

The Footprints of Trademark Law in a Booming Market Economy

Sanskriti Shrivastava*

Abstract

The world saw a shift in behavior of states from being a closed economy to entering the era of globalization in the 90s. Transactions in a global market offers a variety of new products and services. Such products and services may or may not be novel, meaning thereby, apart from the “creating-effort” as recognized by other branches intellectual property rights (“IPR”), like patents and copyright, the focus must equally be shifted towards “entrepreneurial-effort”. Branding and advertising of a product plays a vital role in establishing goodwill and reaching the intended customer base. However, the trademark law does not enjoy enough consideration as compared to other branches of IPR in terms of its economic value.

This paper aims to analyze the role of trademark law in the global economy. It also explains how trademarks increase the economic value of a product or service with which it is associated, its relevant competitive advantage and its potential to generate more value in an economy. Additionally, the paper also seeks to differentiate the function of trademarks in the market and non-market economies.

The scope of this paper is to understand the utility of trademark law in a market economy which can thereby be used to generate more surplus, value and income. Further, the paper highlights the impact of the reluctant approach of various jurisdictions around the world, particularly, India, the European Union and the United States of America, towards non-conventional trademarks (smell marks, taste marks, colour marks, etc.) which have sometimes resulted in a loss to the economy. Lastly, the paper seeks to address the issue of market monopoly with respect to trademark law and suggest the benefits of welcoming non-conventional marks on the economy.

KEYWORDS: Trademarks, a market economy, non-conventional trademarks, IPR

* BBA LL.B, 4th-year student, School of Law, University of Petroleum and Energy Studies

1. INTRODUCTION

Trademarks [“**mark(s)**”] are the symbols, slogans, words with which a consumer associates a product. Examples may be understood as Mac Donald’s “yellow M” or Vadilal for ice-creams. Such market could be a sign, a phrase, a word, a numeral representation or even some particular and distinguishable smell, colour, taste or sound¹. In the era of globalization, a consumer has ample options to choose from, however, depending upon the class of goods, the consumer’s choice is highly dependent upon the goodwill of a product. For this issue, it is relevant, for a consumer to identify the source of a product, only after which, he or she would be able to distinguish the particular product from other like or similar products available in the market.

This attracts the importance of legally registered trademarks. Businesses around the world, use them to the best of their competitive advantage, by giving their trademarks, economic and legal value. Apart from acting as a source identifier, it helps in providing relevant information to the consumer about the description of the product, the quality and durability etc. Thus trademarks, around the globe, has been used as a commercial tool by the business to boom their market economy.

This commercial tool, although, is used to increase the market value, is also quite expensive for businesses. Branding and advertising are often considered one of the most expensive parts of a business. It requires creativity and funds. Despite these factors, the business considers it one of the most crucial factors in developing a brand name over time for the particular product or service, they wish to offer.

The purpose of having trademark law in the first place is commercial and is thus, market-oriented. This may be understood as, unlike other intellectual property rights (“**IPRs**”), like the patents and copyrights, a trademark is not granted to protect an invention or creativity in the form of art, music or drama. Rather, it is associated with competition and branding- useful

¹ Article 15(1) TRIPS Agreement.

as a tool of advertising the product and increasing its market value. Thus, the idea of trademark law is not “intellectual” in its true sense².

Further, another notable distinction that may be seen in other branches of IPR and trademarks, is its association with the public goods theory. This theory has had a justifiable foundation in terms of patents and copyrights. It talks about a lawful restriction put forth in granting an author or creator limited patent or copyrights, to avoid the creation of monopolies. The ideology behind this concept lies with the fact, that inventions and subject matter of copyrights are considered to be for the public good and if restricted to some creator’s monopoly, it would restrict the general public to utilize them for a larger benefit.

However, authors around the globe have considered trademarks as private entities and not “public goods”. This argument ignores the fact, that the information associated with trademarks is what attracts the public in choosing a particular product. Thus, this paper aims at rejecting this approach of considering trademarks as “private goods” and makes an argument in favour of trademarks being hit by public goods theory.

Thus, for better articulation, this paper is primarily divided into six parts, wherein, *foremostly, it talks about the benefits of the trademark in the market (1), moving ahead with highlighting the economics of acquisition of trademarks and their transfer (2). Thereafter, the paper examines the value of branding (2.1), goodwill (2.2) and its impact on income (2.3). Further, the paper argues trademark as “public goods” (3) followed by highlighting the potential monopolies that may be created therein (4), and, thereafter, concluding the paper with a way forward.*

2. RELEVANCE OF TRADEMARK IN AN ECONOMY

After globalization, there are several products available for consumers to choose from. This is true for both consumer goods and luxury goods. Also, choices are available within a class of products. The consumers get to choose from several unobservable characteristics and features. This availability of choice offers the business to maintain desired quality and variety

² David W. Barnes, “A new Economics of Trademarks”, Vol 5 No. 1, 2006 *Northwestern Journal of Intellectual Property*, (2006), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1048&context=njtip>.

standards and also give way to a healthy competitive environment, in different dimensions, including quality, price, advertising, features etc.³

The primary reason for the protection of a trademark is two facets. First, they have the potential to alter consumer's choices and enhance their purchasing decisions. Second, they offer incentives to the business to make their goods of desired standards both in terms of quality, quantity and variety, also when such features are non-observable before purchasing the physical product. Both these benefits are because of the capability of consumers based on the trademark attributed to the product, to distinguish between different products, which might be identical in all observable aspects before purchasing the physical product.

From the eye of economic perspective, the argument with respect to the relevance of trademark is quite simple. It is seen, that sellers usually are in a much knowledgeable position with respect to unobservable characteristics of a product, as compared to the buyer, this concept is known as information asymmetry. Unobservable characteristics serve as an influential factor from the perspective of the consumer in determining the overall value of a product.

In cases, where the goods are identical in all observable characteristics, consumers tend to decide the purchasing option with respect to the unobservable characteristic, which comes along with the trademark attributed to the product, including but not limited to the branding, advertising and pre-committed advertising of the product. Further, the businesses tend to reach out to the cheapest potential unobservable criteria for a product, because a higher degree of unobservable characteristics, do not result in increasing the price of a product, thereby increasing the profit margins⁴.

Therefore, the economic relevance of trademarks is to enhance the unobservable characteristics of a product and to assist the consumer in identifying the same. This kind of information is provided to the consumer in a pre-determined written form in the forms of labels on the packaging, it is done by way of the packaging itself and the symbols, words, or a combination of both (i.e. the trademark). The consumer ends up attributing the symbol, word,

³ Daniel McClure, *Trademarks and Competition: The Recent History*, 69 Trademark Rep. 305 (1979) <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4321&context=lcp>.

⁴ George Akerlof, "A Market for Lemons", Vol 84 No. 3, *Quarterly Journal of Economics*, (1970).

phrase used therein with the quality of a product. An example may be taken of advertising strategy of Maggi by Nestle, i.e. “Meri Maggi”, this makes the consumer automatically identify Maggi being close to it, instead of any other brand of instant noodles.

The original intent of having a trademark in the ancient era was found in its function of serving as a source identifier, to eliminate potential fraud and countervailing particularly in cases of jewellery makers and pottery makers. However, by the introduction of the 20th century, trademarks gained popularity for their function of attributed goodwill in terms of standard of quality⁵. Presently, the trademarks are utilized for both features i.e., working as a source identifier and working as a product identifier. Its function of being a product identifier helps the consumer to distinguish the product from other products of like nature based on taste, utility, features, price, quality, and other like characteristics - all of which is highly subjective in a way that it varies concerning personal preferences of the consumer.

Further, from the perspective of businesses, it helps the market players to utilize the unobservable characteristics of a mark (attributed to the product) and make a better market reach to the consumer, making the distinction much more visible to the consumer. In the environment, where profit maximization is a goal of the businesses, they tend to deviate from the practice of making identical products, thus, they make a difference in terms of unobservable characteristics. This makes the consumer enjoy a choice from a widely available variety of products and classes of products.

Furthermore, to keep up with the function of economic value, the trademarks must avoid duplication. The failure of such obligation would involve two kinds of costs, First, in the relevant market of a particular product to which the trademark is attributed to and Second, the relevant market concerning language.

As far as the market of trademarked products is concerned, it requires the producer or seller of the goods to maintain the desired quality of the product in question for a consistent duration, across all the intended consumers. Thus, it can be alternatively put as the protection of trademark encourages the businesses to invest upon the quality of the product. This can be understood as, if a consumer, develops loyalty with brand “A” and wishes to purchase the

⁵ Sidney A. Diamond, “The Historical Development of Trademarks”, 65 TMR 265 (1975).

product of some kind again, he or she may not potentially incur a cost of conducting the preliminary enquiry again, to find the brand which offers equivalent features as brand “A”. He or she would simply find the trademark of brand “A” and purchase its product directly.

Herein, goodwill serves as an integral factor. This makes the consumer develop a certain amount of confidence in the fact, that he need not conduct the enquiry again, which he possibly had conducted in the past and he just needs to identify the trademark, under which it enjoyed the services and quality of the product earlier.

Coming over to the next kind of cost involved in the market in language, it involves a huge investment by the business, not only in the quality of the product but the new invention of marks⁶. Businesses tend to invent or improve the language of trademarks in many ways, including using generic words with completely different products, they are generally used with; creating novel generic words; using phrases that the consumer value for the intrinsic information it provides.

3. ECONOMICS OF ACQUISITION AND TRANSFER OF TRADEMARK

As far as cost is concerned in acquiring a trademark, the available literature from various jurisdictions suggests that trademarks may be acquired in three ways, i.e. by registration, by first possession rule and lastly, by a combination of registration and first possession rule. Further, the transfer of a trademark is generally prohibited because of the economic nature of the trademark. Thus, for better understanding this section first deals with the different modes of acquiring the trademark along with their respective advantages (3.1), followed by a sale of trademarks (3.2).

3.1 Acquisitions of Marks

Trademarks may be acquired in any one or more than one out of three different ways throughout jurisdictions. The first and most common being, by way of registration of a mark. The second way is highly influenced by common law jurisdictions i.e. based on ‘first-to-use’, herein, the person who first used the mark is deemed to be the owner and creator of the mark.

⁶ Rishi Ram, *Economic Perspective of Trademarks*, Vol 9, The Saptagandaki Journal (2018), <https://www.nepjol.info/index.php/sj/article/view/20882/17149>.

The third way is a result of American culture, whereas, a combination of the first two methods, i.e. registration and first-to-use technique is used.

The economics of the “first-to-use” or “first possession” way of acquiring trademarks, is determined in terms of the general course of trade and commerce. That means, when did the product was introduced to the intended consumer. This approach comes with a lot of advantages. First, it reduces rent-seeking. Meaning thereby, if a business is allowed to register a mark before using it, the business might end up utilizing many resources to make up for a new and unique mark. On the contrary, in countries like Japan, where an ‘only registration-based system exists, the entry cost is much more as compared to countries with a “first-to-use” approach or countries that follow a combination of first use and registration approach.

The second advantage of having the first-use approach is the reduction in administrative cost, which is levied while deciding an opposition application as to who was the first one, to ever think of that mark. Since, trademarks are capable of involving some common words, symbols or colours, which are distinct enough, it would be a tedious task to determine who came up with it first. Therefore, it is cheaper to determine who used it first, due to the availability of evidence in the public domain therein.

The third advantage of this approach is that to determine, who used the mark first, one needs to gather information with respect to the public or intended consumer. This serves the additional purpose of making the second user aware of the existence of a prior trademark and thus, helps him avoid potential duplication costs. Lastly, this approach satisfies the social feature of a trademark of being categorically more identifiable and distinctive.

However, this paper suggests, that the best method of acquiring a trademark is not only “first-to use”, but also registration of marks, i.e., a coupled method. This is followed in American and Indian Jurisdictions. The reason behind this being, the legal sanctity involved. It is true, that the first-to-use doctrine ensures the best interest of trademark holders, however, often cases of honest and concurrent use occur. Additionally, such questions purely question of fact and require evidence-based scrutiny. Registration, on the other hand, signifies the awareness of the trademark holder to get his mark registered to protect his interests and rights. Thus, in

cases of dispute, if registration is checked as a secondary factor, first use being the primary factor, it would save time and cost of the adjudicating authority and the parties at dispute.

Another issue with using only the first-possession rule is that the product to which a mark is attributed to have no fixed physical locus. This may be understood as, Whirlpool Ltd. was not a known name in India till the late 90s, however, and today whirlpool is one of the leading brands in India for washing machines. Under such a situation, when Whirlpool was not dealing in India, it is debatable, whether a seller in India, can use a similar trademark in India, with an argument that Whirlpool Ltd. has no market in India.

3.2 Transfer of Trademarks

The law usually does not recognize the sale or transfer of trademarks excepted in some specific instances⁷. This specific exception is applicable in the fact where the right to produce the particular product to which the trademark is attributed, is sold to other businesses. However, this legal position is flawed in the way that it lacks any legal rationale for the same. However, one possible argument to support this approach lies in the economic characteristic of a trademark, i.e. the useful information, which the trademark indicated about a product is much more costly to sell.

This may be elaborated as if Company “A” sells his trademark to Company “B” and people are aware of such transfer, this would lead to the attribution of A’s goodwill to B. This allows company “B” to obtain a higher price of the same product making use of the goodwill of A. However, an aware and knowledgeable consumer would not be interested in buying the same product for a higher price, just because the product now has got a new name.

4. THE FUNCTION OF THE TRADEMARK IN THE MARKET AND NON-MARKET ECONOMICS

The importance of legally enforceable trademarks increases in a growth-oriented society. This is where the consumers are conscious and capable enough to make choices about the product

⁷ Pepsico Inc vs Grapette Co. 416 F.2d 285 (8TH Cir. 1969).

or services they use in their daily lives⁸. In contrast, a society that is not so growth-oriented, i.e. it is inclined towards a very steady or no growth, confers a comparatively lesser interest over trademark protection.

Such a society, which favours a steady growth or no-growth approach is primarily when a society is more focused upon the spirituality perspective among its people and thus restricts its people, the consumer from having personal comfort and wealth. Herein, the market does not offer a lot of competition and thus, trademarks are useful only to the extent of being a source identifier and does not relate to the competitive advantage of a brand. This depicts that social factors are directly proportional to the economic value of a trademark. The more restricted a society is, the less economic value trademarks hold therein.

5. ARE TRADEMARKS PUBLIC OR PRIVATE?

Contrary to the legal propositions of the part, this paper suggests that trademarks are not private goods and are public goods, therefore liable for all the restrictions faced by the public goods theory. The benefits of the categorization of a good into a public good is that multiple people can benefit from its use, without being prejudicial to the interest of others, and hence these are non-rivalrous⁹.

In contrast to the traditional approach that trademarks are different in categorization as compared to the ideas and expressions, and that this approach does not lead to market failure, the paper argues that the trademark holder marks their contribution to the pool of information and this effort is quite similar to the efforts put in by inventors of patents and authors of copyrights.

This may be elaborated as, people in the United States of America and the United Kingdom, trace their coffee by tracking down the “Starbucks logo”. Now, this simultaneous use of words as a source identifier and do not harm or prejudice other consumer’s interest or use. The theory giving trademark protection to the seller was to save the consumer from confusion

⁸ William Hennessey, *The Role of Trademarks in Economic Development and Competitiveness*, Franklin Pierce Law Center, https://www.ipmall.info/sites/default/files/hosted_resources/Hennessey_Content/RoleofTrademarksinEconomicDevelopmentandCompetitiveness.pdf.

⁹ Richard Cornes, *The Theory of Externalities and Public Goods* (Cambridge University Press, 2nd ed. 1996).

and protect the interest of the original holder. Therefore, it can be safely concluded that, from the perspective of consumers, the use of a trademark is non-rivalrous, whereas from the perspective of sellers it is completely rivalrous¹⁰.

Going with this line of thought, the trademark law does not restrict and in fact, permits the referential use of trademarks. Further, if a seller uses the same mark for a different class of goods in the same market as the original holder of a trademark, it is doubtful, the argument of dilution in the eyes of the consumer would suffice here. However, if other sellers use the mark repeatedly, it would result in loss of distinctiveness of the particular mark. This loss of distinctiveness would gradually fail the function of a trademark to work as a source identifier. Thus, simultaneous uses which are non-competitive can be understood as partially rivalrous.

In the same line of thought, this paper argues that trademarks are impure or mixed, i.e., for some characteristics they are rivalrous, for some others they are non-rivalrous and for the remaining partially rivalrous. Thus, for further elaboration, this header is divided into two parts i.e., public goods theory and market-failure theory.

5.1 Public Goods Theory

This paper puts forth an argument in favour of the categorization of a trademark as a public good, to be more specific, a category of mixed public goods. Further, proprietary uses attributed to a trademark is in some instances purely rivalrous and some other instances congestible. Public goods theory showcases that there is no difference in using market failure to justify regulation of trademarks, like patents and copyrights.

Further, considering the first argument i.e., categorization of a trademark as non-rivalrous and hence, pure public goods, it is submitted, that in instances of referential use of the trademarks by the consumer the mark qualifies for Professor Samuelson's theory¹¹. This may be elaborated as once a seller decides to use the trademark in the usual course of trade and commerce, this mark is available for all (consumers) to be used for referential purposes¹². One consumer's use of a trademark as a source identifier or in search of a product does not

¹⁰ J. Thomas, "Trademarks, Antitrust and the Federal Trade Commission", 13 *Marshall Rev.* (1979).

¹¹ Paul A. Samuelson, "The Pure Theory of Public Expenditure", 36 *Rev. Econ. & Statistics* 387 (1954).

¹² John Head, "Public Goods and Public Policy", 176 *Public Sector Economics*, (1990).

anyhow prejudice similar benefits of other consumers. Therefore, in this sense trademarks are non-rivalrous and public goods.

5.2 Market-Failure Theory

The significance of categorizing trademarks as public goods lies in the prefix that these are non-rivalrous. This prefix implies, that once a particular product is produced, to which the trademark is attributed, simultaneous consumption by various consumers do not result in the imposition of any additional cost over other consumers. This can be further extended to mean that once a product is produced, it involves no additional cost of a product to make it enjoyable for other consumers. Meaning thereby, the marginal cost of making the product reach another person is theoretically zero.

The traditional approach of equating the marginal cost to the price of the product is flawed and ambiguous, because of the concerns of static efficiency and is a short-term approach. It is an established principle of trade and commerce that resources are limited in nature and thus their allocation on an additional unit of the particular product can prove to be efficient if it is established that the benefits arising out of the product would be greater than the cost involved therein. In cases where the marginal cost becomes zero, further resources shall be allocated to make the product reach the desired consumer, who have a positive value for it.

However, the arguments of marginal cost pricing fail to address the concerns of providing an efficient supply of the product to the general public (comprising of both the person, who may or may not attach any positive value to the product) in a competitive market environment. The sellers fail to recover their production costs in cases of public goods, or else they would have to give away their product for free to the consumers. Thus, the sellers need to recover the total costs to remain in the competitive arena, and this is a long-term approach and thus involve dynamic efficiency¹³.

This is where the market failure in respect of public goods arises, i.e., the conflict between dynamic efficiency and static efficiency. Even if we consider that the seller can exclude a certain class of consumers and charge a positive price and the revenue earned therein is

¹³ James M., *The Demand and Supply of Public Goods*, Vol. 5 (1999).

sufficient to cover the initial costs, the static efficiency criteria fail. This situation of a dilemma is a situation of market failure and it occurs only with respect to public goods. This is so because the marginal cost of private goods can never be equal to zero. Thus, in such cases, the sellers would easily be able to recover their initial costs.

6. TRADEMARKS VIS-À-VIS MONOPOLIES

Advertising of a product leads to a mental image created in the mind of consumers about the product and its associated qualities. This formation of an image may lead to various results, including but not limited to the ability of the consumers to distinguish between two goods of the same class, confer profits and power over a certain business due to its pre-committed advertising and advertising may also create a perception over the minds of consumers which would impact their purchasing decisions¹⁴.

The latter mentioned impacts could probably create a monopoly in a way that it would result in the entry of businesses, more than what is required and might lead to underproduction. The critics of trademark law consider it as a threat to the creation of a monopoly. Almost every jurisdiction has had stricter norms to restrict monopolization of a market by way of their respective competition laws¹⁵. This argument might seem relevant *prima facie*, since, if for instance, Company “A” gets a trademark “xy”, it has a monopoly over the mark “xy” and no other company could use the particular mark or could not sell identical products (trademark also works as an identification factor of a product). However, if dig into this argument, it fails to answer the ability of other companies to produce a similar product, which may be identical in all aspects as that of Company “A” except their symbol or mark “xy”.

This may be further strengthened as, it is true that a consumer is more attracted towards a product because of the mark associated therein, however, the purchasing decision is not ‘only’ gets impacted by this market¹⁶. The ultimate utility of the product, quality therein, goodwill, quantify, price etc. also serves as a determining factor. This may be understood with an example as, every Black Tea player in the market have a trademark, but, not every black tea is successful. Consumers tend to consume Tata Tea more as compared to Hindustan Uniliver’s

¹⁴ Edward Chamberlin, “The Theory of Monopolistic Competition”, 8th ed., *Harvard University Press*, (1969).

¹⁵ *Ibid.*

Tea. The shift in consumer preference is not because of the packaging or trademark of Tata Global Beverages Ltd, but factors like taste, quality, price, the market reach of Tata Tea, contribute evenly. Therefore, a trademark could be one of the factors affecting a consumer's purchase decision, but it cannot be considered a sole factor in creating a monopoly in the market.

This implies, if there is no direct pleasure, involved whatsoever, by the trademark in question, particularly the symbol, word, colour, number, or a combination is involved therein, two products of different brands will seem similar to a consumer and hence, Company "A", which is the monopolistic holder of trademark "xyz", will no longer hold a monopoly for the particular product it deals in.

The same argument, if put up differently, may be understood as, another product of similar kind, to that of product produced by Company "A" would serve as a substitute to each other. Substitutability increases competition and does not monopolize a market. An increase in competition means, a company holding the particular trademark, will be under a constant threat of substitutability from similar products of other companies and would thus, lose the power to control the prices of the product since a significant monopolistic increase in price would thereby cost such company to lose a huge market share to its substitutable product. Both such internally substitutable products would thus be subject to perfectly elastic demand, thereby would require to be priced at a marginal cost, with nil monopolistic price.

Another facet of this issue is the issue of advertising. A significant change in a product's advertising has the potential to change the image of the product in the eyes of the consumers, where in fact, the product is the same as previous advertising. This is so because the advertisement of a product adds additional attributes to it. This phenomenon is often cited as "persuasive or perception advertising". This is contrary to active advertising, since, unlike persuasive advertising, the former refers to the advertising limited to information of the product concerning prices, location of outlets etc.

In persuasive advertising, the brand aims at creating a mental image of the product in the minds of the consumer, even before they have brought the product. This highly impacts a consumer buying decision, since it tends to buy the physical product along with the attributes

of the mental image of the product created by way of advertising, whereas, in essence, the consumer only gets the physical product. Such “perceived features” are associated by the consumer to the product like any other descriptive feature of the product including but not limited to the quality, utility, service, price etc.

The fact, that such perceived attributes do not necessarily mean to be evident in the physical product is often ignored by the consumers because of the strong mental image therein, which they believe to be true. Trademarks make such perceived attributes possible and more inflammable. Thus, it is contested that such creation of a perceived attribute creates a monopoly in the market. However, this paper denies this statement with an argument, that trademark, by increasing the perceived attribute does not, in essence, create a monopoly, but actually, increases the competition. It offers the market players to compete in an additional dimension, which ensures competition in the first place, that is before the product is presented to the consumer.

To elaborate this further, perceived advertising may give rise to three aspects of a competitive economy. The first being opening competition in an additional dimension, i.e., advertising. Unlike the usual belief of legal fraternity, competition is not always fruitful for the society and economy. In a situation where the resources are limited, and such limited resources are used to establish a new brand. Additionally, the cost of products also reduces when an increased quantity of such products is produced, the economy does not need more brands than what is required. This happens because the number of brands is inversely proportional to the number of units. Meaning thereby, when the number of market players increases in a market, the quantity of products (each brand) decreases. At an instance of equilibrium at the entry stage, different players end up making less or even quantity of products.

This concept is further related to the concept of social welfare. It can be calculated by subtracting the cost of production from the amount which the consumers are willing to pay for a particular product. This factor is generally increased by a reduction in the number of active market players in the product spectrum. Therefore, the factor of social welfare maximization tends to limit the number of market players to the count below the count which is prevailing in market equilibrium. This position of economics coupled with social welfare stands true,

where the products are distinguished only based on observable characteristics and not trademarks.

However, when trademarks are introduced within a market, and non-observable characteristics come into play, there are two possible effects. First is the welfare gain which comes attached with the function of trademark working as a source identifier. Second, is the ability of a business to compete in a new dimension of creating perceptions. Herein, the market players are free to produce products that are identical or similar in all observable aspects, except for the perception factor. This unobservable non-physical factor is so important to compete in, that it has the potential of using an identical product to target a different audience. The best example of this is toothpaste. The identical or similar paste, by way of perceived advertising and perceived notions, is used to target a different audience, including kids, adults and the old aged.

However, in the way of competing in the perceived characteristics of a product, the market players or businesses gain a certain degree of monopoly in the market, wherein, they are empowered to decide the prices of their product based upon the flexibility of demand which arises. This monopolistic power gives rise to increased profits. The threshold of the impact of perceived advertising over social welfare maximization is highly dependable upon the capability of businesses to pre-commit their product by way of advertising it. Such pre-committed advertising leaves an impact on the consumer's mind even before the prices of the product is determined by them.

The way of pre-committed advertising is used by the business as an aggressive competitive strategy in front of their competitors. This is so because, by this medium, they target higher profit, where in essence, everything else about the product remains the same. Such competition removes the entry barriers to the market, whatsoever, and increase the entry of new businesses. When the perceived image of the product (made through perceived or pre-committed advertising) is coupled with the actual physical product, it gives rise to increased production of such product by each market player¹⁷.

¹⁷ William Oakland, "Public Goods and Welfare", 1 *Pub. Econ.* (1972).

The last impact of such preconceived notions or pre-committed advertising about a product may be seen in a way when it has the potential to change the purchasing decision of a consumer in terms of desirability. Thus, this paper argues that pre-committed advertising benefits the consumers in a way, that opens up new dimensions of competition and do not hamper the competitive environment in a market. Additionally, it results in an unobservable characteristic of a product, which have the potential to impact a consumer's buying decision. Further, the paper suggests that such advertising is mostly seen in products of daily use and not luxury goods, since, a consumer while purchasing a luxury good tends to conduct a better enquiry about the physical characteristics of the product than the consumer goods. Thus, pre-committed advertising does not impact luxury goods.

7. CONCLUSION AND WAY FORWARD

The role of the trademark in the market economy is undeniable. While buying a product, a consumer is not only attracted by the observable characteristics of a product, including the quality, ingredients, quantity and personal preferences with respect to taste, smell, colour and other like attributes of a product but the use of trademarks welcomes a new dimension of unobservable characteristics.

Further, the analysis on the subject suggests that the relevance of trademark protection is not only to ensure the existence of sufficient words. There is no end to creativity, BATA was not a dictionary word before the footwear brand came into existence in India. This is also somewhere related to the spectrum of trademark distinctiveness propounded by Justice Hand in the case of *Abercrombie vs. Hunting*. Herein, the trademark must be either inventive, descriptive or in some cases suggestive to qualify for protection. Thus, the paper argues that the relevance of trademark is purely commercial and is also to protect the interest of the sellers so that the consumers are not kept under any dilution.

Further, the paper suggests that out of all the possible modes of acquiring a trademark, that is, by way of registration or based on first possession rule or by making use of both these positions, the best way is to use a combination of both, as in India and all-American states. This reason is based upon economic consideration including the costs. Further, the paper recommends, that despite giving an option to dispute to the potential plaintiff after the mark is

registered, more scrutiny must be done before the mark is registered. This is so because, the purpose is not only commercial and to protect the interest of the seller, it is equally meant to save the intended consumer of possible dilutions and confusion. In a case, where the seller might not have an issue, the consumer still suffers. Thus, enquiry before registration saves the consumer and additionally, reduces the cost of possible litigations that may persist after conflicting trademarks.

The paper then argues that the nature of the trademark is not of private goods, but mixed goods. This may be elaborated as the public goods theory concentrates upon the non-rivalrous nature of the trademark with respect to its referential use. Further, trademarks could be both rivalrous and non-rivalrous depending upon the context in which its categorization is sought for. Therefore, it would be wrongful to suggest that trademarks are purely private goods in nature since it involves the characteristics of being a public good. Further, the debate between static and dynamic efficiency with respect to marginal cost pricing of the trademark can never be contested in a competitive environment. Therefore, the paper recommends in cases of any dispute and policy framing with respect to trademark, it must not be treated leniently to that of other IPRs. In line with the same, the duration of a trademark must not be perpetual. Presently, in most jurisdictions, it is limited for a time duration subject to renewal which has no limit.

Furthermore, the paper rejects the argument of economists that trademarks are capable of creating a monopoly. This argument is made on the basis that having a trademark might monopolize the particular symbol, colour combination, words, combination of words or letters, a combination of numerals and words etc., however, it cannot monopolize the full market. Other sellers are free to sell identical or similar products with different branding and trademarks. The fact that a mark carries the goodwill of the seller with it and the consumer attributes the trademark with the source of the product, opens an additional dimension for competition and does not restrict the scope of competition.

Lastly, it is seen that jurisdictions around the world are restrictive in granting unconventional trademarks on the ground that they lack the requirement of graphical representation and distinctiveness. This is specifically the scenario in the European community. However, the

paper suggests that after looking at the economic nature of trademarks and the associated factors therein, even unconventional trademarks must be given protection. The benefits of this proposition are that it would reduce costs, offer new dimensions of competition and would thus be more profitable and in the interest of consumers.
