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The Renewed Relevance of Fluid Trademarks in the Times of Covid -19 Pandemic - The Legal and the Moral Implications

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ABSTRACT

COVID-19 has left an unprecedented mark on consumption behavior of customers and production routines of corporations. In the wake of pandemic, there has been a huge change in the dynamics of business sector leading to several companies struggling to find a way to retain their market attention and remain relevant to the distracted consumers. Fluid Trademarks have been a popular way for the brands to keep up their popularity in the digital age for a long time. However, the unexpected impact of the pandemic has led to a fresh resurgence of the Companies in adopting the concept of Fluid Trademarks to refresh the brand image and keep up with the changing times.

This increase in popularity of the concept of Fluid Trademarks will certainly lead to a consequential increase in the Court battles on the issues of infringement of these marks. In the light of these, this article analyses the existing legal provisions for the regulation of fluid trademarks. The risks of these marks need to be known by the companies before adopting the concept. This article also discusses the moral aspect of Fluid Trademarks, and their effects and relevance on the public at large, instead of limiting focus on the impact of Fluid mark on Companies. Legal circle should welcome radical thinking towards Fluid Trademarks.

Keywords: Intellectual Property Rights, Trademark Law, Fluid Trademarks, COVID-19.

I. INTRODUCTION

A new and modern approach to branding, that has found huge success in the contemporary era are “Fluid” trademarks. As indicated by the name, Fluid Trademarks are marks that change over a period of time. The traditional Trademark ideologies, which depended on unchanging and static symbols and words, and formed a familiarity with the consumers over a period of time, are being challenged by the emerging concept of Fluid Trademarks.

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The traditional trademarks allowed the consumers to build a long-term association with the product or service provider that the mark was associated with. But in the present era of constantly evolving technology and trends, fluid trademarks enable the consumer engagement through constantly evolving and dynamic refreshment of the brand and thus grab the attention of the consumers.

However, identification of source is essential to recognize and match Fluid Trademarks to the origin in order to avoid confusion. Fluid trademarks are those marks which are based on a popular trademark, that has been intentionally changed while retaining the basic and important elements of the original mark. These fluid trademarks are attractive and they are more equipped to be able to grab and retain the interest of the consumers in this new age era, where trends are constantly changing. The traditional marks can be customized through fluid trademarks to represent a particular trend, or season or festival and make a greater personal impact on the consumers.

II. RENEWED RELEVANCE IN THE TIMES OF COVID-19

Fluid Trademarks can be considered as a dynamic marketing tool, where the business owners, in order to keep up with the times, refresh the identity of the brand through various versions of a trademark, while the source identification remains the same. Hence the goodwill built up by the brand through the trademark is not lost and the relevance of the trademark and the brand is maintained.

The advent of the Covid-19 pandemic has lent fresh importance and new instances of major companies adopting Fluid Trademarks for their brands in order to remain relevant and update their brand image among the consumers. The times of Covid-19 has led to fresh insights concerning all elements of life as well as the manner in which the world is dealing with it. No sector or business has been spared as a result of the pandemic. It has had a significant impact on a wide range of business endeavors. In such exceptional circumstances, it has undoubtedly resulted in a significant shift in how organizations position themselves as battling and raising awareness about the disease's problems. In this sense, the creation of fluid trademarks is a particularly fascinating element of branding and advertising.

The pandemic had confined us within four walls and with connection to the outer world through internet, TV and computers only, people had more time to revel on Fluid Trademarks that gained its popularity at recent times.

III. EXAMPLES OF FLUID TRADEMARKS IN THE TIMES OF COVID-19 PANDEMIC

The most iconic example of fluid trademark that can be seen is Googles Doodles, where

different variations of the Google mark is displayed on its homepage. Sometimes, these marks are even made interactive. For instance, during the 30th anniversary of the game Pac-Man, google created the mark as a Pac-Man game, which was interactive and the public could play it.

Another very important Indian company which has successfully incorporated the example of fluid trademarks is the brand of Amul. Amul has as its logo “Amul Girl” which is an extremely famous cartoon which is used to create commentaries and dialogue on the prevailing current issues.

The most recent instances of brands incorporating fluid trademarks as a way of increasing the consumer engagement can be seen during the period of Covid-19.

MacDonald’s Brazil changed its logo, in which the golden letter “M” in its logo was split into 2 golden arches. This was a way by which the company encouraged social distancing in these trying times.

Another example of the same can be seen is through the logo of Subway India, which added a face mask, to help it seem more relatable to the consumers and also encourage social distancing. Furthermore, the letters in V and W in the logo of Volkswagen were moved farther apart, with a message that read “Thanks for keeping your social distance”

Even Audi joined in on the trend, and the wheels which were intersecting in the original logo were spaced further apart. Another relevant example of incorporation of the idea of fluid trademarks can be seen in the logo of Starbucks, where the mermaid has a mask over her face. The period of Covid-19 created an outlet for these brands to tweak their logos and thus retain their relevance even during changing times.

IV. LEGAL ASPECT OF FLUID TRADEMARKS

A well thought out plan of action needs to be put in place by the Companies that want to adapt Fluid Trademarks. Companies and brands need to decide if they want to register the mark and how effectively they need to monitor their marks. The different variations of the Fluid mark need to be elaborated upon in order to capture the essence of the fluid mark. The variations also need to be elaborated when applying for registration of the fluid trademark.

The changed mark must retain the original mark's essence, but the new form must give the appearance of being basically the same mark, is said by the **Trademark Manual of Examining Procedure in the United States**². Further, it states that the usual criteria for whether a change is substantial is whether the mark would have to be republished after the change to display it

² Trademark manual of examining procedure (TMEP) <https://tmap.uspto.gov/RDMS/TMEP/current>, accessed 18.07.2021, 18.25 HRS

fairly for opposition purposes.

Even after the adoption of the fluid trademark, the company should not discard the use of the original trademark so as to not get cancelled due to non-usage of the original mark. Along with that, random changes in the original trademark should be discouraged and there should be a strict look out for the third-party infringement of the marks.

The case of **Louis Vuitton Malletier v. Dooney & Burke Inc.**³, is a good example of the different issues that affect the owner of a trademark while trying to enforce his rights in a Fluid Trademark. Louis Vuitton launched its new handbag collection. The distinctive Toile Monogram Mark was prominently displayed on these purses. These markings (the "Monogram Multicolour Pattern Mark") were printed in 33 colours on a white or black background.⁴ The monogram multicolour pattern mark was an adaptation of the basic Toile Monogram Mark. After a year of the launch of the handbags, the defendant, Dooney and Burke launched a collection of handbags that highlighted their own monogram "DB" in a similar style. Louis Vuitton claimed that the defendant had replicated a stylized version of their toile monogram (the LV letters) onto their items as a result of this.

The Second circuit in its verdict stated that Louis Vuitton's mark was distinctive and over a period of time had acquired "Secondary Meaning" as thus was protectable. Regarding the likelihood of confusion, the Second Circuit remanded the matter back to the District Court, which held that there was no likelihood of confusion.

In the Indian domain, the Trademarks Act 1999 does not explicitly mention Fluid Trademarks. However, protection is available to unregistered Trademarks as a claim of passing off. Thus, even without registration of the Fluid Trademark, the rights can still be claimed based on the goodwill that the mark has acquired among the people. This position can be supported through case of **Proctor and Gamble vs. Joy Creators**⁵. In this case, the High Court of Delhi decided that a mark does not have to be a carbon copy of a registered mark to be infringing.

Further under **Section 15 of the Trademarks Act 1999**⁶, there is a provision for the registration of a series of Trademarks. This concept is explained further by the **Draft Manual of Trademarks 2015**⁷ under Section-A, Serial Number 14.2. It basically says that a person who claims to be the owner of several trademarks for the same goods or services that, while

³ Louis Vuitton Malletier v. Dooney & Burke Inc., 454 F.3d 108

⁴ Fluid Trademarks <https://www.kashishipr.com/blog/fluid-trademarks/>, accessed 16.07.2021, 17.35 HRS

⁵ Proctor and Gamble v Joy Creators (2011) (45) PTC 541

⁶ The Trade Marks Act, 1999, Section 15, IN

⁷ Manual of Trademarks – Practice & Procedures, Ministry of Commerce and Industries, Government of India https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_32_1_tmr-draft-manual.pdf, Accessed 18.07.2021, 17.50 HRS

substantially similar in material particulars, differ in matters of a non-distinctive character that does not materially affect the trademark's identity; seeks to register those trademarks; they may be registered as a series in one registration.

This provision to an extent provides for the concept of a fluid trademark, but the dynamic and unpredictable nature of the Fluid Trademarks provide an obstacle on the way. Section 15 of the Trademark Act can work only when all the future variants of the mark can be anticipated and listed out. For example, the Companies could not have predicted the happening of the pandemic and thus, this provision falls short of covering the dynamic and the unexpected nature of the Fluid Trademark. Hence the provision set out in Section 15 cannot absolutely apply to the concept of Fluid Trademarks.

Further, the constantly evolving and dynamic nature of Fluid Trademarks does not let the companies give prime importance to the of registration of the mark.

Copyright law, which gives an inherent right to the owner and does not need registration, may be particularly useful in protecting the creative aspects in a new variation of a trademark. However, there are currently no court precedents in this area.

A case of infringement of Fluid Trademarks is yet to come before the Indian Courts. Thus, we can see that there no particular provisions in the Indian Jurisprudence to control and protect the infringement of Fluid Trademarks.

V. RISKS ASSOCIATED WITH FLUID TRADEMARKS

The following are some of the risks that are created while using Fluid Trademarks⁸-

(A) Confusion among the public

Since Fluid trademarks imply constant evolution and change in the marks, it is possible that there may be many variations of the original mark. This creates a problem that the consumers may not be able to identify source associated with the mark or confuse the mark as belonging to a knockoff brand. This would defeat the purpose of incorporating fluid trademarks and would break the association between mark and the product.

(B) The underlying mark is weakened

Since there is a chance that the fluid trademarks may create confusion in the minds of the consumer, there is also a chance of weakening the underlying original trademark. 'Strong' marks with a high degree of individuality are protected against the use of comparable marks on a broader range of products and services than 'weak' trademarks with a lower degree of

⁸ Fluid Trademarks – Freshness of the Future <https://www.advayalegal.com/blog/fluid-trademarks-freshness-of-the-future/>, Accessed 15.07.2021, 12.30 HRS

individuality or market recognition.⁹ Hence the use of different variations of the original mark may weaken the original underlying mark.

(C) The Original mark might get abandoned

There may be instances where the brand owner uses the fluid trademark without the use of the original trademark. This is where the original trademark comes within the purview of abandonment. This would create an opening for a rival company to try and get the original trademark of the business owner cancelled. One of the ways abandonments can be avoided is by “tacking” of the new variation with the original mark. But this can be done when the new variation and the original mark have the same “commercial impression”¹⁰

(D) Variations created by third parties of the underlying mark

Fluid trademarks may suggest an invitation for consumers to respond to changes in a particular mark, including by developing their own unique alterations to the underlying mark, due to its dynamic and interactive character (e.g., on a blog or social media feed). As a result, customers and other third parties may be able to quickly create and spread illegal versions of a mark.

This can be troublesome since, under the theory of "nominative fair use," enforcing fluid trademark rights against a customer who makes his or her own version might be difficult.

VI. GUIDELINES AND RECOMMENDATIONS

Given the various forms of risks that are involved with the advent of the concept of Fluid Trademarks, there are some recommendations that should be followed while implementing the concept of fluid trademarks. These are-

(A) The strength of the mark

The owner of the mark, before implementing a fluid trademark should make sure that the original mark is strong. This helps in reducing consumer confusion between the marks, by helping the consumers create a connection between the Fluid Trademark and the original underlying mark.

(B) Registration

Registration of the Fluid Trademark is one of the safest ways of protecting it from being infringed by a third party. The brand owner should be the one deciding if it would be feasible to register the different variants of the Trademark to be able to legally protect it from future

⁹ Chapter 1, § 21. Proof Of Likelihood of Confusion: Market Factors, Restatement (Third) of Unfair Competition, American Law Institute

¹⁰ Perry J. Viscounty, Jennifer L. Barry and David B. Hazlehurst, “*Fluid Trademarks: All Fun, or Some Risk?*”, Intellectual Property Today, February, 2014

infringement.

(C) More Methods of protection-

The additional ways of trying to protect the Fluid Trademark should be considered and explored. This includes but is not limited to exploring the protection of Fluid Trademarks under the Copyright and the Patents laws.

(D) Continued use

The underlying original mark should be continued to be used by the brand owner. This would help to depict continuous use of the original mark and thus would avoid the risk of abandonment. Another aspect of this is that the Fluid Trademarks should be identifiable with the underlying original mark by retaining some source identifying characteristics. This would enable the consumers to identify the brand and thus help in keeping the brand strong and relevant.

(E) Specified terms of use

In some cases, the brand, as a way of interaction with the public, allows the public to come up with its own design or parodies of the brand. When that happens, the brands should have a specified terms of usage drafted, that show to what extent the consumers can change or interact with the mark.

(F) Check the market

It is advised that the owners should conduct a clearance procedure before launching any new mark in the market, but that might be difficult due to the due to the dynamic and constantly evolving nature of the fluid trademarks. But conducting clearance is extremely important to avoid legal complications that come with infringing another Trademark. A way to make it more convenient to check the market is by keeping a track of the new and updated Trademarks that come into existence.

(G) Maintain reputation of the brand

Enforcement actions to protect a trademark should be exercised very carefully by the brand owners. Any form of communication that the brand owners send across should be worded very carefully so as to not harm the public's opinion of the brand in case the letters are publicized.

VII. MORAL ASPECT OF FLUID TRADEMARKS

Historically, trademark laws have been implemented to protect the interest of the consumers by indicating the source of the products. But the entire concept of Fluid Trademarks is more brand centric. Through the Fluid marks, the brands gain relevance in the dynamic society,

maintain consumer loyalty and twist the market force in their favor.

However, the consumers are not gaining anything through brands tweaking their marks continuously. Further they may get confused between the marks and hence incur extra search cost. Moreover, the cost of implementing and constantly changing marks are compensated by over charging the consumers for the same products. Apart from providing the consumers with a certain factor of entertainment and engagement, Fluid Trademarks do not have any positive impact on the consumers. Hence, although Fluid Trademarks help brands to refresh their image among the public and grab the consumers attention, it does not particularly help the consumers in any substantial way.

Another aspect is that, the well-established and large brands will find it easier than small brands to implement fluid marks since their marks would have a strong brand identity and recognition among the public. The smaller businesses whose marks might not be well established among the consumers may run the risk of confusing the consumers and weakening the original mark. This to an extent creates monopoly in the market by the big corporations, for whom implementing and execution of Fluid Trademarks is so much easier. This helps the bigger brands become dynamic and gain consumer popularity, which ultimately leads to smaller businesses and brands to lose business, which is more detrimental during the pandemic.

VIII. CONCLUSION AND WAY FORWARD

The fluid trademarks gained fresh interest among the public after the advent of the Covid-19 Pandemic. Various brands implemented, by way of fluid marks, ways to increase consumer interaction and hence renew their brand image. These ways have largely succeeded as a way to popularize the brand among the consumers.

The concept of fluid trademarks should be used by caution among the brand owners since there is no particular legislation in India that deal with them specifically. Along with the that, the dearth of Judicial Precedents in the matter also indicates that Fluid marks should not be used carelessly, since the outcome of these can be uncertain.

But fluid marks are here to stay, and India should develop and amend existing regulations to include the concept and infringement of fluid marks. With the renewed popularity of Fluid Trademarks during the pandemic and a large number of companies adopting this concept to retain the attention of the consumers, it is inevitable that there will be an increase in the number of Court cases on the infringement and problems of managing these marks. This emphasizes the need for having proper Regulations and guidelines for the management of these marks.

Fluid marks have largely helped the large corporations as opposed to the small business owners. The legal and moral aspects of the Fluid Trademarks are extremely interesting to

examine. Thus, legal framework in India regarding Fluid Trademarks needs to be monitored. As an afterthought, in a country like India which is already overburdened with a large number of outstanding Court cases, the infringement of the underlying original Trademark should be considered more seriously by the Judiciary.

In cases of reckless and careless introduction of Fluid Marks by the large companies in order to solely provide entertainment to the consumers and capture the market, the subsequent infringement of these marks should not be freely brought before the Courts and take up the Judiciary's precious time. There should be guidelines to check and weed out Court cases involving careless use of Fluid Marks so as to protect the time of the Judiciary.

One solution to this can be setting up Tribunals for the management of Fluid Marks. These Tribunals should be entrusted with power to regulate and pass solutions in case of infringement of the Fluid Marks. Only when the Tribunals deem it necessary, the cases for management and infringement of the Fluid Trademarks should proceed to the Courts.

Another effective way of managing Fluid Marks can be through the process of Mediation. Mediation has proved itself to be an effective way of managing disputes at a personal level, thus reducing pressure on the Judiciary. By allowing the concept of Mediation to solve the matters of Fluid Marks, it will save time and provide timely resolutions in all matters pertaining to Fluid Marks. Recently, the Chief Justice of India, emphasized on the importance of mediation at the India-Singapore Mediation Summit and stated that mediation should be the mandatory first step in the dispute resolution process.¹¹

These are just a few ways in which the concept of Fluid Marks can be handled effectively by the Indian Structure. The concept of Fluid Marks needs a lot of legal considerations and there should be proper guidelines put forward for the same.

¹¹ CJI Ramana cites Mahabharata, says mediation as a concept deeply embedded into the Indian ethos Mathur, <https://www.indiatoday.in/india/story/amicable-dispute-settlement-is-part-of-indian-cultural-ethos-says-cji-nv-ramana-1829436-2021-07-18>, Accessed 18.07.2021, 16.40 HRS