



Newsletter March 2011

Concept & Editing by: Dr. Niti Dewan

- [PATENT LINKAGE DISALLOWED BY SUPREME COURT](#)
- [EPO REJECTS PATENTS FOR ESSENTIALLY BIOLOGICAL BREEDING PROCESSES](#)
- [THE BEGINNINGS OF COMPULSORY LICENSING](#)
- [OREO COPY?](#)
- [TURTLE 1 - TATA NIL](#)
- [FREE TM SEARCHES & INCREASING FEES FOR TM FILING](#)
- [GEOGRAPHICAL INDICATIONS](#)
- [BRAND BULLIES](#)

Patent Linkage Disallowed By Supreme Court

The patent linkage battle that has been going on between Bayer (Bayer Corporation and Bayer Polychem(India) Ltd. and the Drug Controller General of India(DGCI) has finally been put to rest by the Supreme Court. On 1st of December, 2010 the Supreme Court upheld the decision of the Delhi High Court dismissing Bayer's application challenging the DGCI's order granting marketing approval to CIPLA to manufacture a generic version of a drug for which Bayer holds the patent.

Patent linkage refers to a system wherein the drug regulatory authority of a country refuses permission to a generic drug manufacturer to market and sell an already patented drug. This sometimes delays the entry of cheap and affordable generic medicines into the market.

Bayer had earlier challenged the decision of the Drug Controller General of India (DGCI) granting approval to Cipla Ltd. to market and sell a generic version of the Bayer's patented drug, by filing a writ petition before the Delhi High Court. This petition was dismissed by the Delhi High Court in February 2010. The Hon'ble High Court based its ruling on the fact that there was a clear distinction between the patent system and drug regulatory system in India and that granting marketing approval to generic versions of patented drugs was completely in accordance with Indian law.

The Supreme Court dismissed the special leave petition filed by Bayer and confirmed the Delhi High Court's decision dismissing Bayer's application challenging the DGCI's authority to grant marketing approval to generic versions of patented drugs. The division bench comprising of Justice A Alam and Justice RM Lodha based their decision on the finding that it was incorrect to say that the DGCI did not have the authority to grant marketing approval to generic versions of patented drugs. The Supreme Court further observed that the issue of injunction sought by Bayer was to be decided in a suit for infringement under the patents act by the Delhi High Court.

For thoughts on this case go to our

EPO Rejects Patents For Essentially Biological Breeding Processes

The EPO's Enlarged Board of Appeal has delivered its decision in two cases G 2/07 and G 1/08 by denying patents for essentially biological breeding processes. The decision was based on the interpretation of the term "essentially biological processes for the production of plants (or animals)" used in the European Patent Convention (EPC) to exclude such processes from patentability.

In the case G 2/07, the patent, EP 1 069 819, was filed by Plant Bioscience Ltd. and was opposed by Syngenta Participations AG (Basle/CH) and Groupe Limagrain Holding (Chappes/FR). It dealt with methods for breeding of certain broccoli plants allegedly having a cancer prevention effect. In the claimed process molecular markers were utilized for selecting specific hybrids. This was regarded as a routine step in modern breeding methods. In the other case G 1/08, the patent EP 1 211 926 was filed by Israeli Ministry of Agriculture and was opposed by Unilever N.V. (Rotterdam/NL). It dealt with breeding methods for tomatoes with a low water content, which are easy to process industrially. These tomatoes have come to be referred to as "wrinkled tomatoes". The breeding process involved a step of allowing the fruit to remain on the vine beyond the point of normal ripening. Moreover, it included a screening step for determining the reduced fruit water content as extended by preservation of the ripe fruit and wrinkling of the fruit skin.

The Decisions passed by the European Patent Office (EPO) are challenged, before the Boards of Appeal of the EPO. The Enlarged Board of Appeal does not incorporate an additional level of jurisdiction. However, this board entertains cases only when the decision of the Boards of Appeal becomes inconsistent or when the question of interpretation of a significant point of law arises. The primary function of this board is to make sure that patent law under the EPC is applied uniformly and important points of law are interpreted correctly.

The questions referred to the EPO's Enlarged Board of Appeal were:

- "Does a non-microbiological process for the production of plants consisting of steps of crossing and selecting plants fall under the exclusion of Article 53(b) EPC only if these steps reflect and correspond to phenomena which could occur in nature without human intervention?"
- If question 1 is answered in the negative, does a non-microbiological process for the production of plants consisting of steps of crossing and selecting plants escape the exclusion of Article 53(b) EPC merely because it contains, as part of any of the steps of crossing and selection, an additional feature of a technical nature?"
- If question 2 is answered in the negative, what are the relevant criteria for distinguishing non-microbiological plant production processes excluded from patent protection under Article 53(b) EPC from non-excluded ones? In particular, is it relevant where the essence of the claimed invention lies and/or whether the additional feature of a technical nature contributes something to the claimed invention beyond a trivial level?"

In its decision the EPO's Enlarged Board of Appeal held that:

- A non-microbiological process for the production of plants which contains or consists of the steps of sexually crossing the whole genomes of plants and of subsequently selecting plants is in principle excluded from patentability as being "essentially biological" within the meaning of Article 53(b) EPC.
- Such a process does not escape the exclusion of Article 53(b) EPC merely because it contains, as a further step or as part of any of the steps of crossing and selection, a step of a technical nature which serves to enable or assist the performance of the steps of sexually crossing the whole genomes of plants or of subsequently selecting plants.
- If, however, such a process contains within the steps of sexually crossing and selecting an additional step of a technical nature, which step by itself introduces a trait into the genome or modifies a trait in the genome of the plant produced, so that the introduction or modification of that trait is not the result of the mixing of the genes of the plants chosen for sexual crossing, then the process is not excluded from patentability under Article 53(b) EPC.
- In the context of examining whether such a process is excluded from patentability as being "essentially biological" within the meaning of Article 53(b) EPC, it is not relevant whether a step of a technical nature is a new or known measure, whether it is trivial or a fundamental alteration of a known process, whether it does or could occur in nature or whether the essence of the invention lies in it."

For more details about the case refer to [click here](#)

The Beginnings of Compulsory Licensing

The much talked about issue of compulsory licensing is once again making the news. The Indian pharmaceutical company Natco has sent a notice to the US drug maker Pfizer, requesting it to grant Natco a voluntary license to manufacture and sell copies of the US company's HIV medicine in India. Natco has brought to the attention of Pfizer that the latter's HIV drug Maraviroc sold under the brand Celsentri which costs about Rs. 65,000 for a month's dosage is unaffordable to the common Indian man. Natco has said that it can manufacture a copy of Pfizer's drug that can be availed by the HIV patients at Rs.15,000 for a month's dosage.

The request for a voluntary license constitutes the first step towards Compulsory Licensing. In case Pfizer rejects Natco's request for voluntary licensing, Natco will have the option of applying to the Controller General of Patents for Compulsory Licensing under section 84 of the Patents Act, 1970, allowing it to produce and market a lower price version of Pfizer's drug.

Compulsory licensing is the phenomenon through which a person (natural or legal) is given permission to legally manufacture and sell a low cost version of a patented drug under certain circumstances. Section 84 of the Indian Patents Act which deals with the provision of compulsory licensing states the following:

"At any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for grant of compulsory license on patent on any of the following grounds, namely:—

- that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or
- that the patented invention is not available to the public at a reasonably affordable price, or
- that the patented invention is not worked in the territory of India"

Pfizer was granted the patent for Maraviroc in January 2007, and hence the provisions relating to Compulsory Licensing may be invoked in this case as 3 years have elapsed since the date of grant of the Patent.

Though the provision for Compulsory Licensing exists in the Indian Patents Act, it has rarely been invoked. Four years ago, Natco had tried to seek Compulsory Licensing in respect of Pfizer's cancer drug, but did not succeed in doing so. Hence if a Compulsory license is issued in this case, it will be a landmark decision and can set the future trend for the application of this particular provision of the Patents Act.

Oreo Copy?

Britannia is once again in a spot of bother as US based Kraft Foods has sued it for trademark infringement of their famous "Oreo" cookies. It was not too long ago that the Nusli Wadia-owned Britannia was involved in a legal battle with French food giant Danone over the "TIGER" trademark.

Kraft Foods filed a suit in the Delhi High Court alleging that the recently introduced "Treat-O" biscuit by Britannia is infringing the IP right of Kraft over its well known "Oreo" cookies. According to Kraft, the name "treat-O" lays emphasis on the letter "O" which would lead the public to link it to "Oreo" cookies and hence be a case of trademark passing off. Kraft Foods has further pointed out that Britannia has copied the specific design etchings like inner rings and florets found in the "Oreo" cookies. An order of injunction restraining Britannia from manufacturing, selling, marketing or advertising the product in question has been sought for by the Kraft.

On 25th January, 2011 the Delhi High Court asked Britannia to reply to the petition within one month, and has set the date for arguments as April 28th, 2011.

TURTLE 1 – TATA nil

The Delhi High Court has disallowed TATA's application for grant of an order of temporary injunction against the international environmental NGO Greenpeace for alleged trademark infringement and defamation by its use of the TATA logo in an online game titled "TURTLE v. TATA" launched by Greenpeace as part of Greenpeace's efforts to protest against Tata's Dharma Port Project.

TATA's Dhamra port project, is located close to the Bhitarkanika National Park and Gahirmatha Marine Sanctuary in an area that is inhabited by endangered species like the Olive Ridley Turtles and crocodiles. Greenpeace launched its online game in order to highlight the alleged threat to the Olive Ridley turtles by the Dhamra private port in Orissa. The game shows four ball-like creatures with Tata insignias embossed on them, trying to catch a helpless turtle which is desperately trying to escape. TATA had alleged the use of their mark to be "disproving and libelious".

The Hon'ble Justice S Ravindra Bhat disagreed with TATA's contentions and dismissed the application for temporary injunction. The Court was of the opinion that use of a trademark, as the object of a critical comment, or even attack, does not necessarily result in infringement. Underling the importance of allowing free speech the Court inter alia held that:

".....the Courts, the world over, have set a great value to free speech and its salutary catalyzing effect on public debate and discussion on issues that concern people at large. The issue, which the Defendant's game seeks to address, is also one of public concern. The Court cannot also sit in value judgment over the medium (of expression) chosen by the Defendant since in a democracy, speech can include forms such as caricature, lampoon, mime parody and other manifestations of wit. The Defendant may - or may not be able to establish that there is underlying truth in the criticism of the Dhamra Port Project, and the Plaintiff's involvement in it. Yet, at this stage, the materials on record do not reveal that the only exception - a libel based on falsehood, which cannot be proven otherwise during the trial- applies in this case. Therefore, the Court is of opinion that granting an injunction would freeze the entire public debate on the effect of the port project on the Olive Ridley turtles' habitat. That, plainly would not be in public interest; it would most certainly be contrary to established principles. To recall the words of Walter Lippman

'The theory of the free press is not that the truth will be presented completely or perfectly in any one instance, but that the truth will emerge from free discussion'

For these reasons, the Court is of opinion that the application for interim injunction, i.e. IA No. 9089/2010 has to fail. It is accordingly, dismissed"

Free TM Searches & Increasing Fees For TM Filing

The Ministry of Commerce and Industry, through a notification in the Official Gazette dated 29th of December, 2010 has notified the public of the following changes made in the Trade Marks Rules, 2002:

- **Trade Mark Search:**

Trade Mark Searches have now become free and is available at the IPO's official website and one may no longer file a request to the Registrar for Official Search under rule 24 of the Trade Marks Rules, 2002 read with form TM-54 and Tm-71.

- The fee for filing of application to register a trade mark for a specification of goods or services included in one class has been increased from Rs.2,500/- to Rs.3,500 /-. The above revision is effective from the date of notification (29.12.2010). All applicants/agents who have filed trade mark applications from 29.12.2010 onwards are required to pay the deficiencies in fees Rs.1,000/- per application in respect of applications filed from the date of notification till issuance of this notice, on or before 30th . January,2011.

Geographical Indiications

Here are some goods/services which have received GI Registration recently.

We have started a new feature in our newsletter with the aim of giving you in-depth knowledge about brand related terms .In every newsletter we will feature one brand related term. For this edition we have chosen the word "Brand Bullies".

Brand Bullies

Small businesses, entrepreneurs in recent times have received notices or have had to face costly litigation or threats of litigation from large businesses for allegedly using a mark or marks deceptively similar to the mark of the large business. It has been frequently been complained of by such small businesses that the larger enterprises are just being 'Brand Bullies'.

A Brand Bully is a trade mark holder who unreasonably uses the size of its resources to enforce its trade mark rights against a person who apparently does not really violate the former's trade mark rights or is not even competing with the 'bully' in the same class of goods / services. This begs the question what is 'reasonable'?

Thus monster cable products should not have a problem with monster roadhouse or monster .

Though one may find numerous instances where it may appear that harmless adoption of a Brand name is found to be objectionable by corporations having a similar name one must remember that the trade mark owners are trying to secure their property and the law does not look favorably upon those who sleep over their rights.

Continued and abundant use of a brand or its variations by unlicensed sources no matter how small may render the mark generic and dilute the mark to an extent where it would not be considered the exclusive property of the original trade mark holder. Case in point- In India the word 'Xerox' is a generic word used by the public and the trade to signify photocopy. The word 'xerox' is no longer the exclusive property of the Xerox Corporation.

The problem or perceived problem seems to be on the rise and the USPTO has called for comments and inputs from the public as to whether Brand bullying is a problem. In the U.S.A, pursuant to the Trademark Technical and Conforming Amendment Act of 2010, the Secretary of Commerce, in consultation with the Intellectual Property Enforcement Coordinator is required to conduct a study and report to the Committees on the Judiciary of the House and Senate on "(1) the extent to which small businesses may be harmed by litigation tactics by corporations attempting to enforce trademark rights beyond a reasonable interpretation of the scope of the rights granted to the trademark owner; and (2) the best use of Federal Government services to protect trademarks and prevent counterfeiting." For which the USPTO has called for inputs from the general public.

This concept seems to be either absent in India or is just not widely publicized.