

Millennium and Generation Next Trademarks: Trends in Branding and Merchandising

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Abstract

In the recent past the field of trademark has witnessed considerable changes and trends which have introduced certain millennium and innovative trademarks. It is important to know about these new millennium and generation next trademarks which brought up innovative trademarks such collective marks, sound marks, smell marks, certification trade mark, scent mark service mark, color mark, taste mark, well known trade mark and feel marks. The paper attempts to throw some light on the new millennium and generation next trademark and their status under the current fabric of law of trademarks.

Keywords: Next trademarks; Branding; Merchandising

Introduction

Law is dynamic and keeps changing constantly to feed the needs of the community at large. Changing perceptions in the field of trade and commerce, emergence of new modes and means of communication have brought into existence new generation of trademarks. There has been much debate and discussion over the reception to this new generation of trademarks across the globe. Since these new generation trademark force to alter the classic parameters of trademark recognition and as well explode the basic frontier of trademark law, there has been much debate and discussion. The definition, meaning and scope of trademarks have gone into drastic and dramatic changes through the new generation of trademarks. On the other hand towards the fag end of the previous century there noticed emergence of a special set of trademarks. These set of trademark have seen the dawn of previous millennium and birth of new millennium and hence called as millennium trademarks. The adoption of the TRIPS agreement has brought in these new trends in the trademark fields with their relevance in the modern day business. India has made necessary changes in its trademark law to implement the mandate of the TRIPS agreement having ratified it. There are certain marks which have influenced the present day business which runs on the basis of the representation made by the associated marks and the reputation and identification gained by those marks [1]. The TRIPS agreement has mandated recognition and protection to these new trends in the trademark fields. At the same time business man and consumer associations have further identified certain novel marks which are also getting familiarized. States with two hands welcomed the new trends by offering protection to these marks. Therefore here it is pertinent to know such new generation of trademarks recognized all over the world due to innovative and new trends in the field of trademark.

Scent (Fragrance) Brands

In the discussion of new generation trademark, scent brands or scent marks come first to the forefront. Scent¹ or perfume or fragrance generally attracts and impress one and all. Since human being can sense the fragrance or perfume which pleases and soothes them, using fragrance or perfume could be a good idea to attract people. In the commercial world where attracting consumer based on various reasons and measures is very important, application of perfume or fragrance representing goods and services could well get them near the consumer. Meanwhile, there is a requirement under the trademark law which states that the chosen mark should not essentially detail or describe the nature, content or characteristic features of the goods or services that it represents [2]. Descriptive trademarks are not considered as valid trademarks. In *Yorkshire copper works TM application*² while discussing the nature and status of descriptive marks it was viewed that descriptive marks are not accorded the status of valid trademark. A mark which describes about the goods or services on which it is used are considered descriptive marks. These marks provide some information or some indication about the features or qualities of the mark. On the same lines if the fragrance is essentially from the content of the product it could very well describe the product. Therefore, applying the principle underling the descriptive trademark, fragrance which essentially makes out the product, its content and the function cannot be a valid trademark. In the year 1990 in *In Re Clarke case*³ the US patent and trademark office considered a particular type of scent as a valid trademark. The scent of plumeria added to swing thread was registered as valid trademark on the basis of its distinctiveness with other existing scents in the market and the established consumer base and the identification of the scent in the market

¹ Scent mark is a very good marketing tool and strategy to attract consumers

² (1954,RPC,150)

³ 17 U.S.P.Q 2d1238 (T.T.A.B 1990)

Fabric Brands

In the discussion pertinent to millennium trademark fabric brands or textile mark has got special significance and presence. A trademark used or proposed to be used in relation to textile goods is called as textile mark⁴. For instance, we get to see Read and Tailor stitched on the edges of cloth sold by Read and Tailor company to signify to the customers that the fabric or the cloth is manufactured and sold under the brand Read and Tailor. Similarly, we get to see number of brands in the textile industry including Syarams suiting's, Gwalior suiting's, Dinesh suiting's. Further, we see Lee cooper, Levis, Denim and such other jean brands which are sold under a particular textile brand while carrying the name of the brand on the cloth either in the stitched or attached format or in the sticker format. There are also textile brands such as Louis Philips, Peter England, and Belmonte. Usually numerals and letters are used as textile trademarks. Letters or numerals or any combination thereof could be registered as textile marks since they have the capacity to distinguish textile goods. Use of heading is permitted in case of textile trademarks. Here heading means the lines, usually colored woven or printed at the end of the cloth sold in the piece.

Color Brands

Similarly, color mark is another millennium mark which adds color to the fabric of trademark law. Bringing its natural existence and content the 'color; color marks could be said as rainbow in the development of trademark Law and policy. According to the TRIPS agreement 'color combinations shall be eligible for registration as trademarks although members may make registrability depending on distinctiveness acquired through use and members may require, as a condition of registration, that signs be visually perceptible. The Indian trademarks Act of 1999 also ethos the same language with reference to color marks and color combinations as trademark. Perhaps, color can be easily identified whenever a particular color is continuously used a particular set of products [3]. Even an illiterate person who cannot read and understand the name of the marks, its bottom line or the information that it is providing, can very well follow the colour of the product. Therefore, from the consumer's angle using a particular color or color combination could be consumer friendly and does not require much compatibility or literacy or awareness to follow the trademarks and to get the product that it is representing. For instance, the colour blue would refer to Pepsi cola in the cold beverages industry and color red represents Coca Cola. As the promos of Pepsi products always appear and run in blue color or shades, blue has been identified to be associated with the Pepsi Company and its products among the masses. At the same time, promos of Coca Cola products is always appear and run in the red color or shades, red has been identified to be associated with the Coca Cola company and its products among masses. On the lines, combination of red and white for Airtel Company, pink for Huch Company, Yellow for Idea, Blue for Reliance Company respectively identify and represent mobile services. Further red for kingfisher airlines, blue for indigo, blue, green and orange color combination for Indian airlines are the colors representing

airline companies respectively. In the field of sports and politics also color plays vital role in presenting the political parties and the sports teams and companies. In particular in the Indian political spectrum we notice, Orange for Barathiya Janatha Party, (BJP) Blue for Bahujan Samaj Party (BSP) Red for Left Front, Combination of Orange, white and green for Indian National Congress party are the representing colors which identify a particular political set up. Further, red color represents revolution, green for harmony white for peace and black for sadness in the general terminology since ancient times. Therefore, color and combination of colors has always been a good identifier which would potentially represent a particular idea or ideology since ages. Hence, color marks as business identifiers may not be a bad idea, if they could potential represent goods and services⁵.

Collective Branding

The dawn of previous millennium brought into existence a vivid trademark namely collective mark which can collectively represent different goods that belong to one origin. Collective mark means a trade marks that distinguish the goods or services of the members of an association of persons not belonging to a partnership firm. The association or the members of the association collectively own mark⁶. A trademark belongs to an individual, but a collective mark belongs to an association of persons not being a partnership firm. The members of the association are authorized to use the mark, governed by certain regulations and rules of the association to ensure certain consistent standards of genuineness and quality of the product concerned. For instance the mark of Wipro company tend to represent different products of Wipro. Their products include electronics, electric, computer, software and even educational services. The sunflower mark having different colors representing different products of Wipro with scoring line 'applying thought' might be a good example of collective mark.

Sound Brands

It is a new generation trademark, where the products and services are identified by means of an audio clip, the particular means of such identification could be a sound mark. In the case of sound marks, the commercial origin of products or services is achieved by means of specific sound or by means of an audio clip. Sound marks are not considered for registration uniformly in all the countries. Few countries do prefer to confer registration to and protect sound marks. Universally accepted definition of trademarks states that trademark could be any sign capable of distinguishing goods and services⁷. Under the most popular TRIPS agreement, though there is no explicit mentioning of sound marks, it is felt that since any sign could be a trademark, even the sign of sound could also be a potential trademark. The Trademarks Act of India also follows the universally accepted definition of trademarks in this regard⁸. Perhaps, the acceptance of sound marks largely depends upon the consumer association and recognition. If the consumer does recognize a particular audio clip to represent and identify a particular set of goods or services, the mark is said to have gained the consumer acceptance. Generally, musical

⁴ Classes 22 to 29 of fourth schedule to the Trademarks Act 1999

⁵ The requirements of trademarks law such as visual representation and description may not be smoothly made in case of color marks, since colours needs to be represented in graphical form and the description of the colors needs to be provided

⁶ Introduced in the TradeMarks Act 1999.

⁷ See the TRIPS agreement under Trademarks Chapter

⁸ See: The Indian Trademarks Act, 1999 as on 15-03-2014

tones, ring tone, songs, noises, sound of desserts winds, sound of sea tides, sound of flowing water, sound of moving plants and leaves, sound of automobiles, etc. It could be any sound which could potentially identify a particular set of goods or services. For instance the audio clip of Ajanta watch is very famous and even an illiterate man can easily identify with the audio clip that an advertisement or promo of Ajanta watches is being played. On the same lines the audio clip of air tell mobile company is also equally popular as a distinct sign representing the mobile services of air tell company. Likewise there are various audio clips which potentially identify the goods and services which they represent. Therefore, uniqueness of sound marks, their reach and consumer identification is undisputed. However, sound marks considered to have certain technical limitation which needs to be looked into by the trademark authorities.⁹ For instance description and visual representation may not be easily made in cases of sound marks.

Service Brands

One among the millennium trademark is service mark, it is a brand for services. In the millennium world marks are not only used with respect to goods manufactured but also to the services. Service marks are signs used to identify and distinguish the services of the user with that of the others¹⁰. Service means service of any description made available to potential users in connection with the business such as banking, communication, education, financial insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repairs, conveying of news, information and advertising¹¹. For instance in the telecom service industry we get to see 'Airtel' brand with 'express yourself' as its scoring line which is a brand in telecom services. Similarly, we have another brand "BSNL" with "connecting India" as its scoring line. There are such other mobile service brands like Vodafone, MTS, AIRCELL, Reliance and Idea. In the field of air services we have brands such as "JET", "Indigo" "Spice" Besides, we get to see 'ICICI' "AXIS' SBI' 'Corp' "HDFC and such other brands in the banking service industry. While, there are number of service brands owned by different service provides in the fields of internet, software, education, security, insurance, consumer and such other trade and business services.

Certification Brands

Yet another millennium brand is certification trade mark. It is a brand which certifies that goods or services on which it is used meet certain very specific standard of quality. It is a mark capable of distinguishing the goods or services certified by the proprietor of the mark with respect to its origin, material used, type of manufacturing of goods, kind of performance of services, quality and accuracy¹². A mark

used by the manufacturer or the service provider to certify his goods or services are eligible to be registered and protected¹³. The proprietor of the mark certifies that goods or services on which it is used possess certain characteristics. A certification mark should be capable of being represented graphically¹⁴. Here the Proprietor will not use the certification trademark for his own goods; he licenses others to do so. Hence, a certification trademark cannot be registered in the name of person who undertakes on a trade in goods of the kind certified or a trade of the services of the kind certified. It is about branding those who would brand or certify the goods and services in a given market

Taste (Flavor) Brands

Coming to another generation next brand it could be said that; one among the senses of human being is that of taste sense which identifies the flavor of the product. Taste or flavor marks are those marks which are identified with specific taste or flavor. One can choose a particular taste or flavor as the trademark of his or her product provided that taste or colour has acquired distinctive character in terms of having consumer association to have identified the same as a distinct trademark. Substantial use of the taste mark is essential before seeking protection and registration [4]. If it is a common taste or flavor which is available and known in the market, the same cannot be claimed as a mark. The claimed flavor needs to be unique and be very specific in its application and marketing. For instance in the market of biscuits, goods with different flavors such as Elachi, Chaco, butter, and coconut, are very famous. Similarly in the market of ice creams, goods with Pista, Badam, Strawberry, are well-known. In the field of beverages, Orange flavor, Lemon flavor, Mint flavor are famous. In the field of perfumes also goods with various flavors are equally well established.

At the same in the beverages industry also we come across number of flavors which have been well recognised. The above mentioned flavors are unique, distinctive and well known among the consumers in the market. These flavors could be sensed and the effect could be felt by the users and the consumers¹⁵. In the western countries such as US and Europe there is increasing demand for recognising the taste or flavor marks. However, in the eastern world these marks have not yet received the attention of the businessman and the consumer. Flavor trademarks cannot be visualized or seen through eyes but could be experienced while using the products. The requirement of visual representation a requirement of trademark under the classical trademark law may not be possible to satisfy in case of taste marks. One needs to liberally or innovatively interpret and implement the trademark law to project and get these marks as valid trademarks¹⁶. Taste or fragrance branding is all about sensing the senses in the most common way as a matter of common sense but for an innovative sense of meaning, use, scope and operation.

⁹ Requirements such as description and visual appeal which are essential for considering a mark as a valid trademark may not be possible in case of sound marks.

¹⁰ Originated in the TradeMarks Act, 1999.

¹¹ Section 2(1) (2) of TradeMarks Act, 1999.

¹² Section 2(1)(e) of TradeMarks Act.1999.

¹³ In accordance of chapter 1x of Trade Marks Act, 1999

¹⁴ Section 2(1) (2b) (ii) of the Trade Master Act 1999

¹⁵ These flavors could be registered as taste or flavor marks before the trademark offices, while expecting the trademark office to be flexible in assessing the fulfillment of requirements of under trademark law for the time being in force

¹⁶ See: Generally, David Vaver, Recent Trends In European Trademark Law: Of Shape, Senses and Sensation, 95, Trademark Reporter. Pg. No: 85

Feel Brands

There are feelers for the feelings and as well there are branding made available for feelings which feels more profiling than feeling. Yet another generation next brand is feel brand or feel mark. Sometime, we get the feelers of the goods or products generated out of touch of the texture of the mark. Touch one among the various senses marks its presence and appeal in the business world though apparently trademarks. These marks are also known as touch marks or texture marks which essentially give the feelers to the consumer with reference to its existence and the goods or services it is representing. Perhaps, the touch mark should be distinctive to the consumers; it must not be just a decorative or ornamental element. It must be a beyond decoration and packaging of the goods or services that it is representing and must possess the feature of regular trademark [5,6]. However, feel marks which ignites the touch sense of human beings is not been claimed by business man in the lines of other non-traditional trademark and therefore feel marks remain as less acclaimed or less claimed marks in the spear of non-traditional trademarks.

Well-known Brands

Popularity and wide presence is also counted when we consider any particular brand to be a well-known mark. It is another millennium mark which¹⁷ means a mark which has become well known to the substantial segment of the public familiar with a particular type of goods or services for which it is used. The use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and person using the mark in relation to the first mentioned goods or services¹⁸. It is the Registrar of trademarks who has got authority to determine whether a mark is a well-known mark or not after considering the following¹⁹. While identifying any mark as a well-known mark the knowledge of the mark in public, business status, circles, continuous use of the mark in a given region on certain goods, due diligence exercised by the owner for possessing the rights and efforts to prevent its dilution, the consumer base will be considered and taken into account. Knowing your brand in the populist terms and senses would fetch your brand the status of well-known brand. It is rebranding of already branded brands on the basis of their popularity.

Motion Brands

Moving images, logos, motion pictures, video clips, film clips, documentary clips are also registered as motion brands in few jurisdictions. It is another generation next brand which is quite popular in USA. Numbers of motion of marks have been protected under the Federal Trademarks Act²⁰. For instance the trademark of Motion Pictures, 20th Century Fox Movies, Columbia Pictures are well known motion marks registered in USA. Perhaps, in the field of media the movies the presence of motion marks is extremely felt and recognised. In case of motion marks, the marks are represented by a moving image or clip which identifies a particular source or origin

with reference to a product of service. For instance in case of 20th Century Fox Movies the phrase 20th Century Fox movies appears in two lines in golden color words. The visuals shows the phrase while camera moves from right to left bringing the phrase exactly in the middle of the television or theaters screens. Likewise there are motion pictures of Columbia pictures and Motion Pictures²¹. In India also the momentum is gaining importance with big movie and media companies looking for motion marks to represent their products and services.

Shape and Packaging Brands

In the new millennium the shape, packaging and the outlook of the product is protected as trademark. These marks are known as shape marks which represent the container of the product, packaging of the product, and three dimensional shape of the product. For instance the shape of the bottle of Coca Cola cool drink is a mark protected as shape mark carrying the shape of the cool drink bottle representing the business of Coca Cola Company and its product of Coca Cola cool drink²². In the field of automobiles we get to see unique shapes of vehicles. The shape of Maruti Swift, Ritz, Ford Icon, Polo, Hyundai I10, I20 are examples for Unique shape which deserve recognition as shape branding. Similarly we notice unique shapes of two wheelers, three wheelers, mobile phones, laptops, Ipads, desktops, televisions, such other electronic goods where shape plays vital role its appeal and in influencing the customers. These unique shapes serve recognition in the form of shape brand. While, packaging in a unique way to be different and appealing is also a growing trend in the commerce and industry. May it be retail business or whole sale business unique packaging is voice fully recognized in the new millennium. These unique shapes and packaging could well be separate and special brands as per the newly redefined definition of trademark and brands under the trademark law and practice.

Conclusion

Millennium trademarks and generation next brands have seriously influenced the system of trademark law and practice. The new trends and developments in trademarks are recognized as new concepts under the trade mark laws. Trademark or a brand is essentially a product of competitive economy, where more than one person competes for the manufacture of the same product or providing same kind of service necessitating the marketing of each manufacture or service by a symbol or mark. Today brands have been recognized not only in the goods sectors but also in the service sectors. There also recognized collective marks in respect of collective services or goods produced by an association. Carrying forth a color of combination of colours, colour marks are recognised and registered as valid trademarks. Further there recognized certification marks for the purpose of certifying the goods and services with a given quality. The packing and shape of the marks are forming shape marks in the contemporary times. The taste, flavor finds presence in the taste marks, the touch or textures presence is felt in the touch or feel marks. There also recognized textile marks meant to be used in the textile

¹⁷ Originated through the Trade marks Act, 1999.

¹⁸ Section 2(1) (zg) of the TradeMarks Act, 1999.

¹⁹ Section 11(6) to (9) of the Trade marks Act, 1999.

²⁰ Lenham Act is the Federal Trademarks Act in USA

²¹ See: Columbia Motion Trademark (USPTO TM 1975999)

²² The shape mark of Coca Cola has long been a registered trademark in USA

sectors. On the other hand well-known trademarks are also recognized which are the marks or symbol used in association with a particular type of goods or services generally for a long period and become well-known in association with such goods or services. Further, the moving images and video clips are registered as motion marks. Fragrance and smell is registered as scent or smell marks. Millennium and generation next brands have brought out revolutionary changes in our perception on trademarks in terms of changing our attitude towards in accepting various types' essentially non- traditional types of marks as trademarks.

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