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Established in 1942

RKD Newsletter March-2017

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Inventorship rights of an Invention by Artificial Intelligence

The ushering in of the technological age has made our lives simpler but at the same time has given rise to new legal issues, which now need to be determined. One such issue is regarding the ownership of an invention which has been created by artificial intelligence. Various scholars have been debating over this issue in recent times with many finding it difficult to choose who should be recognized as the inventor when the invention is a result of an artificial intelligence's creation.

To break it down simply, the 'Invention Machine' developed by John Koza is capable of creating and developing new designs from a general code and these designs may even be considered as patentable. In such a situation who should be recognized as the inventor –the 'Invention Machine' or John Koza? As per the existing legal regime only a human inventor is recognized because there is a supposition that a machine cannot operate on its own sense, the data is being fed to it by a human creator. However, like in the case of 'Invention Machine' the human author may only feed basic data into the machine, but the unique patentable result generated is a consequence of the machine's activity in which there is no human intervention. It is at this juncture that scholars put forth different views, the first view is that the machine was created by a human to perform its tasks in a certain way therefore, the creator of the machine will be the inventor; the second view is more controversial, here the scholars opine that since the machine has itself generated the novel, non-obvious information, the machine should be considered as the inventor. While the former view shows a conservative mindset, it is embedded in our patent statutes; case in point Form 1 under the Indian Patents Act, 1970 requires the details of an inventor such as nationality, address and there is an underlying presumption that the inventor is a person capable of filing the patent application or giving a No objection certificate to the applicant (in case of companies). There is less legislative support for the view calling for the recognition of a machine as the inventor.

One may say there is no harm in recognizing the creator of the artificial intelligence as the inventor and while that theoretically may appear to be true, it will practically create problems for instance, there are multiple 'Invention Machines' and its creator sells it to different individuals. In such circumstances if the 'Invention Machine' generates a patentable work who will be considered as the inventor? The 'Invention Machine', the creator of the machine or the purchaser of the machine? This seems a complicated situation, it may be argued that the purchaser of the machine is merely given the right to use, she/he cannot be considered as assignee of any IP rights vested in the 'Invention Machine'. These issues are convoluted and require careful consideration by the legislators and members of the legal fraternity.

So far, the issue of artificial intelligence being more advanced than humans has been a subject matter of science fiction books and movies but as is obvious now, it is soon becoming a reality. It is an opportune time for legislators of different countries to discuss the issue and draw up policies addressing the same.

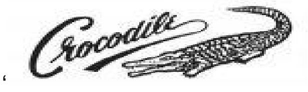
'Waymo'(re) Competition

Google Inc. takes pride in being the pioneer of executing revolutionary technological applications such as –google search engine, the google maps, android, google translate etc. In 2015, Google's parent Company 'Alphabet Inc' came into existence and it formed a subsidiary 'Waymo' which was earlier known as the Google self-driving car project. The Google self-driving car project involved fifteen engineers working towards further developing the technology and Anthony Levandowski was the technical lead and co-founder of this project. He worked on this project with Google until 2016, when he quit Waymo to form his own venture 'Otto Motor LLC'. The company 'Otto' was engaged in developing self-driving kits to retrofit big rig trucks. This company was taken over by 'Uber Technologies Inc.' in July 2016 and Mr. Levandowski was granted the leadership of Uber's driverless car operation.

In February 2017, Waymo filed a civil suit against Otto and Uber claiming infringement of patents and misappropriating trade secrets. It has been claimed that, Mr. Levandowski at the time of resigning from Waymo, took almost 9.7. GB of data containing trade secrets, know-how, confidential information design blue prints regarding the, 'self-driving project' with him. The technology in question is the 'Light Detection and Ranging' Technology (LiDAR), which works by *"bouncing millions of laser beams off surrounding objects and measuring how long it takes for the light to reflect, painting a 3D picture of the world. LiDAR is critical to detecting and measuring the shape, speed and movement of objects like cyclists, vehicles and pedestrians."* In the official statement issued by Waymo it has been claimed that one of the primary reasons for Uber to acquire Otto was the acquisition of LiDAR technology. It has been claimed in the complaint filed by Waymo before the District Court of California, San-Francisco Division, that recently it received a mail in which there were attachments of machine drawings of the Uber LiDAR circuit board furthermore, it is claimed that the circuit board design bore a striking resemblance to Waymo's confidential and proprietary design and also disclosed multiple patent infringement being committed by Uber. In its complaint Waymo has initiated the legal proceedings for violation of trade secrets and multiple patent infringements. This instance is an example of how even IP vigilant organizations like Google may suffer at the hands of one employee's act of breaching the confidence reposed in him by the Company.

Inventorship rights of an Invention by Artificial Intelligence

The registration of a trade mark allows the proprietor of such mark to exercise legal rights against parties using marks identical or deceptively similar to the registered marks. The right to claim protection against any party using even deceptively similar marks is a protection of penumbra rights i.e. shadow of the original rights. However, does registration of a trade mark also confer on the proprietor to claim protection over individual elements of a mark? This issue was dealt by the Supreme Court of New Zealand in the trade mark suit between *Crocodile International PTE Ltd v Lacoste.*

Section 66(1)(a) of the Trade Marks Act, 2002 of New Zealand lays down the provision that if a registered mark is not used for three years from its registration, such mark is liable to be removed from the Trade Mark Register. Crocodile International applied for revocation of the trade mark registration No. 70068 of Lacoste for the mark '

' citing that the mark had not been used by Lacoste.Lacoste argued that under Section 7 of the New Zealand Trade Mark Act, 2002 a trade mark could be said to be used if the use is *"in a form differing in elements that do not alters the distinctive character of the trade mark in the form in which it was registered".* Furthermore Lacoste admitted that though it had not used the exact registered trade mark it had used it in the following forms:

Therefore, on a reading of Section 7 and the use of Lacoste of its trade mark, it was argued that the trade mark bearing registration no 70068 was used by Lacoste. The Assistant Commissioner of trade marks rejected Lacoste's arguments and held that on a 'global appreciation' of trade marks the mark registered by Lacoste and the marks used by Lacoste were different and therefore, did not constitute use by Lacoste. This decision was appealled before the High Court where Collins J overturned the decision of the Assistant Commissioner; he noted that there were differences between the registered mark and the mark in use, such as addition of the word 'crocodile' in the registered trade mark, crocodile faces in a different way in the marks etc. He observed that these differences were not significant and the prominent feature was that all the marks depicted a crocodile in a similar way and therefore an average consumer too would conclude that the visual and conceptual message in the marks was similar. Lacoste appealed this decision before the Court of Appeals, which also upheld the decision of Collins J but gave Lacoste the leave to appeal to the Supreme Court. The Supreme Court held that the central message of the mark could be of assistance to the extent that it represents the visual, aural and conceptual elements of the mark which contributes towards the distinctiveness of a mark. However, simply using this test to determine the use of a mark was considered to be incorrect since, it ignores that a mark may communicate various messages and the central message test might result in granting excessive protection to a trademark owner than was intended. Furthermore, there were differences in the overall representation of the registered trade mark and the one in use by Lacoste therefore, the court ruled that the registration should be revoked –there were no instances of use of the registered trade mark anywhere.

This decision of the New Zealand Supreme Court is well reasoned and allows the parties to decide trade mark revocation cases upon consideration of the use of the mark which is registered and not only by use of a prominent feature of the mark.

What actually matters!

In the case of *G. Srinivasan vs. Voltamp Transformers Limited and Ors.,* decided by the Madras High Court on 14th February 2017, the Hon'ble Court refuted the Plaintiff's case for infringement of his *"midget transformer"* patent and his lack and inability to prove the same before the Court. On the other hand, the Madras High Court was pleased to side with the Defendant's contention and passed an Order for revocation of the Plaintiff's patent.

The Plaintiff i.e. Mr. G. Srinivasan, in the present case is an engineer who has invented the novel concept of power distribution titled "midget transformer", which is small in size, easier to install and maintain and also reduces power wastage. The Plaintiff's invention employs Star Node Circuit Breakers' (SNCB), which substitute the costly and conventional switchgear in control applications. The Plaintiff claimed that he had acquired patent registration for his invention under the Patents Act, 1970.

The cause of action for the present suit arose when the Plaintiff visited the site of M/s. P.V. Technologies India Limited., at Sivaganga, Tamil Nadu, where he found his patented invention being used by the Defendant. On an examination of the circuit diagram of the technology on site, the Plaintiff was convinced that the Defendant was using an identical technology to his 363 model transformers, patented by the Plaintiff. As a result, the Plaintiff approached the Hon'ble Madras High Court claiming infringement of his patented invention by the Defendant. The Defendant however countered the Plaintiff's suit with a Counter-Claim of its own, the Defendant claimed as follows:

i. The claims made by the Plaintiff in its complete specification in its patent application cannot be considered to be an invention within the meaning of the Indian Patents Act.

ii. The Complete specification did not disclose the source of geographical origin of biological materials used for the invention.

iii. The Patent, in spite of being applied for by the Plaintiff and the same being granted since the past 10 years had not been had not been commercially exploited by the Plaintiff.

The Defendant had further claimed in its Counter-Claim that the Plaintiff had filed the present suit in the year 2012 when its Patent was not valid. It was the contention of the Defendant that the Plaintiff's invention was not granted protection until 2012. The Defendant further submitted that in the year 2010 it was manufacturing "Cast Resin Transformers" when the Plaintiff's patent was not in effect, since it had lapsed.

The Defendant further led evidence before the Madras High Court to show that transformers similar to that of the Plaintiff were worked and used in many parts of the world and patented by some in US. Furthermore, similar transformers were already publicly used in other parts of the country; hence, the Plaintiff cannot claim any monopoly over the said transformer. The Plaintiff on the other hand merely relied on diagrams of its patented invention and submitted the same to the Patent Controller to substantiate its claim of similarity between the Plaintiff's invention and the technology used by the Defendant which resulted in the infringement of the Plaintiff's patent.

The Madras High Court refuted the Plaintiff's claim of infringement as it had failed to produce any expert witness to substantiate its claim and disclose the similarity between the two products of the two parties to the present suit. The Madras High Court ruled that *"To find out any infringement, technical report and expert opinion is necessary".* As a result, the Madras High Court refused the Plaintiff's claim for infringement of its Patent and dismissed the suit and further revoked the Plaintiffs patent by allowing the Defendants Counter Claim.

Bayer's latest plight

Bayer's woes with the Indian legal system are far from over. In the year 2011, Bayer had filed a suit for restraining NATCO from making, importing, selling, and offering for sale 'Sorafenib', 'Sorafenib Tosylate' or any generic version of the same. During the pendency of this suit NATCO approached the Patent Controller for the grant of compulsory licensing over 'Sorafenib' and 'Sorafenib Tosylate'. In 2012, the Patent Controller granted compulsory license in patent no. 215758 (Sorafenib) to NATCO. In 2014, Bayer obtained an order according to which no consignment from India containing 'Sorafenat' could be exported. NATCO submitted that it had the drug licenses and the consent of the counsel of Bayer to export the drugs in question not exceeding 15gm for clinical studies/trail. NATCO again applied for a license to allow export of 1kg of the drug to China for clinical studies and trials. This was contested by Bayer in the present suit. The counsel for Bayer submitted that Section 107A of the Patents Act, 1970 did not contemplate export of products per se and is in fact restricted to the information generated within India. It was also argued that the rights under Section 107A flowed from Section 84(4) of the Patents Act, 1970 and the word 'selling' under Section 107A referred to the sale of the drugs in India alone and did not include export of such drugs.

These arguments were countered by NATCO's counsel; it was submitted that the drugs were exported to China solely for research and development and the drugs regulatory regime of China requires clinical trials to be conducted in China. Furthermore, NATCO did not have any commercial purpose to export those drugs. Similarly, Bayer had instituted a suit against Alembic Pharmaceuticals Ltd. claiming that the latter had exported almost 90kg of this drug in bulk to Brazil and Palestine. It was argued by Bayer that even experimentation, research and development in the patented product was prohibited as it would lead to commercial exploitation.

Hon'ble Justice Endlaw was of the opinion that if he upholds the understanding of Bayer's counsel of Section 107A, it would be contrary to the textual interpretation of the section. He ruled that the TRIPS provisions allow each member country to carve exceptions to patent rights; it was held that even if Article 31(f) of TRIPs permits only domestic operation of Bolar exemption, the legislature of a country was still entitled to decide whether export of patented article under Section 107A would be permissible. Furthermore, it was ruled that the judiciary did not have the powers to legislate hence, the fact that there were no provisions to regulate the export of patented drugs, in itself did not imply that such activity is barred under Section 107A. Bayer's counsel also argued that since NATCO had obtained compulsory license under section 84, it could avail the benefits of Section 107A which applies to non-patentees. It was held that the condition of Compulsory License is for making, using, and selling the drug covered by the patent within the territory of India. However, the purpose of sale under Section 107A is only for obtaining the regulatory approvals under the laws of India or in a country other than India. Therefore, compulsory license would not bar NATCO from acting under Section 107A.

This judgment though well-meaning, allows room for misuse. The act of exporting patented drugs to other countries is contrary to the interest of the patentee and the patentees will have to be vigilant about their rights in the countries where the drugs are being exported. It is true that initially the drugs are exported from India to other countries for research purposes but once the patented drug is in another territory, the legal action against infringement (if any) will have to be brought in the other country because patents are territorial rights. Furthermore, the judgment does not put a limit on the amount of a drug that can be exported in a single transaction, in this case NATCO exported 1 kg of the drug to China and Alembic exported 90kg to Brazil and Palestine. It is true that the judiciary cannot legislate, but the judiciary can ensure appropriate checks and balances in the system to prevent misuse. It is quite possible that Bayer may appeal against this judgment.

Territorial Rights

The Supreme Court's decision in the case of *Indian performing Rights Society v Sanjay Dalia & Anr* has led to different interpretation for determining jurisdiction of a Court under the Trade Marks Act, 1999 and the Copyright Act, 1957. Recently in the case of *Allied Blenders & Distillers Pvt Ltd v Prag Distilleries Pvt Ltd* the issue of territorial jurisdiction was again brought up before the Delhi High Court.

The Plaintiff (Allied Blenders) had filed a suit against the Defendant for infringing its registered trade mark 'Officer's Choice'. The Defendant submitted that it was using the mark 'Officer's Choice' only in Andhra Pradesh therefore, the cause of action 'if any' arose in Andhra Pradesh not Delhi. Therefore, an application for return of plaint under order 7 rule 10 of the Code of Civil Procedure, 1908, was filed by the Defendant. The single judge of the High Court ruled that in accordance with the understanding of the Sanjay Dalia case and the *Ultra home Construction Pvt Ltd. v. Purushottam Kumar Chaubey and Others* it was necessary for the Plaintiff to prove, when filing a suit from the citus of its branch office that a part of the cause of action arises in that jurisdiction, it should not merely be an attempt to harass the Defendant. Therefore, the Defendant succeeded in its application of Order 7, rule 10. The decision was appealed to a higher bench of the court and upon the perusal of the facts of the case the appellate court was of the opinion that the Plaint revealed two causes of action: 1) about the infringement already committed by the Defendant; and 2) the apprehension that Defendant's business may expand to Delhi and other parts of India as well. In light of these facts the Appellate court held that a part of the cause of action was *qua timet* in nature and in such circumstances the Plaintiff was correct in instituting the suit in Delhi.

This case very interestingly deals with the issue of jurisdiction when there may be more than one cause of action, it was ruled that in such circumstances more than one court could have the jurisdiction to hear and decide the matter. Furthermore, if one cause of action is pertaining to an infringement that has already occurred in territory A, and the other points towards an apprehension of infringement in another territory B then the party instituting the suit will have the right to institute the suit in either Courts of territory A or B. It is quite possible that this may be used as a means to circumvent the Sanjay Dalia suit and allow parties to file suit in forum of their convenience citing 'apprehension' of infringement in such jurisdiction. It remains to be seen if this matter is further appealed.

Non-Commercial Use Bars Damages

Recently the Madras High Court dealt with the dishonest adoption of the mark "Aurovallie" by the Defendant i.e. Ramaniyam Real Estates Pvt. Ltd., that was alleged to be deceptively similar to the Plaintiff's organization's name 'Auroville Foundation'. The Court passed a decree of permanent injunction restraining the Defendant; however it denied any relief of damages or rendition of accounts.

Auroville Foundation, is an international cultural township situated in the outskirts of Pondicherry. The Foundation was established in 1991 manage and develop the Auroville. The Court accepted the Plaintiff's contention that the name Auroville is protected under the *"Emblem and Name (prevention of Improper Use) Act 1950",* and has been in continuous and uninterrupted use by the Plaintiff since its inception in 1968. The Plaintiff approached the Court with its case that the Defendant had dishonestly adopted a deceptively similar name "Aurovallie" for its building construction project under the name "Ramaniyam Aurovallie".

The Defendant in the case contended that it was a reputed Company formed in the year 1986 with a vast reputation of its own in the industry of Real Estate and Construction. The Defendant further claimed that their adopted mark "Ramaniyam Aurovallie" was coupled with their name and an emblem in order to avoid any confusion amongst the masses with the geographical region in the Villupuram District in the state of Tamil Nadu, India. In addition to this, the Defendant submitted before the Court that the Plaintiff had no registration under the Trademarks Act, 1999 for "Auroville" and neither was the Plaintiff involved in producing goods or services for commercial use, hence, there could be no case for passing off.

The Court after listening to the arguments of both parties held that the Plaintiff's mark "Auroville" was distinctive in nature on account of its continuous and uninterrupted usage. The Hon'ble Court further held Auroville is protected under the *Emblem and Name (prevention of Improper Use) Act 1950* and the *Auroville Foundation Act 1988.* The Hon'ble Court further negated the Defendant's submission that its adoption of the name and emblem for its mark "Aurovallie" was made in order to avoid any confusion with the geographical region in the Villupuram District, since there was no such region in existence. The Court held that the Defendant's adoption of "Aurovallie" was deceptively similar to the Plaintiff's mark and name and hence an Order of Permanent Injunction was passed by the Court restraining the Defendant from adopting and using the mark "Aurovallie" or any other mark deceptively similar to the Plaintiff's mark.

While the Hon'ble Court was pleased to grant the relief of permanent injunction, it refused the Plaintiff any relief for damages or rendition of account. While the argument of commercial use of a name is not mandatory for a case of passing off or infringement, which worked in the Plaintiff's favor, the very same argument also worked as a double-edged sword that restrained the Plaintiff from claiming any actual damages, as the Plaintiff was not involved in any commercial activity and hence any monetary losses could not be claimed. The Court acknowledged that the Defendant has been present in trade since 1986 and since its time of existence has created a reputation, hence, the claim of the Plaintiff in respect of the Defendant having sold flats in its constructed building on the basis of the deceptive mark "Aurovallie" alone, did not hold any merit.

In conclusion, while the Court was correct in holding that commercial use is not the only criteria for ascertaining a case of passing off; its act of not granting of relief of damages may not be justified. The Madras High Court has ignored the *doctrine of unjust enrichment,* which was engaged by the Defendant by its adoption of the mark "Aurovallie" which was held to be deceptively similar to the Plaintiff's mark. The Courts ought to had considered the aspect of damages to a non-profit organizations, as damage to reputation and goodwill cannot be quantified in monetary terms.

No Exclusivity Over Pharmaceutical Ingredient

Recently the Hon'ble Delhi High Court adjudicated on the matter of trademark infringement for pharmaceutical trademarks between the parties *Sun Pharma Laboratories vs Mylan Laboratories & Anr.* The dispute in the present case between the aforementioned parties is respect of the deceptive adoption by the Defendant of the Plaintiff's mark **'OXIPLAT'**. The Delhi High Court after considering the arguments in the present matter refused to grant relief against trademark infringement and passing off in favor of the Plaintiff and further a very interesting commentary on adoption of generic names as trademarks by pharmaceutical companies.

The Plaintiff instituted the present suit before the Court when it first discovered the Defendants product bearing the mark "SOXPLAT", which was alleged to be deceptively similar to the Plaintiffs own mark "OXIPLAT". The Delhi High Court at the interim stage of the suit was forced two take note of two crucial facts in the suit, they are:

i. The Plaintiff and Defendant are engaged in the same line of trade in respect of pharmaceutical/medicinal preparations of drugs.

ii. The Plaintiff and Defendant are both registered owners of their respective trademarks i.e. OXIPLAT and SOXPLAT.

Furthermore, the Court also took note of the fact that both parties had opposed the validity of registration of each other's trademark before the IPAB *(Intellectual Property Appellate Board).* Hence, through an application by both parties under Indian Trademark Law, the trial stage of the matter was stayed until rights of parties in respect of their trademarks was not settled by the IPAB, leaving the Court to decide on the Interim stage of the suit.

The Court while deciding the matter heard at length the arguments of both parties to the suit. The plaintiff relied on various cases in support of its arguments for its claim of infringement and passing-off of its mark, while the Defendant stated that the Plaintiff cannot claim any relief of temporary injunction for infringement or even in passing off unless the Plaintiff demonstrates that the trademark adopted by it has a distinctive character. Furthermore, the Defendant in its argument stated that the burden of proof is on the Plaintiff to prove that its adoption of the mark Oxiplat, is not an attempt to monopolize the mere abbreviation of the name of the main ingredient i.e. the generic name of the salt Oxaliplatin. In the contract, the Defendant stated that the adoption of the mark Soxplast was on account of it being an invented mark. Wherein the "Ox" was taken from the beginning and "Plat" from the middle of Oxaliplatin combining them together to form a distinctive mark with the addition of the letter "S" as a prefix representing the Defendant no. 2's Company name "Strides", thus forming the mark "Soxplast".

The Delhi High Court took note of the fact that in the field of medicines and pharmaceuticals, it is a common practice that the drugs are named by either the name of the organ which it treats or by the principal ingredients or the name of the ailment. Furthermore, the Court also noted that in the field of pharma, no trader could restrain another trader from using the description of the organ, ingredients or ailment.

In its findings the Court stated that 'Sox' and 'Ox' as used by the Plaintiff and Defendant as prefixes in their respective trademarks were not similar and are not capable of creating any possibility of confusion and/or deception amongst the public. Furthermore, the Plaintiff had also failed to state its reasons for the adoption of its mark Oxiplat and its reasons for its having acquired distinctiveness as was claimed by the Plaintiff in the suit. As a result, the Delhi High Court held there to be no proof of a *prima facie* case in favor of the Plaintiff and hence relief of interlocutory injunction being denied. The Delhi High Court further commented, *"The test of similarity of pharmaceutical trademarks may also be the test of the prefix. If both competing marks draw letters, words or their parts from the main ingredient of similar pharmaceutical products, there is very little room for play or for permutations or combinations. Giving primacy to one would be denying the use to the others allowing resultantly the former to monopolize the generic name which is neither fair nor permissible".* Interestingly, the Delhi High Court, took note of various factors in the present suit such as the two marks of the two parties in the present suit having descriptive features and being *publici juris* (common words in trade); however, the fact that the Plaintiff is a prior user of the mark was never considered or pondered upon by the Court.

A stitch in time saves nine

Shrimad Bhagvadgita is a religious book for Hindus, it is said to be the representation of true words of Lord Krishna during the Mahabharata. Since it is a religious book that has been passed on for various generations the book is in public domain however, there are various interpretations to the book and numerous scholars have put forth their understanding of the religious book. These interpretations are protectable under the copyright laws since, the understanding of each individual is different; even if the understanding is similar, the expression will be different.

In the case of *The Bhaktivedanta Book Trust vs Thomson Press (India) Ltd & Anr.,* the Plaintiff (Bhaktivedanta Book Trust) alleged that the Defendant was reprinting its copyright protected works without obtaining a license or permission in any form whatsoever. Furthermore, in the reprinted version, the Defendant had claimed that it had the license to print and publish the works of Swami Prabhupada. Once the Plaintiff learnt of the Defendant's activities it filed a *qua timet* suit i.e. apprehending that the Defendant will engage in activities that will be injurious to the Plaintiff. The Defendant's books were ready and soon to be made available in the market. Justice G.S Patel understood that it was necessary to restrain the Defendant from making the books available. An interim order injuncting the Defendant from selling the books was passed, this order is effective until 22nd March, 2017.

This case throws light on the importance of initiating a *qua-timet* suit; such a suit will enable the owner of IP rights to initiate a suit when there is evidence of reasonable apprehension of violation of IP rights. In this practice the owner of IP rights too does not suffer any losses in the business and the balance of convenience clearly lies in favor of the owner of the IP.