

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

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The Rationales Behind Freedom of Speech & Expression and Trademark Law

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ABSTRACT

The basic premise of the functioning of the state is the liberty of its subjects. Such liberties are often reduced into an underogable written document called the 'Constitution'. As Patrick Henry puts it "The Constitution is not an instrument for the Government to restrain the people, it is an instrument for the people to restrain the Government." Freedom of Speech is recurrently considered as the first and foremost axiom of liberty. It is the enforcement of freedom of speech and to express oneself that gives birth to liberties of other description. The unbridled ability to express one's ideas and thoughts without any fear of sanctions constitutes freedom of speech in the true sense and thus shall be protected perpetually. This untrammled protected is warranted as it allows the progression of state by opening up platforms for fearless & free discussion, propagation of ideas and values, dissemination of information, formation of viewpoints and opinion on mattes and issues of public importance like economic, social and political matters and thus consequently allows people to think, reason out and criticize the decision making of the government, if required. In this way the freedom of speech & expression serves as the bastion of democracy. The Constitution of India guarantees to the citizens of India the solemn right to Freedom of speech & expression vide Article 19(1)(a). This portentous right can be exercised throughout the territories of India subject to the restrictions enshrined under clause (2) of Article 19. The scope of the freedom of speech & expression has been under judicial scrutiny right from the very enforcement of the Constitution. Judicial interpretations of the freedom of speech & expression have been aimed to augment and magnify the scope of the said freedom in order to cover the maximum facets within its umbrella.

Keywords: Constitution, Dissemination, Expression, Liberties.

I. INTRODUCTION

Generally speaking, the right to freedom of speech & expression would cover the right of the citizens to manifest their views, propagate their ideas by various means of expression like verbal, written, dramatization, etc. But does this right also include a right not to speak or express or is the other person to whom the expression is conveyed, is he bound to hear those expressions.

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More questions of this sort seeking to examine the scope of the freedom of speech & expression have been raised time and again and have been remarkably answered by the Supreme Court. The freedom of speech & expression has been interpreted to include:

(1) Freedom of propagation of ideas which is ensured by freedom of circulation. (2) Pre-censorship of a journal is a restriction on the liberty of the press. (3) Advertisement meant for propagation of ideas or furtherance of literature of human thought. (4) The right to publish and circulate one's ideas, opinions and views. (5) Freedom of Press including the right of citizens to speak, publish and express their views as well as the right of people to read. (6) Right to exhibit films on Doordarshan. (7) The right to communicate & propagate ones opinion by words of mouth, writing, printing picture or in any other manner. (8) The right to air views through the printing and/or electronic media or through any communication method. (9) The right to free speech and expression includes the right to receive and impart information. (10) Right to know and disclosure of information regarding functioning of the Government or public functionaries or the affairs of the Government. (11) The right to decline to listen, a right to silence, and a right to decline to read a publication. (12) Right to information. (13) The threat of going on a hunger strike is a mode of expression.

II. FREEDOM OF COMMERCIAL EXPRESSION

In *Tata Press Limited v. MTNL* the Supreme Court read the freedom of commercial speech into the freedom of speech and expression under Article 19(1)(a) of the Constitution of India. Earlier in *Hamdard Dawakhana*, the court had refused to accept the position that commercial speech is liable to be protected under freedom of speech & expression. At para 25 the court held “*We, therefore, hold that “commercial speech” is a part of the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.*” The court noted that advertising has two facets- dissemination of information regarding the product advertised and right of the public to receive such information. The court noted that in a democratic setup, free flow of information is indispensable and the recipient of commercial speech have a deeper interest in receiving that speech than the advertiser. Undoubtedly, the freedom is subject to restraint under Article 19(2) in the interests of 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 or defamation or incitement to an offence.

(A) Rationales justifying Freedom of Speech & Expression

In this section, the researcher will discuss the justifications and the reasoning and rationales for which the freedom of speech & expression is placed at a solemn pedestal. The first and foremost

rationale for freedom of speech & expression as recognized in *Whitney v. California*, 274 U.S. 357 (1927) is “**self governance**”. As per this rationale an unbridled flow of information, exchange of ideas and consequent formation of opinions is pertinent in the chalking out of public policies. This rationale further helps in the prevention of reinforcement of the interests in the government; it affirms political stability; it also serves as a check on the misuse, abuse and overuse of power by the officials. The second rationale of the freedom of speech & expression is “**The search of truth**”. This rationale was identified in the case of *Abrams v United States* (250 US 616 (1919)). According to this rationale freedom of speech is an essential pre-condition for the discovery of truth. The question is how well the truth will advance is the state of freedom of speech and the conception that it is a knowable fact derives more strength and thus supports this rationale. The third rationale for freedom of speech & expression is “**Societal Tolerance and Self-Restraint**”. Freedom of speech is said to develop and nurture tolerance and self-restraint. In *United States v. Schwimmer*, 279 US 644 (1929), J. Holmes articulated that “free expression does not mean free thought for those who agree with us, but freedom for the thought we hate. In an increasingly culturally diverse society, these virtues may be necessary for social preservation.”

The fourth rationale for freedom of speech & expression is “**autonomy**”. In *American Constitutional Law*, 2nd Edition 2005, Chapter 9 titled “Free Expression Ideas” by Massey at page 798-99 it has been argued that free speech is an indispensable for development of ideas, for the mental exploration of a man for him to realise his character and his potentials and the affirmation thereof. In the views of Professor Thomas Emerson, firstly, freedom of speech & expression was a means to attain self fulfillment of an individual. Secondly, he viewed this freedom as a tool for advancement and discovery of truth. Thirdly, he articulated that the freedom of speech ensures that all the members of society participate in the decision making process. Lastly, he regards this freedom as a harbinger of an adaptable & stable community. The expression of Justice P N Bhagwati in *Maneka Gandhi v Union of India*, is worth reproducing where he highlights the importance of freedom of speech and expression in a democracy.

Freedom of speech & expression serves to fulfil the following purposes:— (a) it helps an individual to attain self-fulfillment; (b) it assists in the discovery of truth; (c) it strengthens the capacity of an individual in participating in decision making; (d) it provides for a mechanism by which it would be possible to establish a reasonable balance between stability and social change. For ensuring the free speech right of the citizens of the country, it is necessary that the citizens have the benefit of plurality of views and a range of opinions on all public issues. A successful democracy posits an “aware” citizenry. Diversity of opinions, views, ideas and

ideologies is essential to enable the citizens to arrive at informed judgment in all issues touching them. The author D D Basu, in his commentary on the Constitution of India reasons other rationales for the protection of freedom of speech & expression viz. The checking value The tolerant society; Free Speech & Character and Conformity and Dissent. These rationales of freedom of speech & expression will be balanced in the following sections.

III. TRADEMARK LAW & RATIONALES BEHIND TRADEMARK LAW

In this section, the researcher will discuss about the various rationales and theories that provide justification as to why at all the trademark rights should be accorded protection by the state. The owner of the trademark is conferred upon with some exclusive set of rights by virtue of which third parties are prevented from using those trademarks. The rationales and various parameters upon which grant of these exclusive rights is justified have been discussed below.

The WIPO Training Manual states that the trademark rights need to be afforded a legal protection so that the distinguishing feature of the trademarks is protected and consequently the consumer does not get confused as to the origin of the goods or services that he wishes to consume. The exclusive right of the trademark holder, to prevent any third person from using a similar or identical mark, comes into play when the consumer is susceptible to be confused between the trademark of the proprietor whose goods he actually wishes to consume and any other similar trademark.

Trademark as defined under Section 2(1)(zb) of the Trademarks Act, 1999 takes a capability approach. The trade mark is defined based on its capability of distinguishing between the goods or services of two or more proprietors. The definition makes it amply clear that a mark will be protected under the trademark regime only if it has the inherent characteristic of distinguishing the goods or one proprietor from those of the other. This distinguishing function is the leading function of a trademark and it affords the ground for a legal protection. Apart from this there are several other functions of a trademark which are incidentally connected to the distinguishing function.

(A) The Functional Approach to Trademarks

The functions fulfilled by a trademark can broadly be bifurcated into identification function and communication function. These two functions can further be bifurcated as follows:

- a. **Identification Function:** Source Identification Function; Product Differentiation Function; Quality Function.
- b. **Communication Function:** Goodwill and Advertising Function.

c. Source Identification Function

This function focuses on the capability of the trademark to identify the source from which any product or service is originating. This function gains importance in the rise of industrialization and increasing competition in order to ensure that any unauthorized party does not use that particular trademark to sell their own goods. Additionally, this function also serves as an indicator of the fact that the owner of the trademark has manufactured or produced this product and no one else. This function serves two purposes viz. The consumers will have less difficulty in recognizing this brand again if they wish to reuse it; this function also enables the consumers to complain about the product or refrain from selecting that product from the shelf if their previous experiences with the product were not good. This function is amenable to legal protection in the interest of the consumers and this interest is ensured by prohibiting the use of identical or confusing use of trademarks by third parties.

d. Product Distinction Function

This distinction function is congruent with the identification function. The prime focus of the distinction function is on the consumer's perspective. According to this function, the consumers in a market use trademarks as indicators to distinguish between two or more products. The trademark "Haldiram's" helps the consumers distinguishing between the snacks that are manufactured by Haldiram and those that are not manufactured by Haldiram.

It is to be noted that the source identification function and the product distinction function are two sides of the same coin. There is a very fine line demarcating the difference between the two. The former focus on the manufacturer's perspective while the later focuses on the consumer's perspective. However both aim to further consumer interest only. In a market where there are numerous players dealing in the same kinds of products, it becomes pertinent that the goods of one manufacturer are distinguished from those of the other. The source identification function and the product distinction function of the trademark cumulatively fulfill this requirement as it enables the consumers to not only realize the distinction between two or more products but also to ascertain that a particular product has been manufactured by which manufacturer and thus enable the reinforcing of repetitive consumption on the basis of prior tastes and experiences.

As noted above, a trademark that enables a consumer to distinguish and differentiate between the goods of various proprietors fulfilling the above functions shall only be registrable and thus a corollary arises that the marks that fail to distinguish as such shall be kept outside the realm of registration.

e. Quality Function

Contrary to what the name suggests, under this function the trademark by itself does not guarantee any standard of quality for the product or service. Rather as is argued under this approach, the public use and airing of trademark forces the concerned manufacturers or service providers to deliver goods or services consistently of the same and undeviating quality. The reason for the delivery of consistency is that if the expected quality or characteristics are deteriorated then the trademarks will be used by the consumers to identify the product in order to avoid it. Though this function does not guarantee anything legally, however, such a guarantee exists in the economic terms and consumers act upon it everyday. This function keeps incentivizing the trademark holder to invest in delivering a consistent quality products or services, as the case may be.

f. Goodwill or Advertising Function

This function assumes importance while considering the stance of the trademark right holders. Trademark facilitates the right holder to convey information, characteristics, features, benefits, etc. of his product to the prospective consumers. Trademarks also facilitate the creation of a goodwill in the market and through the advertisement of this goodwill supplementary purchasing motivations are created resulting in increased market shares. The ability of a trademark to represent and promote a business to the outside world can be articulated as goodwill function as it obligates the consumers and thus influences the position of the trader in the market. Illustration: If a general store does not have leading brands like Lays, Doritos, Kurkure, etc. in their stock, the store may not be very successful in terms of its sale. The goodwill attached with these brands has a great impact on the sale of the store. As *Frank Schechter* calls the trademark a “silent salesman” and emphasizes that “[t]he fact that through his trademark the manufacturer or importer may reach over the shoulder of the retailer and across the latter’s counter straight to the consumer cannot be over-emphasized.” This indicates that this function is cognizant about the consumers buying trademarked products for various consideration other than the characteristics of the product, like the goodwill.

The European Court of Justice has laid down the “essential function doctrine” with respect to trademarks with the following choice of words: “essential function serves to guarantee the **identity of origin** of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to **distinguish the goods or services from others** which have another origin. For the trade mark to be able to fulfill its essential role in the system of **undistorted competition** which the Treaty seeks to establish and maintain, it must offer a

guarantee that all the goods or services bearing it have been manufactured or supplied under the **control of a single undertaking** which is **responsible for their quality**” (emphasis supplied). It is to be noted that the Indian law does not explicitly recognize “essential function doctrine” but the essential functions have been protected under the Trademark Act, 1999.

IV. ECONOMIC RATIONALES OF TRADEMARK

Economic functions of trademark are an extension of the legal function of the trademark. (Legal or Functional approach above) The economic rationale of trademark protection is built largely upon the efficiency arguments. Trademarks are advocated as a measure of search cost reduction. As per this theory the protection of trademark results in the reduction of costs that result due to information asymmetry between sellers and customers. Information asymmetry refers to the situation wherein the information available with both the parties is unequal. It is generally that the seller possesses more information than the customer. As it was noted above that the economic justification is an extension of the functional approach of trademarks and thus the search cost theory is based on the premise that prevention of fraud and counterfeiting of goods lowers the search costs for the consumers.

It is argued that in order to magnify the economic activities in a free market economy, that is, to reach the desired economic equilibrium, it is necessary that informed decisions are made on the basis of perfect information. The consumers while transacting must have quantitative & qualitative reliable information about the products, features and characteristics thereof, for ready reference. This mechanism ensures that decision making is optimal and the transaction in the market magnify and thereby leading to increased economic growth. However, the practicality is far from theory. It is observed that in a market, it is the producers or service providers who possess the maximum information while the customers seldom have any information. The time is also an important consideration as it would take very long to achieve the state of perfect information. This creates a condition which was earlier referred to as information asymmetry. Though this asymmetry, in the short run, balances in favour of the producer as he would not be inclined to disclose any information about his product that would adversely affect the buying decision of the prospective customer. But in the long run, this information asymmetry negatively impacts the entire economy.

The search cost theory regards trademark as a tool to symmetrize the informational asymmetry by enhancing the availability of information to the customers and as a vehicle by enabling the producers to provide information to the customers. Consumers are the focal point of the search cost theory. Let us examine with an illustration how a purchase decision is made. Suppose Mr.

A wants to purchase a car. In order to decide which car to buy he would invest his time and money in information gathering about various manufacturers, performance, after sales service, mileage, maintenance, etc. This process would include monetary costs, psychological costs and communication costs. Trademarks serve as a remedial measure in such situations. Trademarks serve as an efficient engine to drive the information from the manufacturer to the consumer about the imperceptible qualities of the product. For instance, from the Segmentation, Targeting and Positioning, or STP (as it is commonly referred to) of Maruti Suzuki, it can be inferred that a car from Maruti Suzuki would be a car for the common man with latest features and technology at a fairly affordable price with minimum maintenance costs while Honda delivers the same features with a better quality and slightly higher price along and higher maintenance costs with an upper middle class image. Thus the trademarks enable consumers to deduce a set attributes about various manufacturers on the basis of efficient & reliable information that is readily available and resultantly avoid making adverse choices. Trademarks allow an inter-brand distinction to the consumers and thus are of immense value in a perfectly competitive market. Owing to the certainty and reciprocity attributable to search cost rationale theory creates a win-win for the trademark holders as well as the consumers. But, the researcher is of the opinion that, the search cost rationale theory is not of much use unless the advertising function of the trademark is extensively used in airing the features and characteristics of the products or services in order to create a brand value of the trademark. Without the advertising function, the customer would not be able to connect the trademarked goods with the given information and thus the search cost rationale would be of no use. Thus trademark rights need to be protected to avoid the confusing or identical use of such marks by the third parties and thus avoid the customers being confused and thereby preventing the collapse of the reduction of search costs. From the above discussion it is clear that the goodwill function of the trademark cannot be given effect without the advertising function and in giving such effect, comparative advertising has an important role to play.

V. DYNAMIC EFFICIENCY RATIONALE

Dynamic efficiency rationale is understood from the perspective of the right holder. In the long run, if the trademark holder is unable to recover their investments, there would be no incentive or motivation for them to invest in delivering a specific quality of goods or services. This rationale takes the bigger picture into consideration referred to as the “long run” or “dynamic efficiency”. An extended reading of the quality function of the trademark in a wider paradigm connotes that trademarks enhance the efficiency and thus trademarks are covered under the

dynamic efficiency rationale. Illustration: A produces high quality stainless steel under the trademark “A” and sells it at a higher price than X who produces stainless steel of sub-standard quality under the trademark “X”. Now if X is allowed to use the trademark “A”, it would be impossible for the consumers to distinguish between the products and this would result in A not getting compensated for its investment. Such a free riding situation would afford zero incentive for A to invest in quality building for its products. Thus, an appropriate protection to the trademark rights can afford an economic incentive for the right holders to strive to deliver high quality products consistently and thereby securing dynamic efficiency.

(A) Ethical and Fairness based Rationales

Ethical and fairness based rationales stem from the objective of entitlement of protection of the deserving right holders as against the social contract society where individuals are to respect the right and freedoms of all. The principles of truth and unjust enrichment are used to justify the ethical and fairness based rationales.

(B) The principle of truth

The principle of truthfulness demands that the trademark rights must prohibit deception about the origin of the products or services. The deception that arises when one proprietor uses the trademark of any other proprietor in such a manner so as to cause confusion to the consumer is said to deceive the public with respect to the origin of the product. Thus the grant of protection to trademark rights protects the right of the public to know the truth and not being deceived. This also implies that the right holders are entitled to prohibit third parties from propagating untrue information and thereby causing misrepresentation and confusion to the public.

(C) The Principle of Unjust Enrichment

This principle lays down that no party shall reap the fruits of labour of another. Legally speaking, it is unjust enrichment when one party takes a benefit from something to which it is not legally entitled and for such an act, an action for making good the loss or compensation can be brought.

In respect of trademark rights, the principle of unjust enrichment protects the efforts and resources of the trademark right holder invested in the production, advertising and marketing of the respective goods or services. Thus by prohibiting a third party to ride freely on the trademark of another serves the principle of unjust enrichment whereby a party is not allowed to exploit on the efforts of another, rather the trademark right holder have to succeed on the basis of their own efforts.

According to Frank Schechter, the uniqueness of a trademark must be protected because:

“(a) the value of the modern trademark lies in its selling power; (b) the selling power depends for its psychological hold upon the public, not merely upon the merit of the goods upon which it is used, but equally upon its own uniqueness and singularity; (c) such uniqueness or singularity is vitiated or impaired by its use upon either related or non-related goods; and (d) the degree of its protection depends in turn upon the extent to which, through the efforts or ingenuity of its owner, it is actually unique and different from other marks.”

VI. REFERENCES

- Patrick Henry was an attorney belonging to America and had served as Governor of Virginia.
- Romesh Thapar v. State of Madras, AIR 1950 SC 124 : 1950 SCR 594.
- Brij Bhusan v. State of Delhi, AIR 1950 SC 129.
- Hamdard Dawakhana v. Union of India, AIR 1960 SC 554
- Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305.
- Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788.
- Odyssey Communication (P) Ltd. v. Lokvidyan Sanghatana, (1988) 3 SCC 410.
- S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574.
- LIC of India v. Manubhai D. Shah, (1992) 3 SCC 637.
- Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal, (1995) 2 SCC 161.
- S.P. Gupta v. Union of India, 1981 SCC 87 (Supp).
- State of U.P. v. Raj Narain, AIR 1975 SC 865.
- Dinesh Trivedi v. Union of India, (1997) 4 SCC 306.
- Noise Pollution v. In Re, AIR 2005 SC 3136 : (2005) 5 SCC 733.
- Peoples Union for Civil Liberties v. Union of India, (2004) 2 SCC 476 : AIR 2004 SC 1442.
- Ramlila Maidan Incident v. Home Secretary, UOI, (2012) 5 SCC 1 : (2012) 2 SCALE 682.
- DD Basu Commentary on the Constitution of India, 9th Edition, 2015, Volume 4
- <https://nahmodlaw.com/2010/01/19/an-introduction-to-freedom-of-speech/> visited on 12.03.2020.
- Craig R. Ducat, *Constitutional Interpretation*, 8th Edn. 2002, pp. 775-776
- *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 at page 305, Para 29
- The Rational Basis of Trademark Protection 40 Harv. L. Rev. 813 (1927).

- ECJ 12 November 2002 *Arsenal Football Club*, para 48; ECJ 23 May 1978 *Hoffmann-La Roche*, para 7; ECJ 18 June 2002 *Philips*, para. 30.
