

PROFILE PICTURE TRADEMARK - AN EXIGENCY OF SOCIAL MEDIA MARKETING

*Soumya Sakshi Mishra**

Abstract

The social media has developed into a market place that is burgeoning progressively. Amidst the new social media market there prevails an exigency of giving trademark status to the profile picture of the users of social media who use it for commercial use. The commercial use on social media is diverse as influencers, singers, dancers and small business use social media directly or indirectly to earn money and for commercial use. The algorithm of social media helps them to effectively advertise and gain popularity which will result in profit return. In light of the contemporary trend of social media marketing the need of a new non contemporary trademark has emerged i.e. profile picture trademark. The paper is divided into two parts wherein first part identifies the need of trademarking the image used as profile picture. It also states the reason as to why profile picture should be used as trademark in social media marketing and why username cannot be used as identification of the product. The author bolsters the argument by describing the real-life issues pertaining to it and the impacts thereafter. The second part of the paper justifies the authors argument of trademarking the profile picture by citing the theoretical, technological and legal justification. Finally, the authors conclude the argument by giving suggestion and comparison of law with other countries.

Keywords- Trademark, profile-picture, image, protection and social media

1. Introduction

The world has witnessed the roller coaster ride of social media's versatility wherein the multifaceted social media is not only about socializing personally or professionally but also commercially. Social media has recently become a market space and unpaid commercial intermediary, especially for small entrepreneurs, home-based sellers¹ and influencers. These social media users use their social media profiles as a

* BBA LLB 4th year student, School of Law, Christ University.

¹ A. R. Andreasen, "Marketing Social Marketing in the Social Change Marketplace." 21 *Journal of Public Policy & Marketing*, 3-13 (2002).

platform to display, communicate and sell their products to other social media users.² The algorithm of social media also helps the seller to display their product to the targeted and potential audience, which becomes the crucial reason for the social media to fill out as a market. For instance, the most viable social media that is turning out to be effective as a commercial intermediary is Instagram, with its reel feature catalyzing the entire process. The question that arises is- what helps the consumer and the buyer to distinguish between the profile of the sellers. If you answer the question raised as ‘user name,’ you will open Pandora's box of confusion and deceptive similarity here. Although user names are different, the dissimilarity is minuscule and hence can confuse the buyers in identifying the source of the product.

PART-I

1. Profile Picture and Source-Identification

It is likely observed most buyers use profile pictures to identify the specific seller they are interested in because, firstly, it is the profile picture that appeals to the eyes of many users. Contemporary social media is, consequently, driven by visual content. Social media is a zone where people come from various sections of society with diverse age groups. It is a forum wherein people not only come from sound educational backgrounds but also come from places where the literacy rate is woeful. On the virtue of that, several steps taken by the social media engineer will make social media easy for everyone regardless of any strand. Hence, most of the features of social media are easy to use, and generally, its options/features are represented through graphical and functional means. For instance, in the setting function option, one can identify it easily as it has a sign of a nut or wrench. Similarly, the search or a time function option is represented by a magnifying glass and a clock, respectively. This proves two ideas; firstly, it depicts that social media is easy and can be used by anyone, and secondly, people get influenced more by the graphical and image representation rather than the scripted representation.³

² R. Agnihotri, P. Kothandaraman, *et. al.*, “Bringing ‘Social’ Into Sales: The Impact of Salespeople’s Social Media Use On Service Behaviors and Value Creation”, 32 *The Journal of Personal Selling and Sales Management* 333 (2012).

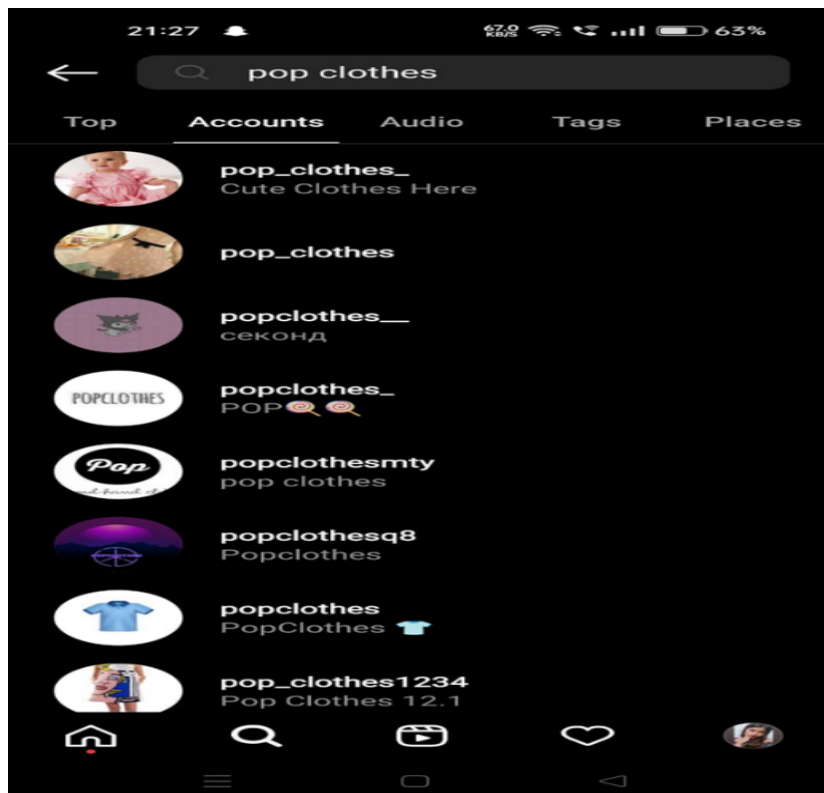
³ S. E. Asch, S. M. Ebenholtz, “The Principle of Associative Symmetry”, 106 *Proceedings of the American Philosophical Society* 135 (1962).

This phenomenon is a recognized phenomenon that is widely known as picture superiority.⁴ Thus, the profile picture plays a crucial role as it perpetually is distinctive to the username. and creates appealing visual content. It not only caters to the attention of the illiterate group but also, in the study, is proved that people with weak memory, especially old people use pictorial information to retain textual information.⁵ If we talk about the literacy rate in India, it is still less. Therefore, it is the profile picture is performing the primary functions of a trademark, that is, source identification and distinctiveness.

2. Username's Disadvantage

The caveat with usernames, as already mentioned before, is that the user names are mostly similar for example, if you type a random name pop clothes, you will get a plethora of similar accounts with similar.

In the given image below the author has randomly typed a name and tried to portray the idea.



⁴ T. Curran, J. Doyle, "Picture superiority doubly dissociates the ERP correlates of recollection and familiarity", 23 *Journal of Cognitive Neuroscience* 1247 (2011).

⁵ K. E. Cherry, K. S. Hawley, et., al., "Pictorial superiority effects in oldest-old people", 16 *PMID* 18651263, 728 (2008).

This shows and proves that the usernames are mostly similar and can cause deception in the social media marketplace. The counter argument against the above statement can be made that-though usernames are similar, they are never identical, and there are dissimilarities. The author would defeat the counter argument by stating three reasons:

- i. A new principle laid down in the most famous trademark case law, i.e., *Cadila Healthcare Ltd. v. Cadila Pharmaceuticals*⁶, overruling an old precedent. According to the new precedent, it was declared that minor dissimilarity should not be taken into consideration. The judgment overruled the case of *S M Dyechem v. Cadbury* (PICNIC case)⁷. It was also stated that -in the cases, while considering the question of similarity, the overall similarity, i.e., the broad and essential features, must be looked into, and dissimilarity, if any, between the concerned two marks cannot be used as a defense. Henceforth, even though usernames are different, the dissimilarity between the users cannot be taken as a defense as the dissimilarity is miniscule⁸. There are a number of cases and statutes itself that suggests taking the essential feature, and the mark should also be taken into consideration as a whole.⁹ Even the courts came out with principles and theories that foster the mark that should be seen as a whole. The anti-dissection principle,¹⁰ the dominant part principle¹¹ and marks not to be kept and compared side by side theory was the outcome of the same.
- ii. If we compare the provision related to trademark and similarity in the USA, it will be evident that USA's trademark law is more consumer friendly as it focuses on commercial, expression and relatedness¹². It means that sufficient enough if they are even slightly related in such a manner that consumers are likely to assume (mistakenly) that they come from a common source. The deception would not end or be avoided even if the mark is changed by 20-30%¹³.

⁶ (2001) 2 PTC 541 SC.

⁷ (2005) 5 SCC 573.

⁸ *Ibid.*

⁹ *William Bailey (Birmingham) Ltd.'s Application*, (1935) 52 R.P.C. 137.

¹⁰ *PhonePe Private Limited v. EZY Services*, AIR 2021 (NOC 753) 301.

¹¹ *South India Beverages Pvt. Ltd. v. General Mills Marketing Inc.*, (2014) 214 DLT 123.

¹² United States Patent and Trademark Office, "Likelihood of Confusion", available at: <https://www.uspto.gov/trademarks/search/likelihood-confusion> (last visited on Jan 19, 2023).

¹³ J. Moreira, "Likelihood of Confusion: What Is It? And What Happens If My Trademark Application Is Refused Because Of It?" May 18, 2021, available at: <https://www.mavenip.com/blog/likelihood-of->

iii. It was held in the case of *Anchor v. Colgate*¹⁴ that the literacy rate in India is abysmal, and people most of the time identify the product by the most dominant part. If we apply the given ratio in this case, then it will be evident that the profile pictures play a source-identifying function more than the user names and, therefore, must be treated as a trademark the trademark and, thus it must be protected.

In light of the above reasoning, it is proved that the username cannot perform the source identification function. Thus, here are three things to be pondered upon; firstly, if the profile picture performs all the functions of the trademark. Secondly, the username does not play any function of a trademark, and thirdly if the profile picture is not given the status of a trademark for a business profile, then there will not only help sellers, but also buyers will face the problem.

3. Consequences and Impacts

Now, the question that arises is, what if the profile picture is not recognized as a trademark what are the consequence that can arise:

3.1. Unrecovered Production Cost and Incentive

Posner and Landes argue¹⁵ that the nature of the public is such that it is vulnerable to replication and freeriding, rendering the impact in the economy as there will be unrecoverable production cost. Thus, an exclusive right is necessary for social media marketing. In simple language, it means that the production cost of manufacturing the goods will not be received by the creator of the quality good, which will lead to economic injustice.

3.2. Problem of Freeriding

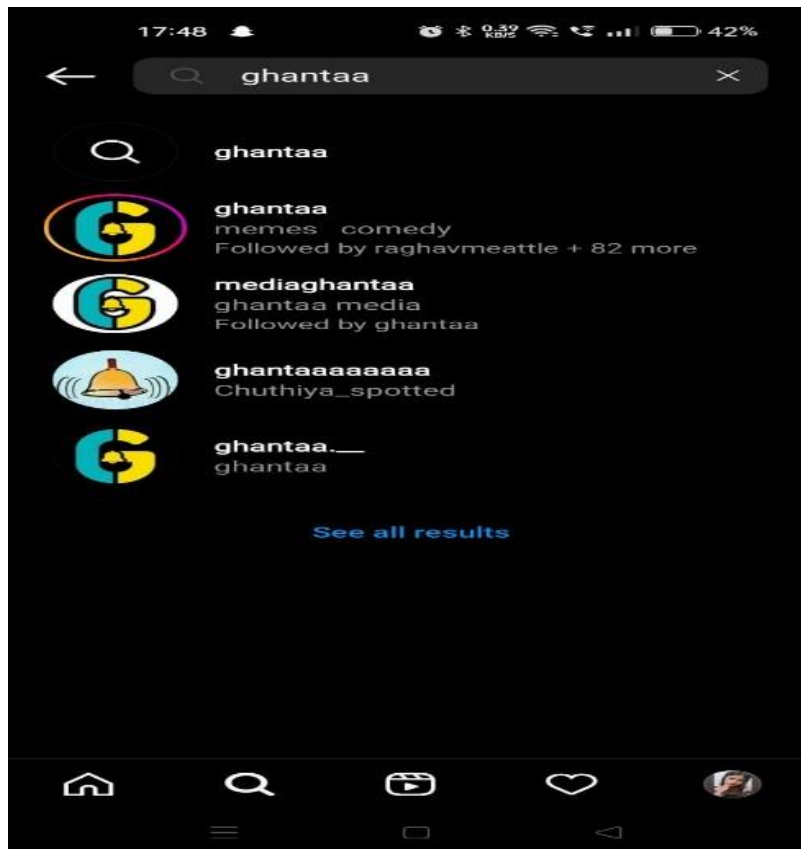
If you are a regular user of Instagram, you must be seen the profile picture of a famous meme page. For example, let us take the example of the famous meme page “Ghanta”. This profile has quality memes and, thus, is followed by many people.

confusion-what-is-it-and-what-happens-if-my-trademark-application-is-refused-because-of-it/ (last visited on Dec 18, 2022).

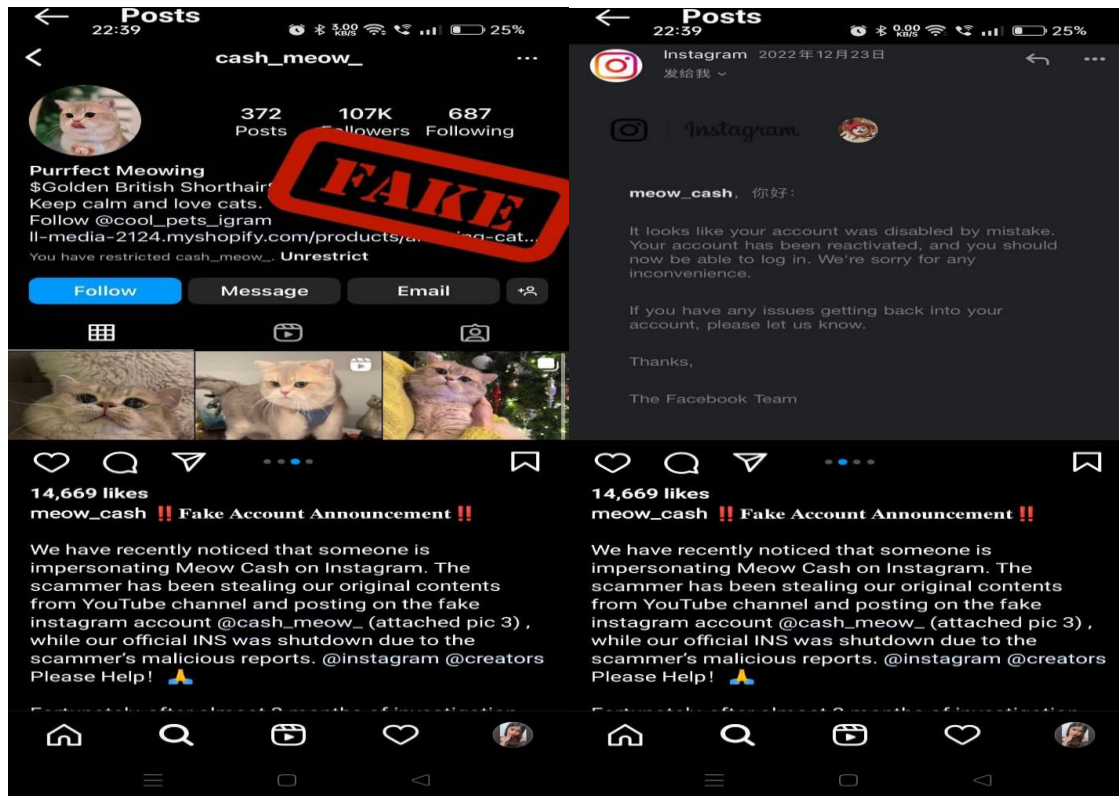
¹⁴ *Colgate Palmolive Company Limited v. Patel & Ajanta India*, 2005 (31) PTC 583 (Del).

¹⁵ W. M. Landes and R. A. Posner, “Trademark Law: An Economic Perspective”, 30 *Journal of Law & Economics* 265 (1987).

Furthermore, it is also recognized by the profile picture. However, most of the other pages with similar names like ghanta, for example, Fantastic Ghanta-meme, use the same profile picture similar or identical to Ghanta and freeride on its popularity of it. These meme creators can also be regarded as small businesses as they earn through their creativity and get fame. These famous meme pages, especially in India, is recognized by the profile picture only, and using it by any other person should be refrained.



Similarly, the account of famous influencer can also be copied, especially those without a blue tick. The fake account can also freeride on the fame of the influencers and their service.



The profile above displayed is the small business done by the owner of the cat. Because of the publicity of the cat, the owner is getting sponsorship and view money. However, recently someone tried freeriding on it which led to the restriction to the original user account. Thus, freeriding in social media can cause loss to the original owner not only in monetary terms but also can lead to entire shut down of business.

3.3. Moral Hazard

Since the profile picture of a small industry or business does not receive any kind of protection as the user names cannot perform the source identification. Furthermore, the law is not recognizing the profile picture to play the role of the trademark. The problem of moral hazard and adverse selection can, in all circumstances, arise. The buyers, most of the time, get confused with the name and buy the product of some other business that might be selling lemons. The purpose of a trademark is also to Compel the entrepreneur to maintain quality. Thus, if there is no protection of the profile picture then the creator will not maintain the quality as there will be no obligation to maintain consistency¹⁶. No recognition of the profile picture can also lead to the unrecovered cost of production and

¹⁶ M. Strasser, "The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context", 10 *Fordham Intell Prop Media & Ent LJ* 375 (2000).

unrecovered incentive to the creator. This will impel the creator, not to creator of the product of good quality.

3.4. Identification Function

The identification function of the trademark resolves the search costs¹⁷. As proved above, the profile picture plays an impost role in source identification. The communication function reduces the moral hazard. If the profile picture will be the same, there will be an increase in search cost. The lemons in the market will increase, thereby increasing the moral hazard¹⁸ resulting in a vicious cycle. Thereby impeding the growth of the commercial side of social media. On the virtue of that profile picture that is used as trademark will make the product identifiable and there will be less possibility to cheat consumers.

3.5. Communication Function

If the profile picture will not be given the status of trademark, then the advertisement done by various small enterprises will go to vain as the communication function of the trademark will not be effective. With the onset of large-scale advertising and promotional measures, the communication function has gained significant importance¹⁹. Therefore, it is important for the benefit of the consumer and for the enrichment of the information pool correct communication should be done.

On virtue of the circumstances, there is a sudden exigency of trademarking the profile picture of the seller.

PART-II

The second part of the paper gives theoretical, legal and technical approach to justify why profile picture should be given the status of a trademark. This part of the paper also gives suggestions and ideas to regulate the profile pictures of small industries and influencers.

¹⁷ *Supra* note 5 at 15.

¹⁸ W. G. Lavey, "Patents, Copyrights, and Trademarks as Sources of Market Power in Antitrust Cases", *27 Antitrust Bull.* 433, 448-51 (1982).

¹⁹ *Supra* note 8 at 16.

1. Theory-Based Justification

This section of the article will discuss two approach/theory of intellectual property right and justify there is a requirement of giving trademark right to profile picture by using these theories.

1.1. Utilitarianism

The scholars and the researchers associate utilitarianism with patent and copyright as it inculcates in society the idea of net social welfare i.e., giving society the maximum benefit.²⁰ This approach also took birth because of a constant fear of underproduction.²¹

All around the world, it is evident that the trademark legislation did not inherit any sign of utilitarian grounds for their justification. However, in my opinion, the utilitarianism theory equally appeals to the trademark, like patents and copyright. As the idea of a trademark revolves around firstly consumer welfare through a reduction in search costs and dealing with the problem of moral hazard(Dealt with in the later part of the article). Secondly, because of the trademark, the good producer will get all the incentives and also the opportunity to recover the cost of production. Thus, the utilitarianism justification justifies the profile picture to be used as the trademark in social media marketing as it will enhance the intellectual or productivity by balancing the economic interest of the seller and the greater good of the public. The recovered incentive and production cost will foster the small business and influencer to flourish their work in the internet and there will be an increased production. This will not only save from underproduction but also it will help to produce quality products along with the incentive for the producer. The presence of source-identifying elements in a trademarked profile picture will give the greatest social welfare.

1.2. Personality Theory of Intellectual Property

The most appealing theory to justify the idea of trademarking the profile picture is the personhood approach. If we analyze the approaches given by the Kanitian and

²⁰ J. C. Ginsburg “Creation and Commercial Value: Copyright Protection of Works of Information”, 90 *Columbia Law Review*, 865 (1990).

²¹ *Ibid.*

Hegelian approach, we will discover that any property is acquired by mixing one's will and labour to an external object²².

Radian expounds on how property should be protected as it is a part of an individual's personality.²³ Hegel's notion of one's natural possession "is neither automatic nor easy, but a long struggle in claiming one's self and developing one's individuality.

Hughes connects the Hegelian theory and justifies it by stating that the trademark is the right of expression for the manufacturer, and it secures respect and goodwill for the producer or manufacturer. Along similar lines, it can be argued that the profile picture is an intrinsic part of the personality which is either created by existence and will or labor. When it is used for securing respect and goodwill in society by the manufacturer, then in that case, using and applying Hughes's explanation, it should be given all the trademark rights. The influencers on social media have built their business with their personality and most of the time it is recognized by their profile picture. Giving their profile picture exclusive right of trademark is the need of the hour.

2. Component of Profile Picture

The profile picture can have a vivid form component that may include an image, a picture of the entrepreneur and influencer, or anything under the sun. Some Professional account also has their trademark as their logo, but that is not the topic of our discussion. In this paper, the emphasis has been given to trademarking any form of profile picture if it is performing the function of source-identifying and is distinctive.

Let us examine each profile picture:

2.1. Self-Image as a Profile Picture

The image of the entrepreneur is one of the leading pictures used in the profile, which helps the buyer to identify the person and purchase.

The reason behind the seller using their profile picture is basic human behavior and their desire to be famous²⁴. Influencers on social media use their own picture as profile picture. We know that using someone else image as one's own can lead to

²² L. Zemer, "On the Value of Copyright Theory" (August 12, 2006). *available at*: <https://ssrn.com/abstract=1657855> (last visited on October 25, 2022).

²³ *Ibid.*

²⁴ G. S. Kavka "Human Nature- Hobbesian Moral and Political Theory", 6 *Princeton University Press* 29 (1986).

copyright infringement, and that's how the interaction of copyright and trademark can be seen. Although the image can be protected through copyright, it has a limited role in protecting the same on the other hand; trademarks have a distinct function to protect names and brands in the sectors within which they operate.

The sector of social media marketing demands image protection, especially those that are used to identify the selling product or service (influencer) by seeing the profile picture. It is not a new concept or a new demand. There has been an image mark for celebrities, and they use their image as a trademark²⁵. Along similar lines, the profile picture for entrepreneurs should be saved. In UK a promising concoction of privacy law, passing off and tort is used to safeguard the image.²⁶

2.2. How to Protect it?

Amidst the blooming technology, there can be a plethora of ways to safeguard the self-profile picture. One of the ways is through face recognition. What is face recognition? A frequent user of Facebook will remember the face recognition feature that was added, which helped the most during tagging people. In the year 2017, Facebook gave people the option to be automatically notified when they appear in photos or videos posted by others and provided recommendations for who to tag in photos.²⁷ The feature turned out to be very strong in the context of data privacy and transparency. However, the feature was removed in 2021 because of the prevailing uncertainties and lack of rules by the government²⁸.

This feature can pave the way for securing the rights to the profile image of a business account on social media if the entrepreneur has uploaded their profile picture of themselves. The picture should be safeguarded, and the face recognition feature can be a great help for the same. The feature can provide two things, firstly, to help to stop the use of registered profile pictures without the user's consent. Secondly, it can also prevent

²⁵ H. L. Cook, "Liability: Avoiding the Lanham Act and the Right of Publicity on Social Media", 83 *The University of Chicago Law Review* 457 (2016).

²⁶ D. Evans, "Can You Protect Your Image Like Your Brand?" *available at* https://www.wipo.int/wipo_magazine/en/2015/02/article_0008.html (last visited on December 02, 2022).

²⁷ J. Pesenti, "An Update On Our Use of Face Recognition" *available at*: <https://about.fb.com/news/2021/11/update-on-use-of-face-recognition/> (last visited on November 2, 2022).

²⁸ Help center Facebook, "What is the face recognition setting on Facebook and how does it work?" *available at*: <https://www.facebook.com/help/122175507864081> (last visited on November 15, 2022).

passing off. Provided the feature should also come along with the registering feature of profile pictures for the entrepreneur.

2.3. Any other image

It is also observed that most of the time, some seller on social media uses the best design as a profile picture. In this case, the design does all the functions of the trademark. The statute does not give both the protection at once, but can the common law remedy be invoked? The conundrum of trademark and design was resolved in the case *Crocs Inc. USA v. Bata India*²⁹, wherein it was held that design, once expired, can certainly be protected as a trademark.

Given below is an example that the master piece of the design is most of the time used as a profile picture.

The profile picture cannot be limited to anything. It is totally upon the whims and fancies to use any kind of profile picture. Hence, safeguarding and protecting a profile picture can be more complex than protecting a self-profile picture.

Artificial intelligence plays a predominant role in image recognition.

2.4. How to Protect It?

There can be mainly two ways in which a profile picture of any kind can be protected:

2.4.1. NFT (Non-Fungible Tokens)

Before understanding anything let first let us understand what is NFTs just like other data; the profile picture can also be saved by storing data in the blockchain. It is commonly referred to as 'PFPs' — an abbreviation that references social media profile pictures. The NFT PFPs can give a unique person or an object a new identity.³⁰In January 2021; Twitter announced that the profile picture could be converted as NFT and can be protected. As Twitter states, this new feature provides a seamless, user-friendly way for people on Twitter to verify their NFT ownership by allowing them to directly connect

²⁹ (2019) 79 PTC 75.

³⁰ Bybit Learn, "NFT PFPs: The Rise of NFT Profile Pictures on Social Media" available at: <https://learn.bybit.com/nft/nft-pfps-profile-pictures/> (last visited on January 10, 2023).

their crypto wallets to Twitter and select an NFT from their collection as their new profile picture,"³¹

2.4.2. Hashing

Hashing is a method in which a data is transforming any given key or a string of characters into another value so that it verifies that data is not modified, tampered, or corrupted³². Hashing will not only secure the profile picture, but also it will impede the tampering and modifying of the data i.e., any object in the profile picture. There is also a similar tributary of hashing that is PhotoDNA which was introduced in 2009 it uses hash technology but with the added ability that it 'recognizes' when an image has been edited.³³

3. Legal Justification

This part of the paper analyzes the legal part and justifies by the help of the legal provision that why trademark rights and status should be given to the profile picture of commercial accounts of the social media.

3.1. Can the Profile Picture be Given the Status of the Trademark?

This part of the paper examines whether the trademark should be given the status of trademark and can be used as an s trademark or not as per law. Around the world, the discovery of new types of unconventional trademarks has been witnessed. Countries like the USA and the EU have also adopted numerous non-conventional trademarks ranging from smell marks to shape marks. The non-conventional came into the picture because of the changing need of the market. Owing to the abstract definition of a trademark, the world can witness the diversity of trademarks.

Even India has broadened its scope of it by amending the trademark manual. However, it has not accepted most of the non-conventional trademarks.

Suppose we refer to the definition given by the supreme court of the USA. In that case, we will understand that the definition of trademark has been widened and broadened as

³¹ J. Morse, "Twitter Makes It Possible to Link NFTs to Profile Pics (For A Price)" *available at*: <https://in.mashable.com/tech/26911/twitter-makes-it-possible-to-link-nfts-to-profile-pics-for-a-price> (last visited on January 21, 2023).

³² A. Zola, "Hashing" *available at*: <https://www.techtarget.com/searchdatamanagement/definition/hashing> (last visited on December 28, 2022).

³³ S. R. Venkatesan, M. Koon, M. H. Jakubowski and P. Moulin, "Robust image hashing," 3 *Proceedings 2000 International Conference on Image Processing*, 664-666 (2000).

the court states that “human beings might use as a “symbol” or “device” almost anything at all that is capable of carrying meaning, [the statutory definition] read literally, is not restrictive”.³⁴

The sieckman criteria³⁵ has also a similar effect in the EU. Consumer perception also plays an important role in this as a trademark is mostly because of consumer’s understanding. Thus, granting the exclusive right to sign, i.e., trademark, if it helps the consumers to resolve the deception.

3.1.1. As per Statute

The definition of mark is not exhaustive as it uses the words “includes”. It defines it as “mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.³⁶

The word trademark is defined in the statute as “trade mark” means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors;

If both of the above definition are read together then, the statute does not put a bar on the image mark. Thus, it can be understood that:

- i. Profile pictures are capable of distinction. It is already discussed above that it is the profile picture that helps people to distinguish the sellers when user names are similar.
- ii. The second element is a graphical representation. It is effortless for it to graphically represent in a paper pen format³⁷
- iii. No function element Section

³⁴ *Qualitex Co. v. Jacobson Prods. Co.*, (1995) 514 U.S. 159, 162.

³⁵ *Sieckmann v. Deutsches Patent - und Markenamt*, (2003) E.T.M.R. 37, 43- 45

³⁶ The Trademark Act, 1999 (Act 47 of 1999), s. 2.

³⁷ Trademark manual Rule 4.3, India, available at: <https://ipindia.gov.in/manual-tm.htm> (last visited on December 10, 2022).

Section 9 (3) impedes the trademark from being functional or technical in nature. Thus talking about any image in the profile picture will not be against the restriction imposed by 9(3).

3.1.2. *Sieckmann criteria*

The landmark case that is used as a precedent for identifying whether a component should be trademarked or not was laid down in the case of *Sieckmann v German Patent and Trademark Office*³⁸, wherein the question was whether a specific odour could be trademarked and it was held that since the mark was unclear and not objective. Thus, seven criteria were laid down for a mark, and it was clear, precise, self-contained, easily accessible, objective, intelligible, and durable. Considering all the aspects and the sieckman criteria, the profile picture should be eligible for trademark status.

3.1.3. *Image mark*

The image mark also got protection in India for limited time being. It was the time when Indian Hotels Company Limited (IHCL) obtained the trademark for the Taj Mahal Palace Hotel and Tower Wing Exterior in the year 2016. It was given protection because of the distinctive architectural design comprising a red-tiled Florentine Gothic dome and the grand exterior. Another instance of image mark occurred in US. In the case of *Rock & Roll Hall of Fame v. Gentile Productions*³⁹, wherein the trademark was registered in the name of The Rock and Roll Hall of Fame and its building design. It was declared an infringement when a photographer named Charles Gentile sold posters featuring a photograph of the Museum, and below the photograph was written "ROCK N' with his signature. It was proved against the photographer that the mark was distinct and had a reputation. It was further stated by the court that the Museum's building design was a fanciful mark and use of the image will be infringement.

The concept of an image right is fairly new. The iconic 1970s English soccer player, Kevin Keegan was the first sports personality to actively enter into what was then known as a "face contract" for what were essentially his image rights. These example

³⁸ *Supra* note 14 at 37.

³⁹ (1998) 134 F.3d 749.

makes it evident that the image mark is acceptable and one the similar context the profile picture can be legally trademarked.

3.1.4. *Passing Off*

The use of profile picture by other is a passing off that is a type of unfair competition made by holders of unregistered trademarks to stop or prevent others from copying the mark, packaging or 'get up' (Brand name, trade description, individual features of labelling or packaging) and presenting the copied goods and services as if it were theirs.”

The passing off is the common law remedy derived from the famous case law *Perry v. Truefitt*; a man is not to sell his own goods under the pretense that they are the goods of another man⁴⁰; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other indication by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.⁴¹

The profile picture though not a registered trademark, however, as in it the indication to identify the page and thus to freeride on it should not be allowed. Therefore, the profile picture can be protected by using the defense of passing off.

In order to safeguard it more, it can also be protected by using the concept of trade dress. As per the definition by the US Courts -"Trade Dress as a category that originally included only the packaging, or 'dressing,' of a product, but in recent years has been expanded by many courts of appeals to encompass the design of a product. In India Trade dress comprises the understanding of the terms trademark, mark, and packaging and thus the profile picture will come under the definition of it. The reason for granting protection as trade dresses is to prevent freeriding and inaccurate affiliation that will lead to exploitation of the original creator⁴². On light of the above idea the profile picture should be at least given the protection as trade dress.

⁴⁰ *Perry v. Truefitt* (1842) 6 Beav 66, 49 E.R. 749.

⁴¹ *Ibid.*

⁴² N. Singh, “*Concept Of Trade Dress In India Mondaq*” available at: <https://www.mondaq.com/india/trademark/1171134/concept-of-trade-dress-in-india> (last visited on January 11, 2023).

4. Suggestions

There have been radical changes that have been brought about by the Internet over the past two decades. This has led to commercial transaction via social media. The social media markets have brought new tools and object for product identification and traditional tools of copyright and trademarks are unable to make pace with the new development. One of such issue is image right. Image rights issues as there are no specific legal tools which define image rights or redress the harm caused by unlawful use of a person's image.

i. A Modern Step by Guernsey

Guernsey, one of the UK Channel Islands, took an effective and most awaited step in 2012 of implementing the world's first image rights registry. The Guernsey authorities made it possible to codify personality and image rights into a fully functioning form by registering them⁴³. By the virtue of this, Image rights can be recorded in relation to a particular personality. The registry has different provisions for different categories of application and also provides for several diverse forms of personality to be registered – for instance individual, corporate, joint individuals, and group. It not only includes image protection but also for, mannerism, gestures, and voice files, to name but a few⁴⁴. Precisely, the registry of Guernsey provides for registration of a “picture” of a personality. Moreover, on registration the image gets complimentary rights be licensed, sub-licensed or assigned in the same way as other intellectual property rights. This remarkable step should be complimented by people worldwide and should be used inherited by other countries.

ii. Further Changes Need

Just like blue ticks given to celebrities, some prominent signs similar to blue ticks should be made mandatory for the person who is doing any kind of commercial activity on the social media. It will make the profile picture more significant in identification. Those specific profile's profile picture should be saved by hashing or by NFT so that no copying without the permission and freeriding does not take place.

⁴³ D. Evans, “*Can You Protect Your Image Like Your Brand?*”, 2 WIPO Magazine, available at: https://www.wipo.int/wipo_magazine/en/2015/02/article_0008.html (last visited on January 2, 2023).

⁴⁴ *Ibid.*

5. Conclusion

For the optimal utilization and recovering the production cost it is essential that the profile picture in social media for business account should be given status of trademark. The recognition of this non-conventional trademark will generate deserved amount of income in the country and it will also help in country to recuperate with the economic conditions. Countries around the world are also taking necessary steps to implement the same on similar lines. India should also take steps on the prevailing exigency.