

IP & IT Laws News Bulletin

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VAISH ASSOCIATES ADVOCATES
Corporate, Tax and Business Advisory Law Firm

From the Editor's Desk...



Dear Readers,

On the occasion of India's 58th Republic Day, I pray for a bright & prosperous India, which is poised to become the 2nd largest economy in the world by 2050.

The present issue emphasizes, not only on the criminal remedies involved in the Intellectual Property matters, but also on the effectiveness of the criminal mechanism for enforcement of penal laws to curb the violation of Intellectual Property Rights in India. We have focused on the penal laws dealing with Trade Marks and Copyrights, under the Trade Marks Act, 1999, the Copyright Act, 1957 and the Indian Penal Code, 1860. Our effort is to highlight the ignorance widely prevalent in respect of the applicability of such laws and the deterrent effect it would have, if made proper use of.

Besides dealing with the criminal remedies in India for enforcement of IPR, as a regular feature, a summary of recent Indian Court Decisions on IPR has also been provided, which would give an insight into Indian judicial mindset. We have tried to cover other relevant topics of interest of our readers. This news letter is an attempt to bring awareness of Indian IPR & IT laws, and the remedies available for its protection. We welcome your comments and suggestions.

With Regards.

Vijay Pal Dalmia

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PATENTS

NOVARTIS GLIVEC- PATENT CASE-News from Madras High Court

In a significant development which may affect Section 3(d) of the Patents Act, 1970, Novartis AG, has gone into appeal before the Madras High Court against the decision of the Indian Patent Office, which has rejected grant of patent to Glivec, an anti cancer drug, on the ground that the claim of Novartis AG of improvement to the original drug is nothing but “old wine in a new bottle”. Slight improvements in form or structure of the existing medicine will be hit by Section 3(d) of the Patents Act, 1970. Section 3(d) provides that the mere discovery of any new property or mere new use for a known substance or the mere use of a known process, machine or apparatus unless such known process results in a product or employs atleast one new reactant, shall not fall within the definition of patent. Novartis AG has challenged the constitutional validity of Section 3(d) of the Patents Act, 1970. The decision of the Indian Patent Office has been welcomed by Indian Drug Manufactures.

Microsoft

wins case against Copyright Piracy and Infringement

In a significant decision, in the case titled as Microsoft Corporation Vs. Deepak Raval Delhi High Court has ruled that sale of pirated software, which are properties of Microsoft by a computer vending firm, amounts to



infringement of trade mark and copyright of Microsoft. The issue before the Court was illegal and unauthorized installation of Microsoft Windows 98 operating system,

Microsoft Visual Basic 6.0, Microsoft Visual C++ 6.0, Microsoft FoxPro, and Microsoft Office 2000. The Court enjoined the defendants saying “in so far as grant of relief of injunction is concerned it hardly possesses any problem”, and held that the Defendants were guilty of violation of Microsoft's copyright and trade mark. In this case, the Court also granted punitive damages, by holding that the Defendants acts of violation were “willfully calculated to exploit the advantage of an established mark” In this case the Court took the professional help of a Chartered Accountant for the calculation of damages who assisted the Court to arrive at the figure of punitive damages of INR 1, 28, 23, 200. However, in the suit since the damages claimed were only Rs. 5, 00,000/-, the Court granted only the above sum as damages.

[Reported in MIPR 2007(1) 0072]

Reckitt & Colman of India Ltd. Vs. Charmy Industries & Anr.

2006(33) PTC 718(IPAB)

CHERRY VS. CHARMY

The plaintiff manufactures shoe polish under the trade mark “CHERRY.” The aforementioned appeal was preferred against the order of registration of the Mark. “CHARMY” with respect to shoe polish. The mark “CHARMY” was held to be deceptive to “CHERRY” and it was further held that user of a mark for five months prior to filing of application has no capacity to acquire distinctiveness.

N Ranga Rao & Son V. Anil Garg & Ors

2006 (32) PTC 15 (Del)

DIA VS. LIA

The issue before the Court was with respect to the trade marks “DIA” and “LIA” with respect to incense sticks and dhoop, which were being packed and sold in similar kind of packings having similar get-up, lay-out, design and colour combination etc. It was held that though the trade marks “DIA” and “LIA” were not similar to each other but it was a case of passing off. The Delhi High Court, in the above case, passed a decree of permanent injunction restraining the Defendants from trading under the trade name “DIA” which was phonetically similar to the trade name “LIA” of the Plaintiffs and held that the use of a similar colour scheme does not amount to the

infringement of trade mark but a resemblance and similarity in the colour scheme, colour pattern, packing, and prices along with phonetic similarity in the trade name "LIA", of the Plaintiffs, and "DIA" of the Defendants would amount to passing off.

**Financial Software and Systems Pvt. Ltd Vs.
Flextronics Software Systems Ltd**
2006 (33) PTC 687 (Mad.)

The issue before the Court related to the abbreviation of the name of the appellant Financial Software and Systems Pvt. Ltd (FSS) and use of the abbreviation (FSS) by Flextronics Software Systems Ltd. The defendants in the aforementioned case were restrained from using the mark/word "FSS" which was being used by the Plaintiffs for the last 14 years. The Court held that even though the mark "FSS" was not registered by the Plaintiffs, the Defendant was restrained owing to the principle of passing off and prior user. Therefore, usage by Defendant without artistic mark of word "FSS" was considered as causing harm to the Plaintiff as there was a prior use thereon by the Plaintiff.

Himalaya Drug Company V. Sumit
2006 (32) PTC 112 (Del.)

This case pertains to the use of database of the Plaintiff by the Defendant in the website <http://ayurveda.virtualave.net>. The Delhi High Court, in the aforementioned case, restrained the Defendants by an ex parte injunction from using the website <http://ayurveda.virtualave.net> which reproduced the Plaintiff's entire herbal database in verbatim. The Plaintiff's website www.thehimalayadrugco.com apart from displaying write ups on ayurveda, animal health products, ayurvedic herbs etc. contained a unique feature titled as "Himalayas Herbs". The Defendants not only infringed the copyright vested in the Plaintiffs but also, owing to the uniqueness of the said database, violated the "trade dress rights" that exist in respect of the Plaintiff's herbal database and any similar herbal database that appears on a different website is bound to create confusion by causing the consumer to associate the website with that of the Plaintiffs.

**Tractors and Farm Equipment Ltd. V. K. S.
Sunil Kumar**
2006 (32) PTC 126 (Ker.) (DB)
Descriptive Mark

INSTA POWER V. INSTANT POWER

The above case deals with the law relating to descriptive words, which are used as trade marks. This appeal came up before the Kerala High Court, which arose from a suit

for declaration that the expression "INSTA POWER" is a descriptive term having direct reference to the words "INSTANT POWER", and the respondent cannot claim a monopoly over the above words. The issue before the court was, whether the trademark "INSTA POWER" is descriptive or not. The Kerala High Court, in the above matter, held that the term "INSTA POWER" has a direct reference to the term "INSTANT POWER" and is a generic and descriptive term describing the character and quality of the goods vis-à-vis batteries etc.

"FIRST PAST THE POST"

"BLENDERS PRIDE"

**Austin Nichols & Co. & Anr V. Arvind Behl
& Anr.**

2006 (32) PTC 133(Del)

The Plaintiff, in the instant case, is the owner of the trade mark "BLENDERS PRIDE", a brand which was originally owned by Seagram Canada and assigned to the plaintiff in India. The Defendants were restrained from using the trade mark "BLENDERS PRIDE" for alcoholic beverages including whisky or any other allied goods thereof and it was held that the Defendants, merely by virtue of their obtaining registration in India in 2004 effective from 1994 do not acquire "first past the post" rights and the same would not be sufficient. The Registration against the prior adopter and user of the trade mark outside India, will not hold good. International trade marks and their user, even out of India, are valid in India, and any violator can be restrained for such dishonest adoption and registration.

NATRAJ V. NATORAJ

**Hindustan Pencils Limited V. M/s J. N.
Ghosh & Bros. Pvt. Ltd.**

MIPR 2007 (1) 0041

The said case is a classic illustration of the phonetic similarity in respect of two trade marks namely "NATARAJ" and "NATORAJ". The defendants, in the instant case, were restrained from using or trading under the name and style of "NATORAJ" in respect of mathematical boxes or any other stationary items as also from using the design of the idol of Lord Nataraj as the said mark was held to be phonetically and deceptively similar to the trade mark "NATARAJ" of the Plaintiff. It was further held that competing marks in relation to goods have to be considered not only in relation to the identity of the goods but also in relation to cognate and allied goods besides considering trade channel and common consumer, i.e, children. The said injunction was granted in favour of the Plaintiff notwithstanding.?

RESTRAINED!!!

Courts held these Trade Marks to be similar and granted injunctions

Betnovate Vs. Betavat

Zevit Vs. Evit

Prestige Vs. Pre/stage

Ajanta for toothpaste Vs. Ajanta for tooth brushes

Institute of Chartered Financial Analysts (ICFAI) Vs. Chartered Financial Analysts

Volvo Vs. Volwo

Sony Vs. Sonny

Viagra (Medicine) Vs. Viagra.in (Domain)

Yahoo.com (Yahoo! Inc.) Vs. Yahoo (Chewing Tobacco pan masala)

INJUNCTIONS REFUSED!!!

Crocin Vs. Corinal

Zincovit Vs. Zinconia

Glucon-D Vs. Glucose-D

IPR & CRIMINAL REMEDIES IN INDIA

- Can combined criminal actions be initiated under the Trade Marks Act, 1999 and the Copyright Act, 1957 in case of infringement and/or passing off?
- Is registration of copyright or trade mark mandatory before initiation of criminal action?
- Is it mandatory to name the accused persons or a criminal complaint can be filed against unknown persons?
- Should the complainant opt for a complaint before the Magistrate or directly lodge an FIR with the police?
- What is the appropriate procedure for initiating criminal proceedings against the violators?

Intellectual Property covers within its ambit a wide array of laws relating to Trade Marks, Copyright, Patents, Designs, Geographical Indications, Plant Varieties and Semiconductor Integrated Circuits Layout-Design. Loosing one's intellectual property owing to lack of initiation of appropriate civil and/or criminal action is a heavy price to pay.



Protection of intellectual property is available under, both, civil as well as criminal law mechanisms, in India. But in practicality, criminal remedy is much effective a medium for protection of rights, particularly

Intellectual property rights, as compared to civil remedy, as criminal action strikes general deterrence and comes with social stigma. The criminal action not only acts as deterrent against the accused but also precludes the entire distributor- sales network of such person as well as the market in general, from doing any such act which would amount to infringement and/or passing off of the goods under the trade mark of the complainant.

Even though intellectual property is an umbrella term, but remedy by way of criminal action is provided only for trade marks and copyrights. Section 63 of the Copyright Act, 1957 deals with Offences of infringement of copyright or other rights conferred by the Act and provides for an imprisonment for a term not less than six months which may extend upto three years and fine not less than fifty thousand rupees which may extend upto two lakh rupees. The said term of imprisonment and fine can be enhanced under the provisions of Section 63A of the Copyright Act, 1957.

On the other hand, the Trade Marks Act, 1999 also provides for criminal remedies against infringement and passing off of the trade mark under Chapter XII which deals with offences, penalties and procedures. Section 103 and 104 provide for imprisonment for a term not less than six months which may extend upto three years and fine not less than fifty thousand rupees which may extend upto two lakh rupees. The provision for enhanced punishment is laid down under Section 105 of the Trade Marks Act, 1999. For the effective implementation of the provisions relating to infringement and/or passing off of the trade mark and/or copyright, both, the Trade Marks Act, 1999 and the Copyright Act, 1957 provide for search and seizure powers of the police under sections 115 and 64 respectively.

Every trade mark involves copyright but every copyright does not necessarily involve trade mark. According to Section 2(m) of the Trade Marks Act, 1999 "mark" is defined as to include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colors or any

combination thereof. Therefore, in any trade mark action the provisions of the Copyright Act, 1957 can also be invoked simultaneously. The Trade Marks Act, 1999 further defines “mark”, “trade mark” and “registered trade mark” separately under sections 2(m), 2(zb) and 2(w) respectively. Thus, from the aforementioned definitions it can be deduced that the legislature, in its wisdom, defined all the three terms separately, keeping in view the provisions of the Trade Marks Act, 1999 and the erstwhile repealed Trade and Merchandise Act, 1958.

Registration of trade marks and copyrights

The common perception is that the registration of trade marks is mandatory to initiate an action against infringement and/or passing off. It is interesting to note that Section 102 defines Falsifying and falsely applying trade marks, Section 103 defines Penalty for applying false trade marks, trade description etc and Section 104 defines penalty for selling goods or providing services to which false trade mark or false trade description is applied. The aforementioned sections were dealt under sections 77, 78 and 79 of the repealed Trade and Merchandise Act, 1958. From a bare comparison of the said sections under the present Trade Marks Act, 1999 and the repealed Trade and Merchandise Act, 1958, an inference can be drawn that the legislature deliberately retained sections 77, 78 and 79 of the Trade and Merchandise Act, 1958 as sections 102, 103 and 104 of the Trade Marks Act, 1999 in verbatim except for enhancement of the quantum of punishment prescribed therein without touching upon the issue of registration of trade marks.

In a controversy pertaining to the requirement of registration of trade marks for initiation of criminal action, the Hon'ble Supreme Court in AIR 1972 SC 232 clearly distinguished a registered trade mark from an unregistered trade mark and interpreted sections 77, 78 and 79 of the Trade and Merchandise Act, 1958 to lay down that the legislature is silent and has deliberately not used the word “registered” before the words trade mark, mark or trade description in the chapter dealing with offences, penalties and procedure and therefore the registration of the trade mark is not compulsory for initiation of criminal action.

There are a plethora of judgments which have laid down that the registration of copyright is a mere recordal of the fact of ownership and is not compulsory for initiation criminal action. Interestingly, neither the Copyright Act,

1957 nor the erstwhile repealed Trade and Merchandise Act, 1958 make the registration of copyright mandatory.

In 1979 CRL. L. J. 757 the Patna High Court held that registration of copyright is not mandatory nor is it a sine qua non to the subsistence or the ownership thereof or the relief of infringement of copyright. The same was upheld in AIR 1981 All 200 and it was laid down that copyright is a common law right.

Procedure under criminal law

Under Section 156 of the Code of Criminal Procedure, 1973 the police has the power to investigate cognizable cases. Sub section 3 Section 156 provides that in case of refusal by the police to lodge an FIR or initiate criminal action, the aggrieved can file a complaint before the Magistrate, the procedure w.r.t. which is laid down in section 190 of the Code of Criminal Procedure, 1973. The offences under the Trade Marks Act, 1999 and the Copyright Act, 1957, by virtue of the First Schedule table II of the Code of Criminal Procedure, 1973, are classified as cognizable offences though the same is not provided for in the said Acts. The First Schedule table II-Classification of offences against-other laws- provides that “Any offence which is punishable with imprisonment for 3 years ... is a cognizable, non-bailable offence and triable by the Magistrate of First Class”. Thus, an offence under the Trade Marks Act, 1999 and the Copyright Act, 1957 can be investigated and inquired by the police by mere registration of an FIR without the adjudication by the Magistrate upon the issue. However, the police are mostly reluctant in registering an FIR in respect of intellectual property matters. In respect of a criminal action with regard to trade marks, as mentioned before, an opinion from the registrar of Trade Marks is compulsory under Section 115(4) of the Trade Marks Act, 1999. As such, complaint before the Magistrate for issuance of summons and trial of the infringers is a convenient option, as the prerequisite of obtaining an opinion from the Registrar of Trade Marks is not called for. Yet another benefit of taking recourse to criminal action is that the same can be initiated against unknown persons. Plenty of times it happens that the identity of the manufactures and the distributors of the infringing material is not known to the complainant and the same operates as an obstacle in initiation of criminal action. The said issue is addressed under Section 93 and 94 of the Code of Criminal Procedure, 1973 under which one can request for initiation of a search and seizure proceedings against known and unknown persons which is the

underlying difference between a civil and criminal action. The said proposition has been upheld in numerous judgments, that is, 1983 PTC 230, 1986 PTC 352, 1982 PTC 411 and 1990 PTC 175 etc.

From the above detailed discussion it can be concluded that protection of one's intellectual property is the need of the hour and the most effective remedy is initiation of criminal action against the infringement of intellectual property rights which has an edge over civil remedy.

RBI Prior Approval for remittance to purchase Trademark or Franchise in India dispensed with



The RBI has dispensed with the requirement of prior approval for drawing foreign exchange for remittance for purchase of trademark or franchise in India. Necessary notification has been issued to this effect, in the Foreign Exchange Management (Current Account Transactions) Rules, 2000 ("the

FEMA Current Account Rules"). Presently, according to Rule 5 of the FEMA Current Account Rules, prior approval of the RBI is required for drawing foreign exchange for remittance for purchase of a trademark or franchise in India.

For details, please visit

[Source: RBI/2006-07/190 A.P. (DIR Series) Circular No. 14 dated 28th November, 2006] www.rbi.org.in

PROCEDURE FOR TRADE MARK OPPOSITION IN INDIA**

PUBLICATION OF TRADE MARK IN THE TRADE MARK JOURNAL



OPPOSITION TO BE FILED WITH IN 3 MONTHS FROM THE DATE OF PUBLICATION IN THE TRADE MARK JOURNAL

OR

FROM THE DATE, WHEN THE TRADE MARK JOURNAL IS MADE AVAILABLE TO THE PUBLIC, WHICH EVER IS LATER



OPPOSITION TO BE FILED ON FORM TM-5



COUNTER REPLY TO BE GIVEN ON FORM TM-6 FROM THE DATE OF THE RECEIPT OF THE NOTICE OF OPPOSITION FROM THE REGISTRAR OF TRADE MARKS WITH IN TWO MONTHS



EVIDENCE IN SUPPORT OF OPPOSITION TO BE GIVEN WITH IN 2 MONTHS FROM THE DATE OF THE SERVICE OF COUNTER STATEMENT

*** EXTENSION OF ONE MONTH IN AGGREGATE ALLOWED**



FURTHER EVIDENCE IN REPLY EVIDENCE OF APPLICANT, IF ANY, TO BE GIVEN WITH IN 1 ONE MONTH FROM THE DATE OF THE SERVICE / INTIMATION OF EVIDENCE BY OPPONENT.



NO FURTHER EVIDENCE ALLOWED. HOWEVER THE REGISTRAR CAN EXERCISE ITS DISCRETION FOR FURTHER EVIDENCE SUBJECT TO COST AND TERMS.

*** THIS CAN BE DONE BY WAY OF INTERLOCUTORY APPLICATION.**



COPY OF SUPPLY OF EXHIBITS TO OPPOSITE PARTIES, SUBJECT TO PAYMENT OF COST



UPON COMPLETION OF PLEADINGS AND EVIDENCE, THE REGISTRAR GIVE NOTICE TO PARTIES FOR FIRST DATE OF HEARING



IF PARTIES WISH TO ATTEND HEARING, NOTICE OF INTENT TO ATTEND HEARING SHALL BE GIVEN ON FORM-7, WITH IN 14 DAYS OF THE NOTICE OF HEARING FROM THE REGISTRAR.



ADJOURNMENTS & MISCELLANEOUS PROCEEDINGS



FORM-7 NOT FILED BY APPLICANT. THE REGISTRAR MAY TREAT THE APPLICATION AS ABANDONED



FORM-7 NOT FILED BY OPPONENT. THE REGISTRAR MAY DISMISS THE APPLICATION FOR WANT OF PROSECUTION.



DECISION BY THE REGISTRAR

- Govt. Fees on Form TM-5 Rs. 2,500/- ** Govt. Fees on Form TM-6 Rs. 1,000/- *** Govt. Fees on TM-7 Rs. 500/-
- ** Subject to change without prior notice. You must consult your counsel for final legal advice on step to step basis. No professional relationship is created on the basis of the above chart or information or opinion of the writer of this page.
- The opposition has to be filed and contested where the original application was filed i.e the Appropriate office (Ahmedabad, Mumbai, Delhi, Kolkata, Chennai)

IPR & Penal Laws in India

Any person committing an act of passing off / infringement is not only liable to be prosecuted under the penal provisions of the Trade Marks Act 1999 but also under the Indian Penal Code, 1860 which is the principal act governing criminal laws in India. The present article gives an overview of the provisions of the Indian Penal Code (IPC), which can be effectively enforced against the violators of trade marks and the other intellectual property rights vested in the trade mark. The India Penal Code of 1860 is one of the oldest Indian statutes and is the substantial law which defines the offences and corresponding punishment for committing those offences.

Any person passing off or infringing any trade mark is guilty of an offence of cheating, forgery, as have been defined under Section 415 and 463 respectively.

The oxford dictionary defines the word "cheat" as "to trick somebody or to make somebody believe something which is not true."



The offence of "Cheating" as defined under Section 415 of the IPC means, to commit an act with fraudulent or dishonest intention, to deceive any person, or to do or omit to do any act, which the

person being deceived would not have done in normal course, and such act or omission is likely to cause damage or harm in body, mind or reputation to the person so deceived or wrongful gain to the person who deceives. The punishment, as prescribed under Section 417, for the said offence is imprisonment of for a term of either description (i.e. simple or rigorous) which may extend to one year, or with fine or with both.

The illustration (b) appended to section 415 reads as follows "(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats."

With this illustration the legislative intent, to facilitate the protection of the trade marks, is brought out clearly and the perception that the law concerning trade marks is in an infant stage is washed away. What's in the infant stage is not the law, but the realization and the implementation of the said law.

To make a person responsible for passing off/ infringement of a trade mark liable for an offence of cheating, the necessary ingredients are:

1. intentional use of trade mark, which is not his trade mark, or applies a deceptively similar trade mark;
2. such use is to induce purchasers or prospective purchaser, to make them believe that the goods sold or services rendered, are from a certain source, which actually they are not.

The word forgery is synonymous to fake and counterfeit.

Section 463 of the IPC defines the offence of forgery as an act of making false documents or electronic records with the intention to cause damage to public or to any person or to enter into any express or implied contract with an intent to commit fraud. The punishment, as prescribed under Section 465, for the said offence is imprisonment of for a term of either description (i.e. simple or rigorous) which may extend to two years, or with fine or with both.

To make a person responsible for passing off/ infringing a trade mark liable for an offence of forgery, the necessary ingredients are:

1. making a false documents or their part thereof containing somebody else's trade mark,
2. with an intention to deceive and commit fraud,
3. inducing a purchaser or prospective purchaser to any express or implied contract to sell goods bearing forged trade mark.

Any person who commits an act of passing off/ infringement of trade mark is concurrently liable to prosecuted for commission of an offence of cheating and forgery as defined under section 415 and 463 of the Indian Penal Code respectively.

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