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Intellectual Property Attorneys

# INDIA IP UPDATE

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## LEGISLATIVE UPDATE

### India notifies Copyright (Amendment) Rules, 2021

The Government of India has notified the Copyright (Amendment) Rules, 2021 ("the amended Rules") on March 30, 2021. These Rules further amend the Copyright Rules, 2013, that were last amended in 2016.

The amended Rules recognize electronic means as one of the primary modes of communication by the Copyright Office. The amended Rules also streamline the compliance requirements for registration of software works. Now, an applicant who seeks to register software as a literary work has the liberty to file the first 10 and last 10 pages of the source code. If the entire source code is less than 20 pages, all of it must be filed with no blocked out or redacted portions.

Further, the time limit for the Central Government to respond to an application made before it for registration as a copyright society has been extended to 180 days instead of the earlier 60 days.

To encourage accountability and transparency in the functioning of the copyright societies, certain new provisions have been introduced through the amended Rules as under:

- where the royalty is not distributed within the stipulated period for want of the contact information of the relevant author or other owner, such royalties would be kept separate in the accounts of the copyright society;

- if the royalty due to the author and other owners remains undistributed at the end of the three years as calculated from the end of the financial year in which collection of the royalty occurred, the copyright society should transfer such amount to its welfare fund;

- Copyright societies must publish and make public an Annual Transparency Report for each financial year containing, among others, the following details:

  - financial information on the total royalties collected;
  - the total royalties paid to the author and other owners;
  - the total royalties collected but not yet attributed to the author and other owners;
  - the total administrative deductions made from the royalty collected; and
  - information on amounts received from and paid to the foreign societies or organisations administering the rights of the authors/owners with whom the Indian societies have reciprocal arrangements.

## CASE LAW UPDATE

### GENERAL

### Indian Supreme Court suspends deadlines due to the alarming second wave of the Covid-19 pandemic

The second wave of Covid-19 in India led the Supreme Court to order an extension of the period of limitation in all matters, including intellectual property matters, until further orders. On March 8, 2021, the Supreme Court had terminated the earlier extension of limitation that had been in place since March 15, 2020. The Court directed that the period(s) of limitation, in respect of all judicial or quasi-judicial proceedings as prescribed under any general or special laws, whether condonable or not, shall stand extended till further orders.

As a consequence, the Indian IP offices as well as the Protection of Plant Varieties and Farmers' Rights Authority issued public notices extending all deadlines, until further orders by the Supreme Court.

### TRADEMARKS

### Delhi High Court rejects Britannia's suit against ITC over biscuit packaging

In this case (*Britannia Industries Ltd. vs. ITC Ltd. & Ors.*), Britannia Industries Ltd. ("Britannia") filed two separate infringement/passing-off suits against ITC Ltd. ("ITC") challenging the packaging of ITC's "Sunfeast Farmlite 5-seed Digestive" and "Sunfeast Farmlite Veda Digestive" biscuits ("ITC's Packaging"). It was Britannia's case that ITC's Packaging was deceptively and confusingly similar to the packaging of its "Nutri Choice Digestive" biscuits ("Britannia's Packaging"). The respective packaging of both the products are reproduced below:

**<u>Britannia's Packaging</u>**


ITC’s Packaging



Rejecting Britannia’s application for an interim injunction, the Court observed as under:

- The points of similarities between the respective packaging cannot be gainsaid. Having said that, points of dissimilarities between rival packaging cannot be regarded as irrelevant and cannot be ignored;
- The perception, whether in the case of infringement or passing-off, is to be that of a person of average intelligence and imperfect recollection – not of an idiot, or an amnesiac. The average human mind has not been particularly conditioned to observe only similarities and overlook dissimilarities;
- Deception and confusion are both states of mind, of which no physically tangible evidence can ever be found. If similarities can cause deception or confusion, dissimilarities, if sufficient, can also obviate any such possibility;
- Confusion or deception is, however, not readily to be assumed. The man of average intelligence and imperfect recollection cannot be treated, for the purposes of the Trade Marks Act, 1999 (“the TM Act”), as being easily confused or deceived;
- If, therefore, between the rival marks, the points of dissimilarities are so stark that they shade or overweigh the points of similarities, the court may legitimately arrive at a conclusion that, irrespective of the points of similarities, no possibility of confusion or deception exists;
- If the packs of Britannia and ITC are stored side by side, then, unless the customer is situated at so great a distance that he can see only the colors of the packs, and not the distinctive features thereof, he is unlikely to be confused between the two;
- The fact that the brand names of Britannia and ITC are prominently displayed on the packs is also of importance. These brands are both reputed and well-known, enjoying their own niche clientele. This would also minimize the possibility of a consumer mistakenly purchasing the product of ITC assuming it to be that of Britannia;
- The distinguishing features more than counterbalance the similarities, and, prima facie, negate any possibility of confusion, much less deception; and
- In designing the impugned pack of “Sunfeast Farmlite Veda Digestive” biscuits, ITC may have made a conscious attempt to “copy” Britannia’s packing. However, a conscious attempt at copying, by itself, does not constitute either infringement or passing-off. The matter has, in either case, to be examined from the point of view of a customer of average intelligence and imperfect recollection. Unless such a consumer is liable to get confused or deceived, howsoever questionable the intentions of ITC may be, no case of infringement or passing-off could be said to exist.

## No trademark over descriptive words including misspelled words

In *PhonePe Pvt. Ltd. vs. EZY Services & Anr.*, the Delhi High Court held that no exclusive trademark rights could be granted over descriptive words, including deliberately misspelled words. PhonePe Pvt. Ltd. ("PhonePe") had sued EZY Services ("EZY") for adopting the trademark "BharatPe".

PhonePe alleged that EZY was infringing its registered trademark, "PhonePe", and sought a permanent injunction to restrain EZY's use of the mark "BharatPe". EZY raised the defence of dissimilarity of the respective marks. It argued that PhonePe had failed to get a separate registration of the individual component "Pe", as required under Section 17 of the TM Act, thus precluding PhonePe from claiming exclusivity over the same. The Court accepted this argument and observed that both "PhonePe" and "BharatPe" were composite marks. Under usual circumstances, the marks could not be dissected for the sake of comparison. While PhonePe had failed to register the individual component "Pe" of its composite trademark, "Pe" was merely a deliberate misspelling of the word "Pay", which would make it a descriptive word or a word common to trade. Considering the core services being provided by the parties, exclusivity cannot be claimed over "Pe" which is descriptive or common to general use under section 17(2) of the TM Act. The Court also cited its judgment involving the marks "Delhivery" and "Deliver-e" wherein again it was held that the generic nature of these marks was derived from the English word "delivery" for delivery services and, therefore, the mark could not be appropriated for exclusive use by one party to the exclusion of others.

The Court concluded that there is no infringement or passing-off on the following grounds:

- "PhonePe" and "BharatPe", being composite marks, cannot be dissected into "Phone" and "Pe" or "Bharat" and "Pe";
- PhonePe cannot claim any exclusivity over the "Pe" suffix, as no infringement can be claimed on the basis of a part of a registered trademark;
- Deliberate misspelling of descriptive words ("Pe" for "Pay"), does not change the current legal position that exclusivity cannot be claimed over descriptive words;
- The prefixes, namely, "Phone" and "Bharat", of both the marks were not phonetically or deceptively similar in any way; and
- Both marks were completely dissimilar, except for the suffix "Pe", wherein no exclusive rights could be granted.

While both parties operate in the e-payment field, both were engaged in dissimilar services; PhonePe is an online payment portal while BharatPe enables its users, i.e., merchants, to receive payments from consumers through UPI-based applications.

## Use of trademark in a news article is not false application of the mark

*Prateek Chandragupt Goyal vs. State of Maharashtra* is a constitutional writ by a journalist, Prateek Chandragupt Goyal ("Goyal"), before the Bombay High Court to quash a First Information Report ("FIR") lodged against him by Sakal Media Group ("SMG"), a media company. The offense for which the FIR was lodged was false application of SMG's trademarks under section 103 of the TM Act. It was claimed by SMG that Goyal "used" its registered trademarks in two articles which he wrote and published on the news portal, Newslaundry.

The articles in question were titled, "*The future is bleak: Sakal Times staffers say they have been sacked in violation of Maharashtra order*" and "*They wanted to get rid of us: over 50 people laid off as Sakal Times closes down*". Goyal argued that the FIR was wrongly registered against him as his use of SMG's trademarks in these articles only indicated that the articles were about SMG; further, his use of Sakal's trademarks in these articles amounted to fair use of the marks under section 30 of the TM Act.

SMG claimed that these were highly defamatory articles against them and that their registered trademark "Sakal" was shown with prominence at the top. Such use of their trademark clearly amounted to falsely applying the said trademark under Section 103 of the TM Act.

Allowing the writ petition and quashing the FIR, the Court noted that the real question is whether the two articles written by Goyal where SMG's registered trademark was printed, would fall within the definition of "goods" or "service"; and if so, whether Goyal's use of the said trademark amounted to false application of the same on goods or services. It held that, the use of the said mark in the articles cannot be said to be in the context of either "goods" or "services" and that, it would have been a completely different matter if Goyal had used SMG's registered trademark to portray as if the news portal itself was that of SMG.

## INFORMATION TECHNOLOGY

### No vicarious liability on WhatsApp group administrator for content posted by group members

In its judgement in *Kishor Tarone vs. State of Maharashtra & Anr,* the Bombay High Court held that there is no provision in the Indian Penal Code, 1860 ("the IPC") to hold the administrator of a WhatsApp group vicariously liable for objectionable content posted by the group's members.

The case involved the question whether the administrator of the group could be held vicariously liable, for comments made by another group member, under certain sections of the IPC and the Information Technology Act, 2000 ("the IT Act"). The Court noted that, beyond the ability to add and remove members, the administrator of a WhatsApp group does not have any additional power to remove, moderate or censor the comments made by other members of the group. In this case, a member had sought an apology from another member of the group for making sexually insensitive remarks against the former.

The Court examined whether any liability for the administrator arose under the relevant provisions of the IPC and found that these provisions do not impose any vicarious liability. Nor did the Court have any proof that the administrator in this case could have intentionally aided or instigated the accused member in making such comments. Further, Section 67 of the IT Act provides for punishment of a person who transmits or publishes or causes to be published or transmitted, objectionable material in electronic form. While rejecting the allegations under this section, the Court noted that there were no charges that the administrator had published or transmitted such material.

## PATENTS

### Why not use compulsory license as a tool to increase supply of COVID-19 drugs: Supreme Court asks

Given the acute shortage faced by the Indian public of Covid-19 medicines during the recent devastating wave of the Covid-19 pandemic in India, the Supreme Court, in *In re: Distribution of essential supplies and services during pandemic* took *suo motu* cognizance of the availability of essential medicines and vaccines.

The Court asked the Central Government why it was not using the available provisions under Sections 92, 100 and 102 of the Indian Patents Act, 1970 ("the Patents Act") to address this. Section 92 prescribes Compulsory Licensing as a tool to address public health emergencies. Section 100 empowers the

Central Government to permit certain businesses to utilise any patent for the "purpose of the government". Section 102 empowers the Central Government to initiate acquisition of patents from the proprietors and if the negotiation fails between the two then the pricing would be as per the directions of the concerned High Court. The Section also empowers the Central Government to act in the public interest and initiate revocation of a patent. The Supreme Court, therefore, opined that the boundaries of the application of these provisions should be decided by the Central Government through policy decisions. In response, the Central Government submitted an affidavit detailing the measures taken by it to address the issues. It specifically mentioned that the patent owners and Indian manufacturers are actively engaged in voluntary licensing of essential drugs such as Remdesivir (Gilead) and Baricitinib (Lilly). The Central Government further emphasized that the real barrier to scaling up production was the availability of raw materials and capacity, and not IP.

### Xiaomi vs Interdigital: Delhi High Court issues an anti-enforcement injunction order

In the ongoing suit in *Interdigital Technology Corporation & Ors. vs. Xiaomi Corporation*, the Delhi High Court passed an order restraining the anti-suit injunction order of September 23, 2020, passed by the Wuhan Intermediate People's Court ("the Wuhan Court").

In June 2020, Xiaomi Corporation ("Xiaomi") had filed a Standard Essential Patent ("SEP") royalty setting suit against Interdigital Technology Corporation ("Interdigital") before the Wuhan Court seeking fixation, between Xiaomi and Interdigital, of royalty rates compliant with Fair, Reasonable and Non-Discriminatory (FRAND) terms.. In July 2020, Interdigital filed a suit before the Delhi High Court against Xiaomi seeking an order of injunction restraining Xiaomi from infringing five of Interdigital's SEPs granted in India. Interdigital prayed, alternatively, that Xiaomi seek a license for using the patented technology on FRAND terms.

Xiaomi also filed an application for an anti-suit injunction with the Wuhan Court to restrain Interdigital from pursuing the case before the Delhi High Court. In September 2020, the Wuhan Court had issued an anti-suit injunction order against Interdigital, restraining it from pursuing the case before the Delhi High Court and had warned that a fine of RMB 1 million per day would be levied on Interdigital if it did not comply with the ruling.

Thereafter, Interdigital filed an interim application before the Delhi High Court seeking:

- an injunction against Xiaomi and the other defendants restraining them from enforcing the Wuhan Court's anti-suit injunction order, pending final disposal of the suit before the Delhi High Court;
- a direction to Xiaomi to immediately withdraw its royalty setting suit and anti-suit injunction application before the Wuhan Court; and
- imposition of costs on Xiaomi, equivalent to the costs likely to be imposed on Interdigital by the Wuhan Court.

Upon hearing the parties in the interlocutory application, the Delhi High Court held that it is impermissible for a court in one sovereign jurisdiction to injunct a party before it from pursuing its cause before a court in another sovereign jurisdiction. An exception to this could be a case where the continuation of proceedings before the subsequent sovereign jurisdiction is 'vexatious' or 'oppressive' to the proceedings pending before the injuncting court.

The Delhi High Court also held that if the Wuhan Court passes any order towards the deposit of the fine of RMB 1 million per day, Xiaomi shall secure such amount of fine imposed on Interdigital by depositing before the Delhi High Court an equivalent amount, and Interdigital shall be entitled to withdraw the said amount, or have it transferred to its account.

## Indian courts continue to enforce patents despite challenges from the pandemic

Indian courts have continued to hear patent enforcement matters despite the challenges of the pandemic-induced restricted functioning. Some of the key orders passed by the courts in patent matters are summarized below:

In ***Centaur Pharmaceuticals Pvt. Ltd. and Kibow Biotech Inc. vs. La Renon Health Care Pvt. Ltd. and Stanford Laboratories Pvt. Ltd.,*** the Madras High Court injuncted La Renon Health Care Pvt. Ltd. ("La Renon") and Stanford Laboratories Pvt. Ltd. ("Stanford") from infringing Kibow Biotech Inc.'s ("Kibow") patent ("the Patent") in any manner or for manufacturing, marketing, or selling their products under the names "Cudo", "Cudo Forte" or "Probigress".

The Patent, licensed to Centaur Pharmaceuticals Pvt. Ltd. ("Centaur") in India, covers a product that augments kidney function by breaking down uremic/nitrogenous toxins in the colon prior to their transfer to the kidneys. Kibow and Centaur ("the Plaintiffs") sought relief by way of an injunction against La Renon and Stanford ("the Defendants") along with damages of INR 1,00,00,000 (~USD 135,000).

The Plaintiffs had alleged that the infringing products were using the same strain of probiotic bacterium, *Streptococcus thermophilus*, as the Plaintiffs' product for exactly the same purpose, thus impinging on their exclusive right. Relying on certain lab test reports, the Plaintiffs also contended that the Defendants were offering inferior products, thereby impacting their market confidence as well as causing economic loss.

The Defendants countered that the Patent was invalid and that its scope had been expanded to encompass their products, thereby giving a false impression of infringement. They contended that the count of *Streptococcus thermophilus* in the Patent was limited to be within a range of 5 billion to 20 billion colony forming units ("cfu") whereas the Defendants' product had a cfu of over 30 billion. The Defendants further contended that the composition of their products was a mix of three different probiotic bacteria, namely, *Streptococcus thermophilus, Lactobacillus acidophilus and Bifidobacterium longum* whereas the Plaintiffs' product was limited to only one probiotic bacterium. Defendants further contended that their products had been in the market since 2012 whereas the Plaintiffs' products had entered the market only in 2018.

The Court, after hearing the parties, granted a temporary injunction against the Defendants and in favour of the Plaintiffs. The Court while granting a temporary injunction, based its decision upon the following reasons:

- The Plaintiffs were the first who identified *Streptococcus thermophilus;*
- To identify a beneficial bacterium from among numerous choices, determining that such a bacterium is probiotic, identifying the strain and thereafter determining the required bacterial cfu, entailed detailed research and indicated that the invention merited patentability;
- The Patent was lawfully granted and upheld by the Intellectual Property Appellate Board, the Division Bench of the Madras High Court and also affirmed by the Supreme Court of India;
- The Defendants had admitted that *Streptococcus thermophilus* had been used by it which showed that it had followed the discovery made by the Plaintiffs centering on this bacterium as a probiotic bacterium;
- The Plaintiffs had early presence in India through online marketing and entered the

offline market in India in 2018 through sales across counters; and

- The presence of the open-ended phrase "comprising" in claims 3, 4, 5 and 9 would cover any further additions to the Plaintiffs' product similar to the Defendants' products.

In ***FMC Corporation vs. Best Crop Science LLP & Anr.*** and ***FMC Corporation & Anr. vs. NATCO Pharma Ltd.*,** the Delhi High Court restrained Best Crop Science LLP & NATCO Pharma Ltd. ("Best Crop & NATCO") from launching Chlorantraniliprole (CTPR), an agricultural insecticide in the market, which would infringe FMC Corporation's ("FMC") patents. FMC, in both the suits, had alleged infringement of its product patent IN 201307 ("IN 307") and process patent IN 213332 ("IN 332").

FMC had alleged that Best Crop & NATCO were intending to launch CTPR which was specifically covered and disclosed in its patents.

Best Crop & NATCO contended that CTPR was covered in FMC's earlier genus/Markush patent, IN 204978 ("IN 978"); thus, the validity of the suit patents was in question and no injunction could be granted. Best Crop & NATCO also pointed out that the IN 978 patent had expired on March 20, 2021, whereas the IN 307 and IN 332 were invalid *per se*. Hence, they could not be restrained from commercializing CTPR. FMC, however, contended that even though CTPR was covered by IN 978, it was not disclosed therein.

After hearing both parties, the Court held that it was not convinced to allow Best Crop & NATCO to release their products in the market before the Court decides the infringement suit in IN 307 and IN 332. The Court observed that, if indeed the patents were found to be infringed, mere damages would be entirely insufficient as a panacea for FMC. The Court further observed that intellectual property has its own sanctity and any prejudice caused even by a single day's infringement is, in principle, incalculable.

Accordingly, the Court restrained Best Crop & NATCO from launching CTPR in the market.

In ***Willowood Chemicals Pvt Ltd. vs. Indo-Swiss Chemicals Ltd.*,** the Delhi High Court denied the defendant, Indo Swiss Chemicals Ltd. ("Indo Swiss") from selling the existing stock of its fungicidal composition which formed a subject matter of Willowood Chemical's ("Willowood") patent.

In October 2020, in the infringement suit filed by Willowood against Indo Swiss, the Delhi High Court had granted an *ex parte ad interim* injunction in favour of Willowood. Indo Swiss thereafter sought permission from the Court to sell the stock of its products manufactured prior to the injunction order till the disposal of the *ex parte ad interim* injunction. Indo Swiss argued that the stock would expire soon in view of the short shelf life of the products; that if it is not sold in the paddy season, the stock would expire, resulting in huge financial loss to them. Indo Swiss further expressed its willingness to furnish a bank guarantee for a sum of INR 50,00,000 (~USD 66,000), if so directed by the Court.

Opposing this strongly, Willowood contended that Indo Swiss had willfully proceeded to manufacture the infringing products despite being served a legal notice prior to the grant of the suit patent. Further, the suit patent had faced a pre-grant opposition by Haryana Pesticides Manufacturers' Association of which Indo Swiss was a member. Hence, Indo Swiss was well aware of the patent application, yet it took the risk of manufacturing the infringing product. Willowood also contended that the Court had already taken a *prima facie* view of the infringement while issuing the interim injunction against Indo Swiss.

The Court finally dismissed Indo Swiss' plea and noted that it had already sold infringing products worth INR 16.97 crores (~ USD 215,000) in 2020.

Further, it noted that it continued to do so despite the knowledge that the pre-grant opposition was dismissed in July 2020. Thus, the production that continued thereafter was obviously at its own risk.

Placing reliance on *FMC Corporation vs. Best Crop Science LLP & Anr.,* the Court reiterated that intellectual property has its own sanctity and that damages are entirely insufficient as a panacea for the holder of a valid patent which is infringed by another. Further, the Court also held that while granting an interim order, it had recorded a *prima facie* satisfaction. Therefore, Indo Swiss could not be permitted to flood the market in the manner as is being sought and damage the rights of the patent holder.

## Eli Lilly voluntarily licenses Baricitinib to NATCO following the latter's application for a compulsory licence

The period between March to June saw an acute rise in COVID-19 infections in India with high death rates caused due to shortage of hospital facilities, oxygen, and essential medicines, especially the ones used in advanced management of the infection. In May, the Indian generic pharma company NATCO Pharma Ltd. ("NATCO"), filed an application before the Indian Patent Office ("IPO") for a compulsory licence ("CL") under Section 92 of the Patents Act for the drug "Baricitinib" of which Eli Lilly ("Lilly") is the exclusive worldwide licensee. The drug, originally used for treating conditions like rheumatoid arthritis, when administered along with Remdesivir, was found more effective as compared to using Remdesivir alone. The US FDA had, in November 2020, authorized this combination for emergency use.

The patent for Baricitinib, marketed under the name of "Olumiant", is held by Incyte Holdings Corporation and has been licensed exclusively on a worldwide basis to Lilly. NATCO applied for the CL citing the necessity for increasing the supply of Baricitinib in the Indian market in view of the prevailing situation of extreme urgency caused by the Covid-19 pandemic. Subsequently, as per reports, Lilly and NATCO entered into a voluntary, royalty free, and non-exclusive licence for NATCO to manufacture and supply Baricitinib in India. Following this, NATCO withdrew its application for the CL.

## NATCO Pharma's writ petition disposed of: Controller directed to decide NATCO's application for cross-examination

In its recent order in the matter of *NATCO Pharma Ltd. vs. Union of India & Ors.*, the Delhi High Court disposed of a writ petition filed by NATCO Pharma Ltd. ("NATCO"), directing the Controller of Patents to dispose of NATCO's application for cross-examination first, and only then proceed to decide Novartis' patent application.

The patent application in question, 4412/DELNP/2007, filed by Novartis, is in respect of "Pharmaceutical Combinations of an Angiotensin Receptor Antagonist and an NEP Inhibitor".

During the pre-grant opposition proceedings filed by NATCO, the Controller had allowed Novartis to submit evidence of three expert witnesses. NATCO filed an application to cross-examine these expert witnesses. However, the Controller did not decide on NATCO's application and instead proceeded to hear the matter on merits and reserved its order.

Aggrieved by the Controller's approach, NATCO challenged the same by filing a constitutional writ before the Delhi High Court.

The Court accepted NATCO's submission and ordered the Controller to first decide NATCO's application for cross-examination, preferably within two weeks of the date of the order, i.e., May 27, 2021.

Further, in the event the Controller rejected NATCO's application, the Court directed the Controller not to pronounce its final order on the merits of the pre-grant opposition for a period of 10 days from the communication of such rejection to NATCO. This would allow NATCO to challenge such order of rejection before the Court prior to the pronouncement of the final order on the merits of the pre-grant opposition.

Alternatively, if the Controller allowed NATCO's application, the Court directed that the matter be fixed for cross-examination after settling the schedule and modalities for the cross-examination. The Court further directed the Controller to take the submissions into account and pass appropriate orders, in accordance with law.

Taking notice of the long pendency of the proceedings before the Controller, the Court directed the Controller to dispose of Novartis' patent application, as expeditiously as possible and practicable.

## DESIGNS

### Delhi High Court continues to issue interim relief to design rights holders despite pandemic challenges

In *UPL Ltd. vs.. Sikko Industries Ltd.,* UPL Ltd. ("UPL"), the plaintiff, alleged infringement of its registered Design No. 325205-001 by Sikko Industries Ltd. ("Sikko"), the defendant. The design pertains to UPL's package containers for selling its product Aluminium Phosphide (ALP), a fumigant sold in the form of tablets, pellets, granules or dust.

UPL stated that the three special characteristics of its containers are: (i) that the cap of the container cannot be opened without using a special device, so as to avoid, to the maximum possible extent, exposure of the ALP to moisture; (ii) the shape of the container, which is straight, uniform and consistently cylindrical, so as to enable easy access to the product contained therein; and (iii) the grooves and rings at the neck of the container above the consistently uniform cylindrical body, which enable the container to be handled and held easily.

Relying on reports of its investigators, UPL further stated that Sikko had yet to commercially launch its product but was at the cusp of doing so. UPL alleged that the design of Sikko's container infringes its registered design and is an obvious and fraudulent imitation thereof. UPL argued that if the product is released in the market, it would become impossible to prevent dissemination of the infringing design among the public and the very purpose of filing this suit would be defeated. The similarity in the design would result in an unwary purchaser believing that Sikko's product emanates from UPL.

The Court held that the above facts made a *prima facie* case in favour of UPL. In view of the averment that Sikko is yet to launch its product, the Court held that the considerations of the balance of convenience and irreparable prejudice to UPL justify the grant of *ex parte ad interim* relief. Accordingly, it restrained Sikko from releasing in the market any product, in the allegedly imitative container bearing UPL's design in the suit.



T: +91 124 4708 700 | F: +91 124 4708 760
postmaster@knspartners.com | www.knspartners.com
***Offices at:*** Bangalore | Chennai | Gurgaon | Hyderabad | Mumbai | New Delhi