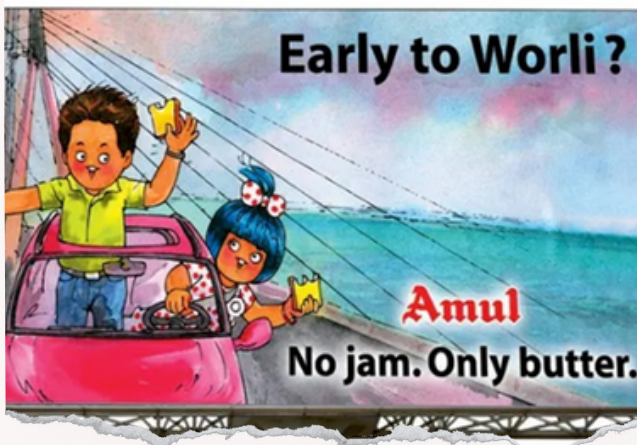


# MARKETING BANG ON TIME

## A HACK TO ACHIEVE YOUR BUSINESS PRIME!



**Wednesday Wisdom**  
**10-05-2023**



## Introduction[1]:

Being in the present moment sometimes sparks a notation of spirituality in one's mind. Today, with increased channels of communication and the race of making every event larger than ever, moment marketing is the latest buzz in the world of digital marketing and is gaining a lot of momentum[2].

Moment marketing is generally understood to be a marketing approach where businesses leverage ongoing events to create relevance by integrating themselves into trending conversations, often at minimal cost.

The classic example of a brand that has mastered this approach is Amul, the dairy cooperative. All of us have been seeing their iconic hoardings and comics on topical events from sports to Bollywood to international affairs, featuring their adored character, The "Amul Butter Girl." [3] Their brief, captivating, and memorable commercials always manage to highlight important recent events.

And they're not alone! Brands like Pepsi, Coca Cola, Zomato[4], Burger King, and many more are in the row. Even Mumbai police[5] is not trailing but have used moment marketing to reach their target consumers in a timely and efficient manner on social media and digital platforms.

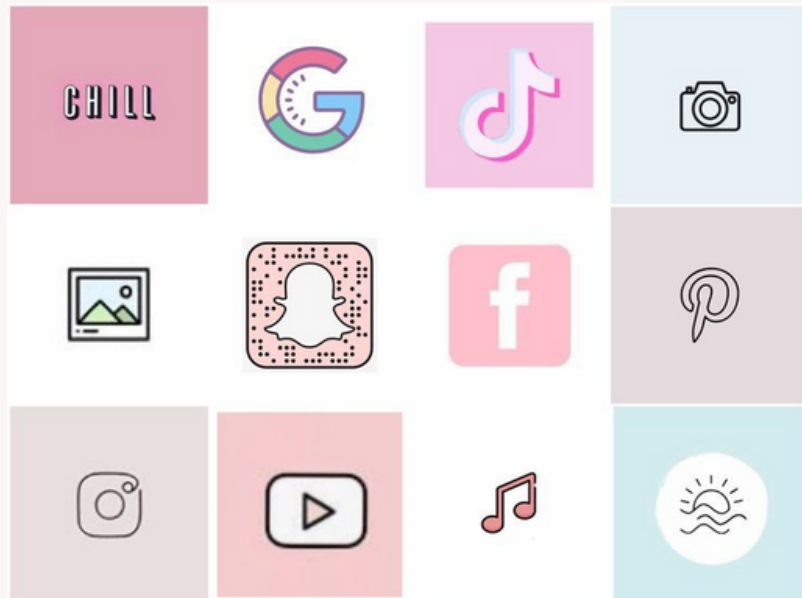
[1]The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

[2]www.ijrar.org (E-ISSN 23481269, P- ISSN 2349-5138) IJRAR19J3062 International Journal of Research and Analytical Reviews (IJRAR) www.ijrar.org 1138 Impact of Moment Marketing on Consumer Buying Behavior for Fast Moving Consumer Goods Kumkum Sinha, Assistant Professor, Pioneer Institute of Professional Studies, Indore Dr. Kali Charan Modak Assistant Professor, IPS Academy, IBMR, Indore

[3]<https://bhatnaturally.com/2009/07/17/amul-on-the-bandra-worli-sea-link/>

[4]<https://twitter.com/zomato/status/1426612154216566786?lang=en>

[5]<https://www.adsoftheworld.com/campaigns/falling-hoarding>



## Moment Marketing revolving around any individual or celebrity.

Sometimes, when a brand engages itself in moment marketing around an event or a performer, controversy arises because the brands who have officially sponsored the performers or celebrities in question may not be comfortable with other brands stealing the limelight.

While there is no cogent legal definition for the word “celebrity”, in any statute book in India, Indian law does recognize the rights of the celebrities. Any celebrity or personality has certain rights, such as publicity, privacy, and personality rights, with which they can assert. Celebrities like Amitabh Bachchan, Rajnikant, Sonu Nigam, Barkha Datt and many more have successfully asserted their rights in the past. The rights of famous personalities are recognized not only in India but in many other jurisdictions as well[6].

In the case of Shivaji Rao Gaikwad (aka Rajnikanth) v. Varsha Production (2015)[7], Rajnikant successfully challenged the usage of his name and rights by the Defendant in a movie titled, MAI HOON RAJNIKANT, which was being produced by the Defendants without his authorization.

Celebrities have the right to control their image, which includes their name and voice. They also have the right to decide when they want to be photographed or filmed by media outlets. **Article 21** of the Indian Constitution provides protection not only for life but also protects personality rights. **Article 19** also plays an important role in giving personalities the freedom of speech and expression.

[6](i)505 SE 6869 LRA 101 Pavesich Vs. New England Life Ins. Co. (ii)694 F2d 674 Martin Luther King Vs. AM.Heritage Prod (iii)849 F2d 460 Midler Vs. Ford Motor Co (iv)122 Misc. 2d 603 Onassis Vs. Christian Dior (v)17 OR 2d 425 Athans Vs. Canadian Adventure Camps Ltd

[7]HIGH COURT OF MADRAS : Application No. 735 of 2014 and Civil Suit No. 598 of 2014

To take a recent example associated with moment marketing, PV Sindhu, India's ace badminton player, made history by bagging a bronze medal in the Tokyo 2020 Olympics. While the country celebrated her historic feat, different businesses used "moment marketing" to stay relevant and capitalised on her success and popularity. Concerned that many firms were exploiting this chance to capitalise on such message, perhaps portraying it as an endorsement, it was reported that Sindhu and her agency Baseline Ventures are ready to sue 20 brands for such moment marketing- Leading public and private sector banks, white goods manufacturers, and FMCG businesses are among the brands, with each claiming Rs 5 crore[8].

Having said that it must be remembered that like other rights, the celebrity or personality rights are also not absolute. In the recent case of **Digital Collectibles Pte Ltd and others versus Galactus Funware Technology Private Limited**[9], decided last month on 26th April 2023, personality rights of certain Indian cricketers, specifically in their Digital Player Cards were discussed by the Delhi High Court in the dispute involving two platforms - Rario and Striker. This case is significant and touches upon many aspects including personality rights, possibilities of extent of usage of intellectual property rights digitally on NFT platforms and also likelihood of endorsements.

Here, the Plaintiff is a company incorporated in Singapore and carried out its business under its trade name "Rario," primarily through its website and related mobile applications. Rario had the official licenses from the cricketers and was using their actual photographs whereas Striker was using the artwork, initials and the publicly available statistics. Rario claimed that the entire value of the digital art collectibles/NFTs available on the Striker Website is derived from the names, likeness and personalities of the players and not on account of the artistic contents of the images.

However, upon considering various aspects in detail including the actual usage by Striker, the Court recorded that:

**A perusal of the Digital Player Cards being used by the defendants on the Striker platform would show that the said cards do not suggest any kind of endorsement or association with the player concerned. Nor do they claim that the cards have been autographed or officially licensed by the players. Further, the NFT Player Cards offered by Striker do not contain the original photograph of a player and only use artwork.**

Rario insisted on an injunction against Striker which was not granted, and the Court held in unequivocal terms that personality rights are not absolute.

**In view of the discussion above, in my opinion, the violation of the right of publicity in India has to be considered on the touchstone of the common law wrong of passing off, as also weighed against the 'right to freedom of speech and expression' enshrined under Article 19(1)(a) of the Constitution. 'Passing off,' though a remedy under common law, is referenced in statutory law in India. It has been recognized in various judgments of the Supreme Court and High Courts. The action of passing off is based on the foundation of deceit and misrepresentation.**

**In my opinion, use of celebrity names, images for the purposes of lampooning, satire, parodies, art, scholarship, music, academics, news and other similar uses would be permissible as facets of the right of freedom of speech and expression under Article 19(1)(a) of the Constitution of India and would not fall foul to the tort of infringement of the right of publicity.**

[8] PV Sindhu, Baseline Ventures to send legal notice to 20 brands - Telangana Today

[9] Delhi High Court: CS(COMM)108/2023

While dealing with possible endorsements, the Court specifically observed

**The plaintiffs have also compared the selling and trading of NFTs on the Striker platform as akin to a bat of a cricketer being sold with his autograph without his authorization. In my view, this analogy is completely misplaced. Unlike a bat which is signed by a particular player, the NFT Player Cards in the present case do not have any such signature/autograph or anything to establish a connection, license or endorsement from a player.**

### Intellectual Property Rights

Infringement of third-party rights associated with the event like lyrics, dialogues, life events or moments is the most intriguing and sometimes overlooked danger in moment marketing. A lot of effort is put in by the brands in creating the art work, logos, tag lines, colour combinations, songs etc. around an event to publicize the same and thus the organizers of the event are generally extremely zealous around protecting the same.

In one of the earliest cases around two decades ago, revolving around the Cricket World Cup held in South Africa in 2003, ICC Development (International) and others vs Arvee Enterprises And Another [10],

an issue arose when Philips wanted to give free tickets to its lucky draw winners to the World Cup. This was objected to by **ICC on the grounds that no permission was obtained by Philips for usage of the words, WORLD CUP**. This contention was not upheld on various grounds, and the Court specifically ruled that no monopoly could be claimed over the words: world cup.

Further, the defendant had only used an indicative art work without using the logo, the words ICC or the mascot Dazzler. There was also no photography of any famous cricketer that was used. The court observed:

**“ ..... prima facie, the words "World Cup Cricket" and "World Cup" have to be non-exclusive and generic. The defendants have, admittedly, not used the logo or the words "ICC Cricket World Cup- South Africa 2003". The use of slogans by the defendants - "Philips: Diwali Manao World Cup Jao" and "Buy a Philips Audio System win a ticket to the World Cup", inserting a pictorial representation of a ticket with an imaginative seat and gate number saying, "Cricket World Cup 2003" and also using the picture of a batsman with three wickets, suggests only the game. Prima facie, defendants' use of the disputed words, in the advertisement is descriptive and not as a mark. It is a fair use, permissible under the law.”**

..... The right of Publicity vests in an individual and he alone is entitled to profit from it. For example, if any entity, was to use Kapil Dev or Sachin Tendulkar's name/persona/indicia in connection with the 'World Cup' without their authorization, they would have a valid and enforceable cause of action."

Interestingly in another judgement, \_ Icc Development (International) vs Ever Green Service Station and others[11] ICC succeeded in obtaining a stay order around the same event against Ever Green Service Station and Hindustan Petroleum Corporation Limited (hereinafter, "HPCL"), as in this case the logo was being used by the defendant. The Court granted an injunction confined only to the logo (denoting black and white stripes colours Zebra) on the advertisement, pending final disposal of the suit.

[10]Equivalent citations: 2003 VIIAD Delhi 405, 2003 (26) PTC 245 Del, 2004 (1) RAJ 10,

[11]2003 IAD Delhi 707, 102 (2003) DLT 723, 2003 (26) PTC 228 Del, 2003 (1) RAJ 426

The classical principle that any case of intellectual property infringement always depends on the facts of each case needs to be remembered. While it would be difficult to lay down a straight jacket formula, it is important that creators must be extra cautious while creating the advertisements.

### Endorsements:

While it is established that celebrities have their rights, the rules around the celebrities has been tightened further with the new guidelines pertaining to **Endorsement Know-hows! [12]**

Department of Consumer Affairs in India has released a set of guidelines on 6th March 2023 called "Endorsements Know-hows!" under Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022.

These guidelines are applicable to celebrities, influencers, and virtual influencers on social media platforms and require them to specifically disclose any **material connection** with their advertisement to ensure that people are not misled. Material connection has been widely defined to include not only payments but also indirect benefits and incentives like media barter, contest entries, awards, coverage or family or personal relationships. The guidelines illustrate that such disclosures of material connection will ensure that the consumers are in a position to make an informed decision.

The guidelines give detailed specifications on specifications of disclosure like :

- endorsements must be made in simple, clear language, and terms such as "advertisement," "sponsored," "collaboration" or "paid promotion" can be used.
- Individuals must not endorse any product or service that they have not personally used or experienced or in which due diligence has not been done by them.
- Disclosure should be displayed clearly, prominently, and extremely hard to miss in the endorsement.
- Celebrities and influencers are required to review and satisfy themselves that the advertiser is in a position to substantiate the claims made in the advertisement.
- Placement of disclosure is very important and it should be ensured that the Disclosure should be superimposed over the image enough for viewers to notice and should be placed in the video and not just in the description.
- Disclosures should be made in both audio and video format.
- Disclosures and endorsements should be in the same language.

In case any brand creates an impression that the products are being endorsed through unauthorized usage while encashing on any specific event around the celebrity, the celebrities are required to be zealous in terms of disclaiming their association [SPYL1] with such brands as was proactively done by PV Sindhu.



[12] Endorsement Know-Hows (consumeraffairs.nic.in)

## Conclusion:

Moment marketing makes you visible, it makes you feel relevant, and it helps you connect with your audience in a relatable way; yet it is critical to recognise that every moment is not your brand's to promote. According to the business, it is critical for a brand to be selective about the moments on which it can rely.

Moment marketing is a time-sensitive endeavour, which is why it is frequently prone to missing the mark or falling on the wrong side of the fence. That is why it is critical for any agency or brand to establish some ground rules to assist them manage it.

The obvious hazards occur when ads use popular song lyrics or hook lines, take renowned language from legendary movies, or simply appropriate a celebrity's life event or moment and make it their own.

While moment marketing has its merits as a valuable strategy for brands looking to engage with their audience and stay relevant in a rapidly changing world. However, it is important to proceed with caution and ensure that all legal and ethical considerations are taken into account to avoid any potential negative consequences.

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