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Trademarks, Colourism and International Legal Standards

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I. INTRODUCTION

The effects of the 'Black Lives Matter' Movement with its genesis on US soil seeped into countries such as India, Nigeria et al. where skin lightening creams came under flak. Countries such as the aforementioned spread across Africa, South Asia, Middle East, etc. are also where companies sold products named: White Beauty, Fine Fairness, Fair and Lovely, Light Complete, and so on. The controversy in India led to the company HUL changing its product name from 'Fair and Lovely' to 'Glow and Lovely'. Therefore, this article aims to bring show the underbelly and underpinnings that stitch discrimination and trademarks. This will, furthermore, highlight the mechanism of Intellectual Property Rights as a means to protect the public interest in the social fora rather than locking horns with it.

II. DOMESTIC APPLICATIONS

The Oxford Dictionary cites prejudice against individuals with a dark skin tone as colorism, further, the meaning of racism is given as that of being an institutional systemic discrimination based on group identities. These two concepts overlap at many junctures but in the context of trademarks become relevant if logos incite either of the two- racism and/ or discrimination. The 'equal protection' clause under Article 14 of the Indian Constitution calls on the state to protect its citizens from discrimination, in this case, the evils of colorism. Further, Article 15(1) prohibits discrimination on the grounds of race, gender et al. The Supreme Court in the Navtej Singh Johar case, once focusing on impact rather than intention, saw in Article 15 a strong anti-stereotypical principle. Putting this forth and given the intersection between colorism, racism, caste as well as gender, trademarks showing prejudice towards skin color and ultimately notions of discrimination against any group identity is violative of the constitutionally bestowed fundamental rights.

It may be counter-argued that trademarks should enjoy protection under Article 19(1)(g) of the Constitution, to this it may be noted that the liberties enshrined under Article 19(1) are not absolute and are prone to reasonable restrictions such as Article 19(6) itself allows reasonable

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restrictions based on public interest. To clarify this further, the case of *Hamdard Dawakhana* may be of relevance which was in the context of advertisements where the court categorically held that when an advertisement takes the form of a commercial one it no longer is pigeon-holed within the freedom of speech since there is no longer propagation of ideas on social, economic or human thought. The key may be seen in balancing such liberties with ideas of social harmony where such trademarks cannot outweigh the rights of equal protection and non-discrimination.

Therefore, it is argued that a ground of discrimination must be added under Section 9 of the Trademarks Act within its list of 'absolute grounds for refusal of registration'. While under Section 9(2) the grounds include refusal of marks that deceive the public, hurt religious sentiments, contain obscene matter, etc., no clause embodies discrimination against individuals. Such a rule must be brought in by the legislature as currently, the Act has no flexibility in construing such a ground. The strongest justification for this being the implications on the aforementioned fundamental rights in the context of trademarks that propel colorism. This would be the first step in making companies that launch such products accountable towards encouraging already prevalent societal issues.

III. INTERNATIONAL APPLICATIONS

While the argument above seems straightforward in terms of refusing the registration of domestic trademarks based on discrimination, however, a layer is added when spoken of international trademark applications in the context of ratified conventions and other Free Trade Agreements. One such convention is the Paris Convention for the Protection of Industrial Property which cites the principle of national treatment as its cornerstone. India's ratification of the same reflects in Section 154 of the Trademarks Act which is a specific provision for registration of trademarks by convention countries. Article 5(C)(3) of the Convention makes space for refusal on 'public interest' grounds apart from Article 7(2), which in the context of collective marks deems each country as the judge to ascertain whether a trademark is contrary to the public interest.

While discrimination is not a ground mentioned for refusal there is no reason as to why it can comfortably be placed within the contours of 'public interest' especially if Section 9(2) of the Act is amended to include 'discrimination' as a ground as argued above. As held by the Indian Supreme Court in *Ashok Kumar Pandey v. State of West Bengal* that 'public interest' includes an assessment of whether a community's rights or liabilities are affected. It may also be useful to refer to the United States case of *Pro-Football Inc v. Blackhorse* where ultimately the mark

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'redskin' being disparaging to Native Americans resulted in its cancellation.

Further, it is also argued that in the International Intellectual Property regime a conscientious effort has been made in balancing public interest and IP with emphasis on developing countries where the social realm is also of relevance. Within TRIPS, the concerns of developing countries to be inclusive of the economic as well as the social found refuge in Articles 7 and 8 of the Agreement. For WTO members this means that among other things there are flexibilities allowed for refusal on public interest issues among other things. The case is made stronger by the continuous efforts of nations including India, Brazil, South Africa who recently tabled the agenda 'IP and the Public Interest' to the WTO TRIPS Council.

Not only is it necessary to refuse applications of trademarks that propel discrimination in form of colorism in light of public interest but also individually for independent international norms and principles. Prohibition of discrimination is enshrined in Article 14 of the European Convention on Human Rights. According to the Convention, "Everyone must enjoy the rights enshrined in the European Convention on Human Rights regardless of skin color, sex, language, political or religious beliefs or origins. The prohibition of discrimination is closely linked to the principle of equality which holds that all people are born and remain free and equal in dignity and rights." Furthermore, according to the International Convention on the Elimination of All Forms of Racial Discrimination which yields due regard to the principles embodied in the Universal Declaration of Human Rights mandates, in Article 5 (a) that each State shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities.

Additionally, the International Covenant on Civil and Political Rights, 1966 mandates the right to equality and freedom from discrimination. Under Article 2(1) each State party shall "undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or another opinion, national or social origin, property, birth.

IV. CONCLUSION

Although 'public interest' and 'socio-economic' development are usually terms used in the IP world in matters of developing countries to encourage technology and innovation, technology transfer, and protection of sectors of interest, however, in the context of trademarks it must be

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remembered that these marks are a part of marketing and advertising strategies of companies. The dual role of trademarks such as 'Fair and Lovely' being a part of advertisements places greater emphasis on the need for accountability given the impact of social media in advertisements on consumers and in shaping society. This makes it the state's responsibility to not only negative discrimination but also to equally protect its citizens from anything that may have a disparaging impact on any section of society in this case darker-skin toned men and women.

While there is much debate and to a certain extent consensus on the need for IP to foster policies that mirror the development needs of countries, it is argued that in the context of trademarks particularly the ones with a dual role must be brought to the limelight for its impact on the social fora. After all, IP is not considered as an end in itself rather, it is seen as a means to enhance social and economic development both. Acknowledging this power of IP this cross-disciplinary and specific issue that emanates from discriminatory trademarks cannot be incorporated in being inclusive of social interests if the understanding of the concept of social development through IP is limited.

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