19 (2). Article 19(2) is attracted, if advertisement is unfair or misleading, or is in contravention of any code or regulation and so can be prohibited by the state. But it's from consumer point of view.

Ironically, the Competition Act, 2000 do not have provisions relating to unfair trade practices and Consumer Act do not afford protection to trader/manufacturer. So, this class of traders remains unregulated with regard to unfair trade practices.

Brand War in Pandemic

Dettol Case (March 22, 2020)

This was the first reported case at Bombay High court pertaining to trademark issues. It was a brand war between Dettol (Reckitt Benckiser [RB]) and Lifebuoy (Hindustan Unilever [HUL]). These two are age old rivals and were caught in legal battle for disparagement and trademark infringement at multiple instances. The triggering point was a commercial in which a RED colour soap, obviously Lifebuoy was shown in bad light by RB. Also, the concept of commercial was identical to the Lifebuoy's commercial aired previously. The contention of HUL was, that the advertisement of RB is disparaging in nature and are denigrating its product. And claimed INR 1 crore as damages along with a permanent injunction. In this case Bombay High Court rightly pinpointed that 'nations across the world are communicating just the opposite and asking people to wash their hands with soaps and water whereas the Defendant is creating scare amongst the general public by falsely propagating that soaps are useless by maligning the market leader in the soaps category. When the need of the hour is for everyone to come together and work towards common good, the Defendant's action is irresponsible and against public morality. The matter was pending before the court; however, RB discontinued its advertisement for the time being (Hindustan Unilever Limited v/s Reckitt Benckiser, 2020).

Corona Beer case (June 22, 2020)

This is another case amidst pandemic, where a competitor made an advertisement linking Corona virus and Corona beer.

The Spanish meaning of word '*corona*' means a crown, and on this logic the beer was labelled as 'Corona' back in 1925. The owner of the brand had no idea few decades later it would be a name of life threatening virus causing pandemic. The resemblances of the beer name and the virus has definitely affected the business of beer makers. Some competitor even tried to encash on such similarity and landed in courts of Delhi for the case of disparagement. The comparison depicted in the advertisement was damaging the reputation and goodwill of its brand (Corona Beer) for which the Company successfully got the *ex-parte* injunction and also claimed damages of INR 2 crores. The case is pending for before Delhi High court. (Cerveceria Modelo De Mexico, S. De vs Whiskin Spirits Pvt. Ltd, 2020)

Lesson from these cases

The memes or parody and even puffery in advertisements are good humour but if ulterior motive is harming any business or individual then is definitely a bad market practice. It is evident from the above two cases that there are few brands who indulge in unhealthy practices and fail to show empathy towards each other which is actually a need of an hour.

The courts till date have been responsible to evolve the law of disparagement and comparative advertisement through various judicial pronouncements. But there is a need for some set of rules and forum so that such brand war is resolved amicably and expediently at market level without bothering courts to decide which brand is best or better. The advertisements are short-lived and hence the need to be resolved as quickly as possible so that the harm to the trademark/brand is minimised also the impact on market and consumer can be timely controlled.

It's sad that Courts have to remind the trader to be sensitive amid pandemic situation. The companies indulging in such bad advertisement should beware as in coming times it might have negative impression on their brand itself. Any wrong move can eventually boomerang on them affecting their brand loyal customers. Post Covid, might change perception of consumers towards brands as they may expect more honest and ethical approach. Trust and Humanity would be pillar of advertisement rather than just money-making approach.

Branding Post Pandemic

Many surveys are conducted at various levels and by various forums to evaluate the customers mindset which may be significantly alter existing marketing model. The business of all sizes needs to re-visit their approach toward marketing strategy. The digital innovation and use of it in the business would be indivisible aspect for all traders. Online marketplace would be new trend, for which traditional business needs to gear up to be in race.

‘The world after the present crisis is likely to be different from the one before. Consumers may think differently, spend differently and plan differently. Would they become more frugal? Would they cut down on luxury spending? Would they order more stuff online at their homes and offices and venture out less? Would big malls and supermarkets be less frequented? Would movie watchers, keep away from big-screen theatres in favour of home-watching on Netflix and Amazon Prime? (CNBC, 2020)

The companies are conducting surveys and research to understand the consumer behaviour and consumption pattern. The advertisement does influence the consumer behaviour and preference. And so, companies are closely monitoring and analysing the situation, so the moment circumstances are back to normal or at least under control the business plan can be executed without delay. The pandemic has definitely shifted the consumer’s outlook.

The pandemic has disrupted entire market place globally. The effect is just like tsunami hitting the city. The pandemic has forced lock down of market places and social distancing norms have completely disturbed the supply chain across the global. The operations of all major industries are hard hit by the Covid. The standard operation protocol of many companies is undergoing drastic change to adapt the global situation (Harris, 2020).In wake of these condition the government initiative like *Aatmanirbhar Bharat Abhiyaan* is welcoming. The local manufactures need to gear up to stay in competition. The consumers would be inclined to buy local products over foreign products. Since Covid 19 has disrupted of the global supply chain availability is a great issue. This might force and encourages people to purchase local products which might be readily available. Thus, decisions of people will be certainly influence on market availability.

Post pandemic would be fresh start for almost all traders with revamped approach. It seems film industry has already started taking steps for its upcoming projects. There has been news that some Production house has applied for the name ‘*Corona Pyaar Hai*’ for their new film. While there are few more in line with words ‘*corona*’ in them.

The budgets of the company for advertisement are completely reshaped in view of present crisis. Influencer marketing might be alternative for celebrity marketing considering the budget constraint. Also, it would be more focussed advertisement and the target audience will be domain specific. The rapid expansion and commercialisation of the Internet has brought forth novel legal disputes which challenge the conventional principles and precedents which apply to them. The present matter is an example of just that.(Marico Limited v/s Abhijeet Bhansali , 2020). These observations were made by Bombay High Court in recent case which brought the issue of trademark infringement and disparagement by a social media influencer, a video blogger precisely on YouTube. This is first time the issue was before the court wherein even ‘social media influencer’ was interpreted within definition of manufacturer under the provisions of disparagement was applicable. Court also rightly pointed out that if social influencer is not brought under the legal scanner, Companies to hire such individual to defame the competitor. This case has made it clear that influencer need to be aware of products and services they are promoting on any social media platform and perform through due-diligence prior making any public disclosure.

Conclusion

The unprecedented situation which entire world is facing has brought us back to basics and on the ground reality that materialistic approach should not be the priority. Companies need to revamp their approach based on values and ethical practices. The business and community need to have symbiotic relationship with each other, just as

two peas in a pod. They need to have share the space, survive together and support each other. This is perhaps the secret of companies flourishing all over the world. Without community support no business can survive. The co-existence of community support and business is vital for growth (Sheth, 2020). The current situation demands synergistic relationship between traders (B2B) and towards consumers (B2C) which would promote the growth and healthy competition. The journey may not be smooth but must be safe in coming time. Business and consumer need to show empathy in approach towards each other. The time demands unity among all and sensitivity. Some companies might have opted to stay in hibernate mode may be due to the cost or lack of proper strategic plan. However, it is the need of the hour, to roll up the sleeves and to be in action. Business need to experiment and adapt to the change. Tweaking the popular saying, '*Tough times don't last but best brand would*'. The testing time bring perseverance and best qualities out.

The usage of trademarks and brand engagement are going to witness a shift from traditional pattern post pandemic. In light of this transformation there will be a need of new policies, rules and governance to avoid friction and to promote sustainable growth of society and all stake holders. The 'online – world' post pandemic would need new set of rules as the game itself is changing. Thus, brand owners should bear in mind that their moves are observed by consumers. Positive and genuine approach will be certainly rewarding. Trademark now functions as a trust factor for quality of goods which is not always visible at glance. The much hype '*NEW NORMAL*' would be consumer centric and digitally driven.

With the dawn of new normal let's hope the end of this pandemic.

References

1. AdAge. (2020, March 18). Retrieved from <https://adage.com/creativity/work/jure-tovrljan-coronavirus-logos/2245061>
2. Agitha. (2008, JULY-SEPTEMBER). TRADEMARK DILUTION: INDIAN APPROACH. Journal of the Indian Law Institute, 50(3), pp.339-366. Retrieved from www.jstor.org
3. Cerveceria Modelo De Mexico, S. De vs Whiskin Spirits Pvt. Ltd, CS(COMM)No.186/2020 & I.A.Nos.4705-08/2020 (Delhi High Court June 22, 2020).
4. CNBC. (2020, April 11). Retrieved from <https://www.cnbc18.com/views/brands-action-plan-during-the-covid-19-crisis-5670881.htm>
5. Collen. (2020, May 18). Forbes. Retrieved from [forbes.com: https://www.forbes.com/sites/jesscollen/2020/05/18/strong-trademarks-a-key-to-boom-in-online-sales-during-the-pandemic/#6b1801fb156c](https://www.forbes.com/sites/jesscollen/2020/05/18/strong-trademarks-a-key-to-boom-in-online-sales-during-the-pandemic/#6b1801fb156c)
6. Forbes . (2013, June 17). Retrieved from <https://www.forbes.com/sites/robertpassikoff/2013/06/17/defining-brand-engagement/#7e2748904446>
7. Hamdard Dawakhana v. Union of India, SC 554 (Supreme Court December 18, 1960).
8. Harris, H. H. (2020 , August). 'The impact of Covid-19 pandemic on corporate social responsibility and marketing philosophy. Journal of Business Research, Volume 116, Pages 176-182. doi:<https://doi.org/10.1016/j.jbusres.2020.05.030>
9. Havells India Ltd. v. Amritanshu Khaitan , Del 8115 (Delhi High Court March 17, 2015).
10. Hindustan Unilever Limited v/s Reckitt Benckiser, COMIPST/300/2020 (Bombay High Court March 20, 2020).
11. Marico Limited v/s Abhijeet Bhansali , Notice of motion no. 1094 of 2019 (Bombay High Court January 15, 2020).

12. Sheth, J. (2020, July). Business of business is more than business: Managing during the Covid crisis . Industrial' Marketing Management, 88, 261-264. doi:<https://doi.org/10.1016/j.indmarman.2020.05.028>
13. Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd, SCC 139 (Supreme Court August 3, 1995).
14. Twitter . (2020, March 17). Retrieved from <https://twitter.com/StuckByFevicol>
15. Twitter. (2020, March 3). Retrieved from https://twitter.com/Amul_Coop