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International News

- BENDING OVER
- WHEN HASHTAGS BECOME BASHTAGS
- #INSTAOPPOSE

National News

- INJUNCTION WITHOUT DAMAGES
- RIDING HIGH ON WELL KNOWN STATUS
- HENNA TIES
- CALLING THE KETTLE BLACK

Bending over

Patent laws gained unprecedented interest among the masses at the time of Apple versus Samsung patent and design war. While it might seem that the same was a matter of the past, it is quite possible that the two technology giants might once again be loggerheads in upcoming years over 'bendable' technology.

A study of the patent applications of the two companies regarding the bendable technologies reveals that:

1. Both Apple and Samsung are using OLEDs and similar material to ensure flexibility (folding) of their products.
2. It is a futuristic idea to use this technology for phones, both the companies have so far conceptualised it to be used in their tablets , for Apple it is the iPad;
3. Apple's patent reveals that their may be use of two or multiple hinges for achieving flexibility in the gadget; whereas Samsung's patent doesn't reveal any such use of hinges.
4. Samsung's patent takes a step further by claiming that the display panel will also be flexible, Apple's patent does not reveal this technology.

These few points reveal that while Apple and Samsung are aiming for a similar end result, the technology used will be different however, what remains to be seen is the final design of the products. Design is simply the outward and aesthetic appeal of a product which is not associated with the functionality at all. Therefore, even if the technology used is different but designs of the foldable products are similar there could be potential clashes between the titans. It also remains to be seen which company will utilize the technology first in the market.

Also, while discussing futuristic technology it is worth noting the breakthrough technology over which Sony Corporation has obtained a patent 'Wristband type information processing apparatus and storage medium'. The invention discloses use of a wristband type apparatus which is configured to project an image on the hand on which



the wristband is worn. Interestingly, this technology is quite similar to what Cicret Bracelet is proposing to use for sale in 2017. The Cicret project is being funded by the public, it is not a project undertaken by a technology driven company.

The working of a Cicret Bracelet can be understood through the video as made available on Cicret's

website: [HTTPS://CICRET.COM/WORDPRESS/](https://cicret.com/wordpress/).

When Hashtags become bashtags

The social media is the foremost and quickest means of getting noticed. This is both a boon and a bane for brands seeking to gain attention which may not always be positive for a brand. Hashtags have become a commonly used marketing tool to garner attention and advertise one's goods and services for e.g. recently Coca-Cola used #openhappiness as its social media campaign. The use of a hashtag on twitter results in classifying all the tweets using the said hashtag in one group for instance, '#AskJPMorgan' will result in all the tweets to be classified together. However, not all hashtags result in positive publicity for a brand, some have even resulted in creating notoriety.

JP Morgan Chase to promote its Twitter Q&A session, they created and promoted the hashtag 'AskJPMorgan' unfortunately, the twitterati (as twitter users are popularly referred to) used the hashtag in a manner contrary to the expectations of the Company. Several tweets were made using the hashtag but many were holding JP Morgan Chase responsible for the 2008 financial crisis or raking unpleasant scandals such a user asked about JPMorgan's favorite type of whale (referring to London Whale Scandal), some accused it of charging excessive interest rates on its loans ("foreclosing on a person's property after they had paid four times over") etc. Pursuant to such backlash on twitter, the Company had to cancel its Q&A session. Similarly, before the JP Morgan tragedy, in 2012 Mc Donald's encouraged twitterati to share their Mc Donalds' story by using the hashtag 'McDstories'. There were several tweets made by individuals poking fun at the fast food chain's quality of food and the high cholesterol in its food articles ("could smell type 2diabetes"). After this debacle of McDonald's' hashtag one would expect other brand owners to be cautious while choosing their hashtags, it turned out that another fast food joint 'Burger King' used the hashtag 'Wtff' , abbreviation for what the French fries to promote itself on twitter. The result, the hashtag Wtff was mostly used in a derogatory sense or by twitter users having a bad day, therefore, the purpose of the hashtag clearly was not served.

The use of hashtags as a marketing tool has now become intricately linked to trademark laws; the reason being that trademarks serve as tools for indicating origin of the goods/services and in some cases hashtags serve as small phrases which people come to associate with a brand. Therefore, one has to carefully assess the outcome of using a particular hashtag before finalizing upon it or there could be repercussions on the brand. This was well understood by the Washington Redskins, a football team which gained considerable notoriety for its name, tried promoting itself using the hashtag #RedskinPride. This hashtag was considered to be in poor taste by several people thereby



resulting in people recounting stories and images reflecting racism faced by the native Americans in the past (“celebrating genocides” , “racist name”).

A ‘hashtag fail’ story can also be cited from India where Fortis adopted the popular Bollywood dialogue ‘Maa Ka Dudh Piya Hai Toh’(If you have had your mother’s milk) as its hashtag for breast feeding awareness week. However, the poor choice of the hashtag resulted in individuals making unrelated and even offensive tweets also wavering considerable from the intended purpose (“make xyz actress your sister” or “make xyz actress goddess Sita” etc.)

The above cited hashtag fails are a cue for all the individuals, companies looking to encash on ‘hashtag’ bandwagon to ensure that they have assessed in detail the consequences of using such hashtags; even though the same may be trending on twitter it doesn’t necessarily establish that the company has succeeded in conveying its message through the hashtag.

#Instaoppose

Instagram, the social networking site which has gained considerable popularity among the younger population, was acquired by another social networking giant, Facebook in 2012. Due to its growing popularity, Instagram has taken up the responsibility of protecting its trade mark very seriously. In the last few years they have filed a series of opposition against the proprietors of marks which have the prefix ‘gram’. Recently, Instagram has filed an opposition against Microsoft for applying the mark ‘Actiongram’ for registration. Microsoft has proposed to use the mark ‘Actiongram’ for its holographic story telling medium whereby people can juxtapose the holographic content in their everyday life and thereby create a Mixed Reality Capture (MRC) video. It is quite clear that this is quite different from Instagram’s purpose i.e. sharing pictures with the world at large through one’s account in Instagram.

It is quite a settled principle in trade mark law that one cannot claim monopoly over a ‘prefix’ or a ‘suffix’ it is necessary to assess the marks in question as a whole and if one mark appears to be deceptively similar to the other in any manner –visual or phonetic, a case for infringement of trade mark can be successfully made out. In the present case the marks ‘Instagram’ and ‘Actiongram’ are quite different. However, it is the case of Instagram that the public might confuse that there is a nexus between ‘Actiongram’ and ‘Instagram’ and therefore, the mark ‘Actiongram’ should not be allowed to proceed for registration with the US Patents and Trademarks Office. On the other hand it is important to note that Microsoft is continuously advertising ‘Actiongram’ as its own product thereby minimizing the possibility of confusion. Furthermore, the classes of users, to which the two social media platform cater to, are different while Instagram is for individuals that like sharing pictures, Actiongram will appeal to the creative user who would like to use their imagination to create a new video. The sophistication of the consumer (in this case user) is an important aspect to be considered and the individuals using Instagram will immediately know that there is a difference between it and Actiongram. Therefore, there is no possibility of confusion.

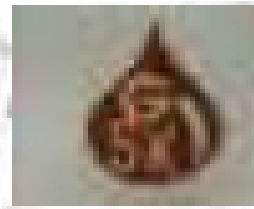


The opposition proceedings are pending presently and it remains to be seen what the outcome may be, one can only hope that the presiding authority looks into factors such as –looking at mark as a whole, the line of activities and the sophistication of the users while deciding the case.

Injunction without damages

The name of a company is referred to as its trading style i.e. the name which is known to the consumers while purchasing the goods or services. It is a common misconception that only if the brand name is identical/deceptively similar to an existing registered trademark then it will be an act of infringement. Section 29(5) of the trademark act, 1999 makes it an offence to adopt a trading style which is identical or deceptively similar to a registered trade mark. This section was invoked by GlaxoSmithKline Pharmaceuticals Ltd. against an entity that had registered itself with the Registrar of Companies under the name 'GSK Life Sciences Pvt. Ltd.' in the case of *GlaxoSmithKline Pharmaceuticals Ltd & Anr (Plaintiff) v Sarath Kumar Reddy G (Defendant)* before the Delhi High Court.

The Plaintiff submitted that it had noticed that the Defendant had adopted a trading style which was identical to the Plaintiff's registered trademark 'GSK' in class 5 (for pharmaceuticals) which could clearly cause confusion in the minds of the public. Furthermore, the device adopted by the Defendant for his Company was deceptively similar to that of the Plaintiff's; the following is a comparison of the marks:



Plaintiff's trademark

Defendant's trademark

The Plaintiff prayed before the Court that the Defendant and his representatives be enjoined from making use of its current trading style "GSK Life Sciences Pvt. Ltd." and the Plaintiff should be given damages for the losses suffered by it on account of the Defendant's infringing use. The court observed that there was a case of trademark infringement made out by the Plaintiff and gladly ordered an injunction in favor of the Plaintiff however, regarding the payment of damages the Court did not agree with the Plaintiff's prayer. It was opined that there was no evidence of actual damages suffered by the Plaintiff because of Defendant's use; the Plaintiff had not established the sales made by the Defendant therefore, no damages were payable.



This decision is quite fair for both sides considering that the primary purpose of injuncting the Defendant from using the deceiving trading style had been served. On the other hand since the Plaintiff had been unable to show the actual damages the Hon'ble Court rejected such prayer. There are several such registered companies in India that have names bearing similarity with existing trade mark(s) even though such trade mark is not owned by them. It is therefore, advisable to owners of trade marks, that a regular search is conducted with the Registrar of Companies to ensure that no miscreant succeeds in registering and carrying out business by making unauthorized use of another's trade mark.

Riding high on well known status

A mark is considered to be well known in India if it has been recognised as such by a competent court or sufficient evidence has been adduced before the Registrar of trademark to prove that the mark is sufficiently well known as per requirements set out in Section 2(zg). A mark accepted as well known is then entered into the register of well known marks pursuant to which the proprietor of such mark can prevent any miscreant from using or applying for registration of an identical/deceptively similar mark without having to undergo the ordeal of proving its popularity among the members of public and trade.

The mark 'KSB', owned by KSB Aktiengesellschaft in Germany and by KSB Pumps Limited in India, was declared as well known by the Delhi High Court in the case of *KSB Aktiengesellschaft & Anr. v KSB Real Estate & Finance Private Limited*. In 2014, the aforementioned companies filed a suit for trademark infringement against Anil Agarwal who had succeeded in obtaining registration for the mark 'KBS' in class 07. The Defendant pleaded that the mark 'KBS' was distinguished from the mark 'KSB' therefore, there was no case of deception; it further submitted that the Defendant was only dealer for a Chinese manufacturer using the mark 'KSB'. The Defendant's counsel also submitted that the goods being sold under the mark 'KBS' were bearings which was different from that of the goods being sold under Plaintiffs' mark 'KSB'.

The Hon'ble Justice GS Patel noted that the mark 'KSB' was well known in India and internationally and therefore, pursuant to the Delhi High Court's order, the mark should be entered in list of well-known mark. He observed that there was trifling difference between 'KBS' and 'KSB' whereby the former had merely swapped the last two alphabets, this was not adequate evidence to counter the Plaintiffs' claim of infringement by Defendant. The judge further opined that if the Defendant was solely a dealer, he had no authority to file the trademark since he was not the authorised/original proprietor of the mark 'KBS' and therefore, the mark should be removed from register. Justice GS Patel is also well aware of the nuances of Trademark laws therefore, he commented that if the Defendant was dealing with 'bearings' as its goods then it ought to have been registered in class 12 instead, the registration was in class 7 under which, Plaintiffs had registered marks. Therefore, it was ruled that the Plaintiffs had rightfully made out a case against Defendant and an interim injunction order was passed in the favour of the Plaintiffs. It is indeed a common practice that several vendors adopt marks which are deceptively similar to popular marks with the sole intent of riding on the success of such marks and thereby deceiving the consumers into purchasing their goods. While this



decision again protects the rightful proprietor of a mark from further infringement of its reputed mark, it is worth pondering over if there is somewhere in our trademark registry's working that is lacking due to which there are proprietors who succeed in getting deceptive marks registered thereby affecting the rights of the original proprietor.

Henna Ties

'Henna' in the Indian subcontinent is applied by women at the time of marriage and special events. It is one of the easily available products in the market but it is only henna of a good quality which will last longer and will give a darker shade when applied. Therefore, like any other product consumers specifically opt for henna of a brand that they rely upon and this, is the juncture when trade marks play a vital role. In the case of *Shri Rajeshwar Prasad v Prem Mehendi Centre* as decided by the Bombay High Court, the trade marks in conflict were 'Kaveri' and 'Kaberi' and both were used for henna cones sold in the market.

The Plaintiff (Prem Mehendi) claimed that it had been using the mark 'Kaveri' for selling its henna cones since 2000 and had even obtained a trademark registration in the year 2007. It came to the knowledge of the Plaintiff that the Defendant (Rajeshwar Prasad) was selling his henna cones under the mark 'Kaberi'. The Plaintiff filed an FIR against the Defendant under Sections 103 and 104 (falsification of mark) of the Trade Marks Act, 1999 and Sections 64 and 65 of the Copyright Act, 1957, pursuant to which the police authorities seized the defendant's goods. The Plaintiff also served a legal notice to the Defendant in 2014 for infringement of its trademark 'Kaveri' and infringing its copyright in the artistic work used by the Plaintiff in its trade dress. The Defendant submitted blatant denials to the same. The Plaintiff filed a case before the District and Sessions Court Nashik, where an order was passed in its favor. The Defendant filed an appeal from the order before the Bombay High Court. It was the case of the Defendant that the Plaintiff was infringing its copyright in the artistic work. It was also the Defendant's claim that the Plaintiff had not submitted an original trademark certificate to the Hon'ble District Judge therefore, he could not compare the Plaintiff's trademark with that of the Defendant's. Furthermore, it was argued that the word 'Kaveri' was a common word and therefore, could not be exclusive to the Plaintiff alone.

The court upon hearing the arguments of both the sides concluded that it was not material if the Plaintiff had not submitted original trade mark registration certificate, the fact remained that the Hon'ble district Court judge had ascertained the similarities in the trademarks of the parties by simply comparing the trademarks on the packaging of the products. The Court further opined that the packaging of the products sold by the parties was indeed similar, the size of the packet, the color scheme adopted was also similar. In fact, the only difference was in the names of the products 'Kaveri' (Plaintiff's) and 'Kaberi' (Defendant's); this was considered to be a trifling difference because there was still phonetical similarity in the two. The Court further opined that unless there was anything contrary stated in the trademark registration certificate, the Plaintiff had the exclusive right over the mark 'Kaveri' specifically in relation to henna cones. The Court even held that even if the trademark currently used by the Plaintiff was different from the registered mark, the fact that it was prior in registration was sufficient to prove that the Defendant's act were in contravention of the law.



The important outcomes for this case are (1) unless the Trade Mark Registrar imposes restriction on exclusivity of the trade mark, the mark will be considered as exclusive to the registered proprietor; and (2) irrespective of the registration if one can prove as per section 34 that the mark was prior in use, such proprietor will always have a better claim over the mark.

Calling the Kettle black

The procedure followed before the Indian courts is different from that before the Controller of Patents & Designs. The Controller of Patents & Designs has the discretion to allow or disallow cross examination i.e. viva voce evidence if he opines that a valid case has been made out. In the case of *Reckitt Benckiser Australia Pty Ltd. (Appellant) v Controller of Patents and Designs & Ors* (Respondent 1), the Appellant approached the Calcutta High Court in an appeal against the order of the Controller of Patents and Designs. The Appellant stated that it had filed a case in the Delhi High Court against R.B Impex (Respondent 2) for infringing its design in a mosquito coil in hexagonal shape. The Appellant claimed that it had a prior design registration from 2000 as compared to Respondent 2's design registrations in 2004. During the proceedings before the Court, Respondent 2 filed a counter claim seeking cancellation of the Appellant's design registrations. Pursuant to this in July 2005, the Appellant filed cancellation petitions for Respondent 2's designs. Meanwhile in the proceedings before the Court the issues were framed where one of the issues framed was pertaining to cancellation of the Appellant's designs. Soon after, Respondent 2 filed a cancellation proceedings against the Appellant's designs.

It was the case of the Appellant that it had on multiple occasions called upon Respondent 1 to allow the Appellant to cross examine the individual swearing on affidavit on behalf of Respondent 2. Respondent 1 did not process the request of the Appellant and proceeded with cancellation petition filed by Respondent 2 and the same reached the stage of evidence under which the Appellant filed its evidence. After this stage Respondent 1 sent a hearing notice to the parties. Appellant then filed for transfer of cancellation petition before the Delhi High Court since the same was contested before the Court. These applications of the Appellant before Respondent 1 as well as Delhi High Court were dismissed. Furthermore, Respondent 1 vide an order cancelled the Appellant's design registration. The Appellant claimed that Respondent had (1) not allowed it to cross examine; and (2) proceeded with Respondent 2's cancellation proceedings without moving further with the Appellant's cancellation proceeding. Therefore, the Appellant from Respondent 1's order filed an appeal before the Calcutta High Court. The Court perused the matter at hand and observed that the applications for cross examination and transferring the matter to Delhi High Court were tactics adopted by Appellant to delay the matter. This was apparent from the fact that the Appellant had only written 'letters' to Respondent 1 to permit cross examination but no formal application was made and the matter was never pursued by Appellant until it wanted to avoid filing written submission at the earliest. Furthermore, the Court noted that after Respondent 1 dismissed the transfer of matter to Delhi, no appeal was preferred by the Appellant. The court also shed light on section 37 of the Designs Act, 2000 where it is specified that "*viva-voce evidence to be taken in addition to affidavit evidence only in case Controller thinks it right to do so.*" Therefore, it was Respondent 1's discretion to allow or disallow the cross examination by Appellant. It was noted that the Appellant never made a



written submission of its arguments and never argued on the prior publication of Respondent 2's designs. Therefore, there were no arguments on merits made by the Appellant. The Court noted that Respondent 2 had proved that its designs were novel at the time of filing whereas the same could not be stated for the Appellant's designs and therefore, the Court upheld Respondent 1's order of cancelling Appellant's design registrations.

This case throws light on the fact that the Controller of Patents and Design has the discretion to allow cross examination and if necessary a party requesting the same, should make a formal application not just engage in correspondence. Furthermore, frequent adjournments and non-submission of written arguments can result in adverse opinion since the written arguments are taken on record by the Controller and can be referred to at the time of deciding a matter. If a party fails to do so, it *ipso facto* waives off its right to contest the decision on the grounds on failure to comply with natural justice.