

# IP UPDATE

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**Special Issue**

## FROM THE EDITOR'S DESK

The year 2007 witnessed certain important developments in the area of information technology (IT) for India, which we believe is an area of interest for many of our clients and associates. To highlight these developments for our readers, we are pleased to bring out this Special Issue of India IP Update which contains updates on both intellectual property and information technology developments in India.

## K&S has moved!

We have since moved from our Sainik Farms office to Gurgaon effective January 28, 2008. Our new address and contact details are as follows:

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## SNIPPETS

### 7-up v. 7<sup>th</sup> up

In *Pepsico Inc and Ors. Vs. Sunrise Beverages*, the High Court of Delhi found that the defendant's mark "7<sup>th</sup> UP" is deceptively and confusingly similar to the registered trade mark "7-UP" and "SEVEN UP" of the plaintiff. The court also awarded damages in favour of the plaintiff to the tune of US\$ 10,000.

### IT and Data Protection Update

In the year 2007, India witnessed various efforts on the part of the legislature towards the protection and regulation of information technology (IT) services and data privacy, primarily due to the mounting pressure from the industry and consumers. While the law relating to these subjects in India is still in the nascent stages, these developments are nevertheless important for India, considering the interest the international IT industry has evinced in India owing to its ever expanding off-shoring operations.

### Recommendations of the Standing Committee on Parliamentary Affairs on the proposed amendments to the Information Technology Act, 2000

India's IT law, namely, the Information Technology Act, (hereinafter called "The Act"), was brought into force in 2000. To deal with certain inadequacies, an expert committee appointed in 2005 by the Government of India suggested some amendments to the Act, a brief summary of which is as follows:

- To make the Act technology neutral, the term 'digital' was proposed to be replaced by the term 'electronic' at various places in the Act as the term 'electronic' has a wider scope than the term 'digital';

- Towards "Data Protection and Privacy", the following amendments were proposed:

- To handle sensitive personal information with reasonable security practices and procedures thereto.
- Gradation of severity of computer-related offences committed dishonestly or fraudulently and punishment thereof.
- Proposal for breach of confidentiality with intent to cause injury to a person.

- The proposed amendments suggested that if those bodies which use personal information of individuals did not provide reasonable security for the same, or if they misused such information, they were liable to pay a heavy penalty.

- Obscenity in electronic form was revised to bring it in line with the provisions of the Indian Penal Code and other laws. The penalty applicable under the Act was proposed to be increased because of ease of such operations in electronic form.

- New sections were proposed to address increasing incidents of child pornography and video voyeurism.

- Computer-related offences were proposed to be amended to include unauthorized access to computer systems, downloading or extracting data from computer systems, denial of access to information to persons who are authorized to access such information, the introduction of viruses into a computer resource, tampering with or manipulating a computer resource and aiding unauthorized access to a computer resource.

■ As regards intermediaries, the existing section was amended to include, inter alia, notice and take down provisions.

■ There was a proposal to notify qualified experts for the purposes of examination of electronic evidence before any court or other authority.

Pursuant to these proposed amendments, the Standing Committee on Information Technology (2007-2008) (hereinafter, 'the Committee') brought out its 15<sup>th</sup> report during the second half of 2007. Some of the recommendations of the Committee on the Information Technology (Amendment) Bill, 2006 (hereinafter "IT Bill") are analysed below. While preparing the summary of the Committee's report, we had the benefit of discussing the same with our colleague **Dr. Gregor Zeifang of CMS Hasche Sigle, Stuttgart, Germany**, who was interning with us. We, accordingly requested Dr. Zeifang to analyse the same for our readers in the light of the existing Directives in the European Union on the subject. His and our analysis is as follows:

■ *Self enabling and people friendly laws:* - The Committee felt that the Government did not bring out a new, exclusive and self-explanatory legislation and instead made certain changes to the existing legislation.

In the European Union (EU) there are several different Directives dealing with the different aspects of information technology and not just one Directive. The approach to cover all aspects of information technology in one Act may not be proper as these different aspects are to be dealt with differently to make technology law more people friendly.

■ *Cyber crime and cyber terrorism:* - The Committee felt that the Act as it stands today has inadequate focus on and coverage of cyber crime and cyber terrorism. It was, therefore, recommended that adequate, stringent and specific self-enabling provisions should be incorporated in the Act.

■ *Jurisdiction of law:* - It was felt by the Committee that the provisions of the Act are inadequate for India to enforce its will in cases where cyber crimes are committed against India from outside the country. In order to ensure that cyber crimes committed against the country from anywhere are tackled with promptness and without technical delays, it was felt that India, as one of the world leaders in IT ought to take initia-

tive in materialising an international convention against cyber crimes under the auspices of the United Nations.

■ *Auditing of electronic records:* - It was felt by the Committee that auditing of electronic records is a pressing need in the present times and it was suggested that a suitable clause be inserted in the amendments to make auditing of electronic records mandatory so that electronic records both in terms of information system and information security are accorded clarity, authenticity and legal sanctity.

■ *Definition and role of intermediary and liability of network service providers:* -

● Clause 4 F of the IT Bill defines 'intermediaries' to include telecom service providers, network service providers, internet service providers, search engines, online payment sites etc. It explicitly excludes 'body corporate' as referred to in Section 43 A of the IT Bill.

● Clause 38 of the IT Bill proposes to amend Section 79 of the IT Act which deals with liability of intermediaries such as Internet Service Providers (ISP). As per the amendment proposal, the intermediary will not be liable for any third party information, data, or communication link made available by him if (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored, or (b) the intermediary does not initiate the transmission or select the receiver of the transmission or select or modify the information contained in the transmission.

However, this privilege regarding liability shall not apply if : (a) the intermediary has conspired or abetted in the commission of the unlawful act, or (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that mate-

rial on that resource without vitiating the evidence in any manner.

● The IT Bill also proposes to remove the words 'due diligence' from Section 79 of the IT Act with a view to explicitly define the exemption from liability of intermediaries.

■ The Committee has sought an explanation on the exclusion of 'body corporate' from the definition of intermediaries brought a lot of ambiguity to the definition.

■ As for the exemption of liability of the intermediaries in certain cases as proposed in the IT Bill, the Committee took strong exception to the same and recommended that a definite obligation should be cast upon the intermediaries in view of the immense and irreparable damage caused to the victims through reckless activities that are undertaken in the cyber space by using the intermediary's platform.

■ The Committee was also concerned about the removal of the words 'due diligence' from Section 79 by the Bill as it felt that it could place intermediaries in an uncalled for privileged position.

The proposed amendments relating to the liability of intermediaries are similar to the existing legal position in the European Union (EU). However, some notable differences worth mentioning are listed below:

● In the IT Bill, there is no clear distinction between mere conduit, caching and hosting unlike that of the E-Commerce Directive in EU. Pursuant to that Directive, a service provider who does not initiate the transmission, or does not select the receiver of the transmission or does not select or modify the information contained in the transmission is a mere conduit if the service provider's function consists only of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network. Further, a host service provider who stores information provided by a recipient of the service upon the recipient's request and who has no actual knowledge of the illegal activities or information or who, upon becoming aware of the same, has expeditiously removed or disabled the access to the same is exempt from

liability. Service providers who would be caching information are also exempt from liability. This difference between mere conduit, caching and hosting is accommodated by the said Directive.

- Under the Directive, service providers do not have a general obligation to monitor the information which they transmit or store, or to seek facts or circumstances indicating illegal activity when being a mere conduit or providing caching or hosting services. There is no comparable provision in the IT Bill.

- Exempting intermediaries from such general obligations would be helpful since it is not reasonable or technically feasible for intermediaries to do such monitoring of any unlawful acts being committed. The Committee seems to have overlooked this aspect while making its recommendations. In particular, the Committee's recommendation to oblige the intermediaries to act with "due diligence" would be a retrograde step in the advancement of IT for India.

- The Committee suggested that there should be some obligations cast on intermediaries when the platform offered by them is being abused for transmission of obscene and objectionable contents. This seems to be a step above that found in the EU Directive. However, from an European perspective such obligations might be acceptable if they only cover reactive (not proactive) measures (i.e. after having received actual knowledge or awareness of the illegal activity) and if they relate only to the prevention of equal or very similar abuses.

- The Committee's observation that even an employer can be an intermediary is the same in EU as well. However, the exemption given to 'body corporate' from the definition of intermediary is not justifiable as a body corporate may very well carry out the services of an intermediary. The EU position does not offer any such exemption.

In conclusion, it may be stated that while some recommendations of the Committee on intermediaries are warranted, many of them seem to have overlooked the almost impossible task of monitoring,

given the borderless reach of internet communications.

- *Data Protection:* - The Committee believes that the IT Bill should have had clear-cut and specific provisions for data protection and retention. Yet again, the Committee would have preferred to see provisions relating to 'personal privacy' in the Bill including provisions defining and protecting personal privacy.

Data protection in the EU is not only restricted to IT related services but also in all other areas of life and business. EU has a separate data protection Directive. Further, EU Directive on data protection does not contain any provision imposing the obligation to retain data; it is only the new EU Data Retention Directive which provides that certain data are to be retained. However, the Committee is right in recommending that the term "traffic data" (indicating the communication's origin, destination, route, time, date, size, duration or type of underlying service) must be defined so as to include subscriber and log data for facilitation of investigation by the law enforcement agencies. The definition of 'traffic data' as recommended by the Committee is quite similar to that contained in the European Convention of Cybercrime and pretty much in line with the definition of the covered data in the EU Data Retention Directive barring certain minor differences.

- *No need for special courts:* - The Committee is of the opinion that there is no necessity for setting up special courts dealing with matters relating to the IT Act.

While this may be the right approach in the European context, in the Indian conditions, it may be a good idea to have special courts with skilled and well-trained judges dealing with such issues.

- *Other recommendations of the Committee :* -

- As cyber crimes are a global phenomenon and take place at lightning speed, these must be made cognisable offences.

- In view of the emerging cyber offences, powers of interception are to vest not only with Central Government but also with State Governments.

- The Indian Computer Emergency Response Team (CERT-In) should be

a government body so as to instil confidence in foreign investors regarding the existence of a bona fide legal framework in India.

- Issues relating to 'spam' have not been appropriately addressed in the proposed amendment. In view of the irritation and agony that the recipients of unwarranted e-mails have to go through, specific provisions should be incorporated in the proposed amendments to effectively deal with such mails.

### **Personal Data Protection Bill, 2006**

Towards the protection of personal data and information of an individual collected for a particular purpose by organizations, the Government of India has proposed the Personal Data Protection Bill, 2006. The salient features of the Bill are as follows:

- 'Personal data' under the Bill means information or data which relate to a living individual who can be identified from that information or data whether collected by any government or any private organization.

- Personal data collected from an individual may not be processed without the consent of such person; however, no consent is required in respect of personal data details obtained through sources which have been made public.

- Personal data collected by one organization shall not be disclosed to another one for the purposes of direct marketing or for any commercial gain; however, it may be disclosed to charity and voluntary organisations after obtaining prior consent of the persons concerned.

Every person whose personal data have been processed or disclosed for direct marketing without consent shall be entitled to compensation.

- Every organisation engaged in commercial transaction and collection of personal data of persons shall report to the Data Controller the type of personal data being collected by them and purpose for which it is being or proposed to be used. Further, they must take adequate measures to maintain confidentiality and security in the handling of personal data and information and collect only such information that is essential for completion of any transaction with the individual.

- The Bill also proposes penalty for contravention of the provisions of the law.

From a European perspective, as long as there is no strong data protection law, India may not be a safe haven for Europeans to off-shore business. The Bill is an important step in the right direction. However, compared to the provisions of the Directive dealing with data protection in Europe, the Bill may not suffice to achieve a comparable or even equal level of data protection. The following are some of the issues in this direction:

- The Bill's main focus is on the prevention of the disclosure of personal data by the organization that collects it for a specific purpose.

- While this is one of the issues to be taken into consideration, it is certainly not the most important one.

- The Bill provides that the personal data collected for a particular purpose, shall not be put to processing without the consent of the person concerned provided where such processing is required for the prevention or detection of crime, the prosecution of offenders and the assessment or collection of any tax or duty. It is further provided that no consent of the individual shall be required if the personal data details of the individual are obtained through sources which have been made public. The Bill does not define the conditions that would make a valid consent. The consent and the preconditions that make it valid are defined in the EU Data Protection Directive. According to the Directive, consent means any freely given specific and informed indication of the data subject's wishes by which the data subject signifies his agreement to personal data relating to him being processed. Such consent has to be given unambiguously.

- Under the Bill, without consent personal data cannot be processed. The position is very different under the EU Directive which gives various other options achieving admissibility of processing personal data than only the consent of the data subject. These options could be processing of data that arises as a necessity for the performance of a contract to which the data subject is a party or where it is necessary for compliance with a legal obligation to which the Controller is subject or where it is necessary in order to protect the vital interests of the data subject etc.

#### **Data Security Council of India**

The National Association of Software and Services Companies (NASSCOM) has

set up a self-regulatory initiative in data security and privacy protection called the Data Security Council of India (DSCI) with a view to ensure a safe environment for the IT sector that can be benchmarked with the rest of the world.

DSCI is a self-regulatory body established under the premise that industry, rather than government is best positioned to develop appropriate data privacy and security standards as it has greater knowledge and better understanding of the practical commercial issues involved. DSCI would adopt global standards towards this and has an initial focus of establishing itself with membership and evolving a code of conduct by promoting a culture of privacy. Initially, DSCI would promote and encourage voluntary compliance of the code of conduct, and would gradually create a mechanism for enforcement of the same in an effort to establish its credibility.

A non-profit organization, DSCI has as its governing body consisting of independent directors and industry specialists. Organizations associated with data security and privacy protection such as IT and ITeS companies, academic or research institutions and universities etc can become members of DSCI.

#### **DSCI's stated mission includes:**

- Enable IT and ITeS companies to provide high standard of security and data protection by adopting best practices;

- Develop, monitor and enforce an appropriate security and data protection standard for Indian IT and ITeS industry that would be adequate, cost-effective, adaptable and comparable with global standards;

- Create awareness among industry professionals and other stakeholders about security and privacy issues.

#### **National Do Not Call Register**

In an effort to curb the ever increasing unsolicited commercial calls (UCC), the Telecom Regulatory Authority of India (TRAI) has established the National Do Not Call Registry (NDNC) with the primary objective of curbing UCC. The Telecom Unsolicited Commercial Communications Regulations 2007 defines UCC as, "any message, through telecommunications service, which is transmitted for the purpose of informing about or soliciting or promoting any commercial transaction in relation to goods, investments or services which a subscriber opts not to receive". Exceptions to UCC are

messages received under a contract, communications relating to charities etc., and communications transmitted under directions of the government in the interest of sovereignty and integrity of India.

Every access provider shall maintain and operate a list to be called a Private Do Not Call List in which the preference of its subscribers for not receiving UCC shall be entered in accordance with the provisions of the Regulations. Furthermore, every access provider shall set up a call center or any such office for the purpose of receiving the request of its subscribers for registration of their telephone number in the National Do Not Call Register. Every existing subscriber and new subscriber may make a request to his access provider for not receiving UCC. The UCC Regulations follow the opt-out approach in connection with the implementation of a Do Not Call Register. This applies not only to telephone calls but also to unsolicited commercial e-mails.

The EU follows a different approach. Pursuant to the Directive 2002/58/EC regarding the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) the use of automated calling systems without human intervention, facsimile machines or electronic mail for the purposes of direct marketing is only allowed in respect of subscribers who have given their prior consent. In respect of all other communications other than these three categories, the Directive has left it to the member states to choose through their respective national legislations either the opt-in or the opt-out approach. For instance, Germany has followed the opt-in approach regarding such other communications.

Ideally, India may follow the opt-in approach since it has a huge mobile user base and presumption of consent to receive would tilt the balance heavily in favour of telemarketers and would not result in the intended objective of curbing UCC. Further, the opt-in approach gives more flexibility and choice to the consumer than the opt-out approach whether to receive a UCC or not if one has not taken the pains to register in the Do Not call Register.

#### **IP CASE LAW UPDATE**

#### **'BRISNOFF' not similar to 'SMIRNOFF': High Court of Delhi**

In a recent judgment of the High Court of Delhi, the defendant's mark 'BRISNOFF'

was not found to be similar to the well-known trademark 'SMIRNOFF'. The court found that the trade mark BRISNOFF, when used without the eyebrow device, and in a different colour combination will not violate the rights in the famous mark SMIRNOFF. In the suit filed by Diageo, North America against the Indian plaintiff, Shiva Distillery Limited, the Court disposed of the interim injunction application by directing the defendant to stop using the eyebrow device and to alter the colour combination as suggested by the defendant to avoid confusion, during the course of the arguments. The court found that, once this is done, there would not be any need to restrain the defendant from using its trade mark BRISNOFF.

The plaintiff's argument that there was dishonesty of adoption on the part of the defendant as the goods were similar and that, therefore, greater attention must be paid to the items of similarity and less to the items of dissimilarity was not considered by the court. The plaintiff also argued a case for impairment and debasement of the reputation in the mark 'SMIRNOFF' as well as dilution and erosion of the distinctiveness in the mark, which was also not considered by the court. In its defense, the defendant pointed out that the element "NOFF" has been used by several third parties in respect of vodka and the plaintiff rebutted the same by stating that they had initiated actions against each of such third parties who have been using the element "NOFF".

It appears that the court was heavily swayed by the argument that the consumers of the competing products are literate persons belonging to affluent classes of society and that they would be in a position to distinguish the two marks. In the process, the court has completely and perhaps dangerously overlooked the arguments regarding dilution of the well-known mark SMIRNOFF. This order may stand starkly against the encouraging reputation the Indian judiciary has in the area of protection of famous and well-known marks.

### Disparaging publicity by defendant violative of plaintiff's trade mark rights

There have been several cases on comparative advertisement in India in the recent years and the jurisprudence in this area has been evolving at a healthy pace. We have reported several of these judgments in the past issues of **India IP Up-**

**date.** The latest in the series is *Eureka Forbes Limited Vs. Pentair Water India Private Limited* decided by the High Court of Karnataka at Bangalore. This case is an appeal by the plaintiff Eureka Forbes Limited against the order of the trial judge, holding that the advertisement of the defendant, Pentair Water India Private Limited in respect of its Reverse Osmosis (RO) water purifier, was not violative of the rights of the plaintiff. The advertisement of the defendant, alleged to be disparaging by the plaintiff, read as follows:—

*"Water contains contaminants that are not visible to the naked eye and to your UV water purifier.*

*And Pentair's R.O. system with PXP removes contaminants as small as 0.0001 microns."*

The defendant Pentair Water India Private Limited denied that the said advertisement was in any manner disparaging and most specifically that the advertisement did not disclose the identity of the plaintiff and argued as follows before the Trial Court:

- It is a global leader in providing innovative products and is the world's largest manufacturer of softener equipment, RO membrane housing and commercial drinking systems;
- It is the manufacturer and seller in India of water purifier systems including water purifiers using the RO technology and the UV technology;
- UV technology is different from RO technology and besides these two, there are many other technologies available for water treatment;
- The plaintiff itself has a comparative chart in its website about these two technologies and states in the said website that the RO technology is more effective than the UV technology;
- The plaintiff had acknowledged in a suit before the Goa District Court that its AQUAGUARD Water Purifier based on UV technology uses a sediment filter that was only capable of removing the dissolved contaminants up to 5 micron units.

The Trial Judge considered the point that the mark 'AQUAGUARD' was absent from the advertisement and that the plaintiff did not place any material to substantiate that 'AQUAGUARD Water Purifier' was synonymous with 'UV water purifier' or for that matter, 'AQUAGUARD' meant

'UV water purifier' and vice-versa. The trial court also took into consideration the admission made by the plaintiff in its website that RO technology is superior to UV technology and, therefore, found that no case was made out by the plaintiff for grant of temporary injunction since there was no prima facie case and the balance of convenience was in favour of the defendant. Accordingly, the interim injunction application was rejected by the trial judge.

Aggrieved by the above order, the plaintiff appealed before the High Court of Karnataka contending that the said advertisement not only violated its trademarks but also disparaged the products of the plaintiff based on the following facts:—

- It is a pioneer and leader in UV water purifier sold under the brand name AQUAGUARD;
- It is a market leader in India in the said product and account for more than 70% of the market share in the UV water purifier segment;
- AQUAGUARD is India's first super brand water purifier enjoying the trust of over 50 million users and the plaintiff had an exclusive monopoly in the market for over one and a half decade. Various other water purifiers in the UV segment were introduced subsequently in the market, however, the plaintiff continues to be the market leader enjoying a huge clientele.

During the course of the arguments before the appellate court, the appellant/plaintiff submitted that the trademark AQUAGUARD is virtually synonymous with UV and, therefore, the trial court was in error in observing that in the absence of the use of the mark AQUAGUARD in the advertisement, the appellant could not have any grievance. In support of this submission, plaintiff relied upon the judgment in *Dabur India Limited Vs. Emami Limited* decided in 2004 by the High Court of Delhi with respect to an advertisement by Emami Limited in respect of an ayurvedic preparation called 'Chyavanprash'. In that case, the Defendant Emami Limited issued an advertisement in Hindi, which in translation meant "forget Chyavanprash in summer and eat Amritprash instead". Considering that the plaintiff, Dabur India Limited, held about 67% of the market share in Chyavanprash, the court found in favour of Dabur and held that even if there was no direct reference to Dabur's

Chyavanprash and that only a reference was made to the entire class of products in a generic sense, disparagement was present in the advertisement.

Considering the above submissions, the High Court of Karnataka held that although there was no specific mention of the trademark AQUAGUARD, and though the advertisement appeared to be generic in nature, the appellant's contention that the advertisement affected its product was correct. The court obviously did not consider the plaintiff's own admission about the RO technology being superior to the UV technology and the plaintiff's own comparative chart in its website comparing the two technologies. The *Dabur case* cited by the plaintiff may be distinguished from the present case in that respect and perhaps if that argument of the plaintiff was duly considered, the High Court of Karnataka may have decided the case in favour of the defendant.

#### **ANCHOR VS. ENCORE: Rules in the game of phonetics in India**

India is a country with over 25 spoken languages. Each federal state in India has its own separate language apart from the widely used official language English and the widely spoken national language Hindi. Hence in a highly linguistically diverse culture, phonetic similarities of trademarks can become a very contentious issue. The decided case of *Encore Electronics Limited Vs. Anchor Electronics and Electrical Private Limited* is a case in point. Here, the plaintiff was the registered proprietor of various trade marks including the mark ANCHOR in respect of goods in classes 9 and 11. The defendant was in the dish antennae trade under the trade mark ENCORE. The plaintiff filed the suit before the High Court of Bombay for infringement and passing-off on the ground of phonetic similarity of the marks and the Single Judge found in favour of the plaintiff. The defendant went in appeal before the Division Bench of the High Court of Bombay on various grounds as follows:-

- while considering the case of deceptive similarity, the rival mark has to be considered as a whole;
- the plaintiff manufactures electrical switches, while the defendant manufactures dish antennae and therefore, the trade channels, customers and the products of the plaintiff and defendant are different;
- the prices of the rival products are different;
- while a purchaser of the defendant's product would be a cable operator or a person in the trade, the plaintiff does not manufacture dish antennae at all;
- The Single Judge erred in splitting up the word mark of the plaintiff and the defendant for the purposes of comparison;
- no material was produced in support of the plea of deception by the plaintiff.

The plaintiff on the other hand contended that the defendant's mark is visually, structurally and phonetically similar to the mark of the plaintiff and that the defendant has not provided any cogent explanation for the adoption of a mark which is deceptively similar.

While dismissing the appeal and holding that the defendant's mark was indeed deceptively similar to that of the plaintiff, the court observed as follows:-

- By assessing the overall impression conveyed by two marks as a whole, the trademarks 'Anchor' and 'Encore' are phonetically, visually and structurally similar.
- Phonetic similarity constitutes an important index of whether a mark bears a deceptive or misleading similarity to another. The phonetic structure indicates how the rival marks ring in the ears.
- Courts in a country such as India whose culture is enriched by a diversity of languages and scripts have to consider how the rival marks are spelt and pronounced in languages in which they are commonly used.

■ Although 'Encore' is a word of French origin and 'Anchor' is an English word and the usage and the pronunciation of the two words may differ, the case before the Court is not about how an Englishman would pronounce 'Anchor' or a Frenchman would pronounce 'Encore'.

■ The Court must consider the usage of words in India, the manner in which a word would be written in Indian languages and last but not the least, the similarity of pronunciation, if the rival marks were to be pronounced in languages prevalent in the country where the marks are used.

■ The fact that the manner in which the 'a' in 'anchor' is pronounced by an Englishman in Notting Hill may appear to a discerning traveler to be distinct from a Frenchman's pronunciation of the 'e' in 'encore' on a fashionable by-lane near Champs Elysées is no defence to an action in Indian courts for passing off;

■ For the ordinary consumer in Ahmedabad and her counterpart in Mumbai's shopping streets, the 'a' in 'anchor' and the 'e' in 'encore' are perilously and deceptively similar. The Court must assess the make up of an Indian consumer and, associated with that, the cultural traits that underline the spelling and pronunciation of words.

■ The plaintiff's submission that in Gujarati as well as in Hindi, there is not even a subtle distinction between the manner in which 'Anchor' and 'Encore' would be pronounced was found to be meritorious by the court;

■ The test is not whether a customer who wishes to buy the product of the plaintiff is likely to end up buying the product of the defendant. The test is whether the ordinary customer is likely to be led to believe that 'Encore' is associated with the mark and the trading style of the plaintiff.

■ The phonetical, visual and structural get up of the two words is so strikingly similar as to lead to a likelihood of deception.

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