

EXPRESSION V EXCLUSIVITY: RECONCILING TRADEMARK PROTECTION AND FREEDOM OF EXPRESSION IN VIRTUAL SPACES

MS. NIYATI D. KHATLAWALA

B.COM(TAXATION), LL.M. (BUSINESS LAW), PH.D. SCHOLAR, PARUL INSTITUTE OF LAW, PARUL
UNIVERSITY, VADODARA.

ASSISTANT PROFESSOR, SARVAJANIK COLLEGE OF LAW, SARVAJANIK UNIVERSITY, SURAT.

DR. KALPESHKUMAR GUPTA

ASSOCIATE PROFESSOR OF LAW, PARUL INSTITUTE OF LAW, PARUL UNIVERSITY, VADODARA.

Abstract:

The growing use of digital and virtual platforms had transformed the way individuals communicate and express ideas. In these spaces, trademarks are frequently used in memes, artworks, and online commentary that reflect social or artistic expression rather than commercial use. This creates a legal tension between the protection of proprietary rights under the Trade Marks Act 1999 and the right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution of India. The paper examines this conflict through a doctrinal study of Indian law and judicial decisions that interpret the meaning of “use” and “infringement” in modern contexts. It analyses cases such as *Tata Press Ltd v Mahanagar Telephone Nigam Ltd* and *Tata Sons Ltd v Greenpeace* to understand how courts have approached expressive and commercial uses of marks. The study finds that the present legal framework places greater emphasis on protecting commercial goodwill than on safeguarding expressive freedom. It argues for the development of clear judicial principles to distinguish commercial exploitation from artistic or critical expression, especially in virtual environments. The conclusion stresses the need for balanced interpretation so that trademark rights do not suppress creative and democratic communication in India’s digital age.

Keywords: Trademark, Freedom of Expression, Virtual Space, Indian Constitution, Trade Marks Act 1999, Digital Expression, Intellectual Property Rights

INTRODUCTION

The increasing presence of digital and virtual spaces has redefined how individuals express ideas, opinions and identities. Social media platforms, online communities and immersive virtual environments have created new forms of communication where words, symbols and images are shared, remixed and reinterpreted every day. In this evolving environment, trademarks, once confined to commercial and physical trade, have become part of cultural and social expression. They appear in memes, digital artworks, commentary posts and online parodies that often reflect public sentiment. While this expansion of expression has enhanced participatory communication, it has also generated a complex legal tension between the proprietary rights of trademark owners and the fundamental right to freedom of expression guaranteed by the Constitution of India.¹

Trademark law aims to protect the goodwill, reputation and distinctiveness of marks used in commerce. Its core function is to prevent consumer confusion and ensure fair competition. However, when trademarks appear in digital or virtual content that conveys criticism, humour or political opinion, the use is not necessarily commercial. Such uses are expressive in nature and contribute to public discourse. Yet, the legal boundaries between expressive use and infringement remain unclear in Indian law. Courts have increasingly encountered instances where individuals or groups have used well-known marks to communicate social or environmental messages, thereby triggering disputes with trademark proprietors. The absence of clear statutory guidance on how expressive use should be treated has resulted in interpretative inconsistency and uncertainty for both right holders and users.²

The issue assumes greater significance in the context of India’s expanding digital economy. Virtual spaces allow users to create and share content that travels across jurisdictions within seconds. This technological fluidity has blurred the line between personal communication and public communication, between creativity and commerce. Consequently, trademark owners are more inclined to invoke infringement provisions even in cases that are primarily expressive. The resulting overreach risks curbing artistic freedom and democratic participation in digital discourse. On the other hand, unregulated expressive use could erode the value of trademarks and facilitate

¹ The Constitution of India, art 19(1)(a).

² V K Ahuja, *Law Relating to Intellectual Property Rights in India* (LexisNexis 2020).

misrepresentation. Therefore, a careful doctrinal balance is required to protect legitimate commercial interests while safeguarding the right to express freely.³

The Trade Marks Act, 1999 provides protection for registered marks against unauthorised use in the course of trade.⁴ The Act, however, does not define “use” or “in the course of trade” in a way that reflects modern online realities. Section 29 of the Act sets out the conditions under which infringement occurs, focusing primarily on the likelihood of confusion or dilution of goodwill. This approach presumes that trademark use is inherently commercial. Conversely, Article 19(1)(a) of the Constitution guarantees every citizen the right to freedom of speech and expression.⁵ This right includes the liberty to communicate ideas through any medium, including symbolic and artistic forms. When a mark is used as part of satire, critique or commentary, the expression often falls within the protective ambit of Article 19(1)(a). Yet, Indian courts have rarely engaged in a detailed constitutional analysis when resolving trademark disputes involving expressive use. The tendency has been to interpret “use” narrowly in favour of proprietors, with limited attention to the broader constitutional context.⁶

In this background, the present study undertakes a doctrinal analysis of the conflict between trademark protection and freedom of expression in virtual spaces within the Indian legal framework. The study focuses on how the judiciary interprets the TMA, 1999 in light of constitutional principles and whether current jurisprudence adequately distinguishes between commercial exploitation and expressive use. The paper also examines the emerging role of virtual spaces, where the reproduction or adaptation of trademarks is often motivated by creativity or critique rather than trade. The discussion draws from key Indian cases such as *Tata Press Ltd v Mahanagar Telephone Nigam Ltd*⁷ and *Tata Sons Ltd v Greenpeace*⁸ to trace judicial trends that illustrate the evolving relationship between proprietary and expressive interests.

The study is significant for two main reasons. First, it addresses an underexplored doctrinal question in Indian law: “whether expressive use of trademarks can constitute infringement when there is no commercial intent?” Second, it contributes to the ongoing conversation about harmonising intellectual property rights with constitutional freedoms in a technology-driven society. The paper argues that a balanced approach is necessary to ensure that trademark protection does not unduly restrict expression, while expressive use does not unfairly exploit commercial goodwill. It recommends interpretative and policy reforms that would help establish this equilibrium in the Indian context.⁹

1. OBJECTIVES OF THE STUDY

- i. To examine the doctrinal conflict between trademark protection and freedom of expression in India.
- ii. To analyse the scope of expressive use of trademarks in virtual environments.
- iii. To evaluate judicial interpretation of trademark and free speech overlap.
- iv. To identify gaps in statutory and judicial recognition of expressive use.
- v. To propose reforms for balancing intellectual property rights with free expression.

2. TRADEMARK PROTECTION UNDER THE TMA, 1999

The TMA, 1999, is the principal legislation governing trademark law in India. It was enacted to consolidate and amend the law relating to trademarks and to provide for the registration, protection and prevention of fraudulent use of marks. The Act seeks to protect the commercial reputation of traders and to ensure that consumers are not misled by deceptive use of marks.¹⁰ A trademark, under section 2(1)(zb), includes any mark capable of being represented graphically and capable of distinguishing the goods or services of one person from those of another. This definition covers names, symbols, shapes, packaging, and combinations of colours.

The Act grants exclusive rights to registered proprietors under section 28. These rights enable proprietors to use the mark in relation to the goods or services for which it is registered and to seek relief in cases of infringement. Section 29 defines infringement broadly as unauthorised use of a mark that is identical or deceptively similar to a registered mark, where such use is likely to cause confusion or association with the registered proprietor.¹¹ The provision also covers use that takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the mark.

However, the Act does not expressly define “use in the course of trade”. The phrase has traditionally been interpreted to mean commercial use in the ordinary course of business. Courts have generally linked trademark use with the intent to trade or advertise goods or services. In the case of *Daimler Benz AG v Hybo Hindustan*¹²,

³ Ibid.

⁴ The Trade Marks Act, 1999

⁵ The Constitution of India, art 19(1)(a).

⁶ Ibid 2

⁷ *Tata Press Ltd v Mahanagar Telephone Nigam Ltd*, AIR 1995 SC 2438.

⁸ *Tata Sons Ltd v Greenpeace International*, 178 (2011) DLT 705.

⁹ See also Shamnad Basheer, ‘Trademark Law and Free Speech in India’ (2014) 2 NUJS L Rev 45

¹⁰ The Trade Marks Act, 1999

¹¹ Ibid, sec. 29

¹² *Daimler Benz AG v Hybo Hindustan*, AIR 1994 Del 239.

the Delhi High Court held that use of the word “Benz” for underwear constituted infringement of the reputed car brand, as it amounted to dilution of a well-known mark and took unfair advantage of its reputation. The judgment reinforced the idea that the law must protect not only consumer interests but also the uniqueness of a famous trademark.

Similarly, in *ITC Ltd v Philip Morris Products SA*¹³, the Delhi High Court observed that the expression “use in the course of trade” covers both direct and indirect commercial use of a mark and extends to comparative advertising. The decision highlighted the broad construction of infringement under section 29. However, the focus on commercial exploitation leaves little room for interpreting uses that are artistic, critical or parodic in nature. The law treats any use of a registered mark that creates association as potentially infringing, even if it arises in a non-commercial expressive context.

Trademark law therefore operates with a presumption that all unauthorised use is commercial in nature. This assumption becomes problematic when the same symbols are used in virtual spaces, where the intent may not be to sell goods but to comment or create. In such cases, the rigid application of section 29 may result in overprotection of proprietary interests. Indian law has yet to develop clear exceptions for expressive use, unlike certain jurisdictions that recognise fair use or parody defences in trademark disputes.¹⁴

3. FREEDOM OF EXPRESSION UNDER THE CONSTITUTION OF INDIA

Freedom of speech and expression is one of the most valued fundamental rights under the Constitution of India. Article 19(1)(a) guarantees this freedom to every citizen, allowing the right to express opinions, ideas, and creativity in any form. The scope of this right extends beyond spoken or written words to include symbolic, artistic and digital expression.¹⁵ The Supreme Court has consistently held that free speech is essential to democracy and that restrictions on it must be narrowly construed.

The right is not absolute. Article 19(2) permits reasonable restrictions on grounds such as public order, decency, morality, and defamation. However, restrictions must be justified by clear legislative or judicial reasoning. Courts have emphasised proportionality and reasonableness in assessing limitations. In *R. Rajagopal v State of Tamil Nadu*¹⁶, the Supreme Court affirmed that the freedom of the press and the right to publish fall within the ambit of Article 19(1)(a), subject to the restrictions under Article 19(2). The judgment also linked freedom of expression to the right to privacy, underscoring the interdependence of personal liberty and expression.

Commercial speech has also been recognised as a protected form of expression. In *Tata Press Ltd v Mahanagar Telephone Nigam Ltd*¹⁷, the Court held that commercial advertisements disseminate information about goods and services and thus fall within the scope of Article 19(1)(a). The decision marked an important expansion of expressive rights, acknowledging that economic communication contributes to consumer awareness. However, the recognition of commercial speech as part of free expression also complicates the interface between trademark law and Article 19(1)(a). When both the trademark owner and the user invoke free expression, one to protect reputation and the other to express criticism, the judiciary must balance two competing claims within the same constitutional framework.

Indian jurisprudence has yet to articulate a clear standard for reconciling intellectual property enforcement with constitutional freedoms. In *S. Rangarajan v P. Jagjivan Ram*¹⁸, the Supreme Court observed that freedom of expression cannot be suppressed merely because it may be offensive to some people, unless it leads to public disorder. This principle, if extended to the virtual trademark context, implies that expressive use of marks should not be curtailed unless it causes demonstrable harm or confusion. Nonetheless, Indian courts have often approached such issues from a purely proprietary lens rather than a rights-based perspective.

The digital environment has amplified the importance of expressive freedom. Online users employ brands and logos as cultural symbols to convey humour, dissent, or commentary. The constitutional guarantee of free speech therefore demands interpretation in line with these realities. The doctrine of proportionality, as developed in Indian constitutional law, offers a viable tool for balancing intellectual property protection with expressive freedoms.¹⁹

4. DOCTRINAL ANALYSIS: CONFLICT IN VIRTUAL SPACES

Virtual and digital spaces have blurred traditional boundaries between commercial and expressive use. The same mark may be used in multiple contexts, some promotional, others critical or humorous. When a registered trademark appears in a meme or an online campaign, the intent is often expressive rather than commercial. Yet, such use may still invite legal notice under section 29 of the TMA, 1999. This has created an uncertain legal environment for digital creators, activists, and commentators.²⁰

¹³ *ITC Ltd v Philip Morris Products SA*, 2010 (42) PTC 572 (Del).

¹⁴ See Shamnad Basheer, ‘Parody and the Limits of Trademark Protection’ (2015) 7 JIPR 112.

¹⁵ The Constitution of India, art 19(1)(a).

¹⁶ *R. Rajagopal v State of Tamil Nadu*, (1994) 6 SCC 632.

¹⁷ *Tata Press Ltd v Mahanagar Telephone Nigam Ltd*, AIR 1995 SC 2438.

¹⁸ *S. Rangarajan v P. Jagjivan Ram*, (1989) 2 SCC 574.

¹⁹ See *Modern Dental College v State of Madhya Pradesh*, (2016) 7 SCC 353.

²⁰ The Trade Marks Act, 1999, s 29.

One of the most relevant Indian cases addressing expressive use is *Tata Sons Ltd v Greenpeace International*²¹. The case involved a satirical online game that criticised the environmental practices of Tata Group concerning a port project. Tata alleged trademark infringement and defamation. The Delhi High Court rejected the claim, holding that the use of the Tata logo in the parody game was not intended for commercial gain but for public communication on environmental issues. The court observed that the constitutional right to freedom of expression must be respected even in the context of intellectual property enforcement. This judgment is a rare example where the court recognised expressive use as distinct from infringing use.

The decision in *Greenpeace* marked an important shift toward balancing proprietary and expressive interests. The court implicitly acknowledged that trademarks can function as linguistic and cultural symbols beyond commerce. However, subsequent cases have not consistently followed this reasoning. The lack of statutory recognition for expressive use continues to leave uncertainty for creators and commentators.

Virtual spaces such as social media platforms and the metaverse present even more complex challenges. Symbols and marks circulate freely across borders, often detached from their commercial origins. Users may recreate brand logos or alter them as part of personal avatars, digital art, or political messages.²² These activities may constitute trademark “use” in a broad sense but not in the commercial sense envisioned by the Act. Treating them as infringement would stretch the scope of section 29 beyond its intended purpose.

Comparative jurisdictions have addressed this dilemma through interpretative tests. The *Rogers v Grimaldi*²³ case in the United States introduced the “artistic relevance” test, holding that the use of a mark in an artistic work does not infringe unless it has no artistic relevance or explicitly misleads consumers. Similar approaches have evolved in the European Union, where courts distinguish between commercial exploitation and expressive use in artistic contexts.²⁴ Indian law, however, remains silent on this distinction. The absence of a clear statutory or judicial framework has led to inconsistent outcomes, with courts either avoiding constitutional analysis or relying on narrow readings of section 29.

As virtual communication grows, the need to articulate a doctrinal balance becomes pressing. The judiciary must recognise that expressive use serves democratic and cultural purposes and should not automatically be treated as infringement. Trademark protection must therefore operate within constitutional limits, ensuring that commercial rights do not suppress individual creativity and public dialogue.

5. JUDICIAL AND DOCTRINAL CHALLENGES IN INDIA

Indian trademark jurisprudence reveals a consistent emphasis on commercial protection, often at the cost of expressive freedom. The Trade Marks Act, 1999 provides wide protection to registered proprietors under section 29, but it offers little guidance on uses that are non-commercial or artistic. Courts interpreting the provision have focused primarily on the likelihood of confusion, association or dilution of goodwill. This approach, while suitable for traditional trade disputes, becomes inadequate when marks are used in virtual or expressive contexts.²⁵

The absence of a statutory exemption for expressive use has created ambiguity for courts and users alike. For instance, while the Delhi High Court in *Tata Sons Ltd v Greenpeace International* acknowledged the importance of expression, it did not establish a clear doctrinal test to distinguish protected expression from infringement.²⁶ Consequently, future courts remain uncertain whether similar uses would be treated as legitimate expression or as actionable violations.

Another doctrinal challenge lies in the definition of “use in the course of trade.” The expression has been interpreted narrowly to mean use connected with commercial activity.²⁷ However, in virtual spaces, a digital post, meme or parody may reach millions and influence public perception of a brand without any direct commercial transaction. The question arises whether such communicative acts fall within “use in the course of trade.” Indian law does not offer an answer. Courts have yet to evolve interpretative principles that reconcile this definition with modern realities.

Judicial decisions have also reflected a cautious attitude toward constitutional analysis in intellectual property disputes. Although Article 19(1)(a) is a fundamental right, courts often refrain from invoking it when applying the TMA, 1999.²⁸ This reluctance arises from the perception that statutory intellectual property rights and fundamental rights belong to separate domains. Yet, the conflict between trademark enforcement and free speech is inherently constitutional, as both rights originate from the same legal system. A purely statutory interpretation may therefore overlook the higher constitutional principles that guide the limitation of private rights.

The imbalance between proprietary and expressive interests is further deepened by the lack of judicial consistency. Some judgments demonstrate awareness of constitutional considerations, while others confine the analysis to the

²¹ *Tata Sons Ltd v Greenpeace International*, 178 (2011) DLT 705.

²² P Narayanan, *Law of Trade Marks and Passing Off* (7th edn, EBC 2021).

²³ *Rogers v Grimaldi*, 875 F 2d 994 (2d Cir 1989).

²⁴ See *Arsenal Football Club plc v Reed*, [2003] RPC 39 (ECJ)

²⁵ The Trade Marks Act, 1999, s 29.

²⁶ *Tata Sons Ltd v Greenpeace International*, 178 (2011) DLT 705.

²⁷ *ITC Ltd v Philip Morris Products SA*, 2010 (42) PTC 572 (Del).

²⁸ *R. Rajagopal v State of Tamil Nadu*, (1994) 6 SCC 632.

mechanics of infringement.²⁹ For example, courts have been quick to protect well-known marks against dilution even in cases involving artistic adaptations, but they have rarely acknowledged the expressive value of such adaptations. Without a clear balancing framework, the outcome often depends on the court's perception of harm rather than on a principled doctrinal test.

6. SUGGESTIONS AND RECOMMENDATIONS

The resolution of this doctrinal conflict requires a twofold approach: judicial evolution of interpretative standards and legislative clarification of expressive use.

1. Judicial balancing through Interpretation

Indian courts can adopt a structured balancing test similar to the proportionality analysis used in constitutional law. Under this approach, trademark enforcement actions should be assessed for their necessity, suitability and proportionality to the harm alleged.³⁰ If expressive use does not mislead consumers or damage the core function of a mark, enforcement should not override free expression. Courts could draw guidance from the “artistic relevance” principle established in *Rogers v Grimaldi*³¹ in the United States, which allows expressive use of marks in artistic works unless the use is explicitly misleading.

Indian jurisprudence has already embraced proportionality in fundamental rights adjudication, as seen in *Modern Dental College v State of Madhya Pradesh*.³² Extending the same reasoning to trademark disputes would help ensure harmony between statutory and constitutional principles. Judicial recognition of expressive use as a legitimate defence would bring predictability and reduce chilling effects on creativity.

2. Legislative clarification

The Trade Marks Act, 1999 may be amended to introduce an express exemption for non-commercial expressive use. This could be modelled on the fair use provisions found in copyright law or on international examples where parody and criticism are recognised defences. Such a clause would not weaken trademark protection but would codify the balance between commerce and expression. It could specify that use of a registered mark for artistic, educational or critical purposes that does not mislead the public or derive commercial benefit shall not amount to infringement.

The legislature may also consider issuing interpretative guidelines to the Trademark Registry for online and digital contexts. The Registry could clarify that mere depiction of a mark in a digital artwork or non-commercial commentary is not “use in trade.” This would prevent unnecessary litigation and align Indian practice with global trends.

3. Policy level recommendations

Awareness programmes could be developed jointly by the Intellectual Property Office and digital platforms to educate users and creators about lawful use of trademarks in expressive content.³³ Institutions such as the National Judicial Academy can conduct seminars and judicial training on balancing intellectual property and free expression. Such initiatives would promote uniform understanding among judges, lawyers and regulators. Finally, collaboration with international organisations such as the World Intellectual Property Organization (WIPO) could help India adopt global best practices on expressive use. WIPO's recent reports on the interface of trademarks and freedom of expression emphasise context-sensitive adjudication rather than rigid enforcement.³⁴

CONCLUSION

Trademark law and freedom of expression are not inherently opposed to each other. Both serve legitimate public purposes—the former ensures fair trade and consumer protection, while the latter sustains democratic discourse and creativity. The challenge arises when the enforcement of one begins to undermine the values of the other. The rise of virtual spaces has made this conflict more visible, as digital communication frequently involves the use of well-known marks for commentary, humour or criticism.

The doctrinal framework of the Trade Marks Act, 1999 was designed for a market-driven society where trademarks primarily identified commercial goods. In today's digital context, the same symbols function as linguistic and cultural tools. Applying conventional infringement standards without adaptation risks overprotecting proprietary interests and stifling expression. The judiciary's role is therefore critical in ensuring that intellectual property rights remain consistent with constitutional values.

²⁹ P Narayanan, *Law of Trade Marks and Passing Off* (7th edn, EBC 2021) 34

³⁰ *Modern Dental College v State of Madhya Pradesh*, (2016) 7 SCC 353.

³¹ *Rogers v Grimaldi*, 875 F 2d 994 (2d Cir 1989).

³² *Ibid* 31

³³ Ministry of Commerce and Industry, ‘IP Awareness Programme’ (Government of India, 2022) <https://ipindia.gov.in> accessed 3 November 2025.

³⁴ WIPO, *Freedom of Expression and Intellectual Property: Policy Challenges in the Digital Era* (WIPO 2021).

Indian courts have the interpretative capacity to resolve this conflict by recognising expressive use as a legitimate form of speech. The decision in *Tata Sons v Greenpeace* provides a foundation for this approach, though it needs further development. Legislative support through clarifying provisions or guidelines would enhance legal certainty and reduce unnecessary disputes.

Ultimately, the protection of trademarks should not result in the suppression of thought. A balanced framework—guided by constitutional principles and informed by global best practices—will help India preserve both commercial integrity and expressive freedom. The virtual age demands laws that safeguard reputation without silencing creativity. The harmony between exclusivity and expression is not a choice between two rights but an essential condition for a democratic and innovative society.³⁵

REFERENCES

1. The Trade Marks Act, 1999, No 47 of 1999, India Code (1999).
2. The Constitution of India, art 19(1)(a).
3. *Tata Press Ltd v Mahanagar Telephone Nigam Ltd*, AIR 1995 SC 2438.
4. *Tata Sons Ltd v Greenpeace International*, 178 (2011) DLT 705.
5. *Daimler Benz AG v Hybo Hindustan*, AIR 1994 Del 239.
6. *ITC Ltd v Philip Morris Products SA*, 2010 (42) PTC 572 (Del).
7. *R. Rajagopal v State of Tamil Nadu*, (1994) 6 SCC 632.
8. *S. Rangarajan v P. Jagjivan Ram*, (1989) 2 SCC 574.
9. *Modern Dental College v State of Madhya Pradesh*, (2016) 7 SCC 353.
10. V K Ahuja, *Law Relating to Intellectual Property Rights in India* (LexisNexis 2020).
11. P Narayanan, *Law of Trade Marks and Passing Off* (7th edn, EBC 2021).
12. Shamnad Basheer, 'Trademark Law and Free Speech in India' (2014) 2 NUJS L Rev 45.
13. WIPO, *Freedom of Expression and Intellectual Property: Policy Challenges in the Digital Era* (WIPO Report 2021).

³⁵ V K Ahuja, *Law Relating to Intellectual Property Rights in India* (LexisNexis 2020) 215.