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Economic Perspective of Trademarks

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ABSTRACT

This paper aims to analyze trademarks from an economic perspective. Through this paper, the author seeks to discuss and analyze the conventional economic theories on trademarks by eminent economists and economic scholars, who previously categorized trademarks as private goods, in contrast to other intellectual properties like copyrights and patents which were categorized as public goods. The paper goes on to discuss the various uses of a trademark, some of which fall under the ambit of public non-rival uses and others which can be considered under the conventional proprietary uses. Thereafter, the author emphasizes upon the modern public goods theory on trademarks, which keeping the above uses of the trademark in mind, categorize it as an impure public good. Lastly, the author also discusses why the categorization of trademarks as impure public goods, alongside public goods like copyrights and patents, is correct as all three of them share common features when it comes to the ultimate goal, which is to act as an information source for the consumers. The paper is divided into three parts, wherein the first part provides an introduction to the topic and the motivation behind its selection, the second part deals with the literature review, and lastly, the third part deals with the discussion and conclusion of the paper.

I. INTRODUCTION

In the olden traditional economy, where market knowledge was scarce, the retailer's goodwill used to be the foundation. The consumer relied merely on the retailer's goodwill, to make informed choices when it came to purchasing goods. However, over time with mass industrialization and production of goods, the consumer has now become reliant on checking upon the manufacturer or service provider's goodwill. When it comes to the modern economy, the essence is time-saving. Unlike in the non-market economy, where the purchaser (or the state) was assumed to be most informed about the products and services in the market, and in the early market economy, where the retailer was assumed to be best informed, in the modern efficient market economy, it is the consumers who know most about the market information².

¹ Author is a student at Bennett University, India.

² Professor William O. Hennessey, *The Role of Trademarks in Economic Development and Competitiveness*, 3 (2004), https://www.ipmall.info/sites/default/files/hosted_resources/Hennessey_Content/RoleofTrademarksinEconomic

Now, the "brand" is considered to be the instrument for disseminating market information³. Consumers safeguard themselves by depending on well-known brands of goods and services. That is where trademarks come in.

Within the ambit of intellectual property, trademarks are in the nature of a name, sign, symbol, word⁴ etc. which are attached by producers to their goods exclusively, in order to assist consumers in recognizing the identity or source of the good, as well as differentiate the particular good from identical goods of other producers in the same market. Hence, a trademark's role is to protect the 'brand' of the company. When trademarks protect brands with notable image and value, the brand by itself becomes a characteristic of the products of that particular producer⁵. Therefore, companies spend a lot of money to develop and advertise their brand via their trademarks, so that customers can identify and recognize it.

The traditional economic understanding of trademarks was that they were used to increase customer retention and revenue generation. It aids in increasing profits, protecting against "unfair competition, adding market share, differentiating products and services, introducing new products, and revenue generation from licensing and franchising"⁶. Hence, due to this viewpoint, various economists and economic scholars developed the conventional economic theory wherein they focused only on the proprietary uses of trademark and categorized it as a private good. Other intellectual properties like copyrights and patents on the other hand were still categorized as public goods as it was understood that creativity and innovations can be enjoyed by all simultaneously.

However, a modern economic theory has developed, which postulates that trademarks, other than their economic and proprietary uses, also have the function of being referred to by multiple consumers for identifying the source of products and hence, are also public goods, akin to copyrights and patents. Other than the protection of the goodwill of the proprietor, the most important function of a trademark has always been to communicate information to the customers⁷ and protect them from deception, as it has the goal of consumer protection at its

DevelopmentandCompetitiveness.pdf.

³ *Id.* at p.3.

⁴ The Trademarks Act, 1999, No. 47, Acts of Parliament 1999 (India), Section 2 (zb).

⁵ WIPO, *The Economics of Trademarks*, WIP.INT, Chapter II, 86, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_944_2013-chapter2.pdf.

⁶ Tavleen Kaur Bhatia and Pulkit Khurana, *Economic Aspect of Trademark*, 1 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681387.

⁷ Professor William O. Hennessey, *The Role of Trademarks in Economic Development and Competitiveness*, 3 (2004), https://www.ipmall.info/sites/default/files/hosted_resources/Hennessey_Content/RoleofTrademarksinEconomicDevelopmentandCompetitiveness.pdf.

core⁸. Through this paper, the author aims to point out, that the misconception held by conventional economists as to trademarks being private goods due to having some rival uses, has led to the unnecessary separation of trademarks from other intellectual properties like copyrights and patents, despite having overall public good character. The author aims to emphasize how the modern public goods theory on trademarks aids incorrectly categorizing trademarks as public goods, due to its recognition of a trademark as a source of information freely available to society, akin to the underlying public functions of copyrights and patents.

(A) Literature review

We see that ‘trademarks’ are words and symbols attached to a particular proprietor’s goods and services exclusively. The proprietor thereafter has a monopoly over the use of these trademarks in connection with the commodities to which they are attached, and are considered as assets of the proprietor⁹. The protection afforded to trademarks is mainly considered to be for the following reasons: (i) facilitation and enhancement of decision making by consumers; (ii) incentives firms to produce products having desirable qualities, even which are not observable at the time of purchase¹⁰. From an economic viewpoint, the role of a trademark is to help in the identification of its source and to help the consumers identify the features of the product. Through these trademarks, the proprietors are able to exclusively differentiate their products and communicate such differences to their customers¹¹. This view of trademarks is in line with the view held by conventional economists.

II. CONVENTIONAL ECONOMIC THEORY OF TRADEMARKS

The figurehead economic theorists of intellectual property law and economics, Nicholas S. Economides, William L. Landes, and Richard A. Posner, mainly contributed to the development of the conventional theory. Nicholas S. Economides asserted that when trademark owners invest in their trademarks, they build goodwill that leads to higher earnings from product and service sales¹². Mark owners invest in their trademarks by ensuring that the quality and features of their products and services stay consistent, as well as through advertising them in ways that tell buyers about the characteristics of their products or, at the absolute least, product features and availability.¹³ Economists William L. Landes and Richard A. Posner similarly point out that the use of trademarks leads to enhancement of competition in the

⁸ *Id.* at p. 6.

⁹ Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523 (1988).

¹⁰ Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 526 (1988).

¹¹ Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP, 527 (1988).

¹² *Id.*

¹³ *Id.*

market, and in turn, also encourage new entrants to invest in their trademarks to attract customers. Such competition leads to a reduction in prices and hence, investing in and maintaining trademarks benefit both suppliers and consumers¹⁴. This understanding led to the development of the dominant economic theory for trademark law, which is the search cost theory, which is based on the benefits these trademarks provide to consumers who refer to or search for products by recognizing the suppliers' marks¹⁵.

Therefore, we see that despite falling under the ambit of intellectual property law, the understanding of trademark law was such that it was not considered similar to copyrights and patents. The argument was that trademarks did not promulgate dissemination of knowledge like copyrights, nor lead to enhancement in innovation like patents, rather the purpose of trademark law was purely economic or market-based¹⁶. The main distinction was that patents and copyrights were considered 'public goods'¹⁷, in whose market government intervention was required, whereas trademarks were 'private goods'. This view is derived from the nature of public goods which are considered to be non-rival i.e., after the production of such a good, everyone is free to consume it simultaneously, without any interference with each other's enjoyment, which is akin to the purpose of dissemination of knowledge and innovation¹⁸ underlying copyrights and patents. However, this view of trademarks as private goods stems from the fact that they are considered to be rival in nature, i.e., if the trademark is simultaneously used by someone else other than the proprietor, such a use would interfere with the proprietor's use of the mark and would also lead to the signals which enable consumers their search costs to be obscured¹⁹.

III. TYPES OF USES OF A TRADEMARK

When it comes to the use of trademarks, there are two types of uses known. One is the proprietary use of the mark by its proprietor as a resource of value. The other lesser-known use is understood as 'referential use' i.e., where consumers and competitors utilize the mark to refer to the product's source or in order to distinguish the product from that of others. From the

¹⁴ William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 276-77 (1988).

¹⁵ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268-70 (1987).

¹⁶ David W. Burke, *A New Economics of Trademarks*, Northwestern Journal of Technology and Intellectual Property, Volume 5, Issue 1, 1 (2006).

¹⁷ Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV., 317 (2005); Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115 (2003).

¹⁸ Livia Ilie, *Intellectual Property Rights: An Economic Approach*, Procedia Economics and Finance, <https://core.ac.uk/download/pdf/81960566.pdf>.

¹⁹ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268-70 (1987).

above discussion, it is apparent that the majority of the conventional economists and scholars who view trademarks as private goods, take into consideration only the trademark's proprietary use. In line with this view, conventional economists Landes and Posner postulated that "A proper trademark is not a public good; it has social value only when used to designate a single brand."²⁰ This narrow view further does not give attention to the creative intricacies of trademarks. They further pointed out that "we do not need trademark protection just to be sure of having enough words" as we need patent and copyright protection to be sure that we have enough inventions and artistic works"²¹. Similarly, another scholar Professor Mark Lemley has also argued that "there is no public goods problem for intellectual property to solve"²².

IV. MODERN PUBLIC GOODS THEORY OF TRADEMARKS

However, over time the view of a trademark as a private good has changed. Economic scholar David W. Burke postulated a new economic theory, commonly known as "public goods theory", wherein trademarks were termed as impure public goods²³. He argued that the conventional treatment of trademarks as private goods ignores its similarities with other intellectual properties like copyrights and patents²⁴. When taking into consideration both the referential and proprietary uses of trademark at an equal level, he pointed out that trademarks simultaneously have both rival and non-rival uses. Referential use by consumers simultaneously of the trademark for referring to a particular source is purely non-rival, whereas proprietary use by competition in the same market is purely rival²⁵. Furthermore, it is congestible in nature as well because proprietary "use of the mark even by non-competitors as a source-identifier overtime whittles away the communicative power of the mark"²⁶. Keeping in mind that even public goods have been recognized to be not completely non-rival²⁷, Burke characterizes trademarks as impure public goods.

Trademark law allows unlimited referential use, i.e., as such use is non-rival, consumers can simultaneously refer to the trademark without interfering with each other. These referential uses of trademarks are sources of information widely available to the consumer public, their

²⁰ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 274 (1987).

²¹ *Id.*, at 275.

²² Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV., 143 (2004).

²³ David W. Burke, *A New Economics of Trademarks*, *Northwestern Journal of Technology and Intellectual Property*, Volume 5, Issue 1, 6 (2006).

²⁴ *Id.*, at 7.

²⁵ *Id.*, at 6.

²⁶ *Id.*, at 8.

²⁷ See John G. Head, *Public Goods and Public Policy*, in READINGS IN PUBLIC SECTOR ECONOMICS 176, 179 (1990).

nature is similar to the copyrighted works and patented innovations available to the public²⁸. Burke even argues that public access to trademarks can be considered to be even easier than copyrights and trademarks, as once trademarks become generic in nature, they are free to be used by the public and competitors, and the protection is revoked²⁹, whereas consumers are given access to copyrighted works and patented inventions, only through special provisions, during the lengthy monopoly periods³⁰.

Burke goes on to emphasize that even the value afforded to consumers by referential use of the mark, at the end of the day, is dependent upon the strength of protection afforded to the proprietary use of the mark³¹. However, it is unwise to say that trademark laws only protect the supplier's goodwill. When it comes to infringement actions, we see that it not only protects the goodwill of the proprietors but also mandatorily requires proof of confusion faced or likely to be faced by consumers as to the good's source³². If proprietary use of the mark by non-proprietors is allowed, it would greatly affect the consumer's referential use of the marks as sources of information and would increase the search costs involved³³. The likelihood of confusion is determined, keeping in mind various factors which are the effects that may occur on the referential use of the mark, due to the alleged infringer's actions³⁴. Now, when it comes to dilution actions, we see that dilution refers to "whittling away" of the value of the mark due to successive proprietary use by non-competitors. Burke emphasizes that this nature of dilution is the same as that of a congestible public good³⁵. Thus, even when it comes to dilution, the focus remains on the protection of referential use of the mark and the likelihood of confusion that could arise. Burke supports his argument by relying on economist Frank Schechter's point, wherein the latter theorized that laws protecting against dilution would only apply to such marks: words that have "been associated in the public mind with a particular product"³⁶ and "have created in the public consciousness an impression or symbol of the excellence of the particular product in question."³⁷ Further reliance is placed on the theories by even

²⁸ David W. Burke, *A New Economics of Trademarks*, Northwestern Journal of Technology and Intellectual Property, Volume 5, Issue 1, 10 (2006).

²⁹ The Trademarks Act, 1999, § 9, No. 47, Acts of Parliament 1999 (India).

³⁰ The Copyright Act, 1957, § 53, No. 12, Acts of Parliament, 1957 (India); The Patents Act, 1970, § 22, No. 39, Acts of Parliament, 1970 (India).

³¹ David W. Burke, *A New Economics of Trademarks*, Northwestern Journal of Technology and Intellectual Property, Volume 5, Issue 1, 12 (2006).

³² The Trademarks Act, 1999, § 11, No. 47, Acts of Parliament 1999 (India).

³³ *Virgin Enters. Ltd. v. Nawab*, 335 F.3d 141, 147 (2d Cir. 2003).

³⁴ *See Cadila Health Care Ltd. v. Cadila Pharmaceutical Ltd.*, (2001) (2) PTC 541 SC; *See also S.M Dyechem Ltd. v. Cadbury (India) Ltd.*, (2000) JT 2000 (7) SC 151.

³⁵ David W. Burke, *A New Economics of Trademarks*, Northwestern Journal of Technology and Intellectual Property, Volume 5, Issue 1, 15 (2006).

³⁶ Frank Schechter, *Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 829 (1927).

³⁷ *Id.*

conventional economic scholars such as Lemley who have also recognized that protecting trademarks against confusing uses, aids consumers in their search for goods and even suppliers attracting consumers³⁸.

Therefore, the new economic theory puts trademarks squarely within the bracket of public goods, similar to the other intellectual properties of copyrights and patents.

V. DISCUSSION AND CONCLUSION

The main distinction when it comes to public goods and private goods is considered the characteristic of non-rivalry³⁹. This was emphasized by economist Paul A. Samuelson, who provided that public goods are once produced, equal quantities of the goods are available to the public⁴⁰. Thus, in support of the public goods theory of trademarks promulgated by Burke, trademarks easily fall under the ambit of this definition, because as soon as a mark is adopted by a supplier and is used in relation to its goods or services, it becomes free to all to use it referentially. We see from an economic viewpoint, that in a market-based system, information asymmetry is unavoidable, since only the suppliers have better information i.e., only they are aware of the unobservable features of the goods being sold by them. In determining the true value of a good, a consumer would also put weightage on such unobservable features present in the good⁴¹. Hence, without trademarks, such identification and differentiation by consumers between identical products would be impossible. Such use is characterized as referential use of the trademark. Referential use of a mark is understood to provide two types of information to the users. The first type is the source of the good. If the mark is used consistently, in line with the search-costs theory promulgated by Economides, consumer's search costs in the selection of goods, would decrease as they can easily rely on their memory of their previous experience of a good from the same brand, or another consumer's reference for such brand⁴². Such identification and recalling of experience of good belonging to a particular brand, come under the ambit of referential uses. The second type of information provided by a mark could also be in the nature of information about the product's qualities or characteristics⁴³. Therefore, as theorized by Burke, a consumer's referential use of a trademark simultaneously with that of

³⁸ Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV., 787 (2004).

³⁹ David W. Burke, *A New Economics of Trademarks*, Northwestern Journal of Technology and Intellectual Property, Volume 5, Issue 1, 36 (2006).

⁴⁰ Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STATISTICS, 387 (1954).

⁴¹ Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP, 526 (1988).

⁴² David W. Burke, *A New Economics of Trademarks*, Northwestern Journal of Technology and Intellectual Property, Volume 5, Issue 1, 12 (2006).

⁴³ *Id.*

others, does not lead to any interference, and thus, being non-rival in nature, makes it fall squarely within the ambit of public goods.

We see that the goal underlying an efficient market economy is a system of “accurate market information”⁴⁴. Similar to authors and inventors of copyrights and patents, a trademark proprietor also provides a contribution to the sources of information available to consumers for goods they are perusing. Economic scholar Professor Lemley also recognizes that the goal of trademark law is “to preserve the informative role of trademarks.”⁴⁵ Therefore, from the perspective of public goods, the ultimate purpose of trademark law is to offer as much information as possible about products and their sources and from an economic perspective, is to provide the best possible amount of information to information users while also paying the information providers⁴⁶. Furthermore, we see that the categorization of a trademark as a public good is also apparent in the mandatory requirement of “confusion” on part of consumers when dealing with infringement and dilution actions. The goal under trademark law hence is not only protection of goodwill of the proprietor, but rather also protection of the public referential uses. Subsequently, we also see that despite the emphasis on non-rivalry when it comes to public goods, copyrights and patents although being considered public goods, do not provide unrestricted access. Exceptions for copyright monopoly exist only in fair dealing provisions⁴⁷, and for patents, only under compulsory licensing provisions⁴⁸. On the other hand, rather trademarks are laxer when it comes to monopoly, as marks once they become generic in nature, are no longer given protection⁴⁹.

Hence, the public goods theory is correct in categorizing trademarks as public goods alongside other intellectual properties like copyrights and patents, and therefore, it is imperative that trademark law be properly enforced in a country. If trademarks of high image brands are not protected, it would not only affect the goodwill and proprietary use of the mark by the proprietor but also affect the public referential uses of the consumers. Therefore, this approach to trademarks based on public use provides a different approach to trademark law. The public-use approach includes consumers, competitors, and others as trademark users, rather than only

⁴⁴ Professor William O. Hennessey, *The Role of Trademarks in Economic Development and Competitiveness*, 10 (2004),

https://www.ipmall.info/sites/default/files/hosted_resources/Hennessey_Content/RoleofTrademarksinEconomicDevelopmentandCompetitiveness.pdf.

⁴⁵ Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 778 (2004).

⁴⁶ David W. Burke, *A New Economics of Trademarks*, Northwestern Journal of Technology and Intellectual Property, Volume 5, Issue 1, 31 (2006).

⁴⁷ The Copyright Act, 1957, § 39, No. 12, Acts of Parliament, 1957 (India).

⁴⁸ The Patents Act, 1970, § 84, No. 39, Acts of Parliament, 1970 (India).

⁴⁹ The Trademarks Act, 1999, § 9, No. 47, Acts of Parliament 1999 (India).

focusing on marks as a mode of competition in the market.
