

SYNERGY OF INTELLECTUAL PROPERTY WITH MARKETING AND ADVERTISING CAMPAIGNS

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Abstract

Marketing and advertising have always played an important role in the business strategy of a company providing goods and services. In the era globalization and with the advent of technology, marketers rely not only on the traditional forms of marketing like newspaper ads, billboards, pamphlets, radio announcements etc., but they also heavily rely on new ways of marketing like digital marketing and social media marketing. With increased reach and multiple platforms for connecting with the target audience, the chance of a brands' marketing campaign being copied by its competitors also increases, resulting in infringement of the brands' intellectual property. Today, intangible assets such as intellectual property, in the form of copyrights, trademarks, industrial designs and patents, account for a much higher percentage of brand valuation than ever before, making it very important for brands to prevent the infringement of their intellectual property. This paper aims understand the need for advertising and marketing campaigns to be intellectual property compliant, it then moves on to identify the various types of intellectual property involved in different aspects of a campaign and then dwells into how these campaigns can be made intellectual property compliant.

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1. INTRODUCTION

With our phones constantly in the palm of our hands and our eyes glued to up to three screens at any given point of time, the ability of businesses to market their products and services to its target audience has increased exponentially. After every post that you like on Facebook and Instagram and before every video that you watch on YouTube, there is an advertisement urging you to try out a new skincare product, purchase a new gadget or enroll yourself into some activity that will help you get fitter, the list is never-ending.

The American Marketing Association defines marketing in the following way; “*Marketing is the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large.*¹”

Marketing helps businesses to expand their customer base, increase brand awareness and most importantly increase their sales and revenue. Marketers market their product through various means, the physical means being billboards, newspaper ads, banners and brochures while the digital means being email marketing, content marketing, text-messages, television commercials and social media marketing. Thus, all brands are in a constant race to create innovative ways to attract customers. Considering this, it is quite possible that the methods implemented by one company are copied by another. Therefore, in order to make business aware of the various protections that they can apply to their advertisement and marketing campaign, they need to know about the various Intellectual Property Rights (further referred to as IP rights) that they can avail in order to protect the content created by them from being infringed upon by someone else.

Intellectual Property Rights are the rights that protect the intangible creations of the human intellect, arising from mental labor and creativity of an individual. These rights are granted under various categories with each category having its own specifications of qualification for protection. The rights and protection granted to each category differ based on a country's laws. Some examples of IP are Copyrights, Trademarks and Patents.

This paper aims to provide an analysis on how and what kind of IP rights and protections can be implemented by businesses in their marketing and advertising campaigns in order to prevent their originality and creativity from being copied.

¹American Marketing Association, ‘What is Marketing?’ <<https://www.ama.org/the-definition-of-marketing-what-is-marketing/>> accessed 25 July 2023

2. THE NEED FOR SYNERGY OF INTELLECTUAL PROPERTY WITH MARKETING AND ADVERTISING

Any marketing or advertisement campaign is made up of various assets such as jingles, songs, dance, literary work, visual arts etc. Additionally, if it is an online advertisement, promotional materials like a branded newsletter, distinctive web designs, and the brands' commercial identification, which includes their names, logos, slogans, and product names, are used. These are commercial and intangible assets that should be adequately protected by different IP frameworks. With all these assets in public domain, imitation and illicit copying can cause grave consequences to these campaigns.

The use of creative advertisements, content, goods, and marketing strategies could be unethically exploited by unfair competitors or rivals, as a result of which, a business may lose its IP rights or be held responsible for violating the IP rights of others due to lack of caution. Additionally, a variety of digital marketing and advertising channels have given brands and organizations the chance to maximize their online exposure and presence. Therefore, brand owners must always safeguard their exclusive IP rights as it plays a crucial role in the development of the brands.

As explained in the World Intellectual Property Organization, “Managing Intellectual Property in the Advertising Industry, Creative Industries- Booklet No.5”, The importance of proper IP management in the advertisement industry becomes obvious when the place and influence of the industry is clearly defined in the global economy. The global economy refers to an environment in which businesses can market products and services worldwide, and can be divided into several sectors or industries¹.

The commercial value of a creative asset involved in a campaign, provides for another reason for having sufficient IP protection. IP commercialization deals with IP as a kind of product, and emphasizes that companies can obtain monetary profits from IP by assigning or licensing them. Therefore, for this magnitude of reasons, it is essential that businesses find a synergy between IP and their creative campaigns³.

² World Intellectual Property Organization, ‘Managing Intellectual Property in the Advertising Industry Creative Industries –Booklet No.5’ (2011) <<https://doi.org/10.34667/tind.28648>> accessed 25 July 2023

³ Onwukwe A, ‘Intellectual Property Protection in the Advertising Industry’, (*Legal Ideas Forum*, 19 August 2021) <<https://legalideasforum.com/intellectual-property-protection-in-the-advertising-industry.html>> accessed 28 July 202

3. INTELLECTUAL PROPERTY PRINCIPLES THAT CAN BE APPLIED IN MARKETING AND ADVERTISING CAMPAIGNS

Brand owners are becoming increasingly aware of how crucial it is to incorporate intellectual property principles into their general business strategy. A marketing campaign comprises numerous assets that can be directly regarded as Intellectual Property. Some prominent examples of marketing assets that are eligible for IP protection are:

- Commercial Identity: This includes product names that fall under specific categories, company names, and visual cues like logos.
- Promotional Materials: A magazine that was curated from scratch, a special advertisement, a landing page with a logo, or an original website layout.
- Creative Assets: The likes or original artwork, photography, or works of literature⁴.

As discussed before, these assets can be protected under various kinds of IP such as trademarks, patents, and copyrights. We will now see how businesses can prioritize their IP assets in a campaign which the help of these tools.

(1) Copyrights are a crucial component of IP in marketing efforts. This is because a copyright has the power to give its proprietor the sole right of usage in relation to category of original works. Such works may take the shape of newsletters, white papers, specially selected images, or specially crafted audio dialogue. Copyright regulations also apply to a brand's unique website layout and tailored landing sites. However, these works might also be covered by industrial designs laws based on the jurisdiction. As was previously stated, the determination of the type of protection would entirely depend on whether the work in question complies with the predetermined requirements for standard registration.

(2) Any literary, figurative, or visual sign that acts as a distinguishing feature for your company is eligible for trademark registration. Brands frequently introduce "sub-brands" in the context of an advertisement or marketing campaign, which would naturally come under the main brand name.

The Big Mac, which is a sub-brand of McDonald's, is an illustration of a sub-brand. Or even the complete line of drugs made or sold by Pfizer under its own name, Lipitor

⁴ 'Intellectual Property and Marketing: How Compliant is Your Ad Campaign?' (*Abou Naja Intellectual Property*)

being the sub-brand. These may be registered as trademarks under the "flagship" name of the companies. Trademarks also help us associate a certain quality to a particular brand for example the iconic Mickey Mouse shape represents Disney and is also associated to the characteristic of being magical and fantastic. Had this shape not been trademarked, it could have been used by other brands and businesses, causing loss to Disney and banking on the goodwill created by the.

(3) Industrial design refers to the ornamental or aesthetic aspect of an article and can be protected by design patents or registered designs. Industrial design can help a brand create a distinctive visual identity that can be easily recognized by the consumers. Like the unique design of Apple's products such as the iPhone and the MacBook, has become iconic and helped the brand enhance its prominence. It can also help businesses differentiate their brand from the competitors and give them a competitive advantage. It can also help a brand build customer loyalty. For example, the classic design of Volkswagen Beetle has helped the company generate a loyal customer base that appreciate its unique style.

(4) Patents can help a company differentiate its product or service from competitors, which is especially effective for companies operating in highly competitive industries such as technology and pharmaceuticals. Patents can be used or licensed for partnerships with other companies and increase their exposure in the market. Moreover, it can seem more attractive to investors as it shows the capability of innovation of the business.

Apple has used its patents extensively in its marketing efforts over the years. When Apple unveiled the iPhone in 2007, it was vigorously promoted as a special and cutting-edge gadget. In order to emphasize the device's uniqueness and set it apart from other smartphones on the market, Apple's patents for the iPhone's multi-touch interface and design were emphasized in the company's advertisements. The same is true of Apple's design designs for the iPad, which were highlighted in advertising campaigns to highlight the tablet's sleek, understated appearance.

4. HOW CAN BRANDS MAKE THEIR MARKETING CAMPAIGNS INTELLECTUAL PROPERTY COMPLIANT?

There are certain steps that brand adopt to make sure that their marketing strategies do not endanger their commercial value.

By conducting research before using a particular brand name, image, or slogan, you can avoid the unpleasant hassle of infringing upon an already-registered trademark and determine whether you have the right to refer to the trademark in question as being your own. Whether or not you want to file it as a registered trademark. Registering your trademark, domain name and using your trademark properly and consistently in all promotional material will help increasing association of such mark with your product in the minds of the consumer.

It is very usual for competing brands to engage in fierce competition. However, it is crucial for brand owners to make a clear distinction between marketing techniques used to gain a competitive advantage and those that rely on inflated and false information. As a result, in the majority of nations, using a competitor's trademark in advertising is not considered to be an infringement as long as it complies with ethical business or commercial practices and does not exploit or damage the trademark's distinctive qualities or image. We see it everywhere: in taste tests between Coca-Cola and Pepsi, in tariff comparisons between mobile phone providers, and in product efficacy tests between automakers. Can you contrast the relative merits of the goods and services your company offers with those of rivals without breaking any trademark or unfair rivalry rules? Comparative advertising has been approached differently and occasionally in conflicting ways by various nations around the globe. Comparative advertising is generally supported by laws, for instance those in the USA, which also hold that customers can learn from accurate comparisons and that they are good for competition. Other nations, like those in Europe, have specific criteria that must be met for comparative advertising to be accepted as genuine.

A recent case before the Delhi High Court, *Bright Life Care Pvt. Ltd. vs Vini Cosmetics Pvt. Ltd.*⁷, the plaintiff filed a suit based on its IP rights in its advertisement campaign *Jiddi Hun Main*, which was projected in the form of a video in 2018 to promote a protein supplement made by the plaintiff. It was the claim of the plaintiff that the defendant had launched a similar ad campaign in 2022, for their deodorant. The defendant was held liable for infringing the IP

⁷ *Bright Life Care Pvt. Ltd. vs Vini Cosmetics Pvt. Ltd.*, CS (Comm) 144/2022.

rights of the plaintiff as their campaign used the same yellow and white lettering on a dark background⁸.

Fortunately, international trademark laws allow owners of registered marks to prevent third parties from using a mark or sign that is identical to or even confusingly close to theirs without their permission. If the terminology is in fact a part of another business, a preliminary search on the key terminologies used in your marketing campaigns will further ensure that your promotional messaging has not been in vain. If a campaign is using certain technical tools which are owned by someone else, it is best to ensure that you have a written license agreement permitting the usage of the same⁹.

Brands often employ another person's likeness and popularity to their advantage. We often see celebrities featuring in promotional material or lending their voice for the same. This helps the brand create credibility and higher value amongst their consumers. Kiara Advani being the new ambassador of Slice, MS Dhoni advertising Redbus, Shahrukh Khan endorsing Disney+ Hotstar are just a few examples how brands use the goodwill of these celebrities to promote their products and services. However, this cannot be done without proper compliance to ensure that the rights of these celebrities to privacy and publicity is not infringed and that their prior approval is taken before portraying them on billboards and using their voice in advertisements.

In the most recent effort for Brand Rights Protection, Meta has launched a new Intellectual Property Reporting application programming interface (API) which helps businesses protect their IP rights across Instagram and Facebook. The automated reporting of content that they think violates their intellectual property rights is now possible thanks to the new IP Reporting API. As the main method for apps to receive from and write to the Facebook social graph, the tool is integrated with the current Graph API. By enabling users to report content at scale, this integration enables authorized API users to more efficiently complete the same fields that are present in the IP reporting forms in a safe and streamlined manner¹⁰.

⁸ Ajay Suman, 'How to protect one's advertisement Campaign', (*Times of India*, 17 July 2022) <<https://timesofindia.indiatimes.com/readersblog/ajayamitabhsumanspeaks/how-to-protect-ones-advertisement-campaign-43845/>> accessed 29 July 2023

⁹ Lien Verbauwhede, 'Intellectual Property Issues in Advertising', *World Intellectual Property Organization*

¹⁰ Paawan Sunam, 'Meta launches new tools that enable brands to protect their intellectual property', (*Social Samosa*, 4 November 2022) <<https://www.socialsamosa.com/2022/11/meta-launches-new-tools-that-enable-brands-to-protect-their-intellectual-property/>> accessed 31 July 2023

5. CONCLUSION

Marketing and advertising rely on creativity and value it. The Internet and significant technological advancements have made it easier to use advertising widely and to develop novel, cutting-edge marketing strategies. However, these options also bring fresh IP law concerns, which force advertisers to exercise unusual levels of caution. Without understanding the legal framework governing the business of advertising, it is today impossible to be a successful marketer or to run a successful advertising agency.

The types of intellectual property that make up a single marketing strategy must be defined precisely and clearly, according to experts. It not only increases the security of the business, but it will also offer the company important information about whether the promotional strategies implemented by them are truly original and have not been copied by another company.

By doing this, one will also have the chance to implement a scalable strategy that will help you avoid future legal issues and confrontations. In conclusion, defining the following questions precisely would be a good place to commence when looking to market your company. What features of your brand need to be protected with IP on the basis of the most frequently violated IP assets? What steps can a business take to ensure that it is not unlawfully infringing someone else's IP rights? And what extent of financial repercussions a brand might face if it chooses to ignore such crucial specifics.