

Moment marketing: when does it infringe on a celebrity's IP rights?

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Introduction

When a brand tries to jump in on a crucial moment (eg, the Tokyo Olympics 2020) or a trending subject matter (eg, a news-worthy celebrity moment) in an attempt to gain traction without actually engaging in any form of meaningful advertising, this is known as "moment marketing" or "ambush marketing".

Moment marketing recently became a hot topic for discussion when it was reported that Baseline Ventures, the sports marketing company that manages professional badminton player PV Sindhu, sent legal notices to around 20 brands claiming damages amounting to 50 million rupees per brand for using Sindhu's name and image in congratulatory posts to allegedly advertise themselves, infringing on her IP rights in doing so.

According to a news report, of the 20 brands that were issued notices, HappyDent, Kotak Bank, Pan Bahar, Vicks and Apollo Group have reportedly removed their posts. This sparked a much-needed debate on the legalities of moment marketing and where to draw the line between infringing upon celebrities' rights and taking advantage of a "moment".

Legal grounds

Broadly speaking, in India, celebrities and other famous personalities possess IP rights with respect to their names, performances and images (more commonly termed as "the right of publicity"), which – though not explicitly provided for – are an extension of more general rights available to individuals under the Trademarks Act and the Copyright Act.

For example, there have been many instances where Indian celebrities have got their names and/or their signatures protected as a trademark. Famous Indian cricketer Sachin Tendulkar and Bollywood actor Shah Rukh Khan have got their names trademarked, and Bollywood actress Kareena Kapoor has registered her signature as a trademark in multiple classes, including classes 3 and 25. Under the provisions of the Trademarks Act, to prevent the misuse of names and representations of persons, living or dead, the registrar may, prior to granting registration of trademarks that falsely suggest a connection with any such person, ask the applicant to show consent from the person in question, and may refuse such an application for lack of consent.

With respect to the Copyright Act, performers' rights (ie, the right to record and/or produce sound/visuals of a performance, broadcasting rights and the communication of work by means other than by broadcasting it), would be applicable to any "performer" – for example, an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance. It is important to note, however, that this definition does not include sportspersons within its ambit.

Where it gets murky is protection of celebrities' images. Here, the Copyright Act would not help in the event that the image in question was an unsolicited image captured by a third party since the "author" of the work in the case of a photograph would be the photographer. This would change should the image in question be captured on the orders of, for example, a celebrity, because in that case the first owner of the copyright therein would be the celebrity. Thus, the rights that a celebrity would have in a photograph of them under the Copyright Act would depend upon a number of factors but mainly upon who the first owner/author (where applicable) of the photograph in question is.

Aside from the IP provisions mentioned above, the Calcutta High Court has given recognition to a celebrity's fame and popularity as being part of their IP rights in the case of *Sourav Ganguly v Tata Tea Limited*.⁽¹⁾ Here, Sourav Ganguly filed a suit for misrepresentation of endorsing a particular scheme where the defendant had included postcards inside every packet of tea that offered consumers the opportunity to congratulate Ganguly on his incredible performance during India's cricket tour of England. While the parties eventually settled the matter amicably, the Court upheld that Ganguly's fame and popularity formed part of his intellectual property.

Moral grounds

The example of Sindhu has clearly demonstrated that her image and meticulously built brand value were used by multiple brands in congratulatory posts without her consent, which in essence took away her right to control how her image was used. What would be important to highlight here is the contrast between this example of moment marketing and several others, where enough creativity was used to link the trending moments to their brands without making direct references, and thus without infringing on the IP rights of the celebrities involved.

Indian brand Amul's infamous satirical cartoons, which often centre around current events, and food-tech giant Zomato's tongue-in-cheek [tweet](#) based on a particular line said by Rahul Dravid in a commercial, are great examples as both are creative enough to not appear as endorsements but are bold in that the related moment is recognisable. Other recent examples include Amul's series of [cartoons](#) that caricatured the members of the famous k-pop boyband BTS and OnePlus India's [tweet](#), which made a reference to their signature colour red in relation to Cristiano Ronaldo returning to Manchester United football club.

Comment

When it comes to moment marketing, there is a marked difference between infringing upon celebrities' intellectual property and having just the right amount of creativity to make the reference known, without actually using what constitutes celebrities' intellectual property. Even though India's IP laws do not explicitly protect celebrities' rights, the limited protection that the existing provisions and precedents have been able to provide do cover substantial ground. Taking Sindhu's example, these rights provide enough coverage to draw the conclusion that the congratulatory posts made for Sindhu do appear to be in violation of her right of publicity. In the other examples discussed above (ie, the posts and content by Amul, Zomato and One Plus), which do not make direct references or post images, there cannot be said to be an infringement of IP rights.

On moral grounds, the unauthorised use of a participant's name and image, even in relation to something as seemingly harmless as a congratulatory post, does create a likelihood of association between the brand and the participant in the minds of the unsuspecting public and is, thus, deceptive.

There is a fine line between creative and satirical posts in relation to something that is trending and blatantly using a celebrity's name and image, and the 20 brands in Sindhu's example seem to have erred on the wrong side of that line. Brands should refrain from engaging in such conduct. Legal and moral repercussions aside, they are doing more harm than good by attracting negative publicity.

For further information on this topic please contact [Indira Sahrawat](#) or [Vidhi Singh](#) at G&W Legal by telephone (+91 11 6134 8306) or email (indira.sahrawat@gnwlegal.com or vidhi@gnwlegal.com). The G&W Legal website can be accessed at www.gnwlegal.com.

Endnotes

(1) CS No. 361 of 1997.