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Article

Patent of method of treating a plant – Interpretation of Section 3(h)

By **Eeshita Das and T. Srinivasan**

The article in this issue of IPR Amicus discusses a recent decision of the Hon'ble Calcutta High Court which has set aside an order passed by the Controller of Patents and Designs refusing the grant of patent for treatment of a plant disease, for being a method of agriculture under Section 3(h) of the Patents Act, 1970. The High Court in this regard noted that Sections 3(h) which bars the patenting of a method of agriculture or horticulture, does not contemplate treatment of plants to render them free of disease, while Section 3(i) deals with the process of treatment or prevention. It also noted that vide an amendment in 2002 in Section 3(i), which at present bars method of treating a human being or an animal, words "or plants" were removed from its scope. The Court for this purpose stated that the Controller failed, to explain why the claimed invention should be considered to fall under 'agriculture' or to justify why prevention of disease or treatment would fall under agriculture, when there is a separate provision under Section 3(i).

Patent of method of treating a plant – Interpretation of Section 3(h)

By Eeshita Das and T. Srinivasan

Introduction

Section 3(i) of the Patents Act, 1970 ('**Act**')¹ bars the patenting of any process for treatment of human beings or animals to render them free of disease. The Section is applicable to claims directed to a method of treating a **human being or an animal**. Before arriving at its present form, Section 3(i) of the Act also included plants under its ambit. It was after the amendment of the Act in 2002², that methods of treating plants were removed from the scope of Section 3(i) of the Act. However, while issuing First Examination Reports ('**FER**') and Hearing Notices, Indian Controllers now object to claims directed to a method of treating a plant under Section 3(h) of the Act³, that bars the patenting of "*a method of agriculture or horticulture;*".

This article examines the decision of the Hon'ble High Court of Calcutta ('**High Court**') on an appeal (AID NO. 11 OF 2021)⁴ filed by Decco Worldwide Post Harvest Holdings B.V & Anr. ('**Appellant**') seeking to set aside an order ('**impugned order**') passed by the Controller of Patents and Designs ('**Respondent**') refusing the grant of the Appellant's patent application for being a method of agriculture under Section 3(h) of the Act, apart from lacking an

inventive step and having insufficient disclosure. The High Court, after considering the facts of the case, decided that the assessment of the claimed invention by the Respondent was erroneous and remanded the application back to the Respondent to examine the subject patent application afresh including the question of patentability, after giving an opportunity of hearing to the appellant. This article specifically focuses on the opinion of the High Court with respect to assessment of inventions under Section 3(h) of the Act.

Facts of the case

The Appellant filed an ordinary patent application titled 'A FUNGICIDAL TREATMENT FOR BLACK SIGATOKA' bearing an application number 201731000726 ('**Application**'). The claimed invention is a method for treatment of black sigatoka (a leaf-spot disease in banana plants, caused by the ascomycete fungus *Mycosphaerella fijiensis* (Morelet)) by use of Ortho-phenyphenol.

The claimed invention is cost effective, environment friendly, eliminates and reduces synthesised chemical fungicides having a significant environmental impact and leaves high residue in soil and

¹ [Section 3\(i\) in The Patents Act, 1970 \(indiankanoon.org\)](https://www.indiankanoon.org/section-3-i-in-the-patents-act-1970/)

² [The Patents \(Amendment\) Act, 2002](https://www.indiankanoon.org/the-patents-amendment-act-2002/)

³ [Section 3\(h\) in The Patents Act, 1970 \(indiankanoon.org\)](https://www.indiankanoon.org/section-3-h-in-the-patents-act-1970/)

⁴ [Decco Worldwide Postharvest v. The Controller Of Patents And .. on 13 June, 2022 \(indiankanoon.org\)](https://www.indiankanoon.org/decco-worldwide-postharvest-v-the-controller-of-patents-and-on-13-june-2022/)

agricultural products. The invention also reduces the risk of resistance (decreased sensitivity requiring large doses). It further improves the health and yield of the plant increasing in their economic value.

A First Examination Report with a statement of objections was issued against this Application, and in the FER, the Respondent raised objections under various Sections of the Act, such as lack of novelty under Section 2(1)(j) of the Act, lack of inventive step under Section 2(1)(ja) of the Act, non-patentability under Sections 3(h), 3(d), and 3(e) of the Act and lack of clear and sufficient disclosure under Section 10(4) of the Act.

The Appellant filed the response to the FER along with amended claims. The Respondent refused to grant the Application on the ground of non-patentability under Section 3(h) of the Act, insufficiency of disclosure under Section 10(4) and lack of an inventive step under Section 2(1)(ja). Aggrieved by the decision of the Respondent, the Appellant filed the appeal.

The Appellant's counsel stated that the objections raised by the Respondent were misconceived and untenable. They argued that the Respondent had incorrectly objected to the claimed invention under Section 3(h), when the claimed invention was directed to a method of treatment of plants to render them free and prevent diseases. The Appellant also said that the Respondent failed to provide any reasons in arriving at the finding that the claimed invention was not patentable under Section 3(h). The Respondent while deciding over the case also ignored that similar inventions had been granted patent by the Respondent previously, the details of which were furnished before the Respondent. The Appellant's

counsel also provided their arguments with respect to the assessment of lack of inventive step and insufficiency of disclosure.

The Respondent, on the other hand, argued that the use of OPP as a fungicide and biocide is well known to a skilled person; thus, the claimed invention is not inventive. Moreover, the claimed invention refers to the use of a reduced dosage, indicating that the invention is a new use of a known substance and therefore not allowable under Section 3(d) of the Act. The Respondents also alleged that the Appellant's claims were contradictory and inconsistent.

Decision of the High Court

The High Court stressed on the fact that Sections 3(h) and 3(i) cover different categories of inventions. Section 3(h) bars the patenting of a method of agriculture or horticulture, which does not contemplate treatment of plants to render them free of disease whereas Section 3(i) deals with the process of treatment or prevention. Further, the Amendment Act of 2002 amended Section 3(i) of the Act to remove "or plants" from its scope.

The High Court stated that the Respondent, in the impugned order, failed:

- to explain why the claimed invention should be considered to fall under 'agriculture'.
- to provide any reasoning as to why a method of treatment of plants to treat fungal diseases would fall within Section 3(h) of the Act which covers traditional methods of agriculture.

- to justify why prevention of disease or treatment would fall under agriculture, when there is a separate provision under Section 3(i) of the Act.

The High Court also clarified that the Manual of Patent Office Practice and Procedure is just a guiding fact and cannot have an overriding effect on the Act. In addition to this, the High Court mentioned that the Respondent, by simply considering that the claimed invention falls under 'agriculture' has not dealt with the submissions of the Appellant. This is after the fact that the Appellant had furnished numerous inventions dealing with treatment of plants which have been granted previously; this was also ignored by the Respondent while passing the impugned order.

The High Court emphasized that reasons are the foundation of any order passed by any judicial or quasi-judicial authority. The intent behind providing reasons in any order is to offer clarity to the reader and to understand how and why the matter has been proceeded and dealt with by the Authority in a particular manner. A similar position has also been echoed by the Hon'ble High Court of Delhi in the matter of *Huhtamaki Oyj and Anr v. Controller of Patents* on 26 May, 2023⁵. Regarding the objections retained by the Respondent in the impugned order on the insufficiency of disclosure and lack of inventive step, the High Court pointed out that the findings of the Respondent were unreasoned and did not appreciate the facts of the case.

Accordingly, the High Court concluded that the impugned order was unsustainable and set the same aside, remanding the application back to the Respondent to freshly examine it, including the objection on non-patentability, after giving an opportunity to the Applicant to be heard.

Conclusion

The High Court's decision in this matter has established that methods of treatment of plants cannot be objected under Section 3(h) of the Act, which covers traditional methods of agriculture. Correct interpretation of the Act and applying the same to the patent applications being examined by the Controllers will also save time and resources of the Applicants. Further, the High Courts in numerous decisions have made it clear that providing reasoned orders in patent proceeding is of the utmost importance. Moreover, it is an obligation on the Controller to provide a reasoned order to the party as per the third principle of natural justice wherein party against whom the order has been passed must know the reasons of passing such an order. Reasoned order will help the Patent Applicants understand as to why the objection is sustained or rejected.

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⁵ [Huhtamaki Oyj And Anr v. Controller Of Patents on 26 May, 2023 \(indiankanoon.org\)](https://www.indiankanoon.org/cases/huhtamaki-oyj-and-anr-v-controller-of-patents-on-26-may-2023)



Ratio Decidendi

- Patents Act, and not Competition Act, to govern conditions in agreement of licensing or abuse of status as Patentee – Delhi High Court
- Plant Variety Protection – Registration to be revoked when incorrect information provided by an applicant – Court rejects plea of bona fide mistake and that error would not make any difference – Delhi High Court
- Trademarks – Marks 'INDAMET' and 'ISTAMET', used for pharmaceuticals, are deceptively similar, both structurally and phonetically – Delhi High Court
- Trademark – Advertisement when mere puffery and not disparagement – Delhi High Court
- Trademarks – Non-filing of affidavit by way of evidence is not fatal to an application for well-known mark – Delhi High Court

Patents Act, and not Competition Act, to govern conditions in agreement of licensing or abuse of status as Patentee

The Division Bench of the Delhi High Court has held that for patents, unreasonable conditions in agreements of licensing, abuse of status as a patentee, inquiry in respect thereof and relief that is to be granted therefor, are all to be governed by the Patents Act, 1970 and not by the Competition Act, 2002. The Court was of the view that Competition Commission of India cannot exercise jurisdiction over actions of an enterprise that are in exercise of its rights as a Patentee.

The Court, for this purpose, held that Chapter XVI of the Patents Act is a complete code in itself on all issues pertaining to unreasonable conditions in agreements of licensing of patents, abuse of status as a patentee, inquiry in respect thereof and relief that is to be granted therefor.

The Court disagreed with the contentions of the Competition Commission of India that as per the provisions of Section 3(5)(i)(b) and Section 4 of the Competition Act, only the CCI can consider whether a condition imposed in an agreement licensing a patent is unreasonable, i.e., such as would cause an appreciable adverse effect on competition within India, or an abuse of dominant position. According to the Court, the inquiry that the CCI proposes to conduct in respect of an assertion of patent rights is nearly identical to that which the Controller will conduct under Chapter XVI of the Patents Act.

The High Court observed that the legislative intent was apparent in the Patents Act, especially as amended by the 2003 Amendment which introduced Chapter XVI after the Competition Act was enacted. It noted that the inclusion of Section 84(6)(iv) in the Patents Act by way of an amendment, after the Competition Act was passed with Section 3(5)(i)(b), is particularly instructive of the above legislative intent as regards anti-competitive agreements.

Observing that the subject matter was not merely anti-competitive agreements and abuse of dominant position, but the anti-competitive agreements and abuse of dominant position by a patentee in exercise of its rights under the Patents Act, the Court held that the Patents Act, and not the Competition Act, was a special statute, for this purpose. [*Telefonaktiebolaget LM Ericsson v. Competition Commission of India* – Judgement dated 13 July 2023 in LPA 247/2016 and Others, Delhi High Court]

Plant Variety Protection – Registration to be revoked when incorrect information provided by an applicant – Court rejects plea of bona fide mistake and that error would not make any difference

The Delhi High Court has upheld the revocation of the registration of a variety of potato under Section 34(a) of the Protection of Plant Varieties and Farmers' Rights Act, 2001, taking note of the fact that the applicant-appellant had given incorrect date of commercialisation of the variety in the application. The applicant

had provided the date of first sale as December 2009 in India, however, the Protection of Plant Varieties and Farmers Rights Authority found the first sale of the variety to be in 2002 in Chile.

Rejecting the plea of *bona fide* mistake and that there was ambiguity in the Form since it was not clear where date of sale in India or any part of the world was required, the Court noted that there was no occasion for the appellant to misconstrue the form as seeking the date of the first sale made only in India. Further, the Court also rejected the argument that even taking the first sale as 2002, would have been entitled to grant of registration. According to the Court, it was not relevant if such date, otherwise, would not materially affect the eventual grant of the registration. The Court in this regard noted that for the purposes of Section 34(a) what is important is that the Certificate of Registration has been obtained on an incorrect information furnished by the applicant.

Rejecting the appeal, the Court also noted that the appellant had filed Form PV-2 in blank and without the signatures of the breeder, the alleged assignee of the breeder, and hence, the registration was rightly revoked under Section 34(c). The High Court also noted that in spite of opportunity granted under Section 20(2), the application filed was not in conformity with the Act, the Rules, and the Regulations. Further, observing that the grant of registration is an act of importance and has wide ramifications as it confers valuable rights on the applicant, the Court was of the view that the application seeking such registration cannot be made in a casual manner without adherence to the form or the procedure. [*Pepsico India Holdings Pvt. Ltd. v. Kavitha Kuruganti* – Judgement dated 5 July 2023 in C.A.(COMM.IPD-PV) 2/2022, Delhi High Court]

Trademarks – Marks ‘INDAMET’ and ‘ISTAMET’, used for pharmaceuticals, are deceptively similar, both structurally and phonetically

The Delhi High Court has held that word ‘INDAMET’ to be deceptively similar to ‘ISTAMET’, both structurally and phonetically when compared as a whole with different prefix. The Court in this regard observed that the only difference lied in the two letters of the prefix, with one company (Plaintiff here) employing ‘ST’ in ‘ISTA’ and the other company (Defendant here) using ‘ND’ in ‘INDA’.

Relying upon various precedents relating to trademark confusion in pharmaceutical industry, the Court observed that even chemists and pharmacists cannot be said to be infallible even though they are trained/ qualified, and thus, confusion and mistakes as to similar marks may arise. According to it, the contention that both drugs (INDAMET for asthma, and ISTAMET for diabetes) are provided to users only on producing appropriate prescriptions as opposed to an over-the-counter drug, does not hold weight. Further, in the opinion of the Court, considering the overall similarity between the two marks, the likelihood of confusion for a buyer cannot be ruled out solely because the packaging is different.

Further, observing that in the case of pharmaceutical products, it is crucial to consider the perspective of the end consumer, the High Court also rejected the contention that description of goods, was

sufficient to distinguish the parties' mark. According to the Court, the marked similarity between the two brand names overshadows the differences in composition, due to the shared suffix 'MET'. It also in this regard noted that a more stringent test must be applied to pharmaceutical products, given their significant impact on public health and safety.

The High Court also rejected the contention that confusion can be averted since 'INDAMET' is to be used alongside a Dry Powder Inhaler. It observed that the deceptive similarity between the trademarks could lead to confusion at the point of purchase, irrespective of the mode of administration, and that the method of administration cannot serve as the sole differentiator for the products.

No estoppel based on stance taken during registration

Defendant's plea of estoppel on the part of the Plaintiff as the later had previously differentiated its 'ISTAMET' mark from the similarly structured conflicting trademarks, such as 'INTAMET', 'INSTAMET' and 'ESTIMET', during the registration process, was also rejected by the Court. The High Court in this regard observed that any statement or stance by the Plaintiff during the trademark registration process or during the opposition to third-party marks cannot logically or legally be applied to the current dispute involving the mark 'INDAMET'. The Court also noted that conditions of estoppel were also not met here. [*Sun Pharma Laboratories Limited v. Glenmark Pharmaceuticals Limited* – Judgement dated 3 July 2023 in CS(COMM) 711/2022, Delhi High Court]

Trademark – Advertisement when mere puffery and not disparagement

The Delhi High Court has *prima facie* rejected the plea of trademark disparagement against the print advertisement of the Defendant's amla hair oil. The High Court in this regard observed that a consumer, while reading the said advertisement, would not be able to relate the term of '*sasta amla*' [cheaper amla] to the Plaintiff's product, because neither was the bottle in the advertisement referring to the plaintiff's product, nor was it directly or indirectly implying the Plaintiff's product. The Court was of the view that reference to the Plaintiff, if any, could be drawn only by a leap of imagination, which was *prima facie* not warranted, even after considering the advertisement campaign of the Plaintiff which highlighted Plaintiff's products being cheaper in price to that of the defendant.

The Plaintiff had claimed that the opening statement '*याद रखना, सस्ता आवला, बालो को महंगा पड़ेगा*' [remember cheap amla would be costly for the hair] of the Defendant's advertisement was alarming and threatening the consumers against all cheaper in price amla hair oils as being inferior and harmful. However, in the opinion of the Court, the advertisement is to be judged from point of view of an ordinary consumer and its perception of the advertisement, *prima facie*, would be to see the advertisement as a puffery. Hence, the advertisement was not a generic disparagement of all cheaper amla hair oil. In the opinion of the Court, the advertisement merely suggested that buying amla hair oil, which is cheaper in price or

quality, might be harmful to the hair, and that this could be stated to be an opinion but not defamatory of all hair oils that are cheaper.

The Court also rejected the submission of the Plaintiff that considering the comparative juxtaposition of the two bottles - one of the Defendants and the other unmarked but with a red cross, with a tagline '*Asli Amla, Dabur Amla*' [real amla, Dabur amla] would convey an impression that only Defendant's product was real and genuine, and that all cheaper oils are not. According to the Court, the tagline, which was a registered trademark of the Defendant, cannot be read to mean that only the Defendant's product is real or genuine while all the others are fake. [*Marico Limited v. Dabur India Ltd.* – Decision dated 2 June 2023 in CS(COMM) 471/2022, Delhi High Court]

Trademarks – Non-filing of affidavit by way of evidence is not fatal to an application for well-known mark

The Delhi High Court has held that for determination of well-known status of a trademark, an affidavit by way of evidence is not a mandatory requirement under the Trade Marks Act, 1999 and the Trade Marks Rules, 2017. The Court however observed that documentary evidence would be required. Holding that non-filing of the affidavit by way of evidence shall not be fatal to the application for determining well-known status, the Court also observed that it could be at best a requirement which the Registrar could call upon [under Rule 124(3)] the applicant to comply with, if

the documentary evidence and the statement of case is not sufficient.

The High Court also noted that mere affidavits by way of evidence without supporting documents may not be sufficient to establish the well-known status of the mark. While, on the other hand, documentary evidence without an affidavit can still establish well-known status of the mark as the statement of case would be setting out the relevant description of the documents.

It may be noted that the evidence in this respect must be substantially documentary in nature, which would establish contemporaneous and continuous use, reputation and goodwill, the Court also listed-out various documents which could be included in the list of documents for the purpose.

Allowing the appeal, the Court gave opportunity to the Appellant to file a supporting affidavit, and any further documents in support of its application for grant of well-known status for its mark '*KAMDHENU*'. [*Kamdhenu Ltd. v. Registrar of Trade Marks* – Judgement dated 6 July 2023 in C.A.(COMM.IPD-TM) 66/2021, Delhi High Court]



News Nuggets

- Trademarks – Wires and cables are not allied and cognate to juicers, mixers, washing machines, pumps, and motors
- No design infringement in case of representation in advertisement
- Filing of evidence – Applicability of Trademarks Rules, 2017 to proceedings under Trademarks Rules, 2002 – Matter referred to Larger Bench
- Submission of additional evidence – Covid-19 is a reasonable cause for both non-disclosure and non-filing – Plaintiff is not obligated to furnish a detailed disclosure in the plaint
- Term 'Emmentaler' cannot be protected as a European Union trademark for cheese

Trademarks – Wires and cables are not allied and cognate to juicers, mixers, washing machines, pumps, and motors

The Delhi High Court has held that wires and cables are not allied and cognate to the goods described in Class 07 which includes appliances such as juicers, mixers, grinders, washing machines, pumps, and motors. The Court in this regard observed that though the products in question do broadly fall under the category of 'electric goods', they are not similar in the context of Section 29(2) of the Trade Marks Act, 1999, relating to infringement. According to the Court, the expression 'similarity of goods and services' in this provision requires a more narrowed and contextual analysis. Scrutinizing various elements as laid down in different precedents, the Court in *Paragon Cable India v. Essee Networks Private Limited* [Judgement dated 3 July 2023] held that the nature and composition of the goods in question are fundamentally distinct, the intended use of these goods is different, and that the trade channels for these goods often vary.

No design infringement in case of representation in advertisement

In a case involving alleged disparagement of a trademark by an advertisement, where the Delhi High Court found no *prima facie* case to injunct the broadcasting or display of the Defendant's said advertisement, the Court also rejected the plea of design infringement. The Plaintiff had pleaded that the impugned advertisement of the Defendant pirated the design registration

held by the Plaintiff in the design of the bottle (while it depicted the same in its advertisement) and was therefore liable to be injuncted under Section 22 of the Designs Act. According to the Court, by using the phrase 'so applied', the qualitative features of the first part of Section 22(1) would apply, *mutatis mutandis*, to the latter part of the clause, and hence the said section would be applicable only where an infringer uses the registered design on his article for the purposes of sale. The Court in *Reckitt Benckiser (India) Pvt. Limited v. Wipro Enterprises (P) Limited* [Judgement dated 18 May 2023] was also of the view that if comparative advertising is permissible, it would include, within it, the right to show the competing product.

Filing of evidence – Applicability of Trademarks Rules, 2017 to proceedings under Trademarks Rules, 2002 – Matter referred to Larger Bench

A Single-Judge of the Delhi High Court has referred to Larger Bench of the Court the question as to whether the rules dealing with procedural aspects, including those relating to the filing of evidence introduced by the Trademarks Rules, 2017, would apply retrospectively to proceedings initiated under the Trademarks Rules, 2002. The Court in this regard differed with the views of the Coordinate Bench in the case of *Mahesh Gupta v. Registrar of Trademarks and Anr.*, which had held that the proceedings initiated under 2002 Rules would have to be adjudicated under the said Rules. It may be noted that the High Court in *SAP SE v. Swiss Auto Products* [Judgement dated 3 July 2023] also referred to the Larger

Bench the question as to whether failure to file evidence in support of the trademark application would tantamount to 'anything done under the Trademarks Rules, 2002', which is saved by Rule 158 of the Trademarks Rules, 2017 and would continue to be governed by the Trademarks Rules, 2002.

Submission of additional evidence – Covid-19 is a reasonable cause for both non-disclosure and non-filing – Plaintiff is not obligated to furnish a detailed disclosure in the plaint

Observing that the legal imperative according to Order XI Rule 1(1) of the Civil Procedure Code was that if a document is within the Plaintiff's power, possession, control, or custody, it should not only be disclosed but also filed along with the plaint, the Delhi High Court has set aside the decision of the Commercial Court wherein the said lower Court had sought to draw a distinction between 'non-disclosure' and 'non-filing'.

The Commercial Court had dismissed the applications for submission of additional evidence/documents, while it proceeded on the assumption that since there was no disclosure by the Petitioner in the plaint, regarding the additional documents, the reason for non-filing (lockdown due to Covid-19) was rendered irrelevant.

Stating that the distinction between 'non-disclosure' and 'non-filing' was artificial, the High Court held that the lockdown induced

by Covid-19 surely constitutes a reasonable cause for both non-disclosure and non-filing, subject to the satisfaction of the circumstances and the discretion of the Court.

Further, regarding disclosure in the plaint, the Court in *Vijay Kumar Varshney v. Longlast Power Products Ltd.* [Judgement dated 3 July 2023] was of the view that a plaintiff is not obligated to furnish a detailed disclosure of each document in the plaint itself. According to the Court, the law mandates disclosure of material facts in the plaint, and not an exhaustive cataloguing of all documents in possession.

Term 'Emmentaler' cannot be protected as a European Union trademark for cheese

The General Court of the European Union has upheld the decision of the Examiner and of the Court of Appeals which had rejected the registration of the word sign 'EMMENTALER' for goods corresponding to the description "Cheeses with the protected designation of origin 'Emmentaler'". According to the EU's General Court, the Board of Appeal was fully entitled to conclude that the term 'Emmentaler' was descriptive of a type of cheese for the relevant German public and was not perceived as an indication of the geographical origin of that cheese. The Court in *Emmentaler Switzerland v. European Union Intellectual Property Office* [Case T-2/21] noted that the relevant German public immediately understands the 'EMMENTALER' sign as designating a type of cheese, and hence the mark was descriptive of a type of cheese for the relevant German public.

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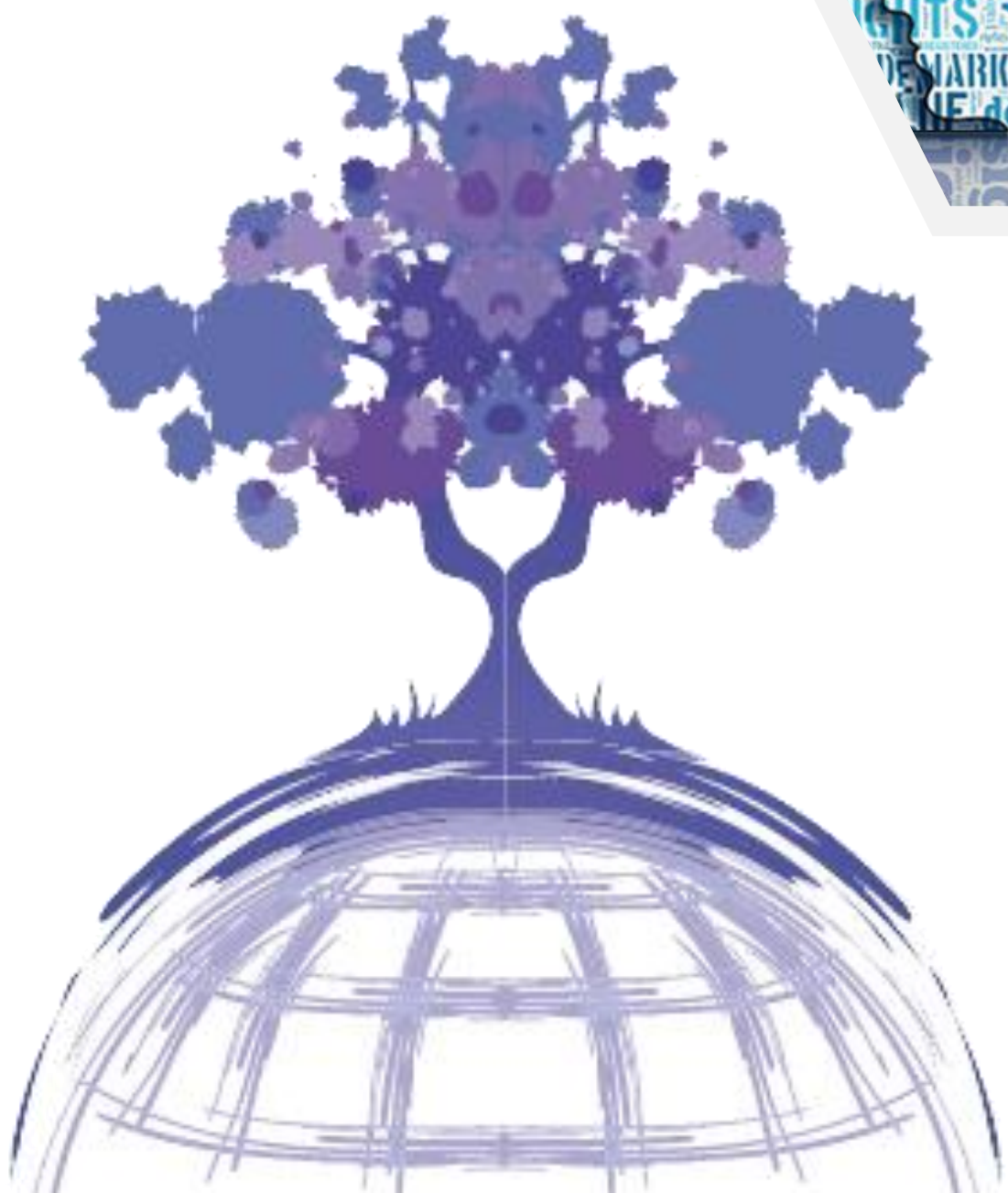
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