Liberalization and Use of Foreign Trade Marks in India

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Until two decades back, all foreign collaborations approvals issued by the Ministry of Industry contained a condition prohibiting the use of any foreign brand names on goods for sale within the country. This condition, however, was not applicable in case of exports. During the 1980s, the government permitted the use of hybrid trademarks to attract foreign investment. With economic reforms introduced in 1991-92, liberalization of foreign investment and market access has been accepted as a policy by the Government of India. It has now been decided that henceforth no condition would be imposed on the use of foreign trademarks (FTMs) in India. The purpose of this paper is to study the aforestated developments and the likely impact of the use of FTMs in the country's market.

The use of popular or prestigious trademarks has today become one of the most important factors in successful marketing. These trademarks are used by companies for marketing their products in the domestic as well as foreign markets. The trademarks owned by MNCs or foreigners are registered and protected in their home countries and may be referred as Foreign Registered Trade Marks (FRTMs). However, if they are also registered or used in India, they become Indian trade marks but better called FTMs. The import and marketing of goods bearing FRTMs has never been prohibited if import of these goods as such is allowed in India.

The Government of India declared the principle more than three decades ago in relation to foreign collaboration approval that "use of FTMs shall not be permitted for internal sales" and that "there is no objection to their use on products to be exported". There has been no specific law which prevented the use of FTMs. The regulation was administered only through a bureaucratic control. In fact the system of approval of foreign collaborations including the use of FTMs had been initiated and administered by the government from late 50s without any express authority under any particular law. With the enactment of FERA, 1973, the matter required formal approval of the RBI.

Section 28(1)(c) of FERA, since repealed, imposed express prohibitions with effect from January 1, 1974 on the (a) non-resident Indians, (b) persons who are not the citizens of India, (c) a company or a body corporate or firm or association (other than a banking company) which is not incorporated under any law in force in India, (d) a company or a body corporate or a firm or association in which non-resident interest is more than 40 percent. These proprietors of registered or unregistered trade marks were prohibited from allowing the use of their trade marks in favour of any other person except with the general or special permission of RBI. The prohibition to allow the use of their trademarks in favour of third parties was attracted if there was some direct or indirect consideration for such permission to use the trademark. The permission was also necessary for continuing the permission already granted to use such a trademark. In other words, if such owners of trade marks had allowed the use of their trade marks by others without charging any consideration or royalty, the permission of RBI was not required to be obtained for allowing or continuing the use of trade marks by such other persons. It is amply clear that the aforementioned proprietors of trade marks could validly use their trade marks in India by themselves.

During the 1980s, the government permitted the use of hybrid trade marks to attract foreign investment. Many such hybrid trade marks such as, say Lehar-Pepsi, etc., are in vogue in India. The Government of India did not regard hybrid trade marks as foreign brand names. They were probably the innovations to avoid a condition laid down in a foreign collaboration agreement that no FTM shall be used on the goods meant for internal sales or perhaps to enhance the reputation of Indian component of the trade mark.

Inspite of about 35 years of regulation of foreign collaborations by government, in which normally FTMs were not to be allowed and 20 years of enforcement of FERA, we come across more number of FTMs than domestic ones in daily life. Subsidiaries of MNCs and independent domestic licensees are using FTMs as one of the tools to achieve dominant market penetration or to gain a substantial market share.

Often, the MNCs have been pioneers in introducing new products because of their vast technological and financial resources which could support innovative research and development. Their promotional efforts and product support programmes have been able to build up international reputation for their trade marks under which these products are sold.

In the case of consumer goods where trade marks play a leading role, FTMs have been dominating the market in India. The MNC subsidiaries have a comparative advantage in manufacturing as they have proven products, geared to the needs and having acceptability and reputation for their trade marks in their home markets. With the use of their dominant trade marks in marketing strategies, they modify the consumption model and local tastes of the consumers. Instead of adapting their products to local needs, the market power wielded by them through their reputed trade marks enable them to sell ideas in a manner that local needs get adapted to their products.

The attractiveness of FTMs is of concern from the point of view of consumer protection too. Sometimes their glamour in India has enabled many unscrupulous manufacturers to exploit Indian consumers through misleading advertisement or sale of products with unauthorised similar FTMs.

The MNCs spend huge amount on advertising to build consumer franchise. Indigenous enterprises cannot match the advertising expenditure of the multinationals and are put to a considerable disadvantage, even though they may be producing equal quality goods. They are left with no option but to either enter into license agreements to receive such marks or accept a reduced market share. For instance, when pursuant to the policy under FERA, 1973, the Coca-Cola was forced to pack off from the country in 1978; its exclusive licensee Pure Drinks faced a market upheaval. Although it was able to sustain some market share after introduction of its own brand Campa Cola because of the distribution channels and other network it had built up over the long period, yet it had to concede a large market share to Parle, a domestic company, which, of course, also proved itself exceptionally well in advertising and other strategies. In a sector dominated by FTMs, there is even a danger of domestic firms being driven out of business. The domestic enterprises, therefore, are always apprehensive of the market power of FTMs and are by and large against the use of FTMs in India.

The restriction on the use of FTMs on goods meant for the purpose of internal sales had been imposed in the past with a view to provide protection to the local industry. The domestic industry performs better in the absence of FTMs has been proved beyond doubt by the absence of FTMs in the marketing of CTVs in which the FTMs were not allowed in India. In this sector, the Indian affiliate of Phillips entered the market with its trade marks but was not able to capture sufficient market share.

On the other hand, the owners of FTMs assert that the use and licensing of FTMs benefit the host society in the form of availability of products, increased profit margins and even better sales for competitors. The case of introduction of Lehar-Pepsi is a pointer wherein all the major soft drink companies registered a growth in their market. This depends upon the product life cycle theory, may be Lehar-Pepsi came when soft drink market was showing an upward curve. But this would not always be the case. The question is which of the producers shall survive when the market is dwindling. The result normally depends on the factors like market power or comparative advantage, ability to withstand recessionary trends in the market and various other techniques of diversifying into new products, by horizontal or vertical integration – the factors normally possessed by MNCs.

The reputed FTMs, moreover, facilitate introduction of a number of new products in the market which otherwise might not gain acceptance. In product categories where Indian brands were already available in the market, the entry of foreign trade marked goods intensified the competition and thus led to the product upgradation, quality improvement, price reduction and provision of better services.

Though the FTMs have an edge over domestic trade marks because of extensive advertising and goodwill, yet the fact cannot be denied that they play an important role in facilitating introduction of new products and ensuring high quality products to the consumer. They also help upgradation of the quality of domestic products through increased competition.

A few restrictions on the use of FTMs may be justified in the initial stages of economic development of the country to provide protection to the domestic industry. But there seems no justification in the continuation of protective regime over extended period of time as it makes the industry permanently infant.

The FTMs have come to stay, rather would play an increased role in the domestic market in the new economic scenario. The thrust of the policies in relation to FTMs now, therefore needs to be shifted from blanket ban on all FTMs to reducing the cost of using them – both for the country and the licensees. Another aim should be the sharing of benefits of the use of FTM, i.e., an adequate framework should be envisaged for sharing the goodwill and market power between the FTM owner and the licensee for which presently no mechanism exists. The policy makers should address themselves to the question of strengthening the position of licensees in its capacity for asking a share in the goodwill and market power. Measures are also necessary for the enforcement of quality standards, the minimum being what is held out in the market. The quality that is supplied in other countries must be adhered in India, to protect the consumers from being misled by the intensive advertising, market power or the goodwill of the powerful FTMs.

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