

IP UPDATE

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manufacturer who copied the looks of Ferrero Rocher on its pralines, branded it 'ROYS' and exported it to an Indian importer (who was also a suit defendant) for sale in India. Holding the 'ROYS' branded products to be lookalikes of Ferrero Rocher pralines, the Court found both infringement of the Ferrero Rocher trademarks as well as its trade dress and, *inter alia*, ordered a sum of INR 1,000,000 (approximately USD 16000) in damages against the Chinese infringer, who was proceeded *ex parte*.

Trade dress in Viagra tablets upheld



In a suit by Pfizer Inc against a local defendant who adopted the trademark V-GRA with an identical diamond shape and blue color for its tablets used for the same purpose as that of Pfizer's VIAGRA tablets, the Delhi High Court enjoined the defendant not only from using the mark V-GRA or any other deceptive variations of VIAGRA, but also from adopting or using a color and shape similar to the distinctive trade dress of Pfizer's VIAGRA tablets. In the *ex parte* order, the Court also awarded damages to the tune of INR 500,000 (approximately USD 8000) apart from an award of costs.

SNIPPETS

Delhi High Court restrains Chinese infringer of Ferrero Rocher



In a recent order [*Ferrero SPA & Anr. V. MahendraDugar&Anr.*], a Single Judge of the Delhi High Court restrained a Chinese confectionary

Indian TMO enables e-filing of responses to FER

For the last couple of years, the Indian Trade Marks Office has made it possible to download first examination reports (FERs) from its website. Vide a notification of

November 7, 2013, the Controller General of Patents and Trade Marks has now enabled the online filing of responses to FERs and also the uploading of supporting documents thereof through the comprehensive e-filing services for trademarks available at the website of the TMO, www.ipindia.nic.in.

Public notice not compliance of statutory requirement of renewal notice to the proprietor

A recent order of the Division Bench of the Bombay High Court [*Cipla Limited v. Registrar of Trade marks & Anr*] directed the Registrar of Trade Marks to restore and renew the trademark 'CIPLA', which was removed for non-renewal. While Cipla Limited challenged the removal order on the ground that no statutory notice for renewal was received by them, the counsel for the Registrar argued that Cipla Limited did not renew the mark despite a public notice issued by the Trade Marks Office calling upon those parties who did not pay the renewal fee to do so. The Court rejected the said argument and pointed out that a public notice contemplated a general public and did not constitute compliance with the provisions of Section 25(3) of the Trade Marks Act, 1999 whose language required the Registrar to send the renewal notice "to the registered proprietor".

Pointing to third party usage not an excuse for adopting a registered mark

The plaintiff, Lavasa Corporation Ltd, is a company dealing with housing development projects and the defendant, Lavasa Visuals Private Limited is a company in the business of erection of visual advertisements. The plaintiff, claiming its registered trademark LAVASA to be well-known, sued the defendant for infringement and passing off [*Lavasa Corporation Ltd. V. Lavasa Visuals Private Limited*]. In defense, the defendant pointed out the use of LAVAZZA by a coffee chain, LAVASSA as names of many US residents and argued that its business activities were miniscule compared to the plaintiff. Rejecting the said defenses, the Bombay High Court held that merely because a coffee chain used LAVAZZA as its trade name or living persons

used LAVASSA as a surname, it could not be concluded that the plaintiff's mark had become common in India especially when it was a registered mark. As such, the defendant was directed to change its corporate name.

For patent revocation under S.8, non-disclosure has to be willful

Section 8 of the Patents Act, 1970 (which requires an applicant to disclose details of any applications relating to the same or substantially same invention filed in any country outside India) was revisited by the Delhi High Court in a suit for infringement of a plaintiff's essential patent by the defendant [*Koninklijke Philips Electronics N.V. v. Maj. (Retd) Sukesh Behl & Anr*]. The defendant filed a counter-claim which challenged the validity of the essential patent. Relying on the judgment passed in *Chemtura Corp. v. Union of India & Ors.* [see *Volume VII Issue 4 of India IP Update available on our website*] the defendant contended that the suit patent should be revoked on grounds of non-compliance with Section 8. The defendant relied on a letter addressed to the Controller of Patents by the plaintiff which stated that some information regarding pending foreign applications had been inadvertently missed. Differing from the *Chemtura* case above, the Court stated that it could not be said that the plaintiff had willfully suppressed information as there was no admission by the plaintiff to this effect. As such, the defendant's prayer for revocation of the patent was rejected.

INSIGHT

Does the use of a well-known mark as corporate name constitute infringement under Section 29(4)?

Section 29 of the Trade Marks Act, 1999 ('the Act') deals with infringement of trademarks. In an order passed in the year 2010 in *Raymond Limited v. Raymond Pharmaceuticals Private Limited* ('*Raymond case*'), the Division Bench of the Bombay High Court narrowed down the scope of the statutory protection provided to well-known marks under subsection (4) of section 29 the Act to exclude situations of infringement of well-known marks when used as a trade name or corporate

name in respect of dissimilar goods or services. The plaintiff therein, Raymond Limited, had appealed to the Supreme Court to consider the issue whether subsection (5) of Section 29 of the Act precluded a court from examining the claim of infringement of a registered trademark having a reputation in India as described under subsection (4) thereof. The relevant sections are quoted below:

Section 29 (4) -- A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which –

(a) is identical with or similar to the registered trade mark; and

(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and

(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

Section 29 (5) – A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered.

In view of the limited application of subsection (5) of section 29 to identical marks and identical goods / services while deciding infringement, it was a golden opportunity for the Supreme Court to settle this issue. However, the Supreme Court simply remanded the matter to the trial court. A Single Judge of the High Court of Delhi recently had the occasion to revisit this issue in another case and arrive at a different conclusion.

The case involved a suit for infringement filed by Bloomberg Finance LP (plaintiff), the famous multinational financial news corporation against the use of the mark 'BLOOMBERG' as a corporate name by 23 of the suit defendants. The plaintiff claimed that

its trade mark BLOOMBERG was in use since 1996 and spread over 100 countries and that in India it had registrations in classes 9, 16, 35, 36, 38, 41 and 42.

The defendants 3 to 25 in the suit were incorporated Indian companies which used the trademark BLOOMBERG as part of their corporate names and were incorporated for doing varied businesses such as realty, entertainment and aviation. Most of these defendants were found to be mere paper companies with no business activities. Inquiries conducted by the plaintiff also indicated that the defendants were originally incorporated under different names and that their corporate names were subsequently amended to include BLOOMBERG. It was also revealed that one of the defendants had filed a number of trademark applications to register the mark BLOOMBERG and in fact had a registration for the same in class 43. Besides the suit and a cancellation action against the said registration, the plaintiff had also initiated parallel proceedings against the defendants before various authorities under the Companies Act and National Internet Exchange of India, in charge of the administration of INDRP for .in domains. The dispute also attained an international angle when the plaintiff obtained a temporary injunction for trademark infringement (through use of the slogan, 'Think Big, Think Bloomberg' by the defendants) and cybersquatting against one of the defendants from a US court.

The instant suit came to be filed when the plaintiff learnt that two of the suit defendants were associating themselves with the production of a Bollywood film. Fearing that the release of the said film under the impugned mark 'BLOOMBERG' would be detrimental to the reputation and goodwill of the plaintiff besides misleading the public, the plaintiff sued the defendants. In the suit, the plaintiff alleged dishonest adoption by the defendants, dilution, unfair capitalization on the strength and value of the mark BLOOMBERG and confusion and deception.

The suit was defended by arguing, *inter alia*, that the adoption was honest, that there was no cause of action, the business activities of the respective parties were distinct and different and that the defendants were the prior users of the mark.

Though a compromise was suggested during the course of the arguments where the defendants offered to give an undertaking that they would not enter into the plaintiff's business domains such as movie business, news broadcast or financial data, the same was rejected by the plaintiff's counsel on the ground that the use by the defendants of the mark BLOOMBERG in respect of varied services other than those that fall in the plaintiff's domain would fall foul of Section 29(4) as the plaintiff's mark had a reputation. The defendants on the other hand relied on the order in the Raymond case and argued that since the issue was about the adoption of the mark BLOOMBERG as a corporate name by the defendants, Section 29(5) of the Act was exhaustive of the issue and if the plaintiff was unable to make out a case under the said section, it would not be entitled to an injunction.

The Delhi High Court considered the arguments and went on to distinguish the Raymond case as follows:

44.3 The Division Bench of the Bombay High Court proceeded to hold that in a situation where the registered mark is used as part of the corporate name by the infringer who deals in goods or services different from those for which the mark is registered, if a remedy is provided under Section 29 (4) of the TM Act 1999 then Section 29 (5) would be rendered otiose.

44.4 In coming to the above conclusion the Bombay High Court had no occasion to consider an important point of distinction between Sections 29 (1) to (4) and Section 29 (5). The latter does not require the registered proprietor to show that any confusion is likely to result from the use by the infringer of the registered mark as part of its trade name or name of the business concern or that the mark has a distinctive character or that any detriment is likely to be caused to the reputation of the mark or that the infringer has taken unfair advantage of the mark. These distinctions make it clear that the purpose of Section 29 (5) of the TM Act, 1999 was to offer a better protection and not to shut the door of Section 29 (4) to a registered proprietor who is able to show that the registered

mark enjoying a reputation in India has been used by the CS(OS) No. 2963 of 2012 Page 28 of 44 infringer as part of his corporate name but his business is in goods and services other than that for which the mark has been registered. In this way it is possible to harmonise the various sub-sections of Section 29 with none of them being rendered otiose.

44.5. A factor that perhaps weighed with the Division Bench in Raymond Limited was that RPPL were using 'Raymond' as a part of their corporate name since 1983 whereas the suit was filed in 2006. Also, it appears that the Court was not called upon to examine whether the registered mark enjoyed a reputation or whether it had a distinctive character. For the above reasons, the decision in Raymond Limited cannot be said to be conclusive of the interpretation to be placed on Section 29 (5) read with Section 29 (4) of the TM Act 1999.

Having distinguished the Raymond case, the Court held that Section 29(5) of the Act was in the nature of a *per se* or a 'no-fault' provision which offered a higher degree of protection and that an injunction order would straightaway follow where the plaintiff established that:

- (i) the infringer used the registered trademark as his trade name or part of his trade name, or name of his business concern or part of the name of his business concern; and
- (ii) the business concern or trade was in respect of the same goods or services for which the trade mark is registered.

Both these elements would have to be cumulatively established. However, for the purpose of this section, it is not required to show that the mark has a distinctive character or that any confusion is likely to result from the use by the infringer of the registered mark as part of its trade name or name of the business concern. In a situation where the registered trademark is used as part of the corporate name by an infringer whose business is in goods or services other than those for which the mark

is registered, the registered proprietor is not precluded from seeking a remedy under Section 29 (4) of TM Act 1999 provided the conditions therein are fulfilled.

It was also pointed out by the Court that given the object and purpose of sub sections (1) to (4) of section 29, sub section (5) thereof could not be intended to be exhaustive of all situations of uses of the registered mark as part of the corporate name nor could sub section (5) be said to render sub section (4) otiose. The Court noted that the purpose of Section 29 (5) was to offer a better protection and not to shut the door of Section 29 (4) to a registered proprietor who was able to show that the registered mark enjoying a reputation in India was used by the infringer as part of his corporate name even though the infringer's business was in goods and services other than that for which the mark was registered.

The decision is significant in that it cleared up the confusion created by the Raymond case. It would also bring a lot of relief for the owners of well-known marks who are constantly faced with issues of their trademarks being adopted as corporate names by third parties in different business domains.

CASE LAW UPDATE

Champagne protection in India achieves another milestone



In September 2012, the Delhi High Court had granted an *ex parte* ad interim injunction in favour of the French body, Comité Interprofessionnel du Vin de

Champagne (CIVC), restraining a Californian company, F. Korbel & Bros, Brown Foreman Worldwide LLC and its Indian distributor from using the expressions, “California CHAMPAGNE” and “Russian River Valley CHAMPAGNE”, on wines produced in California. CIVC is a body in charge of the administration and protection of the rights in the geographical indication CHAMPAGNE for and on behalf of the numerous Champagne wine producers which are its members. Its powers and duties include the responsibility to enforce

its statutory rights against any unauthorized use of CHAMPAGNE on wines that do not originate from the Champagne region in France.

CIVC was first alerted to the unauthorized use of the name CHAMPAGNE by the defendants in April 2009, when certain media reports in India carried news about the purported launch in India of a Californian wine under the name and description “Korbel Champagne”. An investigation as to the nature and extent of use of the name CHAMPAGNE by the defendants, revealed that the offending products were indeed being imported to India from the United States and distributed in the local markets for sale and bore the descriptions, “California CHAMPAGNE” and “Russian River Valley CHAMPAGNE”.

CIVC's suit before the Delhi High Court was based on the registration of ‘CHAMPAGNE’ as a geographical indication in India in class 33 under the Geographical Indication of Goods (Registration & Protection) Act, 1999 (‘the GI Act’). In the suit, CIVC contended that the defendants were committing acts of infringement of their statutory rights in the geographical indication “Champagne” under the GI Act. It was also argued that the use of the offending description “Champagne” in respect of Californian wines fell foul of the additional protection granted to Champagne under the GI Act.

The Court granted an *ex parte* ad-interim order in favour of CIVC, *inter alia*, restraining the defendants from using the offending expressions, “California CHAMPAGNE” and “Russian River Valley CHAMPAGNE” on wines produced in California. Pursuant to the injunction order, the defendants approached CIVC for a settlement wherein they acknowledged CIVC's statutory rights in CHAMPAGNE and agreed that “CHAMPAGNE” is a naturally sparkling wine produced only in the Champagne region in France. A settlement arrived at by the parties was recently recorded by the Delhi High Court.

The highlights of the settlement are as follows:

- The defendants agreed not to use any label or packaging that includes the name ‘Champagne’ or its deceptive variations or the expression

‘Methode Champenoise’ to export, import, sell or distribute any alcoholic spirits or beverages in India or other countries where Champagne is protected as a geographical indication through registration, legislation or agreements.

- In addition, as and when Champagne is protected in any other country through registration, legislation or agreements, CIVC may intimate the defendants in writing and the defendants will extend the terms of the settlement agreement to those countries as well.
- There are nearly 80 countries that are currently listed in a schedule to the settlement where this agreement will take effect.

The settlement assumes significance in that CIVC has managed to stop the defendant from wrongly using the name ‘Champagne’ in 80 countries through a single agreement which also has the potential for a gradual wipe out of such unauthorized use by the defendants globally.

CIVC was represented by K&S Partners before the Delhi High Court.

New judicial trends in telecom patent infringement actions

In a recent appeal [XU Dejun & Others vs. Vringo Infrastructure, Inc. & Another] concerning a CDMA technology patent, a Division Bench of the Delhi High Court, reversed the trend of setting interim arrangements in the form of royalty rates in favour of a plaintiff, where the plaintiff alleges infringement of Standard Essential Patents (SEPs) and claims FRAND (fair, reasonable and non-discriminatory) negotiations. Recognizing the time sensitivity of patent litigation matters, the Court, *inter alia*, ordered an expedited trial of the suit.

In the early part of 2013, in the Ericsson vs. Micromax series of cases, the Delhi High Court had ordered Micromax to pay interim royalty to Ericsson during the pendency of the suit based on Ericsson’s contention that Micromax had infringed its SEPs on 2G, 3G, EDGE and AMR technologies and claimed royalty on FRAND terms.

In the backdrop of the above order, in November 2013, Vringo Inc. (along with its wholly owned subsidiary – Vringo Infrastructure Inc.), a US based patent holding company, obtained an *ex parte* ad interim injunction order from the Delhi High Court in a suit for patent infringement against the Chinese telecom equipment giant, ZTE Corporation. Vide an order dated November 8, 2013, ZTE was restrained from manufacturing, assembling, importing, selling or offering for sale or advertising their products (telephone instruments, mobile handsets, tablets, handheld devices, dongles etc.) or any other similar devices that include the 3G technology CDMA2000 technology which may be covered by the said patent of Vringo Inc.

Before the Single Judge of the Delhi High Court, Vringo had claimed that it acquired a patent portfolio including SEPs in the field of CDMA technology from Nokia. The suit was for the infringement of one of such acquired patents (Indian Patent number 243980), claimed to be an SEP in the field of CDMA technology. Vringo alleged that since ZTE Corporation was manufacturing various CDMA2000 compliant products (such as mobile phones, tablets, dongles and other infrastructure equipment), it would necessarily require to use the technology which was the subject matter of the suit patent. Accordingly, Vringo alleged that ZTE could not import, sell or market the said products in India without obtaining a license from Vringo on FRAND terms. The Single Judge granted an *ex parte* interim order in favour of Vringo.

Aggrieved by the said order, ZTE filed an appeal before a Division Bench of Delhi High Court. ZTE, *inter alia*, claimed non-infringement and contended that Vringo, being a non-practising entity (NPE) has not worked the patent in India. Vringo Infrastructure has sued ZTE globally in what appears to be an attempt to force ZTE to agree to FRAND licensing terms. ZTE took the categorical plea that FRAND licensing should be preceded by proof of validity of patent being established and the issue of infringement being held against ZTE. Relying on the view taken in the Ericsson v. Micromax orders, Vringo argued that ZTE be directed to first pay royalty on per product basis till the pendency of the suit.

After consideration of the arguments of both the parties, the Court declined to follow the precedent set in *Ericson v. Micromax* series of cases and vacated the *ex parte* interim injunction order, without fixing any royalty rates in favour of Vringo.

ZTE Corporation was represented by K&S Partners before the Delhi High Court.

PEPSODENT v. COLGATE: Delhi High Court on comparative advertisement

Though Robert Browning said “Truth never hurts the teller”, the world of advertising thrives in not telling the truth. Courts have time and again interfered and laid down principles that define the limits to which comparative advertising is permissible in the numerous battles between competitors arising from their attempts to glorify their products in comparison to their competitors.

In a recent appeal before a Division Bench of the Delhi High Court [*Colgate Palmolive Company and Anr. v. Hindustan Unilever Ltd.*], the Court was yet again called upon to interfere in one such issue. The controversy arose from a print advertisement for Pepsodent toothpaste of Hindustan Unilever and its corresponding television commercial which compared the same with Colgate toothpaste owned by Colgate Palmolive. The commercial showed two children brushing their teeth, one with Colgate Dental Cream Strong Teeth (‘Colgate ST’) and the other with Pepsodent Germicheck Super Power (‘Pepsodent GSP’). The respective packaging of the products was also prominently displayed in the commercial. The appellant claimed in the commercial that Pepsodent GSP contained Triclosan, which was effective in preventing cavities and stated that it had 130% germ attack power in comparison with Colgate. Colgate Palmolive alleged that the claims were based on incomplete and incorrect facts and that the commercial disparaged Colgate ST.

Hindustan Unilever’s claim that Pepsodent GSP was better than Colgate ST in combating tooth decay (cavities) was based on the measurement of concentration of Triclosan in dental plaque conducted through tests by independent laboratories which found the concentration of Triclosan in

dental plaque to be higher where Pepsodent GSP had been used. This aspect was disputed by Colgate Palmolive. The Court noted that such claims would have to be tested strictly for truthfulness and if the same was found to be illusory, then clearly the message sent out by the commercial would be untruthful and thus impermissible. It was further pointed out by the Court that Hindustan Unilever did not compare Pepsodent GSP with the corresponding product of Colgate Palmolive, namely, Colgate Total, a premium product having higher Triclosan concentration when compared to Pepsodent GSP and which delivered a sustained release of Triclosan. As such, the Court found the voiceover at the end of the commercial that claimed Pepsodent GSP to be better than Colgate ST to be inaccurate and *prima facie* mischievous.

The matter was remanded to the Single Judge with a direction to investigate whether the concentration of Triclosan was the only parameter for inferring that Pepsodent GSP was more efficient than Colgate ST in preventing cavities and whether Hindustan Unilever’s claim was indeed true. Restraining the telecast of the commercial, the Court noted that in the event the claims of the Hindustan Unilever were found to be false, Colgate Palmolive would be entitled to protection against the injury being caused to their reputation and goodwill.

Concluding, the Court held that comparison should be truthful, honest and factual and in a case where the reputation of a competitor was at stake, truthfulness should be tested strictly.

IPAB upholds patent for a probiotic composition

In a well-reasoned order [*Kibow Biotech Inc. vs. La Renon Healthcare Pvt. Ltd.*] in November 2013, the IPAB set aside presumptions made about India’s position on pharma/biopharma patents post the Supreme Court decision on Novartis’s anticancer drug, Glivec. The IPAB upheld a product patent relating to a dietary supplement comprising a probiotic composition that reduced the need for kidney patients to undergo dialysis. The product patent entitled, “Compositions for Augmenting Kidney Function” was registered in the name of Kibow

Biotech Inc., a US-based pharmaceutical company, which manufactured this product under the brand name “Renadyl”. The patent application was filed on March 28, 2006, for a probiotic composition for augmenting kidney function by removing toxic nitrogenous metabolic by-products and inhibiting the overgrowth of undesirable bacteria in the gastrointestinal tract. The original patent application contained 20 claims, covering both product claims as well as method claims. However, when the patent was granted on September 29, 2009, these were eventually amended to 10 claims covering the composition, and the method claims were deleted as they were not permitted under Indian Patent law.

In 2012, a revocation petition was filed against this patent by La Renon Healthcare Pvt Ltd., (‘La Renon’) a Gujarat based Indian company, which sold a similar product in the market under the brand “Cudo”. In 2011, the Madras High Court had dismissed a suit by Kibow Biotech against ‘La Renon’ for infringement of its patents, including the patent under discussion here. The revocation petition claimed that the invention was not patentable under Indian law and raised grounds of obviousness and lack of inventive step.

Though La Renon, had filed several documents in support of the ground of obviousness, the IPAB noted that 33 of such documents, were unsupported by any pleadings or grounds. As for the remaining prior art documents, the IPAB noted that none of the documents taught, either alone or in a combination, the specific limitations claimed by Kibow Biotech in its patent. While rejecting the ground of obviousness, the IPAB noted that mere speculation of a hypothesis was not enough to defeat the claimed invention on the ground of obviousness. The IPAB also rejected La Renon’s argument that the composition claimed by Kibow

Biotech was a mere admixture and therefore, did not qualify as patentable subject matter. It held that the disclosure in the specification of the patent went against La Renon’s contention and that the claimed composition was indeed a synergistic composition having unexpected benefits and was not a mere admixture.

Lastly, La Renon alleged false suggestion and misrepresentation in obtaining the patent, stating that the composition as claimed could not be administered to patients with renal problem because the various ingredients of the composition, such as, protein and fat soluble vitamins A, D, E and K would over-stress the kidney by increasing nitrogenous waste in the body. Kibow Biotech countered that the composition of the impugned patent did not claim to treat kidney disorder but acted in the intestine on the unfiltered waste and toxins present in blood, thereby enhancing the functions performed by the kidney during normal conditions. The IPAB agreed with Kibow Biotech that augmenting “kidney function” was not the same as augmenting the “kidney functioning” per se. It was, therefore, held that the petitioner had deliberately misconstrued the scope and ambit of the invention. Based on the above analysis, the IPAB dismissed the revocation petition and imposed costs of INR 20,000 (approximately USD 320) on the petitioner, La Renon Healthcare Pvt. Ltd.

This order passed by the IPAB is one of the few orders on cases involving biotech based products in India and has indeed been received very well by innovator companies in India and abroad. According to news reports, following the positive order from the IPAB, Kibow Biotech Inc. is all geared up to enter India’s fast-growing dietary supplement market with its various proprietary products, including Renadyl.

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