

# INDIA INTELLECTUAL PROPERTY & INFORMATION TECHNOLOGY LAWS News Letter



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From the Editor's Desk...



Dear Readers,

This issue brings you an analysis of the recently promulgated privacy and data protection regulations titled as the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, wherein wide ranging obligations are imposed on practically all entities involved in collection, handling and processing of data of natural persons for any purpose. These new Rules could have a profound effect on multinational businesses that either outsource business functions to Indian service providers or maintain their own operations in India.

We have also tried to give you an insight into the major trade mark infringement cases in India which have demonstrated a significant impact in creating extremely healthy precedents in the IPR regime in India. In a spate of recent judgments, the Indian judiciary has been prompt in providing interim protection to trademark proprietors.

Deterrence philosophy is being extensively followed by the Indian Courts these days. This issue also analyses few orders of Indian Courts granting punitive damages to discourage unscrupulous individuals / companies to take unfair advantage upon the goodwill and reputation of well-established companies/organizations.

In this issue, we also bring forth an analysis of the law relating to jurisdiction for initiation of legal action in Indian Courts on the basis of interactive websites.

We welcome, as always, your views, comments and input.

With Regards.

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## **KNOWLEDGE BANK**

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## Do you have a Privacy Policy?

### NEW INDIAN PRIVACY AND DATA PROTECTION RULES

#### The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011



Affecting all, the Central Government has recently, on 11th April, 2011, dramatically transformed the privacy and data protection landscape in India by promulgating the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

The new Rules have wide scope and extraterritorial application. These new Rules could have a profound effect on multinational businesses that either outsource business functions to Indian service providers or maintain their own operations in India. The Rules impose wide ranging obligations on any “body corporate” regarding use and collection of personal information.



These Rules cast a duty upon the Corporate to have a mandatory Privacy Policy for handling, processing and use of personal sensitive data.

It also requires a body corporate to *publish the privacy policy* on its website. It also restricts the processing of *sensitive personal data*, restricts *international data transfers*, establishment of a *dispute resolution mechanism* and requires *additional security* measures.

Some of the provisions under the new Rules appear to be more restrictive than regulations under US laws and the EU Directive. It is argued that the new Rules could have a dramatic effect on the IT landscape in India and for overseas companies that contract IT services with Indian companies.



The Rules apply to Corporations in India getting any information from anywhere. These Rules define “*sensitive personal data*” to include password, bank account details, credit card, debit card, health conditions, sexual orientation, medical records etc. and permit the collection of such information by Corporate only for a '*lawful purpose*'

connected with their function or activity and '*necessary*' for that purpose.

The most important feature of the Rules is the absolute requirement of taking *consent, in writing by email, fax or letter, before* the collection of sensitive personal data, regarding purpose of usage of such information and before disclosing any information to any third party. Thus, Outsourcing companies in India will have to inform the client regarding purpose of usage before collection of such information. This would put additional responsibility on Indian suppliers to obtain consent from the customers of their clients. It is interesting to note that the consent is not required in case of disclosure to the Government.

These Rules further provide that a corporation should take reasonable steps to inform an individual that personal information about them has been collected and the purpose of that collection. The sensitive information must not be retained for longer than is necessary. Furthermore, personal information must only be used for the purpose for which it was collected. It also empowers a person to access its personal information or sensitive information which is held by a corporation, and to correct inaccuracies. These Rules also require that an individual should be provided with the option to opt out of providing personal information. These Rules lay down the standards for protection of sensitive personal information. However, Corporate is free to follow their own standards provided it is duly approved and audited annually.

It also makes it obligatory for a Corporate to establish a dispute resolution mechanism for issues that arise during the handling, processing and use of personal information. In the event, a body corporate fails to have an elaborate privacy policy or fails to follow the rules for handling and processing of personal sensitive data, it becomes liable to pay compensation to the aggrieved person. It is to be noted that there is no upper limit specified for the compensation that can be claimed by the affected party in such circumstances.

The Rules allow the transfer of personal data to any person or Corporate, in India or abroad, provided that such person or Corporate ensures the same level of data protection that is adhered to by the Corporate as provided under these rules. This puts extra responsibility on the Corporate to ensure the compliance of prescribed standards by the transferee.

The new rules lack clarity creating ambiguity as to the extent of applicability of these rules. Furthermore, certain terms are not defined and may prove difficult to determine how they apply to typical scenarios.

*In view of the above, it becomes necessary that the Corporations in India should review their Privacy Policy and any online terms and conditions available on its website to ensure compliance with the new Rules.*

It also entails revision of the Employment contracts and offer letters, requiring specific consent of the employee with respect to the employer collecting, accessing and using personal information and sharing such information with third parties in accordance with the new Rules.

## INDIAN IPR DECISIONS

### Drink “Darjeeling Tea” at “Darjeeling Lounge”

#### Tea Board, India Vs. ITC Limited

MANU/WB/0271/2011



Recently the Calcutta High Court in a decision of its kind while upholding the importance of Geographical Indication (GI), refused to grant an injunction against ITC Limited, (the Defendant therein), from using the word “Darjeeling” for ITC Calcutta's

lounge area. This is an important decision not just because it is the first ever by an Indian court on the infringement of a registered GI, but also because it may have significant implications on the protection of GI rights in the country in the times to come.

“Darjeeling” and the logo of a woman holding tea leaves have been registered by The Tea Board (Plaintiff) as GIs as well as certification trademarks, under the respective Acts, in connection with “tea”.



The Tea Board sued the ITC Sonar, Kolkata Hotel, for their “Darjeeling Lounge” as the name for its executive lounge. The suit was mainly based on issues of infringement of the GI and the certification TMs, as well as for passing off and dilution “Darjeeling Tea”, being the Plaintiff's GI, was the first GI to be registered in India.

The Courts after hearing the arguments of both the sides, observes that under the Trademarks Act, registration of a Certification Trademark may be obtained both in goods and services and the proprietor or authorized user of the certification service mark has a right of action against an alleged infringer who uses a mark which is same or similar to the certification trademark. Such right of action of the proprietor or authorized user of a mark lies irrespective of the certification trademark being registered for goods and the impugned mark being used in respect of services or vice versa. Thus, there is no restriction on cross category claim.

However, situation may differ in case of a GI. The GI Act, as it reads today, applies only to goods and leaves services out of its current ambit. Therefore, infringement claim would not lie in case the same GI is used in relation to the services. However,



the Hon'ble judge, rightly considered the provision of Section 20(2) and Section 22(1) (b) of the GI Act to examine the tenability of a cross category claim.

The Court in its interpretation of S. 22(1)(b) of the Geographical Indication Act, 1999, which deals with the use of a GI in a manner which would constitute an act of unfair competition including passing-off, held as follows:

*“The expression “unfair competition including passing off” would not, by reason of the explanations in the relevant sub-section, imply that every kind of passing-off would amount to unfair competition. The expression has to be understood to mean that certain kinds of passing-off, not all, would amount to unfair competition as defined. The phrase used is “unfair competition” and not “unfair practice” or “unfair trade practice,” though it seems to have been borrowed from the TRIPS agreement and not uniquely coined. If every kind of passing-off amounted to unfair competition, Section 20(2) of the GI Act would be otiose.”*

The decision was categorical in stating that the word “Darjeeling” could not be exclusively claimed by the Tea Board despite its GI and TM registrations. Crucially, the court held, “Even for a case of passing-off, the use of “Darjeeling” by a person other than the plaintiff can be complained of if the word or the geographical indication has any nexus with the product with which it is exclusively associated upon the registration.” The matter was accordingly dismissed by the Court in favor of the Defendant.

**3D Trademark**

**Monopoly Over Shape Of A Bottle**

**Gorbatschow Wodka K.G. Vs. John Distilleries Limited**

MANU/MH/0630/2011



In an effort to uphold the mandate of the Trade Marks Act, 1999, the Bombay High Court granted an injunction while protecting the distinctive shape of “Gorbatschow Vodka bottles” and reiterated that the distinctive shape of containers or packaging materials used to market products also enjoys goodwill and reputation and *therefore can form the basis of an action for passing off in India.*

The Plaintiff, a wholly owned subsidiary of Henkel & Co. Sektkellerei KG, Germany, manufactures vodka which is bottled in distinctively bulbous shaped bottles, which bears resemblance to the unique onion dome shape of the Russian Orthodox Church.



The Plaintiff came to know about the Defendant and the unauthorized use of deceptively similar bottles from its website. The Defendant was using the deceptively similar bottles for manufacturing vodka under the trade mark 'Salute'. It is noteworthy that Plaintiff has registered the shape of its bottle in various countries including Germany, Poland, New Zealand, Australia and in several nations governed by the WIPO framework, however in India the registration of the bottle under the Trade Marks Act, 1999 is pending. It is pertinent to mention herein that the deceptively similar bottle of the Defendant was registered under the Designs Act, 2000.

The Plaintiff initiated an action of passing off against the Defendant before the High Court of Bombay to restrain the Defendant from launching its products in Defendant Bottles in India. . The Hon'ble High Court granted an ex-parte ad interim injunction restraining the Defendant from launching its products packaged in the deceptively similar bottles. Confirming the ex-parte ad interim injunction the Bombay High Court held the shape of the Vodka bottle which has been adopted by the Plaintiff is unique to the point of being capricious and has acquired distinctiveness. It further held that genuine and novel shape of the

vodka bottle trace back to the Plaintiff alone. The Hon'ble High Court further held that the Plaintiff has prima facie established both a trans border reputation as well as a reputation in the market in India and the shape of goods and their packaging is statutorily recognized as a constituent element of a trade mark as distinguishing the goods or services of a person with those of others.

**Punitive Damages awarded by Indian Courts**

**Pfizer Products Inc. & Anr. Vs. B. P. Singh Tyagi & Anr.**

MANU/DE/2146/2011

In an interesting case of trademark infringement, the Delhi High Court granted injunction against Omax Healthcare Pvt. Ltd. (“Defendant No. 2”) from manufacture and sale of its product being phonetically and deceptively similar to the registered trademark of the Plaintiffs and punitive damages of INR 1 lakh for act of infringement.



The Plaintiffs, a large multinational pharmaceutical company filed a, rendition suit for injunction of accounts and damages against the Defendants for marketing their cough syrup under the mark “OREX” being phonetically and deceptively similar to their registered mark being “COREX”.

The Delhi High Court granted injunction restraining the Defendant No. 2 from manufacturing, marketing and distributing cough syrup under the mark “OREX” or any mark deceptively similar to that of the Plaintiffs and awarded payment of INR 1,00,000 as punitive damages.

The Court placing reliance on its earlier decision of Pfizer Products, Inc and Anr. vs. Vijay Shah and Ors., discussed the entire jurisprudence on trademark infringement with respect to statutory rights provided under the Trademarks Act, 1999 and claims of passing off under common law.



The Court noted that a “consumer with average intelligence and imperfect recollection” has to be kept in mind. It is important to note that the consumer does not have both the marks lying side by side for comparison. This increases the chances of deception. It is a settled law that any party using a mark, visually, phonetically

and deceptively similar to that of a registered trademark creating confusion in the minds of the customers, would lead to claims of infringement and passing off.

Based on the above reasoning, the Delhi High Court, granted injunction against the manufacture, sale and distribution of cough syrup of the defendants under the name of “OREX” or any other name/mark which is phonetically and deceptively similar to the registered mark “COREX”.

### **Castrol Limited & Others Vs. Mr. Rajinder Kumar Gupta & Others**

MANU/DE/0936/2011

Deterrence philosophy is being extensively followed by the Indian Courts these days. After the case discussed above, we see yet another attempt by the Delhi High Court to grant punitive damages wherever court finds a case of clear intent of riding on another's goodwill.



In the case of Castrol Limited & Others Vs. Mr. Rajinder Kumar Gupta & Others

(decided on 21 March, 2011), Castrol filed a suit against the defendants for Permanent injunction to restrain the Defendants from infringing Plaintiff's registered trademark CASTROL in the field of oils and lubricants etc. and the violation of plaintiff's copyright in the packaging material, etc. by in counterfeit manufacturing & selling of the oils, lubricants, greases, etc., in the market in duplicate packaging material. The defendants did not contest the matter and did not even appear in the Court.

Relying on the evidence provided by Castrol the Delhi High Court not only passed a permanent Injunction order against the defendants but also directed the defendants to pay proceeding costs and punitive damages to the tune of INR 10,00,000 with a view to discourage and dishearten the law breakers to indulge in such like violations with impunity.

The Court further directed the defendants to pay interest on the aforesaid amount at the rate of 9% per annum from the date of filing of the suit till realization.

**!!!Punitive Damages are here to stay!!!**

### **M/s. Mahashian Di Hatti Ltd. Vs. Mr. Raj Niwas, Proprietor of MHS**

MANU/DE/1706/2011

In yet another case of trademark infringement, the Delhi High Court granted punitive damages observing that if punitive damages were not awarded in cases like the instant one, it would encourage unscrupulous individuals / companies to take unfair advantage upon the goodwill and reputation of others.



The Plaintiff in the instant case uses the registered logo, MDH within three hexagon device on red colour background, in its business of manufacturing and selling spices & condiments. The aforesaid logo has been in use since 1949 in respect of various products of the Plaintiff.

The plaintiff filed a suit seeking injunction restraining the defendant from using the logo **MHS** or any other trademark identical or deceptively similar to its **MDH** logo in the same business. The defendant inter alia tried to blunt these arguments by contending the phonetic dissimilarity between **MDH** and **MHS**.

Placing its reliance on Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories<sup>1</sup>, the Court distinguished the remedies pertaining to trademark infringement and passing off.

The Court said that *“In an action pertaining to trademark infringement, the statutory right of the owner of the registered trade mark would be infringed when the mark used by the defendant was visually, phonetically or otherwise similar to the registered trade mark of the plaintiff.* The plaintiff just had to prove that the trademark adopted by the defendant substantially resembled its trademark on account of extensive use of the main features present in his trademark.

Court further observed that even if the defendant proved that the consumer could distinguish his products from that of the plaintiff, he would still be held liable for infringement of the registered trademark. On the other hand, in case of passing off, if there was a possibility for distinction of goods by the consumer, the defendant would not be held liable”.

The Court after comparing the logos of the plaintiff and the defendant concluded the presence of strong visual similarity in the two marks. It also noted that both the parties were engaged in the *same business of manufacturing and selling spices*. Holding that the registered trademark of the Plaintiff was being infringed

<sup>1</sup> PTC (2) 680 (SC)

by the defendant, the Court restrained the Defendant from manufacturing, selling or marketing any spices or condiments using the impugned logo MHS or any other trademark which was identical or deceptively similar to the registered trademark of the plaintiff.

## KNOWLEDGE BANK

### Interactive Website- Platform for Territorial Jurisdiction



Jurisdiction is an aspect of state sovereignty and refers to judicial, administrative and legislative competence. The term Jurisdiction in common legal parlance would mean the right to administer justice. It may be defined as the power or authority to hear and determine a cause to adjudicate and exercise any judicial power in relation to it.

The scope of this article is to expound the jurisdictional powers of the courts in matters where the cause of action lies in the “World Wide Web”.

In order to invoke jurisdiction of a court to institute a suit for trade mark infringement and/or passing off, the Indian law recognizes three settled criterion i.e.

- Territorial jurisdiction,
- Pecuniary jurisdiction and
- Subject-matter jurisdiction.

In determining all the above, it is the cause of action which plays a pivotal-role. It is the subject of the cause of action which determines whether a court has jurisdiction over such subject matter and it is the pecuniary value of the suit which establishes the presence or absence of competence in a court. Every suit presupposes the existence of a cause of action and in majority of cases, it is the place where the cause of action arises and which determines the jurisdiction of the Court.

The statutory provisions for institution of suits for infringement of Trade Mark and/ or passing off are provided under Code of Civil Procedure, 1908 and the Trade Marks Act, 1999. However, Section 20 of Code of Civil Procedure, 1908 is the **fundamental law** which governs the procedure and law to institute any suit in a competent court of law.

It shall be not out of place to mention here that the Trade Marks Act, 1999 provides for a special provision for proprietor of a

registered trade mark to institute a suit for infringement of a trade mark. Section 134(2) of the Trade Marks Act, 1999 provides for additional forum to the proprietor of a registered trade mark to institute a suit for infringement of trade mark in whose jurisdiction, the said proprietor actually and voluntarily resides or carries on business or works for gain, at the time of institution of suit.



The internet is a paradox. It is a worldwide entity whose nature cannot be easily or simply defined. In this era of e-commerce, the Indian courts addressing the importance of World Wide Web in commercial transaction has broadened the ambit of the principle 'cause of action' by including the use of an active website for commercial transaction as the situs of jurisdiction.

The Indian judiciary has through a thorough understanding of the evolving law, demonstrated what is required of Indian legislation-dynamism and an open mind to incorporate certain changes that may be necessary considering the changing trend of cases globally.

Over the years, several parameters have been developed by various courts to determine jurisdiction over Internet related matters.

In keeping with its liberal approach to issues of jurisdiction in infringement and/or passing off cases, the High Court of Delhi in the first case of its kind, *Casio India Co. Limited v. Ashita Tele Systems Pvt. Limited*<sup>2</sup> passed an injunction against the defendant from using the website [www.casioindia.com](http://www.casioindia.com) on the basis of the fact that the website of Defendant can be accessed from Delhi, which is sufficient to invoke the territorial jurisdiction of this Court.

In the above case the Court further held the said website/ domain name to be similar/deceptively similar to the registered trade mark "Casio" and website/ domain name of the Plaintiff i.e, *CasiIndiaCompany.com, CasiIndia.org, CasiIndia.net as well as CasiIndia.info, CasiIndia.Biz and CasiIndiaCo.*

Moving ahead on the same subject, a different approach was adopted by another learned single Judge of Delhi High Court in **(India TV) Independent News Service Pvt. Limited v. India Broadcast Live Llc And Ors.**<sup>3</sup>

<sup>2</sup> 2003 (27) PTC 265 (Del)

<sup>3</sup> 2007 (35) PTC 177 (Del.)

Adjudicating the suit of passing off action initiated by the Plaintiff to injunct the Defendants from using the domain name [www.indiatvlive.com](http://www.indiatvlive.com), wherein the defendants were neither residing nor carrying on business within the territorial jurisdiction of the court of the learned Single Judge held the following:-

“46. I am in agreement with the proposition that the mere fact that a website is accessible in a particular place **may not** itself be sufficient for the courts of that place to exercise personal jurisdiction over the owners of the website. However, **where the website is not merely 'passive' but is interactive** permitting the browsers to not only access the contents thereof but also subscribe to the services provided by the owners/operators, **the position would be different.**”



The Court also stated that where the **website** was an **interactive** one, as opposed to one merely conveying information (static website) and where the target audience and a large consumer base of the website was located, the court could **exercise jurisdiction** over the matter, **irrespective of the location** of the defendant. **The level of interactivity of the website was held to be of vital importance.** Court further held that the website "indiatvlive.com" of Defendant is not wholly of a 'passive' character. It has a specific section for subscription to its services and the options (provided on the website itself) for the countries whose residents can subscribe to the services including India. The services provided by Defendant can thus be subscribed to and availed of in Delhi i.e. within the jurisdiction of this Court. It was also held that "the Defendant is carrying on activities within the jurisdiction of this Court; has a sufficient contact with the jurisdiction of the court and the claim of the Plaintiff has arisen as a consequence of the activities of Defendant within the jurisdiction of this Court".

The decisions in the Casio and India TV matters are quite disparate, with the former stating that **mere access to a website would suffice** and the latter stating that commercial transactions at a particular location and the **level of interactivity of a website** are vital for exercising jurisdiction. Predictably, the law in this regard is quite uncertain. As a result, in the matter of **Banyan Tree Holdings**, the single bench of the Delhi High Court made a **reference** to the division bench to clarify the law in this regard.

The case of **Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy and Anr**<sup>4</sup> was a suit for passing off filed by the Plaintiff who was using the word mark 'Banyan Tree' since 1994 and websites namely [www.banyantree.com](http://www.banyantree.com) and [www.banayantreespa.com](http://www.banayantreespa.com) since 1996 against the use of the word 'Banyan Tree Retreat' and advertisement of the same on the website [www.makprojects.com/banyantree](http://www.makprojects.com/banyantree) of the defendants. The said suit was filed on the basis of website



<http://www.makprojects.com/banyantree.htm> of the Defendants which was also accessible in Delhi. The most striking peculiarity of the case was that **neither of the parties** were located within the territorial jurisdiction of the Court.

In view of the conflicting decisions on the question whether accessibility of a website in a particular place may itself be sufficient for the courts of that place to exercise personal jurisdiction over the owners of the website? and since the Court found the Single Judge Bench decisions of both Casio as well as India TV disparate in its reasoning, Hon'ble Justice S.Ravindra Bhat of Delhi High Court, in the hope to find an answer to this issue referred the same to the Division Bench.

Clearing the air of speculations, the Division bench of the Delhi High Court **settled the law** on the subject of exercising jurisdiction on the accessibility of a website in case of suit for passing off and/or infringement of a trade mark.



The court held that *merely accessing a website in Delhi would not satisfy the exercise of jurisdiction* by the Delhi court. Rather, it has to be shown that the defendant "purposefully availed" itself of such jurisdiction, by demonstrating that the use of the website was *with intent to*

*conclude a commercial transaction* with the site user, and such use resulted in injury or harm to the plaintiff. For this it would have to be prima facie shown that the nature of the activity indulged in by the Defendant by the use of the website was with an intention to conclude a commercial transaction with the website user and that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the Plaintiff within the forum state. *The Hon'ble Court further went on to say that the Plaintiff will have to show prima facie that the said website, whether euphemistically termed as "passive plus" or "interactive", was specifically targeted at viewers in the forum state for commercial transactions.*"



Undoubtedly the decision of Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy and Anr has added a new chapter on the protection of trade mark in India. In 21st century the use of Internet is not limited to e-mailing, surfing, browsing, etc. It is increasingly used by commercial organizations to promote themselves and their products and services. It is also interactively used to buy and sell products. The amplification of the ambit of the principle of 'cause of action' in decision of the Banyan Tree Holding Pvt Ltd would indisputably tighten the screw on the infringement of trade mark and passing off goods or services through the active use of internet inspite of not having a physical presence before the judicial forums.

4 CS(OS)No. 894/2008

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