

## Branding and Business Management: Leveraging Brand Names for Business Advantage

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Smart branding of offerings is imperative for businesses today. Brand names in the contemporary commercial world not only serve as tools of competition in the global market-place, but also as a means of commercialization and business expansion. Utmost care is required while handling the brand name of a business at all stages, i.e., while selecting, protecting and enforcing a brand name on one hand, and while taking steps for its growth and development on the other. Key consideration is required to be given to the commercial as well as the legal aspects of branding and business management.

In this article, an attempt has been made to generalize the outlook of business units with respect to their intellectual properties, viz., patents, design rights, copyrights, trade secrets and trademarks. It is also attempted to bring to light a few basic branding strategies, for which parameters have been defined. Using any or a mix of branding strategies, the business units can improve upon their branding models and leverage from their scopes. A branding model apposite to a particular business unit could greatly facilitate its sustainable growth and development in today's commerce-oriented system.

**Keywords:** Leveraging brands, primary IP, secondary IP, branding strategies, value transference, genericization of trademarks

### Branding System: An Introduction

'What's in a name? That which we call a rose, by any other name would smell as sweet'. Shakespeare's famous quote certainly does not apply well in the contemporary competitive world. In the current global marketplace, businesses leave no stones unturned to make a mark among competitors and build a significant market presence. It has become extremely vital for corporate groups to resort to several measures in order to magnetize attention and interest of consumers, so as to distinguish their offerings from other offerings in the market and also distinctly identify such offerings as their own.

Creating a brand which commands a significant goodwill among consumers, enjoys their loyalty, as well as serves as a differentiation mechanism from competition is a necessity today for survival and also a key to a successful business.

### Evolution of Branding System

The brand system in olden times related to identifying property rights over animals. The earliest use of the system, the use of hot iron branding on livestock<sup>1</sup> for associating them to a particular owner, can be traced back to the period of mankind's evolution;

such branding mechanism for livestock albeit with regulatory rules is still prevalent in some places.<sup>2</sup>

With commercial and trade related objectives, i.e., for branding products of merchandise, the earliest marks recorded have been used by potters, goldsmiths and construction workers<sup>3</sup>, who made signs and symbols on their products to draw association of such products with themselves. Some historians also say that blacksmiths who made swords in the Roman Empire are thought of as being the first users of trademarks.<sup>4</sup> However, it was in only the 14<sup>th</sup> and 15<sup>th</sup> centuries that the use of trademarks became common as a prominent identification or representation system for articles of merchandise, and for the services offered by a specific trade unit.<sup>5</sup>

### Concept of 'Brand' and 'Brand Identity'

The term 'brand' is generally defined as 'a mark, sign, symbol, stamp or emblem to point the ownership of offerings to the brand owner'.<sup>6</sup> Nevertheless, in present times, the scope of brand has widened tremendously.

The present day definition<sup>7</sup> of a brand includes the identity and uniqueness of an organization, valuable goodwill generated by long existing, reliable and superior offerings, respect of consumers at large and commitment of an organization's human capital.

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The same would also include impressions related to a business created in the minds of emotional consumers. Today's concept of brand is founded on the basis of branding of patrons' minds.

The concept of 'brand identity' or 'brand name' is relatively specific and defined. The visible features by which consumers associate and identify brands, are referred to as brand names or identities.<sup>8</sup> Generally, a brand identity may include words, logos, labels, distinct colour combinations, writing patterns, names, taglines, packaging, etc. However, there are some non-conventional forms of representations, viz., shapes, objects, sounds, smells, etc., that can be developed as brand identities. Since a brand identity is tangible, it acts as the distinguishing feature in the minds of consumers and gives them a perception about the business it denotes or is associated with.<sup>9</sup> A brand identity plays a very crucial role for a business due to its perceivable nature. Brand identity creates an impression, i.e., brand image, in the minds of consumers which, in turn, helps in building the overall brand.

#### **Brand Identities *vis-à-vis* Other Forms of IP**

Patent rights are granted to new inventions, design rights to new aesthetic features of commercial products, copyrights accrue in original expressions developed and created by a person through his intellect and labour, trade secret rights are attracted in respect of exclusive trade-related information not known generally and brand name / brand identity rights are secured on names and marks that are used or intended to be used in commerce in relation to a particular business. These different forms of intellectual property (IP) serve as competition tools for modern day business houses and the value of a business is strongly dependent on all these forms of IP.

When it comes to earning confidence and loyalty of consumers and making an impression in their minds, the first objective is to offer the best. It is also necessary to attract the attention of public for having an edge over competitors. Enterprises do this by increasing their intellectual asset base, depending upon the nature of business and industry. Intellectual assets are assets, that are earned through the intellectual labour of an enterprise's human capital, i.e., innovative business ideas and techniques, better internal systems and processes, development of superior merchandise, improvements over existing technologies, catchy and attractive designs

of products, creative works, etc., that could be commercialized. The intellectual assets by attracting patent rights, trade secret rights, design rights or copyright, are converted to IP once it is realized that an intellectual asset could be covered under the scope of IP protection and the same is vital and of utmost significance in order to grow in the industry.<sup>10</sup>

Each industry sets its primary and secondary forms of intellectual properties. For example, an electronics company like Samsung or a pharmaceutical company like Sanofi-Aventis would primarily aim at inventing new technologies to bring in new products to market. Similarly, an automobile manufacturer or a telecom company or even a consumer goods company would have the same aim of bringing in pioneering and superior products. They generate technology-related (and functional) intellectual assets and try converting them to IP, covering them under the scope of patent protection. They may or may not be interested in protecting the aesthetic aspects of their products. On the other hand, say, tooth brush or crockery sellers will endeavour to protect their 'aesthetic to the eye' intellectual assets under the scope of design protection, which are the primary forms of IP for them; protecting the functional or utility aspects of their goods or the processes by which such goods are manufactured may be secondary for them.

Disney, the global giant in the entertainment sector, employs creative human resource, in order to generate more number of literary, artistic and musical copyrighted works forming a part of its asset base. Similarly, a movie production house or a music company would employ techniques to create new copyrightable works. They would also make efforts to obtain rights in others' literary and musical works for use in their own derivative works. Generally, the enterprises interested in creative intellectual bases (creative bases being the primary IPs for them) are least concerned about obtaining and nurturing patent and design rights. Such patent and design rights will be secondary, or at times of no value to these enterprises.

In rare cases, an organization aims to protect its confidential information as trade secret, like the Coca-Cola Company which protects its secret formulas/ recipes of soft and aerated drinks, one of them being branded 'Coca-Cola'. Although there is no intention to protect its formulas through patents, its cold drink bottles are protected by designs.

In industries where primary forms of IP are patents, design or copyrights, the use of brand identities is suggested when the products are to reach the target consumers. Generally, the brand identities support primary IPs and are considered secondary in nature.

### The Legal Framework

Under the legal framework, the brand names/identities are addressed as trademarks, service marks, trade names, label marks, etc., and protected under trademark regimes in almost all countries around the world. Trademark is a legal synonym for brand name or brand identity. A trademark<sup>11</sup>, is defined as 'a symbol, word, or words legally registered or established by use as representing a company or product'. The TRIPS (Article 15) explains that 'any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark'.

Another aspect is that although trademarks must be distinct, the means of identification for goods and services in commerce and allow differentiate goods and services offered by competitors in market; yet the actual source from where such goods or services originate is not required to be known to the consumers. In other words, when looking at a particular trademark, it is not the owner, but the brand and its associated values that consumers should be able to distinctly recognize as the trade source. This is supported by the US definition<sup>12</sup> and the Indian definition<sup>13</sup> of the service mark / trademark, as provided in the Lanham Act and the Trade Marks Act, 1999 respectively.

In this article, the expressions 'brand identity' and 'brand name' are used interchangeably and the word 'trademark' is used when a legal reference or viewpoint is provided.

### Accrue of Proprietary Rights over Trademarks

Trademark rights are territorial in nature. In most of the countries around the world, valuable proprietary rights accrue in trademarks by virtue of open, extensive and long use of the same by their owners in relation to specific categories of products and services in the territories of use. This started when the UK common law courts started recognizing rights accruing 'by way of use' in olden times.

Almost all these jurisdictions have statutes that provide for registration of trademarks and creation of statutory rights in trademarks. They follow the

principle of 'first-to-use' in relation to trademarks, i.e., one who is the prior honest user of a trademark has better rights over the same. UK, US, India, Australia follow the 'first-to-use' system for trademarks and recognize proprietary rights (common law rights) in trademarks accrued 'by way of use'. It may be noted that although it is not mandatory to obtain registrations of trademarks in countries like India, as Indian trademark law recognizes trademark rights accrued by way of use, such registration undoubtedly gives an added advantage to the trademark owner so much so that a trademark registration serves as *prima facie* evidence of ownership in a court of law and establishes a strong case in favour of the owner when it comes to enforcing trademark rights against unauthorized users.

Some common law countries recognizing first-to-use systems may also recognize trademark rights associated with an internationally reputed and well known trademark, even though the same is not used in their respective jurisdictions. The UK and Indian trademark laws clearly acknowledge trans-border and international reputation subsisting in trademarks.

Jurisdictions like China, Korea, Japan, France, Germany, and Spain, to name a few others, follow the principle of first-to-file, i.e., one who files the trademark application first, deserves to get rights over the same. Registration of trademarks is mandatory in these jurisdictions.

The trademark legislations started developing pursuant to the industrial revolution<sup>4</sup>, when need was felt to afford stronger recognition and protection to proprietary rights of brand owners for preventing unauthorized use of their brand names by competitors, as well as a matter of public policy to protect consumers from dishonest traders.

Statutory rights over a trademark could be secured in different territories by obtaining rights in each such jurisdiction. The Madrid Agreement and the Madrid Protocol<sup>14</sup> facilitate the filing of trademark applications simultaneously for different jurisdictions; however, the designated jurisdictions apply their local laws for evaluating the applications and allowing registrations. India has still not implemented the Madrid system, which is a convenient way to protect trademarks internationally. An amendment to the current Indian Trademarks law, which would bring the Madrid Protocol in India into force, was passed by the Government on 21 September 2010; however, the effective date for the amendment to come into force is yet to be notified.

### **Enforcement of Trademark Rights**

A brand owner, upon securing either statutory or common law rights or both in respect of his brand name, is empowered to prevent misuse of such brand name by unauthorized parties in the jurisdiction where he has secured rights. He can enforce his trademark rights against the violator by availing remedies provided to him in law. For this, it is required that a brand owner be vigilant about misuse of his trademark and track unauthorized use of his brand name by others in the course of trade. It is also an essential requirement that he prevent third parties from obtaining statutory rights over identical or similar brand names in order to avoid dilution of his trademark.

### **Selection of Brand Name for Business**

Owing to the fact that brand identity for a business is crucial, when it comes to choosing one, it is extremely important for a business unit to carefully and vigilantly select marks / identities. These should be such that they are direct enough to draw association of the products or services designated under the same with the trade source, while, sufficiently differentiating from other names and identities in the market in order to distinguish such goods and services from the offering of competitors. This is important in the initial stage of setting up a new business, owing to the fact that brand names could be a part of initial promotional exercises and campaigns, e.g., used on company brochures, advertisements, business documents, etc. The business could thus establish a distinctive brand identity from the very beginning.

There are different schools of thought on strategies of selecting and developing brand names. Marketing analysts suggest that name and identities that describe nature and functions of goods and services have good recall value and do not involve a great deal of promotional efforts on the part of the brand owners in the initial stages of building brand recognition.<sup>15</sup> For example, 'Fast' in respect of taxi services and 'Visions' in respect of optical products, are descriptive in nature and will have a good recall value, owing to which a great deal of promotions may not be required. Similarly, the expression 'Registering a Trademark' in respect of a website, which advises on registrability and registration procedures for registering trademarks, is descriptive in nature and easy to remember.<sup>16</sup>

However, this strategy is criticized by brand experts, as descriptive trademarks cannot be associated and identified with merely one proprietor in the trade channel; such words being required or used by all others in relation to their products or services of same or similar nature and description. Thus, by default, all the traders in an industry will have right to use expressions that are generic or descriptive with respect to a particular kind of goods/ services. For example, the expression 'Big Market' in respect of super markets, being descriptive, can be used by all in the retail industry. Additionally, obtaining statutory rights in respect of descriptive trademarks is difficult, as Trademark Offices around the world are reluctant to afford rights over a descriptive expression to one party. However, descriptive expressions, with long and extensive use can acquire secondary meaning in relation to the products and services offered under them and qualify for registration without facing much objection from the Trademark Offices. The best example of a word, which has acquired secondary meaning in commerce, is 'Windows', which is used to designate the Microsoft's windows software.<sup>17</sup> Thus, although descriptive marks are considered good from the marketing point of view, they are considered the weakest by brand experts from the aspect of using them for any business in the long run.

Brand experts suggest that the trademarks should be newly conceived, fanciful and arbitrary for the products and services for which they are used. They should be able to lay a discrete impression in the minds of consumers at large. According to experts, invented and arbitrary trademarks hold maximum trademark strength, and therefore, preference should be given to invented or coined expressions, newly created designs or arbitrary words. The best examples of invented and arbitrary trademarks are 'Kodak' and 'Apple', used in respect of cameras and computers respectively. Few enterprises have been smart enough to tweak their descriptive marks into distinctive brand identities, for example, 'International Business Machines' became the 'eight-bar IBM logo'.<sup>18</sup> These invented and arbitrary trademarks are considered the best when it comes to establishing proprietary rights, including obtaining rights by way of trademark registration, owing to the fact that they are considered inherently distinctive of the owner and his offerings. Also, these marks serve best in long run, if they are able to establish the association with the business. All the same, they have the drawback of not having a good recall value.

The third category of brands names and marks is that of suggestive trademarks. Suggestive trademarks do not directly describe the nature, quality or characteristics of goods or services; however, they lead the consumers to imagine and induce them to reason that a specific brand name could be in relation to particular class of goods or services. For example, the brand name 'Jaguar' is suggestive in respect of automobiles and 'Mango Frooti' is suggestive in respect of fruit drinks. These trademarks, like descriptive marks, are considered to be good from the marketing point of view, as they are easy to remember, have good recall value and relieve the owner from the initial promotion burden. When it comes to claiming and obtaining rights, including the statutory rights, suggestive trademarks are considered fanciful and inherently registrable, although weaker than the coined / arbitrary marks; also there is no requirement of any factual distinctiveness being accrued to them as a prerequisite to accrual of statutory rights. There is a very thin line between descriptive and suggestive trademarks and the famous *Baby Dry Case*<sup>19</sup> has been an important authority, which set parameters as to why and how a trademark will be considered to be suggestive and not descriptive in nature. Suggestive trademarks are advised to be adopted when it comes to choosing a new name or identity for a business.<sup>20</sup> This strategy has proven to be successful for a range of businesses, like, 'Jaguar' for automobiles, 'Playboy' for a men's magazine and 'Reliance' for telecom services.

After a trademark is selected for a business, it is equally essential to know that it is not already in use by others. For this, investigations ought to be conducted in relevant trade magazines, directories, online medium and trademark journals published by the Trademarks Offices, in order to find out if there is any other party using the trademark or any other similar brand identity. Since trademark rights are territorial in nature, investigations should be conducted in those territories, where the business is intended or expected to expand.

If the trademark is found to be in use by any others in such territories, it is not advisable to adopt the same for business, as no two parties can have trademark rights over one brand name, for the reason that unregulated use of a trademark by two different parties in respect of same trade in the same territory results in dilution of the trademark. Even the Trademarks Offices take strong objection to the registration of identical or closely similar marks.

### **Branding Strategies**

As stated earlier, a brand name, identified as a primary or secondary IP, can serve as a competition tool for a modern day business house. The branding strategies which identify brand names as competition tools are 'competition strategies' or 'strategies of war'. There are also others referred to as 'commercialization strategies' or 'strategies of peace', which identify brand names as a means of commercialization, if exploited well.<sup>21</sup>

The present section explains how brand names could be leveraged for business advantage using these strategies. Furthermore, it discusses how loss of a valuable right in an extremely valuable brand name may be avoided.

### **Strategies Generally**

Brand identities as mentioned earlier, could either be identified as a primary or secondary form of IP. Business groups having operations for a very long time strategically cash upon their brand identities, which are used over years. In such cases, the brand identities are acknowledged as primary IPs of a business. The common examples where the brand identities are used as primary IPs are 'McDonalds' and 'Starbucks'. The fast food company and coffee company have generated tremendous goodwill in their brand identities and are operating in various countries throughout the world. The brand names are their primary IPs. Obtaining patent protection over the recipes or formulas is secondary for these companies. In fact, they have and mostly prefer the option of keeping their recipes and formulas protected as trade secrets. Even the generic drug manufacturers like Cipla and Ranbaxy have brand identities as their primary IPs. Similarly, there are consumer products companies for which brand identities are the primary forms of IPs, for instance, 'Cadbury' and 'Nike'. Also, in service-oriented enterprises where brand identities play a pivotal role, they form primary IPs. Common examples are 'Vodafone' and 'Gold's Gym'.

When the whole business of an enterprise is dependent on creation of impressions and affording a perception of quality and reliability in the hearts and minds of consumers, the enterprise is required to adopt a war-like stance for brand building in order to face the competition in marketplace. On one hand, giants like Tata, Coca-Cola Company and L'Oreal, believe in creating a bunch of brand identity rights around the principal brand name, i.e., creating a

fortress of brand names and identities, and promote all their names and identities of the fortress together.<sup>21</sup> Here, the ancillary rights may include rights over trade dress, taglines, designs, and colour schemes as well as over associated brand identities for different range of products / services. On the other hand, businesses may go on to venture in their competitors' distinct segment and introduce new brand names to counteract, in order to cut the competition.<sup>21</sup> The enterprises in the FMCG sector, like Nestle, P&G, ITC, and so on mainly follow this strategy and face the competition with the principle 'brand vs brand'. Even Coca-Cola Company and PepsiCo compete with each other by bringing competitive products under different set of brand identities.<sup>22</sup>

Rigorous advertising and marketing campaigns remain the key factors of branding strategies. Significant promotion is undertaken by extensive advertising campaigns, including exploitation of celebrity rights for these campaigns. Wide promotion also includes online brand advertising through the Internet, which is a quick, affordable and accessible medium of global reach for start-up enterprises.

Marketing experts suggest any or a mix of branding strategies apposite to a business house. Regardless of what strategy or combination of strategies are used, the underlying issue is what does a particular brand stand for that matters to people and makes a difference?; an enterprise that finds a solution to this is the one which can make a difference.<sup>23</sup>

#### **Strategy of Value Transference**

At most times, businesses recognize patents, copyrights and designs as their primary IPs and aim to grow and compete with others in the industry on their basis. However, a few of them strategically plan and obtain trademark protection for the so called secondary forms thereby creating a bundle of IP rights. They focus on nurturing the secondary IP, i.e., brand identities, right from the very beginning and on using them as competitive weapons as and when required, i.e., when the primary IPs are on the verge of expiry, and also as a means of commercialization in the market. In such events, rights acquired under the scope of trademark protection can even be more valuable and profitable.

It is known that patent and design rights as well as copyrights are acquired for specific terms in different territories. On a general note, the term of patent protection is for a period of 20 years, design protection for 15 years and copyright protection

between 60 and 100 years. The term of protection for trademarks on the other hand, is in perpetuity, provided the trademark is in continuous use by the owner.

After the expiry of primary forms of IP, the value generated in the subject matter declines, as they fall into public domain and become imitable by others in market. This results in loss of revenue as well as loss of market share (which may have been considerable during the term of the IP protection) for the IP right holder. For instance, after expiry of patent rights over a particular technology, its owner loses the right(s) to restrain others from using the technology. Owing to this, there are a lot of substitute products available in market resulting in a heavy decline in the sale of his products. What option does he have in such a situation? Further R&D may lead him to improve upon his technology and he can secure patent rights over improvements under the patent regime. However, after putting in significant effort, time and money in developing an improved version of the technology and after obtaining patent rights over the improvement, he may be able to reap only limited benefits by selling or licensing the improved technology; the basic technology already being in public domain after expiry of the patent term.

Modern business experts suggest another option, which is to strategically transfer the value acquired in the differentiation points, through the primary form of IPs to the secondary form, by applying the theory of 'value transference'.<sup>21</sup> Value transference is defined as 'the premeditated use of multiple IP regimes at specific points across the product lifecycle, in order to realize sustainable differentiation'.<sup>24</sup> As, trademarks can be legally protected for infinite period, provided they are continuously used, the patent owner can develop his secondary IP, i.e., brand identities, by investing heavily on promotion and advertising at a period, when term of patent protection is approaching expiry.

The example of AstraZeneca and its 'Purple Pill' is appropriate in this context. AstraZeneca had a patent over its 'Prilosec' (medicine for treating gastric reflux disease), which was in substantial demand in market and tremendously profitable for AstraZeneca in the 1990s. AstraZeneca anticipated quite early, on losing heavily on sales of Prilosec after the expiry of its patent term. When the patent in the medicine was nearing its expiry, AstraZeneca started campaigns to market the drug in a unique purple packaging, calling

it the Purple Pill. Clearly, AstraZeneca took steps to transfer the value of its in-demand patented product to its branded product and apparently became successful in doing so.<sup>25</sup> Till date, the colour purple as trade dress<sup>26</sup> and expression 'Purple Pill' as trademark<sup>27</sup> are used by AstraZeneca in respect of another medicine Nexium (for treating gastric reflux disease), for which AstraZeneca enjoys patent protection presently.

Another notable story is of Disney's strategy.<sup>28</sup> When Disney's copyrights in its works were on the verge of expiry, it explored the avenues of keeping its valuable intellectual assets intact by marketing its movies, merchandising various products and opening theme parks under the names of well known and cherished Disney characters viz., 'Snow White', 'Mickey Mouse', 'Alice', 'Cinderella', 'Winnie the Poo', and the like. Disney acknowledged its entertainment properties as brand identities. Disney went on to register these characters' names in various categories of merchandise, like toys, clothing, jewellery, bedding, clocks, watches, CDs, videos, software, etc., and transferred the value of its differentiating characters under the scope of trademark protection. Disney thus ensured that it could have the rights over its characters till the time it wanted to.

The case of Apple's 'iPod' brand is one of the best examples, where the multinational applied the theory of value transference by keeping iPod's cognitive point of differentiation alive for perpetuity.<sup>24</sup> It is known that Apple's portable music player has always been branded with a unique and fanciful name 'iPod'. However, there is another thing which is unique and fanciful in iPod, and that is its design. There were changes in the versions of iPod and new features were added in each new version over the course of time. However, the basic design of the various newer iPod portable music players has been kept stable and consistent. The iPod's sleek, clean and finished designs are considered to be the most distinctive elements in iPod. Apple, at the outset, took steps to protect this feature of iPod players under the design regime. However, it very well realized that post expiry, the sleek designs of iPod protected under the design regime shall fall in public domain and be open to imitation by others. Since it was vital for Apple to protect these designs, it invested heavily on promotion and advertisements on its iPod and filed a trademark application in June 2005 before the US Patent and Trademark Office for registration of the

two-dimensional design (vertical rectangle, with a horizontal rectangle inside on top and concentric circles below the horizontal rectangle, signifying iPod portable music players). This design by this time, had acquired a special recognition and association as Apple's iPod design, and secondary meaning was attached to it. Apple further filed another trademark application for registration of above the two-dimensional design with the words 'Made for iPod', and went on to file an application for the three dimensional basic shape of the iPod, i.e., a non-traditional trademark.<sup>29</sup> All these applications of Apple have proceeded to registration. These applications were filed for registration in respect of a wide category of products, ranging from portable electronic devices for recording, organizing, transmitting data and other files, to computer software for the purposes of conducting these actions, to battery chargers, to electrical connectors and adaptors, to headphones and earphones, to various other similar and related products and also to carrying cases and bags, for use with the above portable electronic devices.

The actions made evident Apple's intention to use the iPod's designs in respect of various allied products, including the accessories used for iPod. In fact, Apple has been licensing the iPod design mark it registered with the words 'Made for iPod' to the manufacturers of iPod's accessories and obtains licence fees from these manufacturers for use of the said mark.<sup>30</sup> This use of value transference strategy is now being applied to iPhones by Apple.

There are several other cases, where the strategy of value transference has been adopted in order to lengthen the products' life cycles such as in 'Barbie' dolls, 'Intel' core processors and 'Microsoft' operating systems.

#### **Commercialization Strategy**

Not only can a brand identity serve as a significant competitive tool, it can be a valuable asset for commercialization. An enterprise could reap the benefits of its valuable brand name and bring in revenue by authorizing third parties to use its brand name by way of licensing.

Trademark or brand licence is a grant of legal permission by the trademark owner to a party, which is interested in using the owner's trademark on specific terms and conditions. By obtaining a licence or permission from a brand owner, an interested party is legally authorized to use the brand name of

another person. In a licensing arrangement, the licensee functions under the licensor's supervision and control with respect to the usage of brand name and handling of branded products, while maintaining the quality of products or services in accordance with certain standards prescribed by the licensor.

A brand owner may license brand names to another enterprise for a valuable consideration, allowing manufacture and marketing of his own products under the brand names, use of the brand names on licensee's merchandise, providing services under the brand names or mere distribution of branded products generally. Apple for instance, licenses its trademarks like 'Made for iPod' and collects lump sum royalties from these licensees who also work towards iPod's brand building exercises.<sup>29</sup> Disney exploits its corporate name as well as the trademarks rights associated with its entertainment properties (Disney characters) by authorizing other enterprises to use Disney's name and marks on their merchandise, viz., apparels, toys and other consumer goods in different territories. Disney has even associated with Mattel, the owner of well known brand 'Barbie', by licensing the trademark rights in Disney characters to Mattel for use in Mattel's video games. In addition to obtaining licences to use trademarked characters from Disney, Mattel obtains trademark licences for using entertainment properties from Viacom, Warner Bros, WWE Entertainment, and many more in its video games. Mattel also exploits its trademarked characters including 'Barbie' by licensing it to other business groups to be used on non-toy products.<sup>31</sup>

Other modes where third parties acquire licences from brand owners to use their brand identities are product distribution and franchising. Product distribution is an arrangement where finished branded products are sold in trade channels by an authorized distributor. The distributor, while operating under his corporate name, sells branded products of another enterprise in a territory. This leads to limited control over the pricing and advertising of such products which are dependent on terms and conditions of the distributorship agreement. Some enterprises grant brand licence to distributors to the extent of using their brand names on products to be distributed in the distributorship territories. Use of brand names, product handling and advertising in relation to the products to be distributed is supervised and controlled by the owner *via* terms and conditions of distributorship agreements. The distribution channels

of L'Oreal range of products, for instance, are diverse, from beauty outlets and salons to super markets to direct mail.<sup>32</sup> Mattel also distributes third parties' finished products, which are made independently.<sup>31</sup>

In a franchise relationship<sup>33</sup>, a company (the franchisor) provides operational support, marketing support and training to the franchisee along with a licence to use its brand name on a set fee, either on a lump-sum basis or on continuing royalties. It is, in essence, a licence to use the system including the brand name. The owner can also require the franchisee to be operating in a prescribed manner, i.e., following the owner's systems, procedures and also to provide reports of performance on timely basis. The infrastructure and other base costs are borne by the franchisee, which develops the owner's franchise operations in a territory, while serving as a unit of the owner. Franchise model suits both, the owner of a big brand (as his expenses are shared) as well as an entrepreneur willing to open and develop a new business (since he gets a big push to hold on in market by using a business name and model developed by the other).

Since the franchise model gives both, the franchisor and franchisee, opportunities to expand, the model is successful with various industries. Several international giants, like, Coca-Cola Company, PepsiCo, McDonalds, Subway, DHL, Levi's, etc., follow the franchising model and have their operations in various parts of the world including India. Indian enterprises like, Café Coffee Day, Blue Dart, DTDC, Shoppers' Stop, Lifestyle, VLCC, etc., have also benefitted from the franchising model.<sup>34</sup> It is noteworthy to mention that the giants like Coca-Cola Company and PepsiCo use the franchise model not for the beverages they sell, but for the bottles used to supply their product.<sup>35</sup>

The above licensing arrangements are adapted during technology transfer agreements, joint venture partnerships and other strategic alliances, to cash upon the name and brand identity associated with an enterprise.

It is pertinent to note that licensing of other forms of IP, such as patent, copyright, etc., is limited to granting rights to other parties to use such IPs and collecting royalties from the licensees. However, the use of brand names by the licensee, in addition to generating licence fee in favour of the licensor, contributes towards the licensor's business promotion, growth and brand building. This is in light of the fact

that the brand names, even though used by authorized third parties, being the business identifiers, are ultimately associated and identified with the brand owners in commerce.<sup>34</sup> Thus, brand licensing could be a measure by which an enterprise could choose to enlarge its brand image. The techniques for commercializing brand names lead to expansion of one's business drastically and rapidly. Benefits are accrued by all the parties involved in the arrangements.

#### **Strategy for Preventing Genericization of Trademarks**

Protecting and enforcing rights in a trademark is important, but equally important is preventing loss of rights over a trademark, i.e., avoiding its dilution and genericization. By virtue of open, continuous and extensive use, brand names become factually distinctive and can acquire secondary meaning in relation to the products or services for which they are used. However, a brand name may get genericized, if it is used for designating (and become synonymous to) all the products or services of a particular category, regardless of the trade origin.

For instance, the word 'escalator' was once a brand name of the Otis Elevator Company; however, it was held generic for moving staircases by the US Court<sup>36</sup> in 1950. The court found that the brand owner did not protect its mark 'Escalator' properly, due to which the general public recognized it as the name for any moving stairway and stopped associating the word with the source of the goods. The registration of the trademark 'Escalator' was cancelled. Similarly, Bayer's brand name 'Aspirin', has become genericized in several countries and is used as a common name of acetylsalicylic acid (a pain killer). Aspirin, which was once a trademark of Bayer throughout the world (and remains so in almost 80 countries), has lost its significance as a trademark in US, UK, India, Australia, France, Russia and many other jurisdictions.<sup>37</sup> Other examples of words which were earlier trademarks, but are now considered generic words, are 'thermos', 'gramophone', 'kerosene', 'linoleum' and 'zip code'. In recent times, it is often anticipated that 'Google' and 'iPad' may also join the league of genericized trademarks.<sup>38</sup>

In order to prevent trademarks from becoming generic words, (i) brand names should always be written in capital or in a style different from the regular text; (ii) whenever required, the generic names of the products or services should be used along with

the brand names; (iii) the brand name should not be used as a noun or a verb, but as an adjective; and (iv) the brand names should always be designated as trademarks, i.e., accompanied with the symbol ® when registered and symbol ™ when common law rights are claimed.<sup>39</sup> Although the marketing team of an enterprise may aim at making a brand name synonymous to a product or service and adopt advertising strategies in order to popularize the same, from a legal point of view, it is extremely perilous to use a brand name or trademark in place of goods or services designated by it. Irresponsible advertising and wrong usage of the trademark can render it generic for the products or services for which it is used. Xerox is often used as a noun and verb in place of 'photocopy' or 'photocopying' respectively. The repercussions of this practice were felt by Xerox Corporation, which now employs a trademark awareness campaign to prevent the brand 'Xerox' from being used as a noun or a verb, resulting in it becoming a generic word.

#### **Conclusion**

Thus, a strong brand name is a powerful weapon for any business in the contemporary competitive arena. It can not only serve as a strong tool for competition, but also for commercialization. It could be thriving when other forms of intellectual property are dying or fading. For the same to happen, it is required to protect it under the trademark regime, to be vigilant enough to enforce it against the infringers as well as to prevent it from dilution. Also it is important to adopt any or a mix of appropriate branding strategies as part of marketing strategies in order to make it immensely strong and valuable.

To analyse and understand how a brand identity can become gigantic and how to adopt branding strategies apt to a business for attaining such an objective, could be simple or difficult, depending upon the nature of enterprise and the requirements of a particular industry. For that, the assistance of brand managers, experts and attorneys may be sought at various stages. In fact, multinationals prefer keeping brand managers as integral members in their legal units, in order to be guided at different levels for protecting their brand identities as well as for making them powerful for competition and exploitation. A business, which understands the importance of names and identities, can help itself grow, nurture and prosper in modern times.

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  - actual use or bona fide intention to use by the person in commerce;
  - identifies and distinguishes goods/services of the proprietor from those of the others; and
  - indicative of the source of goods/services, even if the source is unknown.
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  - capable of being represented graphically,
  - capable of distinguishing the goods or services of one person from those of others,
  - used or proposed to be used in relation to goods or services in order to indicate connection of such goods or services with the trade source,
  - some person having the right, either as a proprietor or as a permitted user, to use the mark, whether with or without any indication of the identity of that person.
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