

FSSAI regulations to create trouble for product trademarks

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In its endeavour to effectively regulate various facets of the Food and Beverage [Industry](#) in India, the Food Safety and Standards Authority of India ([FSSAI](#)) had recently published a draft of the Food Safety and Standards (Claims and Advertisement) [Regulations](#), 2018 (“Regulations”) pertaining to claims and advertisements by [Food Business](#) Operators.

These Regulations have been formulated with the primary intention of curbing the use of vague/ open-ended/ misleading words/ phrases by food businesses to sell and market their products, without any tangible or concrete basis for the statements made in this regard. The Regulations seek to achieve this through the establishment of general principles for claims and advertisements, laying down technical and other criteria for specific claims and mandating that all producers/ manufacturers/ brand owners obtain prior approval from the FSSAI for all claims made, such as health and nutritional benefits, concerning their food products.

Keeping in mind this general framework, the Regulations defines “claim” as any representation which states, suggests, or implies that a food has particular qualities relating to its origin, nutritional properties, nature, processing, composition or otherwise. Every Food Business Operator and marketer, while advertising, publishing or disseminating marketing communication meant for promotion of sale of any article of food is required to comply with the general principles laid down therein. Specific emphasis for the purpose of this article has been placed on the principle that prescribes, “Where the meaning of a trade mark, brand name or fancy name appearing in the [labelling](#), presentation or advertising of a food is such that it may imply a nutrition or health claim, all the general & specific conditions, prohibitions and restrictions as laid down in these Regulations shall be applicable.” Therefore, it appears that the Regulations impose certain restrictions with

reference to trademarks related to the food product.

The Regulations also specifically regulate the use of certain adjectives and prescribe strict conditions for their usage in relation to the food product. Of these adjectives, emphasis for the purpose of the article, has been placed on the regulation of words as 'Premium', 'Finest', 'Best', 'Real', 'Traditional' and 'Original' that commonly form part of product taglines which may be registered as trademarks under the Trademarks Act, 1999 ("Act"). The regulation of the use of these adjectives may pose a possible conundrum, specifically in relation to existing trademarks and considering that specific and exhaustive criteria already exist for the registration of taglines under the Act.

The registration of trademarks aims to serve a dual purpose, namely consumer protection, helping consumers distinguish between the products of two manufacturers/ sellers; and to protect the interests of the manufacturers/ sellers, safeguarding goodwill associated with their brand by granting them exclusive rights in the use of their "marks". Qualification for registration under the Act is premised on the capability of a brand tagline of being reduced to a two-dimensional representation on paper which meets the tests laid down for registration as "mark" under the Act. The underlying test for registration rejects those applications which consist exclusively of marks or indications that are solely descriptive of, inter alia, the kind, quality, quantity, intended purpose, values, geographical origin or other characteristics of the goods. Therefore, if a product tagline in question is merely a combination of words that are only descriptive of the product, it cannot be registered as a trademark in India. However, if a descriptive tagline acquires secondary meaning and is identified with a particular product, it may be registered as a trademark. To acquire secondary meaning, an average man of ordinary prudence and imperfect recollection must associate the mark with the manufacturer/ seller rather than the underlying product itself. For example, "Two-Minute Noodles" describes noodles that may possibly require little cooking time and is therefore descriptive but the same has also acquired a secondary meaning in the mind of the consumers as they associate the same with "[Maggi](#) Two-Minute Noodles".

Given the criteria for the registration of trademarks under the Trademarks Act, there are two possible categories of taglines associated with food products that are relevant to the present context. One, wherein the tagline for the food product does not fall within the realm of descriptive taglines and second, wherein the tagline, though descriptive, has also acquired a secondary meaning and is associated specifically with a particular manufacturer/ seller. In this context, given that one of the general principles laid down by the Regulations postulates a scenario wherein the meaning of a trade mark, brand name may imply a nutrition or health claim, it is imperative to understand the scope of the phrase "may imply a nutrition or health claim", particularly given that the Regulations specifically prescribe the usage of the above mentioned adjectives:

- In a situation wherein, the adjectives regulated by Regulations are used in taglines registered under the Act that are non-descriptive, the possibility that the claims made in relation to the food product pertain to a nutrition/ health claim is non-existent. Thus, in such a situation, it is apt to assume that there is no conflict in the effective operation of the two enactments in question.

- On the other hand, wherein the adjectives regulated by Regulations are used in the combination of words registered under the Act that fall within the category of descriptive taglines that have acquired a secondary meaning and are associated specifically with a particular manufacturer/ seller, there arises a possibility of overlapping operation of the two laws. It is plausible that the adjectives contained in the tagline may imply a nutrition or health claim if a wide interpretation is accorded to the phrase. In the event, the use of the adjectives in the tagline is not as per specifications prescribed in the Regulations, the Food Authority may require the concerned Food Business Operator/advertiser to issue corrective advertisement(s) to neutralizing the effect of the allegedly misleading advertisement.

Given the dual purpose the registration of trademarks seeks to achieve, the Act adequately regulates and imposes restrictions on the words/ combination of words that may be registered therein. The additional restrictions imposed by the Regulations may transgress the clear constitutional demarcation that exists between a statute and a delegated legislation, specifically in the case of trademarks already registered under the Act. While the possibility of conflict is apparent, if the two laws are read harmoniously and understood as operating only in their respective spheres of operation, this apparent clash may only be theoretical. However, it may be interesting to note and follow the stance taken by Courts in their attempt maintain the delicate constitutional balance that must be struck while upholding the intent of both the Legislation and the Delegated Legislation.