India

RNA Intellectual Property Attorneys

Food and beverage products in the branding crosshairs

As the Indian food and beverage market becomes increasingly alluring to to brand owners, the courts are witnessing an eruption in trade dress protection and advertising disputes

The Indian food and grocery market is believed to be the sixth largest in the world, with retail comprising 70% of sales. Food processing accounts for 32% of the market and is one of the largest industries in India. In addition, the range of food products exported from India has been steadily increasing to destinations in the Middle East and Southeast Asia.

Following rapid urbanisation, there has been a significant uptake of packaged and ready-to-eat foods by Indian consumers. Brands and the appearance of products are therefore key factors for rights holders trying to build and retain a customer base. Shifts in consumer attitude and lifestyle have led to an increasing awareness of health and wellbeing, along with an appetite for high-protein, low-fat, wholegrain and organic food. As a result, the food and beverage industry is housing a growing number of start-ups, multinational corporations and home-grown brands such as Dabur, Hamdard and Patanjali which offer natural or herbal products as an alternative to well-established brands.

The beverage industry – excluding alcohol – is worth around $16 billion. Tea and coffee are the most popular beverages, followed by soft drinks (eg, carbonated drinks and juices), health drinks, milk-based drinks, flavoured drinks and energy drinks. The latest trend in hot beverages is mushrooming tea or *chai cafés* (eg, Chaayos and Chaipatty) and with tea as a favourite among Indian consumers, the market has witnessed growing activity around new branded tea bars. The drinks market has also evolved, with the entry of major international brands over the past few decades. The bottled water market is now estimated to be worth $50 million – with both Coca-Cola and Pepsi vying for larger market shares through their Bonaqua and Aquafina brands respectively.

Supermarkets and online groceries

The Indian retail market is estimated to be worth $600 billion and is dominated by a highly decentralised and unorganised sector. Small retail outlets – most of which are family-owned businesses (so-called 'kirana' or 'mom-and-pop' shops) – account for approximately 90% to 95% of sales. However, in the past decade, India has witnessed the development of organised retailing, which has encouraged large private sector companies – including Reliance (with Reliance Fresh stores), Future Retail (Big Bazar), Aditya Birla (More) and Bharati Retail (Easyday) – to invest in the sector.

The online grocery and food ordering business is in a nascent stage in India, as the convenience and low cost of ordering online makes it more popular in urban areas. A rising number of internet users, coupled with the ability to offer attractive discounts and a wider variety online, is attracting investment from both start-ups (eg, Big Basket and Grofers) and established brand owners or those with deep pockets (eg, Amazon and Flip Kart). The online food delivery industry has experienced 150% growth year on year, with an estimated gross merchandise value of $300 million in 2016.

Brand protection

As competition increases and multinational and home-grown companies battle to retain their market share, various disputes have erupted among competitors – from straightforward infringement claims to comparative advertising and allegations of copied colour schemes. Alcoholic beverage companies seem to be taking a particularly aggressive approach when it comes to enforcing their rights in trademarks, packaging and product designs:

- In *Pernod Ricard SA France v Rhizome Distilleries Pvt Ltd* (2009 (39) PTC 367) Pernord successfully enforced its rights over the trade dress, get-up, colour combination and label of Royal Stag for whiskey, prohibiting Rhizome from use of similar features for its Imperial Gold whiskey.
- In *Gorbatschow Wodka KG v John Distilleries Limited* (2011 (47) PTC 100 (Bom)) Gorbatschow successfully restrained John Distilleries from use of a similar trade dress in the shape of a bottle to sell vodka.
- In *Mohan Meakin Limited v AB Sugars Limited* (2013 (56) PTC 471 (Del)) Mohan Meakin enforced its trademark rights in the Old Monk brand for dark rum against use of the TOLD MOM mark and label in relation to rum.
- In *Allied Blenders & Distillers Pvt Ltd v RK Distilleries Pvt Ltd* (CS(OS) 2266/2013) Allied enforced its rights in the Officers Choice brand to restrain use of the REGULAR CHOICE mark for whiskey.

Comparative advertising

Notable court decisions were also issued in relation to comparative advertising and the protection of colour schemes in 2016 and 2017.

Comparative advertising is a tool often used by competing rights holders to gain consumer attention. On June 16 2017 in *Hindustan Unilever Limited v Gujarat Co-operative Milk Marketing Federation Ltd (GCMMF)* (Notice of Motion (L) 690 (2017) in Suit (L) 204 (2017)) the Bombay High Court granted an injunction against a television advertisement aired by GCMMF, owner of the Amul brand. The dispute began in March 2017 when GCMMF aired an advert for Amul ice creams which urged consumers to choose ice creams (made from milk fat) over frozen desserts, claiming that the latter were made with vegetable oil. The court held that the advert had disparaged goods in the frozen desserts category and, by extension, disparaged Hindustan Unilever's Kwality Wall's products in the same category. The court prohibited GCMMF from airing the advert and from otherwise disparaging or denigrating Hindustan Unilever's products or business.

Similarly, by way of a September 7 2017 order, the two-judge bench (division bench) of the Delhi High Court prohibited local "natural and pure" food and beverage company Patanjali Ayurved from airing advertisements promoting its healthy food supplement brand Chyawanprash (made from Indian gooseberry) which denigrated another local company, Dabur India. Dabur had objected to an ad used by Patanjali on social media which depicted a Dabur product with a blurred trademark. The court opined that Patanjali's trade dress and packaging in the advert were too similar to Dabur's, and that illiterate and semi-literate users could easily be deceived.

Protecting colour schemes

On September 6 2016 in *ITC Ltd v Britannia Industries Ltd* (CS (COMM) 1128/2016) the Delhi High Court granted an interim injunction in favour of local fast-moving consumer goods company ITC in a dispute concerning biscuit packaging. ITC had brought action against Britannia based on its trade dress rights in the yellow and blue packaging of Sunfeast Farmlite Digestive All Good biscuits and sought restraint of Britannia from use of "deceptively similar packaging" for its Nutri Choice Digestive Zero biscuits. The court observed that in order to attain reputation, a product need not be in the market for years, as popularity can be achieved over a short period and sales trends can be indicative of this. Further, where a product is edible, the colour scheme of its packaging plays an important role in determining consumers' initial choice. However, Britannia appealed the single-judge order and on March 10 2017 the division bench of the Delhi High Court set the order aside, holding as follows:

- The get-up (ie, the yellow and blue combination of the package) was not exclusively and distinctively associated with ITC.
- ITC mainly relied on its trademarks and business name in its advertisements.
- The yellow and blue combination used in the packaging of ITC's biscuits could not have become so identifiable with ITC in such a short timeframe (ie, six months) that it could prevent use by competitors.
- Although limited evidence of use may suffice to establish distinctiveness where the get-up is both novel and striking, ITC's get-up and colour combination did not fall into this category.

The decision, while case specific, recognises the significance of colour schemes in consumers' purchasing decisions.

In *International Foodstuffs Co LLC (IFCL) v Parle Products Pvt Ltd* (Notice of Motion 2624 (2012) in Suit 2497 (2012)) the Bombay High Court refused to grant an injunction against Parle for its use of the trademark LONDONDERRY following allegations that the mark infringed IFCL's registered rights in the mark LONDON DAIRY. The court referred to its April 11 2016 order and held as follows:

- Visually, no commonality existed between the disputed trademarks and the words themselves were different. Although pronunciation of the words may have sounded the same, this was not the entirety of the test.
- IFCL's product was clearly distinct, required refrigeration, was packaged differently and was expensive by Indian standards, with prices starting at Rs80. Alternatively, Parle's boiled sweets were sold in single sachets priced at Rs0.50. Therefore, over and above the differences in the products' vendibility, a likelihood of confusion did not exist.
- The words 'London dairy', when used in relation to ice cream, might connote the goods of IFCL, but the word 'Londonderry' did not connote those of Parle. Despite the two products falling in the same class, Parle's product was distinguishable in every manner other than the phonetic.
- The court could not ignore the surrounding circumstances (eg, the differences in packaging, colour, trade dress, the goods and their pricing, their use in an everyday context, the lack of meaningful reputation or goodwill, and want of demonstration of deceit or misrepresentation) while considering an application for injunction.

Conclusion

Liberalisation and the growth of organised retail have increased the attractiveness of the Indian market to global brand owners. Recent cases before the courts highlight the significance of trademarks and trade dress in the food and beverage industry. As local supermarket chains continue to grow, rights holders must prepare for the increasing numbers of own-brand labels and watch out for elements of their established brands being copied. **WTR**

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Daleep Kumar became a member of the Bar Council of Delhi in 2010 and has been a registered trademark agent since 2007. He advises a number of Fortune 500 companies on brand clearance, IP management and enforcement strategies. He regularly appears and argues cases before various judicial forums, including the Trademarks Registry, the IP Appellate Board and the courts.