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CONSUMER CONFUSION OF TRADEMARKS Role of 'Risk Reducers'

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The objective of this paper is to study the role of the 'risk reducers' like trademarks in mitigating the consumer confusion. It starts with the laying of groundwork for the relevance of the consumer perception in general. This is followed by the relevance of the study of consumer perception in the economic-legal environment of the business. The evidence so provided is used to look into the role of risk reducers in mitigating the consumer confusion in identifying and buying the desired trademarked product.

A study of consumer behaviour involves the activities that people engage in when selecting, purchasing, and using products and services so as to satisfy needs and desires. Such activities involve mental and emotional processes, in addition to physical actions. This is influenced by external and internal processes. The external processes cover the culture and innovation, cross-cultural and symbolic dimensions, social and situational influences, household and family, sales person's influences, and the advertising's influences. They act to shape, guide, and influence consumer behaviour. The internal processes include the consumer information processing, motivation, involvement, perception, learning, and the attitudes. These processes guide us in our actions as consumers.

In a broad sense, the topic of perception is concerned with the translation from the external physical world to the internal mental world that each of us actually experiences.

PERCEPTION

Petrovsky and Yaroshevsky (1985), in their Concise Psychological Dictionary, have defined perception as an essential stage of cognition that is associated with thinking, memory, and attention, directed by motivation, and has a definite emotional tinge. It is different from illusion which is an inadequate reflection of the object perceived.

According to Oxford Advance Learner's Dictionary of Current English, perception is the process by which we become aware of changes through the senses of sight, hearing, smell, touch, and taste. Berelson and Steiner (1964) have defined perception as the process by which an individual selects, organises, and interprets information inputs to create a meaningful picture of the world.

After looking the consumer perception in the consumer information processing system, which is how external world (stimuli) affects the internal world (sensory register, short-term memory of working memory, and long-term memory), Wilkie (1990) defined it as the process of sensing, selecting, and interpreting consumer stimuli in the external world. The author also suggested that there were two factors that determine what would be perceived and how it would be perceived: stimulus characteristics (the properties of a stimulus that would cause us to receive attention) and consumer characteristics (the influences that our physical and conceptual systems have on what we perceive and how we perceive it).

Schiffman and Kanuk (1991) have observed that stimulation can occur at the level that is above the conscious awareness, called the supraliminal perception. Furthermore, an individual may also perceive stimuli without being consciously aware, for example, by flashing a message on the screen for a part of the second. The authors felt that the flow of information can be attended, organized, and interpreted in an individual way resulting in different perceptions of the same situation. Kotler (1994) observed that perception depends on the physical stimuli, its relation to the surrounding field, and the conditions within the individual. Since everyone is exposed to numerous stimulating objects and it is impossible for an individual to attend to them all, the author concluded that the individual is bound to selectively screen out, distort, or retain the effects of the objects. And, the three perceptual factors — selective exposure, selective distortion, and selective retention — mean that marketers and consumer protection groups have to work hard to see that their message is sent through.

Werkman (1974) felt that interpretation of objects perceived becomes important as the consumer usually attributes the sensory input to sources that he or she considers most likely to have caused the specific pattern of stimuli. The author observed that interpreting of objects perceived means not only recognizing known objects but also explaining unknown objects according to the observer's idea. He felt that, in most cases, the results of interpretation are not checked against any absolute standard, at least in the case of trademarks. Werman commented that an incorrect interpretation of device mark may not prevent the mark from performing its function. The author commented that the speed with which the interpretation takes place depends basically on the extent to which the consumer is familiar with the object that is represented in the trademark.

To conclude, Schiffman and Kanuk (1991) observed that the self-image, the cues, the store-image, the physical and visual appearance of the trade-marked product, and the perceived risk (whether functional, physical, financial, social, or psychological) are considered important parts of the perceptual interpretation. The authors further observed that the information-seeking behavior of consumer, their brand loyalty, and the reassurance from the seller, broadly help them (the consumers) in the reduction of the perceived risk.

TRADEMARK

Narayanan(1981) has felt that a trademark is recognised as a form of property. He defines a trademark as a visual symbol in the form of a word, a device, or a label applied to the articles of commerce, with a view to indicate (to the purchasing public) that the goods bearing visual symbol are the goods manufactured by a particular person as distinguished from similar goods manufactured by other persons. The author observed that though trademark is grouped with patent, design, and copyright as industrial property, it differs from them because the subject-matter with which the monopoly right is associated, is a product of innovation, discovery, or intellectual effort, and the duration of the rights is limited. It is not necessary that the trademark chosen should be the result of inventive skill or intellectual labour, and the word or device adopted may be some common-place thing.

STATUTORY DEFINITION

The statutory definition of trademark, as given in Section 2(1)(v) of the Trade and Merchandise Marks Act, 1958, includes a registered trademark or a mark. 'Mark' has been defined to include a device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof. The Trademarks Bill, 1993 enlarges the definition of trademark so as to include a mark capable of being represented graphically and to include shape of goods, their packaging and combination of colours, and covers both goods and services. 'Name' includes any abbreviation of name. Further, the use of a mark is construed as a reference to the use of a printed or other visual representation of the mark. And, the use of a mark must be upon, or in any physical or other relation to the goods. Finally, the use must be for the purpose of indicating a connection, in the course of trade, between the goods and the person who has the right to use the mark either as proprietor or as the registered user.

MARKETING DEFINITION

According to the American Marketing Association (1960), a trademark is a brand or part of a brand that is given legal protection—it protects the seller's exclusive rights to use the brand name or brand mark. 'Brand name' is that part of a brand which can be vocalized—the utterable part. 'Brand Mark' is that part of a brand which can be recognized, but is not utterable, such as a symbol, design, or distinctive coloring or lettering. Finally, 'Brand' includes a name, term, sign, symbol, or design, or a combination of these, intended to identify the goods of one seller or group of sellers and to differentiate them from those of competitors.

DEFINITION USED IN THE ARTICLE

Trademark, as used in the article, includes a brand, whether registered or not.

RELEVANCE OF THE STUDY

A business enterprise needs separate identity as its name by having its own policy and credence for any action based on that policy. Trademark surrogates these basic predispositions of the enterprise by giving it a separate identity (distinctiveness function), source of identity (indicative function), consistent assurance of nature, quality and characteristics of goods (guarantee/assurance function), and by providing it an advertisement base (promotional function). Trademark is thus, formal expression of one of the significant aspects of marketing strategy.

Rogers (1949, p.159), an acknowledged authority on the subject, hypothesised a world without trademark:

If we suppose that no merchandise could be distinguished from any other—that is were forbidden to mark any goods or put any name, or other identification on them—a consumer would fare badly in such a world. A producer would too. There would be no pride of workmanship, no credit for good quality, no responsibility for bad. There would be competition to be sure, but it would be competition to see who could make the worst goods, not the best; and he would win whose product was cheapest, poorest, and most dishonest.... If there were no way to tell the good from the bad, why bother to sell anything but the bad—and the worse, the better?...The ability to distinguish people and the use of distinguishing trademarks and other identifying means on goods prevent this sort of barbarism. Trademark make identification possible and enable people to buy with the assurance that they are getting the merchandise which by faith or experience they believe to be good, and by the same means to avoid what they dislike or know nothing of. Thus, both good will and ill will no difference, can be made effective.

Trademark is an effective bridge between seller and buyer in the market place. It has become an indispensable tool of any business/corporate strategy. Life has become so much accustomed to see trademark that way back 1942, Justice Frankfurter observed:

If it is true that we live by symbols, it is no less true that we purchase goods by them.

Thus, legal protection of trademark becomes an imperative against its commercial piracy. The remedy is granted to the owner of trademark, but it is *assumed* that buyer is thereby shielded from fraud perpetuated by unscrupulous use of trademark. Jones(1950) feels that the trademark owner who fails to develop an understanding and appreciation of his products, cheats the customer. The understanding and appreciation by a trademark owner could be achieved by keeping a constant watch on its unscrupulous use by other manufacturers/traders. But what happens during the period a trademark is used by another unscrupulous person? In this context, justice B.N.Kirpal, in the famous *Hindustan Pencils case* [38(1989) Delhi Law Times 54], raised the issue thus:

The manufacturer of the genuine products may not be adversely affected by such sales and may not choose to approach the court for a number of years but as far as the general public is concerned, the sale of spurious goods results in the public spending good money for bad things. It is the general public which is being cheated... but during this period when the defendant is allowed to continue to infringe the intellectual property it is the consumer or the purchaser who alone suffers and who ultimately can not be compensated. [Paragraphs 28 and 29, emphasis added].

The issue of studying the consumer perception, when duplication takes place and no effective action is taken against such duplicator(s), is the basic thrust of the present article.

ECONOMIC—LEGAL ENVIRONMENT OF BUSINESS

The present article was undertaken in view of its economic-legal significance in relation to consumer-trademark interface. Apart from the brand loyalty and use of other 'marks' (to be discussed later), newspapers play an important role in mitigating consumer confusion by informing the consumers about the current position regarding breach of any mark that may be successfully used in making their buying decisions.

A look at the advertisements, news items, articles, editorials, warning/caution notices, and legal notices, in Exhibit 1 to 4, has a direct reference to the prevalence of the menace of duplication.

ADVERTISEMENTS

The advertisements generally contain some tips to look for genuine trade-marked products. They point out difficulties involved in correctly assessing the genuineness of a product. Further, the advertisements show the serious consequences of such duplicate products in terms of loss of money and health to consumer.

NEWS, ARTICLES AND EDITORIALS

They show the events, the *modus operandi*, and the action taken by the relevant authority. Such items seek to make the consuming public aware about the trademark duplication.

WARNING/CAUTION NOTICES

The press warning/caution notices released by traders seek to warn the general public against the sale of duplicate goods. The notices also call upon the traders to abstain from indulging in unscrupulous activities because the acts are liable to the civil and criminal action.

LEGAL NOTICES

These are issued by the trademark lawyers, who give relevant information about the trademark, and warn all concerned against the consequences of duplication. The advertisement also reminds the public about the legal steps being taken and to be taken, including civil and criminal action.

EXHIBIT 1**Advertisements:
Mitigating Consumer Confusion**

"Can you tell which is the fake safety valve?" (by Hawkins Pressure Cookers), The Hindustan Times (HT), dated 14.07.1991.

"Duplicate parts, unreliable payments, missing mechanics, unreasonable customers" (by Tata Bearing), HT, dated 30.12.1991.

"Operation legal bearing" (by SKF Bearings), HT, dated 23.01.1992.

"An inferior bearing can damage your equipment, insist on a world—class bearing" (by NORMA Bearing), HT, dated 22.04.1991.

"Spurious spares will not spare your pump" (by Worthington Pump India Ltd.), HT, dated 22.01.1992.

"You could be driving 1/2 a car" (by LUCAS—TVS for auto electrical parts), HT, dated 17.03.1992.

"Wescon—original equipments to Maruti Udyog Limited" (by WESCON caps), HT, dated 23.02.1993.

"What does Tatfelt have in common with Mobil, XEROX, and Dalda?" (by STP Limited for waterproofing), HT, dated 31.01.1992.

"It's not easy to imitate Kitply" (by KITPLY for boiling water—proof and termite resistant ply), HT, dated 17.01.1990.

"Beware of cheats—the world is aware of genuine Kitply", HT, dated 23.02.1990.

"Now let your finger be the LIE DETECTOR" (by Godrej 'NAV-TAL' for locks), HT, dated 20.02.1993.

"Better Than Renowed Names, Genuine Water—proof Plywood" (by Greenply), HT, dated 24.10.1993.

"Beware of Duplicate Sarees" (by Poonam Sarees), HT, dated 10.11.1993.

EXHIBIT 2

**News Items, Articles, and Editorials :
Mitigating Consumer Confusion**

- "Computer piracy racket busted", HT, dated 22.03.1991.
- "Fake electrical unit unearthed", HT, dated 29.12.1989.
- "Poor quality bulbs: whose baby?", The Times of India (TOI), dated 31.01.1992.
- "Fake DMS milk pouches", HT, dated 05.12.1991 and 24.01.1992.
- "Spurious pan masala racket", HT, dated 15.01.1994.
- "Pepsi wins legal battle for trademark", Financial Express (FE), dated 25.03.1991.
- "Face cream factory unearthed", HT, dated 27.04.1989.
- "Spurious liquor kills 7", HT, dated 01.01.1992.
- "Spurious liquor", HT, dated 24.11.1991.
- "Licensed killing" (on liquor), Editorial, HT, dated 03.01.1992.
- "Eight killed in Cuttack liquor tragedy", Indian Express, dated 08.05.1992.
- "Liquor racket busted", TOI, dated 28.05.1992.
- "Fake drugs and doctors", Editorial, HT, dated 20.11.1989.
- "Action on fake auto parts urged", HT, dated 11.02.1991.
- "Disposed syringes being sold to Hospitals", IE, dated 04.02.1993.
- "Disposal of empty cartons" (by DTDC), HT, dated 31.01.1992.
- "Racket Busted" (on spurious soaps of Lux, Lifebuoy, OK, Rin, and Savera), HT, dated 09.11.1993.

EXHIBIT 3**Warning/Caution Notices by Companies and Traders :
Mitigating Consumer Confusion**

Bombay Deying (for bed sheets and pillow cases), H.T. dated 11.10.1991.

Wilson (for jotter pen and refills), HT, dated 12.04.1989.

Bush Boakes, HT, dated 05.04.1989.

Greaves (for Dryton greaves inverted bucket steam traps), HT, dated 13.03.1990.

Amul (for butters being used for goods such as salt, bread, cakes, oil, soaps, detergents, matches, undergarments, etc.) HT, dated 10.04.1989.

Omni (for precured repair patches for tyres and tubes). HT dated 31.08.1989.

Apar power oil, HT, dated 15.12.1990.

Oswal (for woolens), HT, dated 09.12.1990.

Citizen (for time pieces), HT, dated 29.04.1989.

Ajanta quarts, HT, dated 05.05.1994.

GEC (for exhaust fans), HT, dated 21.04.1989 and 26.04.1989.

Tata (for fabrics of non-woven rolls), HT, dated 25.03.1989.

EXHIBIT 4

**Legal Notices from Trademark Practitioners :
Mitigating Consumer Confusion**

"Liberty" (footwear), HT, dated 21.03.1989.

"UNITEX" (non-woven products such as carpets and materials for floor coverings), HT, dated 19.03.1989.

"BMW" (Zip fastener and Zip rolls), HT, dated 09.02.1992.

"KZ" and "TKK" (Zip fastener), HT, dated 01.03.1991.

"Newman" (ready-made garments), HT, dated 06.03.1993.

"Ultimate" and "Realtime" (apparatus and instruments, for telecommunication and EPABX system), HT, dated 29.03.1991.

"Maruti" (Pressure cookers and stoves), TOI, dated 28.05.1992.

"Taaza" (masala pastes, masala powders, spices for cooking, papads, squashes, dried and cooked foods, jams, jellies, pickles, sauces, syrups, and chutneys), HT, dated 01.04.1989.

"Divine" (CI valves, cocks and fittings), HT, dated 03.02.1993.

"AKG" (PVC conduit pipes, rigid PVC pipes and steel conduit pipes), HT, dated 30.03.1989.

"STAR TREK TV" (television receivers), HT, dated 26.02.1992.

"7 in 1 (Label)" (juice concentrates and all kinds of beverages), HT, dated 04.09.1993.

In view of the wide prevalence of duplication in trademark in the market, the present article becomes all the more relevant.

OBJECTIVE OF THE STUDY

It is proposed to look into consumer perception in relation to the distinctiveness of trademark and its fall-out. It seeks to focus on the following problem:

Whether consumer perception of trademark, in identifying and buying the product, calls for more effective measures to be taken?

TRADEMARK AND CONSUMER CONFUSION

The operative part of the trademark-consumer interaction can be identified by studying the basis of consumer confusion. The consumers may have different perception of an object because of the surrounding environment, and physical stimuli and its relation to the surrounding environment. The difference in the consumer perception of the same stimuli can cause confusion, actual or probable, about the object — the trademark.

Wheately and Chin (1977) found that the perceived quality of a product appeared to be associated consistently, with the high prestige stores, high prices, and the physical attributes of products. The researchers have shown that the demographic characteristics of consumers do interact with each other and with the marketing of products in a very complex manner. Rao and Monroe (1989) experimented the influence of price, brand name, and/or store name on the buyers evaluation of product quality. The meta-analysis has suggested that, for consumer products, the relationship between price and perceived quality and between brand name and perceived quality, is positive and statistically significant. However, the positive effect of the store name on the perceived quality, has been small and insignificant. But, the experimental design did not investigate the interactive effect of brand name, store name, and price, on the consumer perception of the product quality.

Hong and Wyer (1989) studied the effects of the country of origin and specific product attribute information on the evaluation of a product. The country of origin had not only a direct influence on the product evaluation, but it appeared to stimulate the subjects to think more extensively about other product attributes. The hypotheses concerning the influence of the country of origin on the interpretation of other product information, the use of country of origin as a heuristic basis for judgements, and the influence of information-presentation order, were less able to account for the phenomena observed. Further, the product attributes, in general, had impact on the product evaluation when subjects considered them with an impression-formation objective rather than with the goal of simple comprehension of the information.

Cohen (1991) cited, with approval, two studies dealing with the problems in consumer perception of trademark. The laboratory study conducted by Loken, Ross, and Hinkle (1986) had revealed the consumer confusion about the origin of private-label products and national brands. They emphasised the need to resolve the consumer confusion. The study by Reece and Ducoffe (1987) found widespread misunderstanding among

consumers, about the meaning of some key words used in brand names. Cohen observed that the problems impinged not only on legal considerations, but also on marketing activities.

Chattopadhyay and Alba (1988) found that, contrary to recent theory and research regarding the lack of correlation between attitude and recall, recall can be a predictor of attitude, given the proper context and a theoretically justifiable recall measure.

On the question of the trademark cues that help consumers in identifying a particular product, Miaoulis and D'Amato (1978) examined a case where the names of the products were prominently displayed on the package. The researchers found that the primary cue was not only the name of the trademark but the visual appearance of the product as well.

Boal (1983) observed that the *sine qua non* of trademark infringement is consumer survey of the likelihood of confusion. The author classified consumer confusion under three major heads : confusion of products (the mistaken belief that one product is another), confusion of source (one product put-up by another producer), and confusion of sponsorship (one product is approved and endorsed by another marker). The author concluded that no generalities can be drawn, and there can not be hard and fast rules for providing proof of the likelihood of confusion, because every case before the court, turns on its own facts and no survey can be designed blindly or in reliance of a precedent.

Narayanan (1981), has observed that a consumer can not be expected to carry in his head the details of any particular mark. A mark is often remembered by the distinguishing or essential feature which strike the eyes and fixes in its recollection. The author felt that the suggested interpretation can include the interests of illiterate consumers. The question therefore is: what is retained by a consumer after looking at the trademark? or, what salient features of the trademark are used by a consumer at the time of purchasing the product? The author has listed the distinguishing or salient features as: a visual device (not just ocular test), phonetic appearance (sound or significance of words), colours used, etc. According to him, it is the entirety of the trademark of product which affects the consumer psychology. These include : the container, receptacle, cork, label, writing, devices and their shapes, sizes, colours, get-up, as also the reference of goods, area of operation for sale, and the type of persons to whom it is sold.

Jorda (1991) has listed various factors that can be considered by courts while evaluating the likelihood of consumer confusion : the degree of public recognition, similarity of design of the overall commercial impression, similarity of products, identity of advertising media, identity of retail outlets and purchasers, intent of the infringer, and the actual confusion.

Thus, the consumer perception greatly affects their psychology in the interpretation of trademarks. The stimuli plays significant role in the recognition of trademarks. In the process, it has been specifically suggested that the problems relating to the trademark are psychological in nature which need solution from the fields of psychology, economics, marketing and law.

Decided Cases and Judicial Opinion

In *Philip Morris Belgium v. Golden Tobacco Co. Ltd.* [AIR 1983 P&H 418], the court took into account the reputation of the trademark and its non-use due to import restrictions. The court granted a temporary injunction pending disposal of the suit, in respect of the class of goods for which their trademark was not registered. Thus, the consumer viewpoint that they already associated the trademark 'VISA' with the plaintiffs and were likely to take that the use of such mark was by the same company, prevailed in the decision. X

In *Bata India Ltd. v. Pyare Lal & Co.* [AIR 1985 All 242], the defendants were injected from using the mark 'Bata foam' in the manufacture of mattresses, safe cushions and other articles, even though the plaintiffs did not manufacture the products. The decision of the court confirms the view that consumer confusion or deception dominates any trademark infringement or passing-off action.

In *Glaxo Operations (U.K.) Ltd., v. Samrat Pharmaceuticals* [AIR 1984 Del 265], the plaintiff was successfully able to restrain the defendants from manufacturing, selling, offering for sale, advertising or otherwise dealing with glucose powder or any other medicinal or food preparations in cartons having the lay-out, get-up, and the colour scheme of Glucose-D and/or Glucon-D that have an impact on the public mind that the products sold belonged to the plaintiffs. The defendants were restrained from encashing the reputation of the plaintiffs and passing-off their inferior products to the public. X

In *Pidilite Industries Pvt. Ltd. v. Mittees Corporation* [1989-PTC-151], the trade-marked product 'Fevicol', was being sold in plastic and tin containers, within highly specific eye-catching designs and colours. The defendant, started using the mark 'Trevicol', with same type of container, colour scheme, and get-up. It was held that an illiterate consumer, (a carpenter), could be deceived by the similarity of pronouncing the two marks (phonetic similarity) and the container, get-up, and colour scheme (visual and physical appearance). 2

In *Bombay Oil Industries Pvt. Ltd. v. Ballarpur Industries Ltd.* [1989-PTC-131], the plaintiffs owned the trademark 'SAFFOLA' for edible oil and kardi oil. The defendants started using 'SHAPOLA' for sunflower oil. The court observed that 'S', at times, can be pronounced as 'SH', and letter 'F' and 'P' in a particular setting can also sound phonetically similar and can be slurred over in pronunciation. In the court's view, there was a striking similarity and affinity of sound in the two marks. Further, the court held that both the oils were used as non-saturated edible oils and, thus, they had same people to buy the product.

It is not necessary to prove the use of same words, device, design, or mark on the goods for the purpose of infringement of trademark. It is enough that the defendants were representing to the members of public by one device or other. This precisely was the case in *Scotch Whisky Association v. Pravara Sahakar Shakar Karkhana Ltd.* [AIR 1992 Bom 294].

In *Hindustan Pencils (P) Ltd. v. India Stationery Products Co.* [38(1989) Delhi Law Times 54], the plaintiffs owned a registered trademark of 'Natraj'

for pencils, staples, refills for propelling pens, pens, pins, clips, etc. The defendants started using the same mark for their products—pins and clips. The major question before the court was about the laches and acquiescences which might come in the way of grant of injunction. The court held that the use of trademark was fraudulent and in the defence in equity both the parties should come with clean hands. The court felt that especially in the Third World countries where the level of education is not very high and where the consumer may not be proficient enough to read what is written, possibly in a language which is unknown to the purchaser, the trademark assumed greater significance. In such cases, the court must see that an unscrupulous infringer does not cheat the general public by selling spurious goods. The court observed that giving protection to the consumer would necessarily amount to giving relief to the plaintiff, even though the plaintiff might have slept over his right for a number of years. The manufacturer of the genuine products may not be adversely affected by such sales and may not approach the court for long. But, as far as the general public is concerned, the sale of spurious goods resulted in the public spending good money for bad things. But, during the period when the defendant is allowed to continue to infringe the intellectual property, it is the consumer or the purchaser who alone suffers and who ultimately cannot be compensated. The court, therefore, gave prime importance to the consumer interest in the present case involving fraudulent use of trademark.

Trademark Registry

The Trademark Registry can promote the consumer interest by acting as Tribunal in the trademark opposition proceedings. This helps the consumer in mitigating the confusion caused by the use of same or similar marks.

In *Lupin Laboratories Ltd. v. Novo Nordisk* [1992-PTC-300], where an application for the registration of mark 'LIPOZYME' in respect of enzyme preparations for industrial use, was opposed by the plaintiffs, the registered proprietors of trademark 'LUPIZYME' in respect of medicinal and pharmaceutical preparations. It was held by the Tribunal that the rival marks, when compared as a whole, were visually, structurally, and phonetically deceptive and similar so as to reflect same source of the goods. The application for registration of the mark was rejected.

In *Tungabhadra Industries Ltd. v. Tirupati Industries* [1992-PTC-306], application for 'NIRAL' in respect of detergent powder, washing powder, and soaps was opposed by the registered proprietor of trademark "NIRALA" for washing soaps. It was held that the rival marks are practically, identically, structurally, phonetically, and visually, identical, and goods are also of similar description.

In *Glenmark Pharmaceutical Pvt. Ltd. v. Carminol Laboratories Pvt. Ltd.* [1992-PTC-320], the Tribunal segregated the common and uncommon parts of the marks as prefix and suffix. 'FURA' was common to the chemical name furazolidone and the suffixes were 'NOL' and 'KAL', which were phonetically, visually, and structurally different. The decision seem to be erroneous because the marks as a whole — 'FURANOL' and 'FURAKAL' -

can be slurred over in pronunciation, unless mark is approved with some restrictions as to colour [Section 10] or contains disclaimer of certain parts of the mark [Section 12].

In *Prem Cottage Industries v. Manohar Traders* [1992-PTC-324], the Tribunal, after observing that the rival marks were deceptively similar, allowed the concurrent use of the rival marks. The only ground was that the area of operations was different, and the reference to the advertisement in the newspaper, by the opponent, that the area of operation was sought to be extended to include the applicants territory, was ignored. Thus, the Tribunal lost an opportunity to subserve the consumer interest by holding that the two marks, the deceptively similar marks, could remain in the same area. The decision of the Tribunal hurts the rights of the registered trademark proprietor since he would be prevented from extending his area of operation. The decision of another Tribunal, which is considered to have persuasive effect, in *Tungabhadra* case, was ignored, where it was held that goodwill in a territory was not dependent on the sales in that territory.

Trademark Duplication is a Crime

Trademark is a right granted to its owner. Normally, no right is conferred on the consumer in the enforcement of the trademark remedies. However, the duplication of trademark directly affects a consumer, and through the consumer, it affects the owner of trademark. The consumer reposes his valuable confidence in the trade-marked product. However, his brand loyalty may not provide him with the desired product, by the unscrupulous use of the trademark by another person who has no respect for such confidence. In jurisprudence, such unscrupulous act amounts to a socio-economic crime or white-collar crime.

'RISK REDUCERS' AND CONSUMER CONFUSION

A consumer buys a product with various assurances granted to him under different legislations. These assurances can be seen as reducing the risk of consumer in buying a non-standard, unsafe, or hazardous product. The element of risk involved in the purchase of a trade-marked product can be assessed by different consumers in different ways. This part focuses on how a consumer reduces the risk of getting confused in the buying process.

Related Studies and 'Risk Reducers'

Schiffman and Kanuk (1991) have observed that consumers might perceive risks in buying a product because the product might not perform as expected, it might be unsafe, it might not worth its cost, or it might result in social embarrassment or hurt his ego. They further observed that the perception of risk by the consumer varied, depending on the person, the product, the situation, and the culture. The authors concluded that consumers often develop their own unique strategies for reducing the perceived risk, by getting product information; by developing brand loyalty; by

trusting a popular brand; by trusting the reputation of store; by buying the most expensive model; and by getting reassurances from seller in the form of money-back guarantee, warranty, by getting the product tested in an independent laboratory, or by having the product trial.

In the study conducted by McClure and Ryans (1968) on the household and the retailer, it was found that the retailers, who have been traditionally described as an excellent source of information about consumers, perceived several interesting misconceptions about the consumers. The retailers consistently underestimated the importance of the service and warranty, ease of use, style, and the attributes of competitive brands.

Ratneshwar (1973) found that consumer self-concept is congruent with brand image, which is greater for the most preferred brand than for the least preferred brand.

Barach (1971) studied the self-confidence of consumers in their decision-making. The experimental results indicated that woman who said that they were very confident that the brand they had initially selected was the best one for them, were much less persuasive than those who were decidedly not confident in their brand choice.

For ascertaining the different strategies of risk reduction, Reselius (1971) surveyed housewives by describing several generalized risky buying situations, each posing a constant threat of some kind of loss. Eleven methods of risk reduction were selected for the time loss, hazard loss, ego loss, and the money loss. The study revealed that the most effective risk-reduction strategies were building the brand loyalty and trusting a popular brand. But, products dangerous to health and safety of consumers, were found to have slightly favourable reliefs by getting tested by the government agencies than by any private person, which was considered to have neutral effect on the reduction of risk.

In evaluating the general attributes, Singh (1989) found that reliability of the seller was followed by brand or company image, are considered important factors in buying milk products. Moreover, the extent of brand loyalty was high, while the intensity of brand loyalty (if retailer ran out-of-stock of their preferred brand) was only moderate. Further, the tendency to switch-over to other brand was found to be negligible.

These studies have thus shown that consumers use a variety of risk reducers in the buying of the preferred products. Brand loyalty and major brand image, self-image, and government testing, have been considered important in order to improve standards which ensure better quality, competitive price, and variety of brands.

'Marks' as Risk Reducers

The analysis has revealed that trademarks play very important rôle in reducing the risks associated with consumer buying decisions. Apart from trademarks, the consumer uses other 'marks' as an instrument of risk reduction.

'ISI' Mark. The use of the ISI mark has become widely popular particularly after the setting up of the Bureau of Indian Standards (BIS) in

the year 1986. The mark symbolises the use of a standard quality control in the production of the products concerned. Improper use of the mark is an offence. The standard mark has been developed for about 1250 products including agricultural, implements, baby foods, electrical goods, electronic items, food stuffs, drugs, cosmetics, utensils, textiles, furniture, sports goods, paints, carpets, and detergents.

'PAC' Mark. According to a news item published in *The Financial Express* [dated 13.08.1991], for quality mark in respect of building material, provides information that the Ministry of Urban Development through its 'Building Material and Technology Promotion Council' will handle the operation of the 'PAC' mark. The mark will cover all building materials, and products and components which are out of the ambit of ISI certification. The scheme is based on agreement, as already prevalent in the United Kingdom, France, Portugal and the South Africa.

'Eco Mark'. According to a news item in *The Hindustan Times* [dated 04.01.1991], environment-friendly criteria will be evolved in respect of scented toilet soaps, dyes, or whitening agents as ingredients of soaps. The scheme has been evolved by the Ministry of Environment under the Water (Prevention and Control) Act, 1974, and the Air (Prevention and Control) Act, 1981. The necessary license will be issued by the BIS. The products to be covered by the scheme include: toilet soaps, food products, paper, and detergents. The manufacturer will be required to display a list of critical ingredients, with their weights in percentage. In order to minimise the harm to environment, the manufacturer will be encouraged to use re-cycled material for packages.

'FPO' Mark. The FPO (food processing order) mark is provided in the rules framed under the prevention of Food Adulteration Act, 1954. The mark is used on food products including jam, jellies, masala, chutneys, pickles, sauces, and squashes.

'AGMARK' This mark is issued by authorities constituted under the Agricultural Produce (Grading and Marking) Act, 1937. Manufacturers use the AGMARK for products that are used for edible agriculture products, including mustard oil, ghee, butter, eggs, fruits, vegetables, pulses, chillies, jaggery, and spices.

In addition to the above marks, ASSOCHAM (1990) and PHDCCI [press release, dated 30.03.1991], have stressed the need to introduce a brand name assistance scheme for encouraging the large business houses to lend their brands to the small-scale manufacturers. The scheme may prove as another risk reducer of consumer confusion caused by the menace of trademark duplication. Thus, the trademarks and other marks, as discussed, can play a vital role in mitigating the consumer confusion and perceived risk.

SUMMARY

The review of relevant literature on consumer confusion, decided cases and judicial opinions, and duplication of trademark as white-collar crime, reveals that consumer confusion hurts the consumers themselves and the

genuine seller, through it hurts the consumer more because of the greed, avarice, and caprice nature of activity. There is a need for enhancing the costs to the unscrupulous persons, especially the psychological costs. The consumer confusion brings in criminality on the part of unscrupulous businessmen. The solution lies in the isolation of such unscrupulous persons rather than putting sole efforts on clearing the consumer confusion, which may not be possible unless such unscrupulous activity is rendered non-profitable.

Trademarks, as an instrument of the risk reduction, have been found as shelters under which a consumer can buy a product. 'Marks' further strengthen the foundation of a trade-marked product. In this respect, day-to-day reporting in the newspaper provide to the consumer the information regarding any unscrupulous activity pertaining to the product. They help the consumer rationalise the buying process and strengthen his confidence in his purchase decisions.

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