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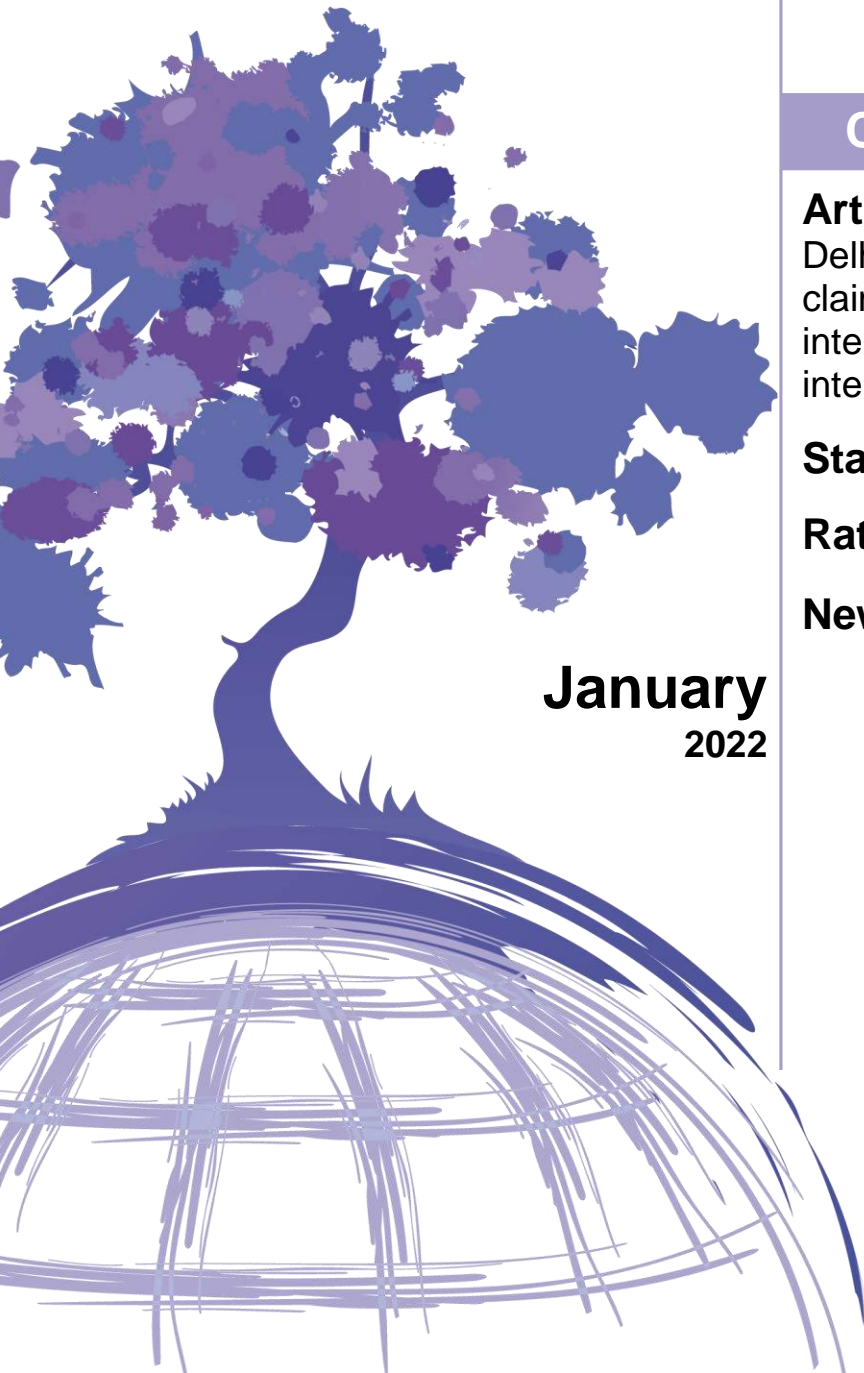
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**January**  
2022





## Article

### Delhi High Court lays down rules of claim construction – Literal rule of interpretation to be applied while interpreting claims

By Dr. Malathi Lakshmikumaran and T. Srinivasan

#### Executive summary

The Delhi High Court *vide* its judgment dated 28 October 2021, while deciding the matters between Novartis Ag & Ors. ('**Plaintiff**') and Natco Pharma Limited (hereinafter '**Defendant 1**') and three other entities ('**Defendants**') restrained the Defendants from manufacturing, using, importing, selling, and offering for sale of any pharmaceutical composition comprising a combination of Valsartan or a pharmaceutically acceptable salt thereof and Sacubitril or a pharmaceutically acceptable salt and a pharmaceutically acceptable carrier or in any other form which may amount to infringement of Indian Patent No. 229051 of the Plaintiff.

In a detailed judgment, the Single Judge of the Delhi High Court rejected the challenge to the validity of the suit patent raised by the Defendants, as they had failed to establish a **credible challenge** concerning its validity.

#### Facts of the case

The Plaintiff holds the suit patent IN 229051 ('**IN'051**'), granted on 13 February 2009. The patent term for the said patent expires on 16 January 2023. The granted claim 1 of IN'051 recited:

*'1. A pharmaceutical composition comprising:*

- (i) the AT 1-antagonist valsartan or a pharmaceutically acceptable salt thereof and*
  - (ii) N-(3-carboxy-l-oxopropyl)-(4S)-p-phenylphenylmethyl)-4-amino-2R-methylbutanoic acid ethyl ester or N-(3-carboxy-l-oxopropyl)-(4S)-p-phenylphenylmethyl)-4-amino-2R-methylbutanoic acid or a pharmaceutically acceptable salt thereof and*
- a pharmaceutically acceptable carrier.'*

Subsequently, in 2007, after considerable research with this combination, the Plaintiff filed a PCT national phase Application No. 4412/DELNP/2007 ('**Patent Application No. 4412**'), seeking a patent for a supramolecular complex of Valsartan and Sacubitril. The said patent application was opposed by several parties, including Defendant 1 in the instant adjudication. In January 2019, the Plaintiff became aware through a press release that Defendant 1 was launching a combination drug by the name VALSAC, comprising of the combination of Sacubitril and Valsartan as recited in Claim 1 of Patent IN'051. This formed the cause of action for the instant infringement suit filed by the Plaintiff. As against the infringement suit, the Defendants filed a counterclaim, alleging

that the suit patent was invalid and liable to be revoked.

Upon the request of the Defendants, a Scientific Advisor was appointed by the Court in the matter under Section 115 of the Patents Act, 1970 ('Act') to assist the Court in determining whether Defendant 1's product was encompassed or subsumed by Claim 1 of suit patent. The Scientific Adviser opined that the Defendant's product is NOT encompassed or subsumed by Claim 1 of the suit patent IN'051. The Plaintiff filed an objection against the report submitted by the Scientific Adviser *vide* IA No. 5416/2019.

### **Arguments advanced by the parties**

**Defendants:** The Defendants argued that they did not infringe the suit patent as their product was beyond the scope of the claims of the suit patent as well as its specifications. It comprised a single supramolecular complex of Valsartan and Sacubitril, whereas the suit patent covers only physical/heterogeneous mixture of the two components. The defendants further relied on the Plaintiff's statements during the prosecution proceedings of Patent Application No. 4412 that the supramolecular complex is not in any way related to the patent IN'051. Lastly, they submitted that the Report of the Scientific Advisor clearly substantiated their arguments.

The defendant further submit that the suit patent is invalid and should be revoked, on account of lack of inventive step, obviousness, non-patentable subject matter, and insufficiency of disclosure under Section 64 of the Act.

**Plaintiff:** The Plaintiff submitted that the Defendants had infringed the suit patent as IN'051 protects any combination of Valsartan and Sacubitril, *without any limitation* in terms of the

form of such a combination. Hence, the product of Defendant 1 comprising a supramolecular compound of Valsartan and Sacubitril would fall within the ambit of Claim 1 of IN'051, irrespective of the form in which they are present. The Defendants' product falls within the claim coverage of IN'051, as the supramolecular compound was *disclosed* in the suit patent. It further contended that Defendants' reliance on Patent Application No. 4412 is misplaced as two independent patent applications could not be construed in reference to each other. Lastly, the Plaintiff contended that the report of the Scientific Adviser was merely advisory in nature.

On the question of validity of the suit patent, the Plaintiff brought to light that the suit patent had been granted in 2009 and no action for its invalidity or revocation had been taken in the intervening years. Defendants had acted belatedly in the matter, as a way of 'counter-blast' against the infringement suit. Therefore, the counterclaim should be discarded.

### **Decision of the Court**

#### **On the interpretation of Claim 1 of suit patent IN'051:**

The Court noted that the pivotal issue in this case revolves around the interpretation of Claim 1 of the suit patent. The Court placed reliance on authorities such as *F. Hoffman-La Roche & Anr. v. Cipla Ltd.*<sup>1</sup> and *Merch Sharp and Dohme Corporation & Anr. v. Glenmark Pharmaceuticals*<sup>2</sup>, to render a decision on claim construction. It noted that to understand the extent of protection granted by a patent, one must look at the claims and laid down guidelines for claim construction:

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<sup>1</sup> (2016) 65 PTC 1.

<sup>2</sup> (2015) 63 PTC 257.

- (i) The Court must apply the literal rule of interpretation for interpreting claims by employing the ordinary meaning of the words used. Going beyond the plain import of the terms of the claims shall be unjust to the public and an evasion of the law.<sup>3</sup>
- (ii) The claims must be construed objectively. Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean.<sup>4</sup>
- (iii) An objective assessment of what is covered in the claim can be done only if the claims are understood 'on its own terms', without reference to extracts from the specification.
- (iv) The terms of the specification should only be looked at if the ordinary meaning of the claims lead to an ambiguity. This also falls in line with the accepted rules of statutory interpretation, where external aids are looked at to ascertain the true intent and purpose behind the clause, only where literal interpretation leads to a discrepancy.
- (v) Extrinsic evidence, such as patent prosecution history and inventor testimony must be resorted to with extreme caution to ascertain the true intent and meaning of the language employed in the claims, only in cases of doubt as to what a claim means.

- (vi) In cases of infringement, the Court must map the claims of the suit patent against the allegedly infringing product. If the claims encompass the said product, there shall be an infringement.

Applying the law laid down to the facts of the instant case, the court ascertained the ordinary meaning imputed to the term 'comprising', used in Claim 1. It stated that 'comprising' is an open-ended term, implying that where a claim *comprises of* three elements 'A', 'B' and 'C', it would still be an infringement if someone adds a fourth element 'D'. In the present case, as the Defendants' product comprised of Valsartan, Sacubitril and a pharmaceutically acceptable carrier, it fell squarely within the plain reading of Claim 1 of the Suit Patent IN'051.

***On whether Patent Application No. 4412 filed by the Plaintiff affects the suit patent:***

On this point, the Court laid down the following principles:

- (i) If an inventor applies for a later patent that is already objectively included in a prior patent, but which inventor subjectively feels a need for a separate patent application, the subsequent patent application cannot be used to read into terms of prior application, which must be construed on its own terms.
- (ii) Any subsequent steps taken by the Plaintiff cannot remove what is patented earlier nor can it include something that was excluded earlier.
- (iii) Section 3(d) does not work backwards. Two independent patent claims must not be construed in reference to each other.

<sup>3</sup> *Edward H. Phillips v. AWH Corporation*, 415 F. 3d 1303.

<sup>4</sup> *Kirin-Amgen Inc. v. Hoechst Marion Roussel Limited*, [2004] UKHL 46.

In this regard, the Court noted that the Plaintiff filed Patent Application No. 4412 to protect the supra-molecular complex of the compound. The said application does not affect the interpretation Claim 1 of IN'051, which shall be interpreted independently.

***On whether the suit patent is invalid:***

The Court relied on *AstraZeneca AB & Ors. v. P. Kumar & Anr*<sup>5</sup> to hold that the challenges raised under Section 64 of the Act are a mixed question of fact and law and cannot be decided at this stage of the proceedings, when the parties are yet to provide their evidence. However, the Court noted that *prima facie* the Defendants have acted belatedly in filing a suit to challenge the patentability of IN'051.

***On whether the findings in the report of the Scientific Advisor is binding on the Court:***

The Court stated that the report of the Scientific Advisor is to assist the court or to inquire upon any question of fact as the court may require. Relying on *State of H.P. v. Jai Lal & Ors.*<sup>6</sup>, the Court clarified that the report of an expert is merely of an advisory nature. It further relied on *La Renon Health Care Pvt. Ltd. v. Union of India, Ministry of Commerce & Industry and Ors.*<sup>7</sup> to clarify that the report of the expert does not go in evidence automatically, and he is to be examined as a witness in Court and must face cross-examination. The Court held that the Scientific Adviser has wrongly interpreted Claim 1 of IN'051.

***Based on the abovementioned, the Court granted an injunction in the favour of the Plaintiff.***

## Key takeaways

The key takeaways from this Order are:

1. Claims must be interpreted as ordinary English sentences without changing their meaning by reference to the language used in the body of the specification. The body of the specification may only be referred where literal interpretation leads to an ambiguity in the claim.
2. The term 'comprising' is open-ended, which means that if the claim contains three elements 'A', 'B', and 'C', it would still be an infringement if someone adds a fourth element 'D'.
3. Two independent patent claims from different patent applications must not be construed in reference to each other.
4. The interpretation of a claim shall not be affected if the inventor files a subsequent patent application for an improvement of the invention. The subsequent action by an inventor cannot remove what is patented earlier, nor can it include something that was excluded.
5. The Report of the Scientific Advisor appointed under Section 115 of the Act is merely advisory in nature.

**[The authors are Executive Director and Director in IPR Teams at Lakshmikumaran & Sridharan Attorneys, New Delhi and Chennai, respectively]**

<sup>5</sup> 2019 (80) PTC 148 (Del).

<sup>6</sup> (1999) 7 SCC 280.

<sup>7</sup> 2019 SCC OnLine Mad 4441, ¶123.



## Statute Update

### Biological diversity Act sought to be amended – Bill proposed in Lower House of Indian Parliament

A Bill to amend the Biological Diversity Act, 2002 has been proposed in the Lower House (Lok Sabha) of the Indian Parliament.

The Biological Diversity (Amendment) Bill, 2021 ('**Bill**'), once enacted and notified, will facilitate fast-tracking of research, patent application process, transfer of research results while utilising the biological resources available in India without compromising the objectives of the United Nations Convention on Biological Diversity and its Nagoya Protocol.

According to the Statement of Objects and Reasons appended to the Bill, the revised provisions will encourage Indian system of medicine and reduce the pressure on wild medicinal plants by encouraging their cultivation. The Bill also seeks to decriminalise certain provisions while also bring more foreign investments without compromising the national interest.

Broadly, Sections 18 and 19 of the Biological Diversity Act are being amended to empower the National Biodiversity Authority to make certain regulations. Similarly, Sections 62 and 63 are being amended to empower the Central Government and the State Governments to make certain Rules. Further, among many other changes, definition of 'benefit claimers' is being restricted while definition of 'biological resources' will include 'derivatives' instead of by-products. 'India' has also been defined now for the purpose of the Biological Diversity Act.

The changes proposed in the Bill exempt *Ayush* practitioners from the ambit of the Biological Diversity Act, 2002, and will facilitate access to biological resources and traditional knowledge by the Indian traditional medicine sector. The Bill also provides that certain categories of applicants must obtain NBA's approval before the grant of Intellectual Property Rights. At present the approval is allowed before applying for IPR, except patents where permission is to be obtained before sealing of the patent.



## Ratio decidendi

### Words 'Renaissance' and 'Sai Renaissance' are phonetically as well as visually similar – Confusion to be presumed in infringement action when marks and goods/services identical

The 3-Judge Bench of the Supreme Court of India has set aside the High Court decision which

in turn had set aside the Trial Court decision holding that the 'Renaissance' mark of the plaintiff would be eligible for protection under Section 29(2)(c) read with Section 29(3) of the Trade Marks Act, 1999 against use of the mark 'Sai Renaissance' by the defendant, for the same hotel and hospitality services. High Court's reliance on Section 29(4)(c) was rejected by the

Supreme Court while observing that Section 29(4) deals with situations where though the trade mark is identical, but the goods or services are not similar to those for which the trade mark is registered.

Observing that both the Trial Court and the High Court had concluded that the trade mark of the defendants was identical with that of the plaintiff and further that the services rendered by the defendants were under the same class, i.e., Class 16 and Class 42, the Court held that it shall presume that it is likely to cause confusion on the part of the public. Reiterating difference between 'passing off' and 'infringement', the Court noted that in an action for infringement, where the defendant's trade mark is identical with the plaintiff's trade mark, the Court will not enquire whether the infringement is such as is likely to deceive or cause confusion.

It also noted that it has been earlier held that if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the getup, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark, would be immaterial in a case of infringement of the trade mark, unlike in the case involving passing off.

The Apex Court was also of the view that as such, the use of the word 'Sai Renaissance' which is phonetically and visually similar to 'Renaissance', would also be an act of infringement in view of the provisions of sub-section (9) of Section 29 of the Trade Marks Act. It also observed that for benefit of Section 30(1) [Limits of effect of registered trade mark] of the Trade Marks Act, both the conditions in clauses (a) and (b) need to be satisfied. [*Renaissance Hotel Holdings Inc. v B. Vijaya Sai and Others* – Judgement dated 19 January 2021 in Civil Appeal No. 404 of 2022, Supreme Court]

## Trademarks 'Rooh Afza' and 'Dil Afza' not similar – No confusion even if words 'Rooh' and 'Dil' connote deep emotion

In a dispute between alleged infringement and disparagement of the mark 'Rooh Afza' of the plaintiff by the mark 'Dil Afza' of the defendant, the Delhi High Court has dismissed the application for interim relief and to restrain continuous of breach. Observing that plaintiff could claim exclusivity to the complete name 'Rooh Afza' and not to either of the two words, 'Rooh' and 'Afza' that constitute the trademark, the Court held that while 'Rooh Afza' may have acquired a secondary meaning, indicative of sharbat produced by the plaintiffs, 'Afza' by itself was not of that category.

Plaintiff's contention that the marks were similar as the words 'Dil' and 'Rooh' entailed deep emotions while the word 'Afza' was common to both, was also rejected. The High Court was of the view that those who appreciate this deep emotion would be the first to be able to distinguish between 'Rooh' and 'Dil'. It also held that for the common consumer, in ordinary use of the words, 'Dil' and 'Rooh' do not denote the same thing.

It may be noted that the mark of the defendant was also registered, and a rectification application was pending there against. Hence, while dismissing the application for interim relief, observing that simultaneous use of 'Dil Afza' would not prejudice the plaintiffs' business, the Court stayed the suit pending final disposal of the rectification application. [*Hamdard National Foundation (India) v. Sadar Laboratories Pvt. Limited* – Order dated 6 January 2022 in CS (COMM) 551/2020, Delhi High Court]

## Trademark disparagement – No assumption that goods depicted in advertisement are that of plaintiff, merely because plaintiff is a dominant market player

The Delhi High Court has stayed the Order granting interim injunction against use of specific advertisements alleged to be disparaging the product and trademark of the plaintiff. Granting relief, the Court observed that merely because the plaintiff was the dominant market player, it cannot be assumed that the bottle of toilet cleaner depicted in the specified advertisements of the defendant only relate to the product of the plaintiff. The Court in this regard also noted that the bottle depicted did not have any label or colour, much less a label deceptively similar to that of the plaintiff or a colour combination deceptively similar to that of the plaintiff (respondent before the Court now). According to the Court, the advertisements in question *prima facie* only sought to puff up the product of the defendant.

Setting aside the decision of the Single Judge, the Court observed that plaintiff's device mark was registered in respect of several matters namely, shape of bottle, label, colour of the bottle and cap.

It held that the Single Judge could not have picked up only the bottle shape depicted in the advertisement and compared it with device registration obtained by plaintiff. The Court also noted that the Single Judge did not deal with the argument that similar bottle shape was used by several other players in the market, including some well-known consumer goods players even though their market share was less. Further, looking at the similar shape of all the other bottles used in the trade for toilet cleaners, the Division Bench of the High Court also found *prima facie* correct the submission that the bottle shape was functional.

The Court however declined to stay the injunction granted in respect of one of the advertisements where the defendant had claimed that their product (Domex) was superior to the product of the plaintiff (Harpic) due to technological advancement. The defendant had in this regard produced a report by another entity. The Court observed that the report was required to be tested in trial. [*Hindustan Lever Ltd. v. Reckitt Benckiser (India) Pvt. Ltd.* – Order dated 6 December 2021 in FAO(OS) (COMM) 157/2021, Delhi High Court]



## News Nuggets

### Limitation for judicial or quasi-judicial proceedings – Supreme Court excludes period from 15 March 2020 till 28 February 2022

Taking into consideration the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing

conditions, the Supreme Court of India has directed that the period from 15 March 2020 till 28 February 2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings. The Apex Court in this regard restored its earlier Order dated 23 March 2020.



It also stated that in cases where the limitation would have expired during the period between 15 March 2020 till 28 February 2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1 March 2022.

The Order dated 10 January 2022 also clarifies that that the said period shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits and termination of proceedings.

### **‘Tattva’ and ‘Tatva(s)’ are phonetically identical and not merely similar**

The Delhi High Court has passed a decree of permanent injunction against use of the mark ‘Tatva’ and ‘Tatvas’ by the defendant. The Court found the mark ‘Tatva’ to be phonetically identical and not merely similar to the mark ‘Tattva’ being used by the plaintiff. It also noted that the defendant was providing spa services identical to those provided by the plaintiff, with the same customer base. The Court was of the view that hence there was every possibility of the public being misled regarding the services provided by the defendant as those of the plaintiff or at least drawing an association between them. It also found substance in the contention that by modifying their mark by adding a letter ‘s’ consequent to the cease and desist notice of the plaintiff, the defendants had tacitly acknowledged the infringing nature of their mark. Defendants absence of response to the plaint in the dispute *Elementia Wellness*

*Private Limited v. TES Beauty Services Private Limited* [Judgement dated 15 December 2021] was taken by the Court as indicating that the defendants had nothing substantial to urge.

### **IPR disputes – Delhi High Court implores members of bar, specially Senior Counsels, to keep constraints of time of Court in mind**

The Delhi High Court recently came down heavily on the advocates, particularly Senior Counsels, appearing for the parties in intellectual property matters. Observing that the matter relating to intellectual property rights are very vociferously contested on the first date itself when the matter is listed, the Court stated that the Counsels should realise that the first date is the date for preliminary hearing and not a date for adjudication of appeal on merits of the matter. The High Court also stated that all should be mindful of the fact large number of other matters are listed on the day when the appeal is listed for preliminary hearing and that just because senior counsels appear on both sides, they cannot take away lion’s share of the Court’s time. The Court in *Hindustan Lever Ltd. v. Reckitt Benckiser (India) Pvt. Ltd.* {Order dated 6 December 2021} implored the members of the bar, particularly the senior counsels to keep the constraints of time of the Court in mind and to cooperate with the Court with a greater sense of responsibility.

### **Identity of subject matter in two suits – Second suit to be stayed**

Relying on Section 10 of the Civil Procedure Code, the Delhi High Court has reiterated that where there is ‘identity of matter’ in both the suits i.e., the whole of the subject matter in both the proceedings are identical, even if further reliefs are claimed in the subsequent

suit, it would be immaterial, and the second suit would necessarily have to be stayed. Gathering the identity of the matter from the pleadings in the two suits, the Court observed that both sides claimed a right to use their respective trademark alleging that the other side was using a deceptively similar trademark. On facts, the Court in *H.S. Sahni v. Mukul Singhal* [Judgement dated 17 January 2022] dated noted that as in the instant suit, in the written statement filed in previous suit, it was also claimed that it was the plaintiffs in that suit (defendants here) who had deceptively adopted the trademarks and trade dress of 'M.G.' and 'M.G.I.' that belonged to the plaintiff.

### **Singapore amends its IP laws to streamline IP policies and processes**

To streamline IP policies and processes for businesses to better protect and manage their IPR, an Intellectual Property Amendment Bill (IPAB) was passed by the Parliament of

Singapore on 12 January 2022. Making certain amendments in the Patents Act, the Trade Marks Act, the Registered Designs Act, the Plant Varieties Protection Act, and the Geographical Indications Act 2014, the Bill, as per reports, will improve business-friendliness, enhance operational efficiency and will provide certain legislative and procedural clarity. The latest amendments will also facilitate certain changes to processes for the registration of intellectual property rights under the abovementioned provisions. According to the Second Reading Speech by Second Minister for Law of Singapore (available [here](#)), amongst many other changes, the recent amendments will streamline the administrative process for international patent applications which are not in English and will permit partial acceptance for national trade mark applications thus, allowing the trade mark to be registered for those goods and services for which there were no objections.

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