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Balancing Trademark Dilution Protection and Freedom of Speech in India: A Critical Analysis

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ABSTRACT

This paper examines the concern between trademark dilution protection and the right to freedom of speech in India. As Indian trademark law has expanded to include anti-dilution provisions, concerns have arisen about the potential impact on freedom of expression, particularly in the contexts of parody, criticism, and commentary. This research analyzes the evolution of dilution doctrine in India, key legal precedents, and the challenges in reconciling dilution protection with constitutional guarantees of freedom of speech. By exploring cases such as ITC Limited and Ford India Private Limited, this paper highlights the developing judicial approach to balancing these competing interests. The study concludes that while Indian courts have shown some sensitivity to freedom of speech concerns, there remains a need for clearer statutory guidelines and judicial standards to prevent overreach of dilution claims and safeguard legitimate expressive uses of trademarks.

Keywords: *Trademark dilution, Freedom of Speech, Anti-dilution provisions, impact on freedom of expression, dilution doctrine in India, statutory guidelines.*

I. INTRODUCTION

Trademark dilution protection, a relatively recent addition to Indian intellectual property law, aims to protect the distinctive quality of famous marks from uses that may blur or tarnish their uniqueness, even in the absence of consumer confusion. While this protection serves important economic interests, it has raised significant concerns about its potential to infringe upon the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Indian Constitution.

This concern is particularly acute in cases involving the use of trademarks in parody, criticism, or commentary, where expressive interests often clash with the broad protections afforded to trademark owners under dilution doctrine. As Indian courts grapple with these issues, there is growing need to establish a clear framework for balancing the legitimate interests of trademark

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holders with the public's right to freedom of expression.

The global discourse on this issue has seen significant developments, with jurisdictions like the United States and the European Union crafting specific legislative and judicial approaches to address the dilution-freedom of speech conflict. India, with its unique legal, cultural, and economic landscape, faces the challenge of developing its own balanced approach that respects both intellectual property rights and the fundamental right of freedom of speech and expression.

This paper seeks to explore the complex relationship between trademark dilution doctrine protection and freedom of speech in India, analyzing the legal framework, key judicial decisions, and the challenges in striking an appropriate balance between these competing interests. It also aims to place the Indian experience in a global context, drawing insights from international approaches to inform potential paths forward for Indian law and policy in this area.

II. TRADEMARK DILUTION IN INDIA: LEGAL FRAMEWORK

(A) Statutory Basis

The concept of trademark dilution was introduced in India through the Trademark Act, 1999, which came into effect in 2003. Section 29(4) of the Act provides protection against dilution for marks with a reputation in India, stating:

“A registered trademark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which-

- a) Is identical with or similar to the registered trademark
- b) Is used in relation to goods or services which are not similar to those for which the trademark is registered
- c) The registered trademark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trademark.”²

This provision marked a significant expansion of trademark protection in India, moving beyond the traditional likelihood of confusion standard to protect marks against uses that may diminish their distinctiveness or reputation.

(B) Types of Dilution

Indian law recognizes two primary forms of dilution:

- i. **Blurring-** Weakening of a mark's ability to identify and distinguish goods or

² The Trademark Act, 1999, S.29(4)

services. This occurs when the use of a similar mark on dissimilar goods reduces the original mark's uniqueness and strength.

- ii. **Tarnishment:** Harm to a mark's reputation through unsavory or unflattering associations. This form of dilution occurs when a mark is linked to inferior or unseemly products or is portrayed in an unwholesome or unsavory context.

The recognition of these two forms of dilution in Indian law aligns with international trends, particularly the approach taken in the United States under the Trademark Dilution Revision Act of 2006.

(C) Well-Known Trademarks

The Act also provides special protection for "well-known trademark" under Section 2(1)(zg), which are afforded broader protection against dilution.³ The concept of well-known trademarks is crucial in the dilution context, as it determines which marks are eligible for this enhanced protection.

Section 11(6) of the Act provides factors for determining whether a trademark is well-known, including:

- The knowledge or recognition of the trademark in the relevant section of the public.
- The duration, extent, and geographical area of use of the trademark.
- The duration, extent and geographical area of promotion of the trademark.
- The geographical extent of the registration or application for registration of the trademark.
- The record of successful enforcement of the rights in the trademark.

The inclusion of well-known trademark provisions in the Act reflects India's compliance with its obligations under the TRIPS Agreement and aligns Indian law with global standards of trademark protection.

(D) Procedural Aspects

The Trademarks Registry maintains a list of well-known trademarks, which provides a degree of certainty for trademark owners and users. However, the process of having a mark declared well-known can be complex and time-consuming, often involving extensive evidence of the mark's reputation and recognition.

³ The Trademark Act, 1999, S.2(1)(zg)

In dilution cases, the burden of proof typically lies with the trademark owner to demonstrate that their mark has a reputation in India and that the allegedly diluting use is detrimental to the mark's distinctive character or repute.

III. FREEDOM OF SPEECH AND EXPRESSION IN INDIA

1. Constitutional Basis

Article 19(1)(a) of the Indian Constitution guarantees all citizens the fundamental rights to freedom of speech and expression.⁴ This right is subject to reasonable restrictions under Article 19(2) on grounds such as the sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

The broad protection afforded to free speech under the Indian Constitution reflects the country's commitment to democratic values and the free exchange of ideas. This constitutional guarantee forms the backdrop against which conflicts between trademark rights and freedom of speech and expression must be resolved.

2. Judicial Interpretation

Indian courts have interpreted the freedom of speech and expression broadly, encompassing various forms of expression including commercial speech. Key principles developed through judicial decisions include:

- i. Commercial speech is protected under Article 19(1)(a), but subject to more restrictions than political or artistic speech. This principle, established in cases like **Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.**,⁵ recognizes the value of commercial speech in informing consumers and promoting competition, while also acknowledging the need for regulation to prevent deception and unfair practices.
- ii. The importance of balancing competing rights and interests when resolving conflicts involving freedom of speech. In cases like **Sahara India Real Estate Corporation Ltd. v. Securities and Exchange Board of India**,⁶ the Supreme Court has emphasized the need for a nuanced approach that considers the specific context and competing interests at stake.
- iii. The doctrine of "chilling effect," which recognizes that overbroad restrictions on speech can deter legitimate expression. This principle, articulated in cases like **S. Khushboo v.**

⁴ Constitution of India, art.19(1)(a).

⁵ *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*, (1995) 5 SCC 139.

⁶ *Sahara India Real Estate Corporation Ltd. v. Securities and Exchange Board of India*, (2012) 10 SCC 603.

Kanniammal,⁷ is particularly relevant in the context of trademark dilution, where the threat of legal action may discourage legitimate uses of marks for expressive purposes.

- iv. The recognition of parody as a form of protected speech. While not as developed as in some Western jurisdictions, Indian courts have shown some willingness to protect parodic uses of trademarks, as seen in cases like **Tata Sons Limited v. Greenpeace International & Anr.**⁸

These judicial interpretations provide a framework for analyzing the intersection of trademark dilution and freedom of speech, emphasizing the need for careful balancing of rights and consideration of the broader public interest in freedom of expression.

IV. RELEVANCE TO TRADEMARK LAW

The constitutional protection of freedom of speech has significant implications for trademark law, particularly in the context of dilution. It raises questions about the extent to which trademark rights can restrict various forms of expression, including:

- Parody and satire using well-known marks.
- Criticism or commentary on products, services, or corporate practices.
- Comparative advertising.
- Artistic or creative uses of trademarks in literature, film, or other media.

These expressive uses of trademarks often serve important social functions, such as facilitating public discourse, promoting consumer awareness, or contributing to cultural dialogue. However, they may also conflict with the interests of trademark owners in protecting their marks from dilution.

(A) Key Cases Examining Trademark Dilution and Freedom of Speech in India

ITC Limited v. Philip Morris Products SA and Ors. (2010)⁹

This case involved the use of similar trademarks in different product categories. The Delhi High Court considered both dilution and freedom of speech aspects, emphasizing the need for a balanced approach in applying dilution doctrine.

Key points from the judgment:

- The court recognized the concept of dilution in Indian Trademark law.

⁷ S. Khushboo v. Kanniammal (2010) 5 SCC 600.

⁸ Tata Sons Limited v. Greenpeace International & Anr., 178 (2011) DLT 705.

⁹ ITC Limited v. Philip Morris Products SA and Ors., 2010 (42) PTC 572 (Del).

- It emphasized that dilution protection should not unduly restrict competition or legitimate business practices.
- The decision highlighted the need to consider the public interest in freedom of expression, even in commercial contexts.

Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd. (2010)¹⁰

This case dealt with the alleged dilution of Dabur's "Hajmola" trademark by the defendant's use of "Hajmola" for paints. The Delhi High Court's decision provided insights into the application of dilution doctrine in India.

Significant points:

- The court emphasized the need to prove actual dilution or likelihood of dilution, not mere association.
- It considered factors such as the strength of the mark, the degree of similarity, and the impact on the mark's distinctiveness.
- The decision highlighted the challenges in proving dilution in the Indian context.

Tata Sons Limited v. Greenpeace International & Anr. (2011)¹¹

While not strictly a dilution case, this decision addressed the use of a well-known mark (TATA) in the context of parody and criticism. The Delhi High Court's ruling highlighted the importance of protecting freedom of speech in such contexts, even when dealing with famous marks.

Significant aspects of the judgment:

- The court recognized parody as a form of protected speech under Article 19(1)(a).
- It emphasized that trademark rights must be balanced against the right to critique and comment on matters of public interest.
- The decision suggested that non-commercial uses of trademarks for expressive purposes should be given greater latitude.

Bloomberg Finance LP v. Prafull Saklecha (2015)¹²

This case involved the use of the "Bloomberg" trademark by an unrelated financial services company. The Delhi High Court's decision provided further clarification on the application of

¹⁰ Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd., 2010 (40) PTC 149 (Del).

¹¹ Tata Sons Limited v. Greenpeace International & Anr., 178 (2011) DLT 705.

¹² Bloomberg Finance LP v. Prafull Saklecha, 2015 SCC Online Bom 1950.

dilution provisions in India.

Key aspects:

- The court recognized the protection afforded to well-known marks against dilution.
- It emphasized the need to consider the reputation of the mark and the potential for unfair advantage or detriment.
- The decision highlighted the global nature of well-known marks and the need for consistent protection across jurisdictions.

These cases collectively demonstrate the evolving approach of Indian courts to balancing trademark dilution protection with freedom of speech concerns. They reflect a growing recognition of the need to protect expressive uses of trademarks while also safeguarding the legitimate interests of trademark owners.

Ford v. Ford India Private Limited (2022)¹³

The Delhi High Court addressed issues of trademark dilution and disparagement in the context of comparative advertising. The court's decision underscored the need to balance trademark protection with the right to commercial speech.

Key takeaways:

- The court recognized that comparative advertising can serve consumer interests by providing information.
- It emphasized that such advertising must not unfairly denigrate or dilute competitors trademarks.
- The decision highlighted the need for a context-specific analysis in balancing trademark rights and commercial speech.

V. ANALYSIS OF CURRENT LEGAL APPROACH IN INDIA

Indian courts have shown an increasing awareness of the need to balance dilution protection with freedom of speech concerns. Key principles emerging from recent cases include:

- Recognition of expressive use-** Courts have begun to distinguish between purely commercial use and expressive use of trademarks, showing greater tolerance for the latter.
- Consideration of public interest-** There is a growing tendency to weigh the public

¹³ Ford v. Ford India Private Limited, CS (COMM) 483/2022 (Delhi High Court, 2022).

interest in freedom of expression against the private interest in protecting brand value.

- iii. **Context-specific analysis-** Courts are increasingly looking at the specific context of trademark use, particularly in cases involving parody or criticism.

However, challenges remain in consistently applying these principles, particularly given the broad statutory language governing dilution.

VI. CRITICISMS AND CONTROVERSIES

1. Overbroad Protection

Critics argue that the current dilution framework in India provides overbroad protection to trademark owners, potentially stifling legitimate speech and creative expression.¹⁴ The lack of clear statutory exceptions for non-commercial use, parody, or criticism exacerbates this concern.

Specific issues include:

- The potential for dilution claims to restrict uses of trademarks in artistic or literary works.
- The risk of limiting commentary or criticism of well-known brands or companies.
- The possibility of stifling innovation in branding and marketing, particularly for smaller businesses.

2. Chilling Effect on Speech

There are concerns that the threat of dilution claims may have a chilling effect on speech, particularly for smaller entities or individuals who lack the resources to defend against such claims. The chilling effect can manifest in various ways:

- Self-censorship in artistic or literary works that reference well-known brands.
- Reluctance to engage in critical commentary on corporate practices.
- Avoidance of comparative advertising or product reviews that mention competing brands.

3. Lack of Clear Statutory Exceptions

Unlike some jurisdictions, Indian trademark law does not provide clear statutory exceptions for parody, criticism, or commentary, leaving these issues to judicial interpretation. This lack of

¹⁴ Dev Gangjee, "Property in Brands: The Commodification of Conversation," in *Concepts of Property in Intellectual Property Law* (Cambridge University Press, 2013).

explicit exceptions creates uncertainty and may lead to inconsistent outcomes across different cases and courts.

Potential areas for statutory clarification include:

- Explicit protection for non-commercial uses of trademarks.
- Clear exceptions for parody, satire, and criticism.
- Guidelines for evaluating comparative advertising and product reviews.

4. Potential for Misuse

Some scholars have raised concerns about the potential misuse of dilution claims to suppress criticism or unfavorable portrayals of brands.¹⁵¹⁶ This potential for abuse stems from several factors:

- The broad language of dilution provisions, which can be interpreted expansively.
- The high costs of defending against dilution claims, which may deter legitimate uses.
- The power imbalance between large corporations and individual critics or smaller entities.

Examples of potential misuse include:

- Threats of legal action against consumer review websites that use trademarks in their critiques.
- Attempts to stifle parody or satire that comments on corporate practices or brand images.
- Efforts to prevent the use of trademarks in documentaries or news reports discussing corporate behavior.

5. Uncertainty in Determining Fame and Reputation

The lack of clear criteria for determining when a mark has sufficient fame or reputation to qualify for dilution protection creates uncertainty and potential for inconsistent application of the law.¹⁷ This issue is compounded by:

- The subjective nature of assessing a mark's reputation.

¹⁵ Shamnad Basheer & Althaf Marsoof, "Trademarks and Freedom of Expression- A Study of Indian Law," 15 Chicago-Kent Journal of Intellectual Property 173 (2016).

¹⁶ Latha R. Nair, "Trademark Dilution: Indian Approach," in *International Trademark Dilution* (Wolters Kluwer, 2021).

¹⁷ J. Thomas McCarthy, "Dilution of a Trademark: European and United States Law Compared," 94 Trademark Rep. 1163 (2004).

- The difficulty in quantifying the degree of recognition required for dilution protection.
- The potential for regional or demographic variations in a mark's fame within India.

6. Concern with Traditional Trademark Principles

Some legal scholars argue that dilution protection fundamentally alters the traditional consumer protection rationale of trademark law, shifting towards a property-like right in the mark itself.¹⁸

This shift raises concerns about:

- The expansion of private control over language and symbols.
- The potential conflict with competition law principles.
- The risk of creating unjustified monopolies in common words or phrases.

VII. COMPARATIVE ANALYSIS: GLOBAL PERSPECTIVES ON DILUTION AND FREEDOM OF SPEECH

To provide context for the Indian approach, it's valuable to examine how other jurisdictions have addressed the balance between dilution protection and freedom of speech.

1. United States

The U.S. has a well-developed body of law on trademark dilution, including specific statutory provisions addressing freedom of speech concerns:

- The Federal Trademark Dilution Act (FTDA) of 1995, amended by the Trademark Dilution Revision Act (TDRA) of 2006, provides explicit exceptions for:
 - Fair use in comparative advertising or promotion.
 - News reporting and commentary.
 - Parody, criticism, and commentary on the famous mark owner or their goods/services.¹⁹

Key U.S. cases:

- **Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC (2007)**, upheld parody as a defense against dilution claims.
- **Mattel, Inc. v. MCA Records, Inc. (2002)**, protected artistic expression using

¹⁸ Rochelle Cooper Dreyfuss, "Expressive Genericity: Trademarks as Language in the Pepsi Generation," 65 Notre Dame L. Rev. 397 (1990).

¹⁹ Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (codified as amended in scattered sections of 15 U.S.C.).

trademarks under the First Amendment.²⁰

2. European Union

The EU approach to dilution is governed by the EU Trademark Regulation and the Trademark Directive:

- Provides protection against dilution for marks with a reputation in the EU.
- Recognizes “due cause” as a defense, which can include freedom of speech considerations.
- Does not have explicit statutory exceptions for freedom of speech, relying more on case-by-case judicial balancing.²¹

Notable EU cases:

- **Interflora Inc v. Marks and Spencer Plc (2011)**,²² addressed the balance between trademark rights and free competition in the context of keyword advertising.
- **Deckmyn v. Vandersteen (2014)**, while a copyright case, it provided guidance on balancing IP rights with freedom of expression, potentially applicable to trademark contexts.²³

3. South Africa

South Africa’s approach to dilution and freedom of speech in trademark law offers an interesting comparison for India, as another developing economy with a strong constitutional rights framework:

- The Trademark Act 194 of 1993 includes anti-dilution provisions.
- The Constitution of South Africa provides strong protection for freedom of expression.
- Courts have shown willingness to consider constitutional values in trademark disputes.²⁴

Key case:

- **Laugh It Off Promotions CC v. South African Breweries International (2005)**, the Constitutional Court upheld the right to parody famous trademarks, emphasizing the

²⁰ *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir.2002).

²¹ Ilanah Simon Fhima, “Trademark Dilution in Europe and the United States,” 40 *Santa Clara High Tech. L.J.*1 (2023).

²² *Interflora Inc v. Marks and Spencer Plc*, Case C-323/09, [2011] ECR I-08625.

²³ *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*, Case C-201/13, ECLI:EU:C:2014:2132.

²⁴ Wim Alberts, “A Critical Analysis of Trademark Dilution,” 17S. Afr. Mercantile L.J.270 (2005).

importance of freedom of speech.²⁵

VIII. PROPOSED SOLUTIONS FOR BALANCING RIGHTS IN THE INDIAN CONTEXT

Based on the analysis of the Indian situation and insights from global approaches, the following solutions are proposed to better balance trademark dilution protection with freedom of speech rights in India:

(A) Statutory Amendments

Consider amending the Trademark Act, 1999, to include explicit exceptions for non-commercial use, parody, criticism, and commentary, similar to the fair use provisions in copyright law. Specific recommendations include:

- Adding a new section clearly stating exceptions to dilution claims, including:
 - Non-commercial uses of a mark.
 - Use in news reporting, commentary, or criticism.
 - Parody, satire and artistic expression.
 - Comparative advertising that is truthful and not misleading.
- Introducing a “fair use” doctrine specific to trademark law, drawing inspiration from copyright law and international best practices.

(B) Judicial Guidelines

Develop clear judicial guidelines for evaluating dilution claims in light of freedom of speech concerns. These could include:

- A multi-factor test for balancing trademark rights and freedom of speech, considering:
 - The nature of the use (commercial v. non-commercial).
 - The purpose of the use (e.g., criticism, parody, commentary).
 - The extent of use of the mark.
 - The strength and fame of the mark.
 - The likelihood of actual harm to the mark’s distinctiveness or reputation.
- Adoption of a modified version of the U.S Rogers test for balancing trademark rights and artistic expression, adapted to the Indian constitutional context.

²⁵ Laugh It Off Promotions CC v. South African Breweries International (Finance) BV t/a Sabmark International and Another 2006 (1) SA 144(CC).

(C) Heightened Evidentiary Standards

Implement stricter evidentiary requirements for proving dilution, particularly in cases involving expressive uses of trademarks. This could include:

- Requiring clear evidence of actual dilution or a high likelihood of dilution, rather than mere association.
- Placing a higher burden on plaintiffs to demonstrate actual economic harm or loss of distinctiveness.
- Requiring survey evidence or expert testimony to establish a mark's fame and the impact of the alleged diluting use.

(D) Alternative Dispute Resolution

Encourage the use of mediation and arbitration for trademark dilution disputes, potentially through specialized panels with expertise in both intellectual property and constitutional law. This approach could:

- Reduce the chilling effect of costly litigation on freedom of speech.
- Provide a forum for more nuanced consideration of competing interests.
- Allow for creative solutions that balance trademark protection and expressive uses.

(E) Public Education and Awareness

Develop programs to educate the public, small businesses, and content creators about trademark rights and freedom of speech issues. This could include:

- Workshops and seminars on intellectual property and freedom of speech.
- Online resources providing guidance on fair use of trademarks.
- Collaboration with educational institutions to incorporate these topics into relevant curricula.

(F) Establishment of a Trademark Dilution and Freedom of Speech Committee

Create a specialized committee under the aegis of the Intellectual Property Office of India to:

- Monitor developments in trademark dilution and freedom of speech issues.
- Provide recommendations for policy and legislative changes.
- Offer guidance to courts and practitioners on balancing these competing interests.

(G) International Cooperation and Knowledge Sharing

Engage in dialogue and knowledge sharing with other jurisdictions to learn from their experiences in balancing dilution protection and freedom of speech. This could involve:

- Participation in international conferences and forums on trademark law and freedom of speech.
- Collaborative research projects with foreign universities and Intellectual Property offices.
- Regular review of international best practices and their potential applicability to the Indian context.

IX. CONCLUSION

The intersection of trademark dilution protection and freedom of speech presents ongoing challenges for Indian courts, legislators, and society. While recent judicial decisions have shown some sensitivity to freedom of speech concerns in dilution cases, there remains a need for clearer statutory guidance and more consistent judicial standards.

The comparative analysis reveals that other jurisdictions have grappled with similar issues, often developing specific legislative provisions or judicial tests to balance these competing interests. India has the opportunity to learn from these experiences while crafting an approach that is sensitive to its unique legal, cultural, and economic context.

As Indian trademark law continues to evolve, it is crucial to develop a nuanced approach that protects the legitimate interests of trademark holders while safeguarding the fundamental rights to freedom of expression. This balance requires ongoing dialogue between legal scholars, practitioners, and policymakers to create a framework that is responsive to India's dynamic intellectual property landscape and its commitment to democratic values.

By implementing the proposed solutions, including statutory amendments, judicial guidelines, and alternative dispute resolution mechanisms, India can work towards a more balanced and equitable system of trademark protection. Such a system would preserve brand value and prevent consumer confusion while also fostering a vibrant marketplace of ideas, critical discourse, and creative expression.

The path forward requires careful consideration, robust debate, and a willingness to adapt legal frameworks to meet the challenges of a rapidly changing digital and global environment. By striking the right balance, India can position itself as a leader in harmonizing intellectual property rights with fundamental freedoms, setting a valuable example for other developing economies grappling with similar issues.

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