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International News

- BIEBER VS. BEAVER
- THE IPAD CAUTIONARY TALE
- BABY BLUE IVY GETS TRADEMARKED
- NIGERIAN COURT JAILS THREE INDIANS FOR CONTEMPT
- DETECT COUNTERFEIT ALCOHOL WITHOUT OPENING THE BOTTLE

National News

- COPYRIGHT ACT (AMENDMENT) BILL 2012 ONE STEP AWAY FROM BECOMING THE LAW: NEWFOUND JOY FOR LYRICISTS, SCRIPT WRITERS AND SONG COMPOSERS
- COMPULSORY LICENSE FOR DRUGS NOW A REALITY
- AGENT VINOD SONG CONTROVERSY
- IPAB REVOKES THE FINANCIAL TIMES TRADE MARK
- EXCLUSIVE RIGHT OVER THE WORD "IMPERIAL" DENIED BY MADRAS HIGH COURT

RKD News

- OUR NEW OFFICE

Bieber vs. Beaver

A recent hilarious case of parody being mistaken for infringement arose in Florida, USA when a company called RC3, Inc. filed a complaint for declaration against the teen pop star Justin Bieber. RC3 prayed that the Florida District Court declare that their iphone/ ipad/ android mobile application game titled 'Joustin Beaver' does not inter alia, infringe the trade mark rights of Bieber.

The complaint for declaration arose in response Justin Beiber's attorneys sending RC3 a cease and desist notice, interalia, demanding that RC3 cease exploitation of the APP.

The game in controversy is hilariously titled 'Joustin Beaver' and according to the complaint of RC3 "…..is a parody of the commercial success of the Defendant (Beiber). The parody App portrays a beaver floating on a log down a river. The beaver presets with bangs, a lance, and a purple sweater. The beaver knock "Phot-Hogs" that are attempting to take his photograph into the river with his lance. The beaver also signs "Otter-graphs". The beaver also must dodge the "whirlpool of success" which will lead beaver out of control, while navigating the river."

The matter is currently pending.

The IPAD Cautionary Tale

The Immensely popular "iPAD" tablet of Apple faced serious legal issues in mainland china concerning the trade mark "iPAD". The Chinese company, Proview, which sued Apple for trade mark infringement claims that it started using the trade mark in the year 2000. In the year 2009 Apple had entered into an agreement with the Taiwanese unit of Proview (Proview Electronics Co. Ltd.), for the purchase of the “IPAD” trademarks in a number of countries including China. However Proview China claims that the 2009 contract between apple and the Taiwanese unit to buy rights to the iPad trade mark in China was invalid because Proview’s Shenzhen unit that owned them wasn’t a party to the agreement.

The parties have entered into formal legal proceedings in both the U.S. and China against each other. Inter alia, Proview China has demanded that the authorities in various Chinese cities prohibit retail sales of Apple’s IPADs. Some cities complied and other cities have so-far, refrained. Proview China has also demanded a ban on exports of Apple’s IPADs from China, but so-far Chinese authorities have refused to comply.

Reports indicate that the parties are attempting to settle the matter through negotiations.

The moral of the story- before having IP licensed or transferred to yourself, conduct a thorough due diligence to see if the person assigning/ licensing the rights does actually have such rights to assign / license.

BABY BLUE IVY GETS TRADEMARKED

According to US reports, Beyonce and Jay Z have decided to trademark the name of their one month old baby, Blue Ivy Carter’s . Having appeared in her father’s video being just a few hours old, Blue Ivy Carter is a brand in the making. An application for grant of trademark was filed by Beyonce’s company BGK Trademark Holdings with the US Patent and Trademark Office.

Two other individuals had tried to trademark the name after the birth of the baby on January 7th which prompted Jay Z and Beyonce to file their application. On January 11, fashion designer Joseph Mbeh attempted to trademark "Blue Ivy Carter NYC" and later stated that his intention was to create a line of products for Jay-Z and Beyonce, while on January 20, a second applicant tried to trademark "Blue Ivy Carter Glory," for a line of fragrances. The Trademark Office rejected both applications stating that the name belonged to a very famous infant.

The application filed by Jay Z and Beyonce is still pending. If approved, it would entitle the parents exclusive use of their baby’s name for any brand or endorsement and would also prevent other businesses from taking advantage of the already famous name.

Nigerian Court jails three Indians for contempt

Justice John Tsoho of the Federal High Court in Lagos, Nigeria sentenced three Indian brothers namely Chandru Ganglani, Bharat Ganglani and Trishul Ganglani, to one-month imprisonment each for contempt of court after they allegedly disobeyed the Court’s orders on a trademark infringement issue.

The trio are the directors of a plastic company, Sacvin Nigeria Limited. Earlier, Rike Industries had filed a suit against Sacvin Nigeria Limited alleging that the defendant company was manufacturing and selling plastic products which infringed the trademark of Rike Industries Limited.

On 9th July, 2009, Justice John Tsoho had passed an order for interim injunction against Sacvin Nigeria Limited, thereby restraining them from engaging in the trade or business of manufacturing and selling or distributing the plastic products which infringed the trademark of Rike Industries Limited.

The Company however allegedly disobeyed the Court's orders and continued activities that would amount to the said trademark infringement.

DETECT COUNTERFEIT ALCOHOL WITHOUT OPENING THE BOTTLE

A hand held gadget has been invented to detect counterfeit alcohol without opening the bottle. This device enables users to analyze contents of a bottle by using a beam of light. The beam of light produces a signature of the liquid which is compared with the signature of the genuine brand. If the match is not identical, it indicates that the bottle is a fake.

The device, developed at the University of Leicester Space Research Centre, is now being designed for sale. Such a device is useful in retail outlets or can be used by wholesalers to test the authenticity of alcohol.

This device has been used to test the authenticity of whisky but can be applied to any form of alcohol. It may require alcohol to have some colour to provide a certain result. Therefore the device when applied to vodka may not produce accurate results.

Copyright Act (Amendment) Bill 2012 one step away from becoming the law: Newfound joy for lyricists, script writers and song composers

The Copyright Act (Amendment) Bill 2012 was passed in India's Lower House of Parliament on May 22nd,2012 and by the Upper House on May 17th, 2012 and now awaits final Presidential approval to become law. The Bill is aimed at correcting an imbalance in India's copyright law which was seen as favoring film producers and record labels rather than the lyricists, script writers and song composers. After the Bill was passed in the Rajya Sabha, Mr. Javed Akhtar who has been at the forefront of the battle for recognition and acclaim of the rights of song creators said "Yes, we are all very satisfied with the amendments that have been made. Now our creations will be non-assignable. We will sell the rights. Right now, we sell our compositions to the production house and they re-sell it to music companies, cellphone companies as ring tones, ads and use it wherever they can. In return, we, the creators of that song, music, tune, we don't get anything. But now, hopefully, those rights will lie with us. Now our words, songs, stories, tunes, will be ours and ours only in the legal terms. Even in the present law, we have a share but we are shortchanged by production houses and music companies. We can claim the royalties they earn from such dealings legally and also on our own,"

The following are the salient features of the bill:

- The original authors of literary, musical, dramatic and artistic works that have been incorporated in cinematograph film will be considered as the first owners of copyright in the said works. The "work for hire" concept which states that the employer or "commissioning party" is the first owner of copyright in relation to a said work shall not apply in the abovementioned circumstances.
- Authors of literary or musical works incorporated in films or sound recordings shall be entitled to receive royalties equal to the royalties received by the assignee for exploitation of their work. However this provision does not extend to communication of the film to the public in cinema halls.
- The right of an author to claim royalties or any other form of consideration for utilization of his work in any form other than as part of a cinematograph film or sound recording shall not be extinguished or affected in any way by assignment of the copyright in that work for making a film or a sound recording.
- The right to claim authorship as recognized under section 57 of the copyright act can now be exercised by legal representatives of the author. Hence the right to claim authorship does not extinguish with the death of the author.
- The right to claim damages in respect of any distortion, mutilation or other modification of the author's work will be available even after expiry of the term of the copyright.
- A new section 38A has been introduced which defines Performer's right as the exclusive right to do or authorize for doing any of the following acts in respect of the performance or any substantial part thereof, namely:
- To make a sound recording or a visual recording of the performance, Including:
- Reproduction of it in any material form including the storing of it in any medium by electronic or any other means,
- Issuance of copies of it to the public not being copies already in circulation.
- Communication of it to the public
- Selling or giving it on the commercial rental or offer for sale or for commercial rental any copy of the recording
- To broadcast or communicate the performance to the public except where the performance is already broadcast.
- The Compulsory Licensing provisions under section 31, (in relation to published work) and 31A (in relation to unpublished work or anonymous work) which were earlier restricted only to Indian works have now been made applicable to all works.
- A new provision has been inserted where the work may be made available under the Compulsory License for the benefit of the people suffering from disabilities.

- Several changes have been made in respect of the law governing copyright issues in "cover versions", the most significant being that a cover version of any literary, dramatic or musical work, can only be allowed after five years from the first recording of the original creation.
- The amendment has introduced the concept of "statutory license" in relation to the published works. Any broadcasting organization, that proposes to broadcast any published work to the public including performance of any published musical/ lyrical work and sound recording, shall be required to first give a notice of its intention to the owners of the rights. Such notice shall contain details regarding the duration and territorial coverage of the broadcast and royalties for each work at the rate and manner fixed by the copyright board shall be duly paid to the owners of the rights. Moreover, the names of the author and the principal performer will have to be announced with the broadcast.
- The amendment also permits authors of the work to be members of the Copyright Societies. Copyright Societies will be granted registration for a term of five years and would need to re- register within a period of one year from the date of commencement of the Copyright (Amendment) Act, 2012. Further, Copyright Societies will be required to have governing bodies consisting of equal number of authors and owners of work for the purpose of administration of the society. As per a new section 33A, Copyright Societies will also be required to publish their respective tariff Schemes.
- Acts that do not amount to infringement are listed in section 52 and the said section has undergone some changes. The use for educational purposes, fair dealing will not amount to copyright infringement in respect of any work. Earlier this exception only extended to literary, dramatic, musical or artistic work. Several new exceptions have been included in the ambit of this section.
- With an aim to curb piracy, Section 65A has been inserted and states the following:

"Any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by the Copyright Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine. However, the following are the exceptions:

- Doing anything referred to above, for the purpose not expressly prohibited by this Act:

Provided that any person facilitating circumvention by another person of a technological measure for such a purpose shall maintain a complete record of such other person including his name, address and all the relevant particulars necessary to identify him and the purpose for which he has been facilitated; or

- Doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or
- Conducting any lawful investigation; or
- Doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator; or
- Doing anything necessary to circumvent technological measures intended for identification or surveillance of a user of national security."
- A new section 53 has been inserted which states that the owner of the copyright can make an application to the Commissioner of Customs for seizing of infringing copies of works that are imported into India.
- Emphasis has been laid on Section 40 which deals with foreign work, that the term of copyright granted to foreign work shall not exceed the term of copyright provided under the Copyright Act, India.
- As per Section 18, it has been clarified that no assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made.

Compulsory License for Drugs Now a Reality

In August 2011, Natco Pharma Ltd., an Indian generic drug manufacturer, had applied to the Controller of patents for grant of "compulsory license" in respect of Bayer's patent covering an anticancer drug, Sorafenib Tosylate, meant for patients with advanced kidney and liver cancer. Mr. P.H. Kurian, heard the evidence adduced and the arguments put forth by the parties and gave this landmark and well reasoned decision, on his last day in office as Controller General of Patents on March 12, granting the country's first compulsory license to Natco, to produce and market an anti-cancer drug.

The main points at issue were three fold – those of satisfying the requirements of Section 84 (1)

"84. Compulsory licences.

- 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 licence 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."

Emphasis has been supplied by us.

The facts of the case are as follows:

- Bayer Corporation supplied the drug to only 2 per cent of approximately 88,000 patients who required the drug. Therefore, the statutory requirements of meeting "reasonable requirements of the public" with respect to the patented drug (Nexavar) were clearly not met.
- Bayer's pricing of the drug was excessive and did not constitute a "reasonably affordable" price. It was priced at around Rs. 2.8 lakh for a month's supply of the drug, whereas Natco was willing to supply the same quantity at Rs. 8,800 a month.
- Since Bayer did not manufacture reasonable quantities of the drug in India, it could not be said to have complied with the "working" requirement under the Indian Patents Act.
- Furthermore this drug was only available in few of the states of India (primarily Metro cities). The drug was not available in states like Madhya Pradesh, rest of Maharashtra among others. Prior to filing an application for compulsory license, the Applicant had approached the Patentee with a request for a voluntary license to manufacture and sell the drug. The request of the applicant was denied. The Applicant thus, filed an Application for Compulsory License on 29.07.2011 under Section84 (1) of The Patents Act, 1970 r/w Rule 96 of the Patent Rules, 2003 which did not materialize. The Applicant proposed to sell the drug at a price of Rs.8800/- for one month's treatment as compared to the price of about Rs. 2,50,428 which was being charged by the Patentee at the time of making the Application. Three years had lapsed since the date of grant of patent when the Application was filed.

THE CONTROLLER'S DECISION

The Controller's decision, in favor of granting a compulsory license, was based on his determination that the question of whether a drug was available at a "reasonably affordable price has to be construed predominantly with reference to the public" and under the "admitted facts" of this case; these considerations fell in favor of granting the license. The Controller found that all the 3 criteria above were satisfied in this case, namely:

- That since Bayer supplied the drug to only 2% of the patient population, the reasonable requirements of the public with respect to the patented drug (Nexavar) were clearly not met.
- That Bayers pricing of the drug (2.8 lakhs for a months' supply of the drug) was excessive and did not constitute a "reasonably affordable" price.
- That Bayer did not sufficiently "work" the patent in India.

The Controller granted the compulsory license u/s 84 of the Patents Act, 1970 to Natco Pharama Ltd. in the patent relating to sofranib granted to Bayer with, inter alia, the following terms and conditions:

following terms and conditions:

- Natco shall sell the drug for not more than Rs. 8,880 for a pack of 120 tablets.
- Natco shall maintain accounts and disclose the same to the Controller on a quarterly basis.
- Natco shall not outsource the production of the drug.
- The license is non- exclusive and non- assignable.
- The royalty shall be paid at a rate of 6%.
- The compulsorily licensed drug product can be sold only for treatment of liver and renal cancer in humans within the territory of India.
- Natco shall provide the drug for free to at least 600 "needy and deserving" patients per year.
- The right to make and sell Sorafenib is limited to applicant (no sublicensing).
- NATCO shall have no right to import the drug.
- The period of the license is for the balance term of the patent in question.
- NATCO shall not be allowed to represent publicly or privately that the product sold by NATCO is the same as or is any way associated with Bayer’s product. Moreover NATCO’s product’s shape and / or colour shall be different from Bayer’s.
- Bayer will not be liable to provide legal, regulatory, medical, technical, manufacturing, sales, marketing or any other support to NATCO.

The Controller also specified that NATCO shall solely and exclusively be liable for its products and Bayer shall in no way be responsible for NATCO’s product liability.

We feel that this landmark decision will have far reaching consequences for the community as whole and shall result in more affordable treatment for all in India.

For full decision please click here

AGENT VINOD SONG CONTROVERSY

The recently released bollywood film “Agent Vinod”, like many others in the past has found itself in the midst of a copyright controversy. An Iranian pop band called ‘Barobax Corp’, has served a legal notice on music director Pritam Chakraborthy who has composed the song titled ‘Pyaar Ki Pungi’. The music band has alleged that the prelude of the song, which has become a rage now, has been "lifted without any change" from the title song, 'Soosan Khanoom', of their album. The notice that has also allegedly been served on the producers, director and Super Cassettes which owns the music rights, calls upon them to refrain from releasing the said song in the film or else the Iranian band would be compelled to initiate proceedings to seek a restraining order and necessary compensation.

Barobax Corp is a music company founded by three musicians Khashayar Moradi Haghgoo, Keivan Moradi Haghgoo and Hamid Forouzmand in Canada. The three musicians obtained a copyright registration certificate in respect of the song Soosan Khanoom.

The Aggrieved Iranian Band moved the Bombay High Court seeking a stay on the Saif Ali Khan-Kareena Kapoor starrer, along with a restraining order from using the track in the film.

The Hon'ble Bombay High Court perused the documents on record and heard the arguments made on behalf of the Plaintiffs. The Hon'ble court found that the certificate on record was in the name of the 3 musicians and not in the name of the Plaintiff, Barobax Corp. Furthermore, no evidence was adduced indicating that the copyright in the song was assigned to the company. The Court found that it was of no consequence that the 3 musicians who are the authors of the song Soosan Khanoom are also the promoters of the company Barobax Corp.

The Hon'ble Court held "It is not necessary to compare the works at this stage for if the allegation is that there is an infringement of the copyright in the sound recording, there is nothing to establish the same on facts. In other words, there is nothing on record that establishes that the alleged infringing work was made from the sound recording which allegedly belongs to the plaintiff."

The Hon'ble High Court refused grant of ad interim injunction to the Iranian band on the ground that they were not interested parties to the suit. However subsequently Iranian band Barobax apologized to Pritam for leveling plagiarism charges against the alleged infringing number from the movie.

IPAB revokes the Financial Times Trade Mark

The IPAB recently gave a well reasoned order resolving the ongoing dispute between the Times Publishing House Ltd. ("TPH") and the Financial Times Ltd. ("FTL"). The order concerned itself with 5 matters pending before the authority between the parties.

FTL is the UK entity which runs the globally renowned Financial Times publication. TPH is the entity which owns the well known Indian publication "Economic Times" which features a supplement titled Financial Times.

The Following Trade marks were at issue:-

- Financial Times in class 16 – filed by FTL on March 1987 claiming user since 1948;
- Financial Times in class 16- filed by TPH in 1993 on a proposed to be used basis;
- Financial Times in class 9- filed by FTL in 1987 on a proposed to be used basis;
- FT in class 16- filed by FTL in the year 1987 claiming user since 1948.

The IPAB considered the evidence adduced by both parties and the arguments put forth and found that FTL proved its trans -border reputation and its intention to enter India and that the mark had become distinctive of FTL. However, it also reasoned that the 'use' of the trade mark has to be considered to see if the mark deserves to remain in the Register of Trade Marks. The Hon'ble tribunal came to the conclusion that though, FTL had very few sales in India, there were sales nonetheless, and the mark did have a distinctive character and was subscribed to by the business elitist. However, the Hon'ble Tribunal also stated that though FTL had an un-deniable reputation it has failed to prove use of the mark Financial Times in class 16 since 1948 and therefore the Hon'ble Tribunal held that the mark wrongly remains in the Register.

The IPAB observed that TPH did have notice of the reputation of FTL and its periodical and had also attempted to negotiate a syndication agreement with them. In spite of such knowledge THP registered the trade mark Financial Times in its own name. Furthermore, the fact was that THP was providing complementary copies of a supplement titled "Financial Times" with its paper the Economic times. Thus, sale of the Economic Times and enclosing a supplement titled "Financial Times" cannot be considered use of the trade mark sale of the "Financial Times". The Senior Counsel for FTL submitted that "It is only when people voluntarily purchased the newspaper in question, one can assess the strength of the mark. Above all, TPHL which has attacked the same mark as being descriptive cannot take a different stand in the rectification proceedings filed against it." The Hon'ble Tribunal held "TPHL knew about FTL, it knew about its circulation in India; so, its adoption of the same cannot be accepted. TPHL's Financial Times was circulated as a complimentary copy along with Economic Times. So, the circulation figures may be a matter of celebration for Economic Times as a mark, but does not push TPHL's Financial Times any further. Therefore, we hold that the applicant's (TPHL) mark shall not remain in the register"

With regard to FTL's mark Financial Times in class 9, the Hon'ble Tribunal held "FTL has not placed any evidence of use of the mark 'Financial Times' in class-9 goods. Whatever evidence it has produced to the extent to which they are admissible or relevant are all with regard to class-16 goods. Of course, the application was a proposed-to-be-used application, but the same was applied for in the same year 1987….. Even if we give that elbow room to FTL it does not help. In view of the fact there is absolutely no evidence with regard to this class of goods, we do not think that FTL's mark in Class-9 merits survival on the register."

With regard to the mark FT in class 16 the Hon'ble tribunal erroneously determined that the mark was filed on a proposed to be used basis and adjudged that the mark may remain on the register. The Advocates of FTL filed an application with the IPAB to hold off enforcing the order of the IPAB until determination of the appeal to be filed against such order. Interestingly in the aforementioned application the Advocates of FTL stated as under "ORA/67/2007/TM/DEL was dismissed and the financial Times Limited's registration for the trademark FT under No. 468932 was retained on the register of the Trademarks. It is however, Pertinent to mention that while the IPAB correctly held that the mark FT had come to be associated with the Financial Times Limited, it erred in observing that the same had been applied for on the 'proposed to be used' basis, when in fact the said claim was only in respect of 'other goods covered under class 16'. Use under the said registration had been claimed in respect of newspapers since the year 1948 and year 1977 in respect of printed materials, periodicals publications, and books."

Exclusive right over the word "IMPERIAL" denied by Madras High Court

On 16th February, 2012, the Madras High Court allowed a Writ Petition filed by Rhizome Distilleries Pvt. Ltd and thereby quashed an order passed by the IPAB directing the Registrar of Trademarks.

Earlier, Pernod Richard S.A., which is engaged in the business of manufacturing and distribution of wines, liquors and spirits had filed an application before the Intellectual Property Appellate Board for removal/rectification of the petitioner's trade mark 'Rhizome's IMPERIAL GOLD', stating that they are the registered proprietors of the trade mark 'IMPERIAL BLUE', which is registered in India since 1997 and is a coined mark, having highest degree of inherent distinctiveness in relation to alcoholic beverages.

The petitioner, Rhizome Distilleries Pvt. Ltd is a bottling and blending unit, which possesses recognized liquor brands in the market capturing middle and lower segments. Some of the brands of the petitioner are 'IMPERIAL GOLD WHISKY', 'MARSHALL WHISKY', 'ROYAL GOLD DELUXE WHISKY', 'ROYAL EAGLE WHISKY', 'THE FAMOUS HORSE WHISKY', 'CREDIT CARD SELECT WHISKY' and '1000 OAKS LUXURY WHISKY'. The trademark 'RHIZOME'S IMPERIAL GOLD' was adopted by the petitioner since 2002.

The IPAB allowed Pernod Richard S.A.'s application for cancellation of the writ petitioner's mark 'RHIZOME'S IMPERIAL GOLD' and stated the following:

"the registration of the trade mark 'IMPERIAL GOLD' is in contravention of the provisions of section 11 of the Trademark Act; the writ petitioner's trade mark was causing confusion and deception in the minds of the public; Pernod Richard S.A. has been using the similar identical trade mark since 1997, whereas the writ petitioner has adopted the trade mark only in the year 2002, but launched the product bearing the impugned trade mark in the year 2006; on the date of application for registration by the writ petitioner in the year 2002, Pernod Richard S.A.'s trade mark was already put to use and there was likelihood of confusion and deception; furthermore, it is the contention of Pernod Richard S.A. that they are the registered proprietor of IMPERIAL RED, IMPERIAL BLUE, etc. and in such circumstances, there is every possibility to cause confusion"

While deciding the fate of the Writ Petition filed by Rhizome Distilleries Pvt. Ltd against the order for cancellation of the mark "'RHIZOME'S IMPERIAL GOLD' passed by the Intellectual Property Appellate Board, the Madras High Court took into consideration two questions:

- Whether Pernod Richard S.A. can claim any exclusive right over the individual element 'IMPERIAL' when a trade mark consists of several matters ?
- Whether the IPAB has committed any error in allowing the application filed by Pernod Richard S.A. by applying the provisions of section 11 of the Trade Act ?

The Honorable Court relied on two factors for delivering its judgment:

- No one can claim exclusive right for the word 'IMPERIAL' since the word 'IMPERIAL' is only a common word.
- The marks must be compared as a whole for determining if there is infringement.

The honorable Court over-ruled the IPAB's order and allowed the Writ Petition by stating the following:

"Undoubtedly, the word 'IMPERIAL' is a common and universal word. As observed earlier, nobody can have an exclusive right over the said word. If the trade mark of the petitioner, 'RHIZOME'S IMPERIAL GOLD', is compared as a whole with the trade mark of Pernod Richard S.A. 'IMPERIAL BLUE' without making any dissection or splitting up the word into several words, in our opinion, it would not cause any confusion in the minds of the purchasers. Further, in our considered opinion, the grounds embodied under sections 9 and 11 are available to the persons only at the time when they raise objection for registering the trade mark. The said principles cannot be applied for rectification of the registration." Emphasis provided by us.