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Intermediary liability, access to information and copyright infringement

ResearchGate was launched in May 2008 and is popularly referred to as the social networking website for scientists and researchers. Several researchers and scientist share their findings, theories, publications with one another through this website. The popular website ResearchGate has been sued by American Chemical Society (ACS) and scientific publisher, Elsevier alleging copyright infringement.

It was reported that several authors/scientists despite assigning the rights in the work to their publishers, were making the same available to other researchers free of cost solely for obtaining their comments and wider discussion. This was alleged to be a clear case of copyright infringement therefore, in September publishers such as, Elsevier, Wiley, Wolters Kluwer, The American Chemical Society and Brill collectively referred to as 'Coalition for Responsible Sharing' decided to initiate legal proceedings against ResearchGate. The legal action was considered necessary by 'Coalition for Responsible Sharing' to ensure that ResearchGate revises its policies. It is interesting to note that in the copyright policy posted by ResearchGate it has been specified that the individual uploading a document on the website should ensure that the same is not infringing the copyright of another. It is evident that many users of the social networking website did not read the terms. Furthermore, this case also showcases the difference in the approach of authors and publishers. It is a fact that most of the researchers/scientists are keen on sharing their knowledge for further discussion with their peers while publishers focus more on the monetary aspect of the copyright. It has been claimed that after being notified, ResearchGate has removed several papers said to be infringing copyright however, there still remain a few infringing documents on the website's database.

This case throws light on issues such as intermediary liability and access to knowledge. It can be said that since ResearchGate is an intermediary it cannot be held liable for the actions of the users but it is a fact that the website should have its own checks and balances to ensure no acts of infringement are promoted. It is also true that the large amount of data being uploaded every day makes it difficult to regulate the content. Therefore, the viable solution is for ResearchGate to work with the publishers in regulating the content and reach an amicable resolution of the dispute.

EU General Data Protection Regulation (GDPR) and its impact on Indian Companies

The General Data Protection Regulation was adopted by the European Union on 25th May, 2016 and it was announced that the regulations will come into effect on 25th May, 2018. It was decided that a time period of two (2) years would be sufficient transition period for the member countries to amend the laws to be in line with the regulation.

The primary purpose of the GDPR is to regulate the information concerning EU Citizens being processed by third parties. The regulation identifies two types of organizations –data controller and data processor. The organization which collects data and determines the manner in which such data should be used is 'data controller'; the organizations that simply collect, process and store data for the controller are 'data processors'. The most important feature of the GDPR is that it has an extra-territorial application i.e. not only the organizations based in EU Member nations, but also in other countries which may be processing data from EU. In case of companies that are primarily dealing with processing of sensitive data of citizens, it is necessary to appoint a Data Protection Officer (DPO). The Data Protection Regulation aims at ensuring that the privacy of citizens is not breached, this is done by ensuring that the information is made available to companies/data processors on the basis of need to know determined on the basis of the purpose of such data collection. The Regulation also grants citizens' rights such as the right to be erasure (forgotten), data accuracy, correction of data, restriction of data accessibility, right to data portability etc. The Regulations are a result of recent incidents of breach of data in different industries such as telecom, healthcare, cloud services etc. The regulations grant data subject the right to request for erasure of data when it doesn't fulfil the requisites specified in the regulations such as the information is inaccurate, not used for the purpose for which it was collected etc. Furthermore, in the event that there is an instance of breach of data, the organization has to within seventy two (72) hours notify the regulators about the same and the subject data that may be affected by such breach. In the event that an organization does not comply with the regulations, it could result in a penalty of 2% of the annual turnover or 10 million Euros whichever is higher. In the event there has been a breach of important provisions such as consent of subject or rights of the subject etc. the fines can be as high as 4% of the annual turnover or 20 million Euros whichever is higher

The Indian organizations that may fall in the category of data processors or controllers will have to ensure that they are encrypting the data; using the data solely for the purpose that they have specified for which it will be used; ensure that there is a team which is available for grievance redressal of subject data in the event that there is a requirement of data rectification or erasure etc. The GDP regulations are stricter in comparison to the existing Section 43A of the Information Technology Act, 2000 in India under which the Companies are liable to implement and maintain

reasonable security practices regarding handling of sensitive information. Furthermore, the IT (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) rules, 2011 also include criminal consequences such as criminal sanctions up to three (3) years in prison or fine of INR 5, 00, 000 for intentional or negligent disclosure of sensitive data. The compliance with these regulations is mandatory and it is important that the Indian companies processing data from EU member countries have prepared for the implementation of the regulations in May 2018.

Evidence of use and ownership of a Trade Mark

The Trade Mark practice in India recognized the right of adoption of a foreign trade mark owner outside India as superior to the rights emanating from registration. This was once again evident in the 'KYK' trade mark case.

KYK Japan had adopted the trade mark 'KYK' around the 1950s and obtained registration for the trade mark 'KYK' in Japan, Korea, China, Taiwan, Iran, Bangladesh and Singapore, but not in India. An Indian firm KYK Bearing International appeared to have adopted the trade mark 'KYK' in 1996 and had obtained registration for the same for automotive parts in classes 07 and 12. When KYK Japan wanted to obtain registration of the trade mark 'KYK' in India they were faced with the hurdle of Indian firm's registration. They filed an application for the cancellation of the trade mark KYK belonging to the Indian entity and produced evidence of use of the trade mark outside India prior to date of adoption and use by Indian entity. On the basis of this prior adoption and use being outside India, the IPAB (Intellectual Property Appellate Board) ordered cancellation of registration of the Indian entity's trade mark. The Appel to the Delhi High Court also failed. It is clear that registration of trade mark in India, is always vulnerable to prior adoption of the same trade mark and its use outside India by foreign proprietors.

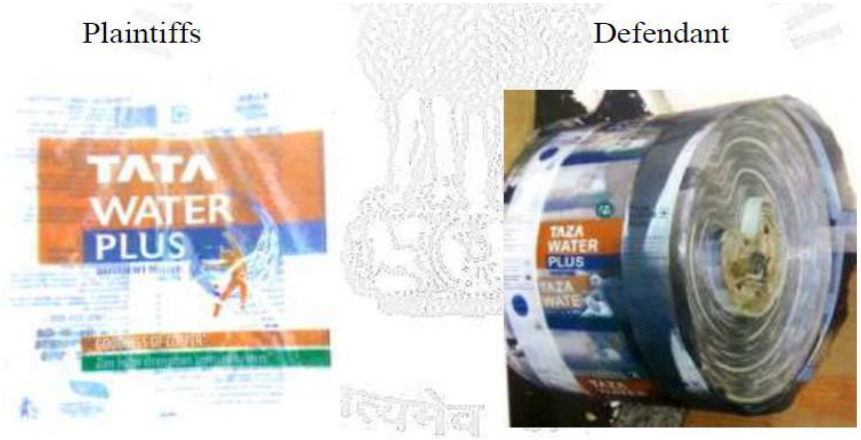
Watered down trade mark

Trade dress, color scheme of the label plays a significant role in the matters in India particularly when it comes to sensitive products like items of food and drink. A case in point is the recently decided case of *Tata Group v Mayuri Beverages.*

Tata Group is marketing water under the trade mark 'Tata Water Plus' in a distinctive color scheme in which the words 'Tata Water' is written in white color against an orange background and the word 'Plus' is written in white color against a blue background. Mayuri beverages also came out with the water pouches under the trade mark 'Taza Water Plus'. The word 'Taza' in Hindi language means fresh; ordinarily the word 'Taza' will not be considered as similar to the word 'Tata' however, in the present case the use of the words 'water plus' below the words 'Taza' in the same color scheme for a consumable product like water seems to have persuaded the court to grant an interim injunction in this case.

In India color scheme and placement of marks and description is important criteria for determining deceptive similarity when marks are in English language or using English fonts which can't be comprehended by majority population. It is

understood that consumers tend to purchase consumable products on the overall impression of the marks, color scheme etc. Therefore, it is necessary to prevent another proprietor from imitating the color scheme and overall impression of a trade mark.



Cleaning up the Act

The objective of an advertisement is to create an impact on the minds of the viewers in a limited span of time. Comparative advertisement per se is not illegal, however if such comparison also includes references which suggest that the other brand is of an inferior quality it will be considered as unfair competition. The line between comparative advertisement and disparaging advertisement is blurred thereby resulting in the companies often toeing the line. This was again observed in the case of *Reckitt Benckiser (India) Pvt. Ltd. v Jyothy Laboratories Ltd.*

Reckitt Benckiser alleged that Jyothy Laboratories had released an advertisement that was disparaging its product. Jyothy Laboratories was promoting its new toilet cleaning product 'T-Shine' and the advertisement was being broadcast through various T.V. Channels in India. In the advertisement the product 'T-Shine' was compared with another toilet cleaning product which was a bottle of a distinctive dark blue color and a unique shape. In the advertisement the message conveyed that the toilet cleaners containing Hydrochloric Acid (HCL) were harmful for cleaning toilets. Reckitt Benckiser claimed that the toilet cleaning bottle containing HCL, depicted in the advertisement, was a direct reference to its product 'Harpic'. Reckitt Benckiser also submitted screenshots of similarities between its advertisement and the T-Shine advertisement wherein the same scenes were shot but only to show 'Harpic' in poor light. It was claimed that the trade mark 'Harpic' is a registered trade mark and the design of the bottle (of Harpic) was also registered by Reckitt Benckiser. Jyothy Laboratories' counsel argued that the prayers of Reckitt Benckiser were seeking to restrain the freedom of speech of Jyothy Laboratories and that there was no disparagement in the advertisement promoting T-Shine.

Justice Manmohan, heard both the parties and held that upon a perusal of the facts of the case, the advertisements, Reckitt Benckiser had made a *prima-facie* case against Jyothy Laboratories. The advertisement contained elements

similar to that of the Reckitt Benckiser's earlier advertisement; however the message conveyed was the opposite. Therefore, there was a prima-facie case of infringement and disparagement against Jyothy Laboratories and an order of interim injunction was passed in favor of the Reckitt Benckiser. This case is a reiteration of the fact that it is not necessary to make another's products appear inferior to promote one's own goods. Also, companies need to adhere to Advertisement Standard Council of India Code, 1985, which lays down the conditions to be borne in mind prior to broadcasting an advertisement.

Origin Story

The Rasogolla is a celebrated sweet dish in India, more particularly in West Bengal and Odisha. The two eastern states have, in the past asserted their rights over the origins of the 'Rasogolla'. The West Bengal government in 2015 applied for obtaining a geographical indication certification for the 'Banglar Rasogolla'.

In the statement of case submitted to the Geographical Indications Registration by the Directorate Food Processing Industries, it was claimed that the Banglar Rasogolla originated in the year 1868 and was created by Mr. Nobin Chandra. The statement of case included various anecdotes that explain the manner in which the Rasogolla gained popularity in West Bengal. The annexures include various literary references to the dish and its Bengali roots along with its recipe. The Geographical Indications certification was given on 14th November, 2017 for class 30 i.e. food stuff. Interestingly, the certification is accompanies with a post-registration condition whereby the West Bengal State Food Processing & Horticulture Development Corporation Ltd./Director of Food Processing will have to give the "No Objection Certificate" to the producers of the Banglar Rasogolla within the GI Area of Production of the GI product, after getting the production & quality standards of the product tested.

The GI certification is a matter of pride for the West Bengal government however it is incorrect to state that it was a victory over Odisha because the Odisha state government has so far not filed a GI application. Furthermore, the registration is for the 'Banglar Rasogolla' not 'Rasogolla' per se i.e. it has been given for the variety of the sweet dish as originating in West Bengal. It is possible that if the Odisha government applies for GI of the Rasogollas as served in the Jagannath temple it might also be granted the status of a GI.

The purpose of a GI is to indicate the origin of products from a particular region therefore, the difference in preparation and the taste may result in grant of GI to Rasogolla originating from Odisha.