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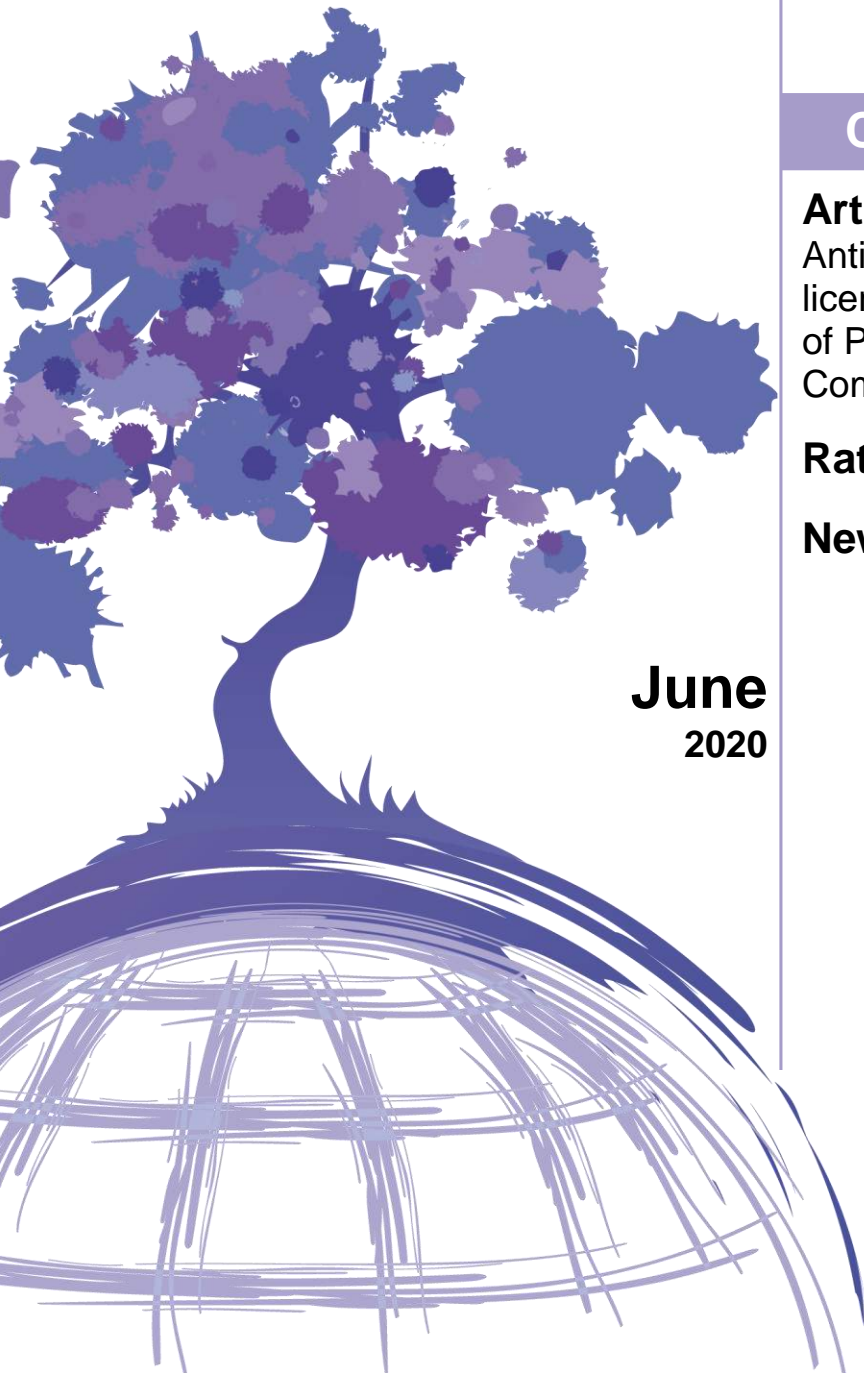
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Anti-competitive practices in patent licenses - No overlap between powers of Patent Controller and the Competition Commission

By Ayushman Kheterpal

In *Monsanto Holdings Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.*¹, the Single Judge of the Delhi High Court decided two writ petitions (clubbed)² challenging a plethora of orders³ passed by the Competition Commission of India (“CCI”) on the ground of lack of jurisdiction of the CCI. While dealing with the issue of jurisdiction of the CCI, the Single Judge held that the *Bharti Airtel* case⁴ was not applicable while determining the jurisdiction between the Controller of Patents and the CCI, and reaffirmed the principles laid down in *Ericsson* case⁵. The Single Judge further held that the sub-section (5) of Section 3 of the Competition Act, 2002 (“the Act”) does not enable an IPR Holder, such as a Patentee, to include onerous conditions under the guise of protecting its Intellectual Property Rights.

Facts in brief:

The Petitioners⁶, entities related to the Monsanto Group, filed a writ petition⁷, *inter alia*, impugning a common order⁸ (“the impugned order”) of the CCI under Section 26(1) of the Act, whereby the CCI had directed the Director General (“DG”) to investigate the activities of the Petitioners and Maharashtra Hybrid Seeds Company (“Mahyco”). The impugned order was passed pursuant to a reference made by the Department of Agriculture, Cooperation and Farmers Welfare, Ministry of Agriculture and Farmers Welfare, Government of India under Section 19(1)(b) of the Act against the petitioners for alleged contravention of Sections 3 and 4 of the Act and in pursuance of information filed under Section 19(1)(a) of the Act by the Informants/Respondents⁹.

In the second writ petition¹⁰, the petitioners impugned four separate orders¹¹ passed by the CCI under Section 26(1) of the Act wherein it was held that the substance of the allegations made therein were similar and directed all the matters

¹ *Monsanto Holdings Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.*, 2020 SCC OnLine Del 598, judgement dated 20.05.2020.

² W.P.(C) 1776/2016 and CM Nos. 7606/2016, 12396/2016 & 16685/2016; W.P.(C) 3556/2017 and CM Nos. 15578/2017, 15579/2017 & 35943/2017.

³ Order dated 10.02.2016 passed in Reference Case 02/2015 and Information Case 107/2015; order dated 18.02.2016; Common order dated 18.02.2016 passed in Case No.10/2016, Case No. 3/2016 and Ref Case no.1/2016; common order dated 09.06.2016 passed in Case no. 37/2016, Case no.38/2016 and Case no.39/2016; Order dated 21.09.2016 in Case no. 36/2016; and Order dated 14.03.2017 in Case no. 88/2016.

⁴ *Competition Commission of India v. Bharti Airtel Ltd. And Ors.*, Civil Appeal No. 11843/2018, decided on 05.12.2018.

⁵ *Telefonaktiebolaget L.M. Ericsson v Competition Commission of India & Another*, W.P.(C) 464/2014 dated on 30.03.2016.

⁶ Monsanto Holdings Pvt. Ltd., Monsanto Company and Mahyco Monsanto Biotech (India) Pvt. Ltd.

⁷ W.P.(C) 1776/2016.

⁸ Order dated 10.02.2016 passed in Reference Case 02/2015 and Information Case 107/2015.

⁹ Nuziveedu Seeds Ltd. (NSL), Prabhat Agri Biotech Ltd. (PABL) and Pravardhan Seeds Pvt. Ltd. (PSPL).

¹⁰ W.P.(C) 3556/2017.

¹¹ Common order dated 18.02.2016 passed in Case No.10/2016, Case No. 3/2016 and Ref Case no.1/2016; common order dated 09.06.2016 passed in Case no. 37/2016, Case no.38/2016 and Case no.39/2016; Order dated 21.09.2016 in Case no. 36/2016; and Order dated 14.03.2017 in Case no. 88/2016.

to be clubbed for the investigation to be conducted in accordance with the impugned order.

Monsanto Company (“Monsanto”), is engaged in developing and commercializing technology for producing genetically modified seeds. Monsanto developed and patented in India a second-generation *Bacillus Thuringiensis* (“BT”) cotton technology Bollgard-II, which consists of two genes that makes it resistant to bollworms, as Pink Bollworms had become resistant to its previous single-gene technology Bollgard-I. Monsanto has licensed the BT Cotton Technology to its joint venture, Mahyco Monsanto Biotech (India) Pvt. Ltd. (“MMBL”). MMBL, thereafter, sub-licensed it to various seed manufacturers in India including the Informants, wherein consideration for the sub-licensing was in two parts, i.e. a non-refundable part to be paid upfront and a recurring part known as “trait value” which is determined on the basis of the Maximum Retail Price fixed for BT Cotton Seeds. The bone of contention is the trait fee charged by MMBL and related terms and conditions imposed for using the technology for manufacturing BT Cotton Seeds.

The informants alleged that MMBL, Monsanto Group and their affiliates held a dominant position in the upstream market of licensing of BT Cotton Technology to seed manufacturers as well as downstream market for manufacturing BT Cotton Seeds. The informants further alleged that the conditions imposed in the sub-license agreement were harsh, not reasonable for protecting the IPR rights, discouraged the seed companies from dealing with competitors and were restricting scientific development of alternate technologies by the informants. The CCI held the allegations of the informants have *prima facie* merit and, thus,

passed the impugned order under section 26(1) of the Act directing the DG to conduct an investigation in the matter.

Contentions of Petitioner

The Petitioners challenged the impugned order mainly on the jurisdictional ground contending that CCI lacked jurisdiction on issues which were related to the exercise of rights granted under the Patents Act. The Petitioners contended that issues related to practices and contracts arising out of exercise of patent rights should be determined by authorities under the Patents Act, namely, the Controller of Patents (“the Controller”) and, therefore, the jurisdiction of the CCI was impliedly excluded to entertain such disputes.

The Petitioners contended that the decision of the Delhi High Court in *Ericsson v CCI*¹² was not a good law in view of the subsequent decision of the Supreme Court in *Competition Commission of India v. Bharti Airtel*¹³. It was argued that to avoid two different bodies, i.e. the CCI and the Controller simultaneously evaluating the same matters resulting in potentially conflicting decisions, the Supreme Court in *Bharti Airtel* case had harmoniously reconciled the provisions of the Act and the Telecom Regulatory Authority of India Act, 1997 (“TRAI Act”) and held that the CCI could exercise its jurisdiction, to determine whether there has been abuse of dominance or an unfair trade practice, only after the Telecom Regulatory Authority of India (“TRAI”) had returned the findings. It was argued that the decision of *Bharti Airtel* case was applicable since the position of the Controller in the field of Patents was arguably similar to that of TRAI in the field of the telecom industry.

¹² *supra* note 4.

¹³ *supra* note 3.

The Petitioners contended that the only remedy for unjustifiably withholding the grant of a license by the Patentee was to seek a compulsory license under Section 84 of the Patents Act, and the jurisdiction to entertain it would rest with the Controller. The Petitioners argued that the Controller, while determining whether to grant a compulsory license, is bound to evaluate whether there is any appreciable adverse effect on the competition / market in accordance with Section 140 of the Patents Act. The Petitioners submitted that Section 140 lists out cases where exercise of patents rights constitutes anti-competitive conduct and mirrors the principles of Sections 3 and 4 of the Act. The Petitioners argued that Section 140 of the Patents Act was retained on the statute despite enactment of the Act in 2002 which indicates that the legislative intent did not contemplate the CCI examining such issues and the same were required to be examined by the Controller. The Petitioners also contended that a Patent could be revoked by the Central Government and the Controller in accordance with Section 66 and 85 of the Patents Act respectively in public interest for promotion of healthy competition including cases where a Patentee is found to be abusing his position of dominance.

The Petitioners relied upon the decision of the Supreme Court in *Shiva Shakti Sugars v. Shri Renuka Sugar Limited*¹⁴ to contend that the Court must also look into economic and realistic consequences of CCI's jurisdiction to examine matters that were within the domain of the Patents Act. It was argued that if the Court were to permit CCI to have jurisdiction in such matters, it may result in significant resource depletion and market disruptions since various parties may abuse the process by proceeding directly to CCI instead of resorting to remedies under the Patents Act.

The Petitioners also contended that by virtue of exclusionary provision of sub-section (5) of Section 3 of the Act, the Petitioners could enter into agreement to restrain any infringement and, thus, the CCI had no jurisdiction to examine such agreements. It was argued that sub-section (5) of Section 3 of the Act had two limbs wherein the first limb provides a blanket exclusion for restraining infringement of Intellectual Property Rights (IPR) and the second limb enables imposition of reasonable conditions for protecting the IPR. It was further argued that the Parliament in its wisdom had used the word 'reasonable' only in the second limb and not in first limb. The Petitioners also submitted that the Informants/ Respondents had disguised their complaint alleging violation of Section 4 of the Act whereas their grievances were related to agreements covered under Section 3 of the Act.

Decision of the Court

Applicability of Bharti Airtel's Case

The Single Judge did not agree with the contention of the Petitioners that it was essential for the specialized regulator i.e. the Patent Controller to first determine whether the agreements entered into by MMBL were an abuse of its rights under the Patents Act before the CCI could proceed further with the information or the reference filed with it. The Single Judge held that the decision of the Supreme Court in *Bharti Airtel* case, relating to the dispute of non-provisioning of Points of Interconnection (POIs) in telecom industry, was not applicable to the facts of the present case, and therefore Ericsson case had not been overruled.

The Single Judge noted that the nature of functions of TRAI was two-fold i.e. recommendatory and regulatory in nature. The Single Judge noted that the TRAI's scope of regulation was all pervasive in nature. The Single

¹⁴ *Shiva Shakti Sugars v. Shri Renuka Sugar Limited* (2017) 7 SCC 729.

Judge further noted that there were certain technical aspects relating to the telecom industry where TRAI had domain expertise such as ensuring technical compatibility and effective interconnection between different service providers, as enshrined in Section 11 (b) of the TRAI Act. The Single Judge noted that the question whether the number of POIs were sufficient was clearly required to be technically evaluated and, thus, the Supreme Court held that this would be best done by the TRAI having the domain expertise.

The Single Judge held that while the Controller does exercises powers and functions other than the grant of patents, including issuance of compulsory licenses, the Controller did not regulate the exercise of patent rights or the agreements that are entered into by patentees with third parties in a pervasive manner. The Single Judge reasoned that the patents were not an industry and grant of a Patent merely recognized and conferred an IPR. Thus, it was held that the nature of the role performed by a Controller could not be equated with that performed by the TRAI. The Single Judge held that the decision of the Supreme Court in *Bharti Airtel* case did not hold that wherever there was a statutory regulator, the complaint must be first brought before the Regulator and examination of a complaint by the CCI was then contingent on the findings of such Regulator.

The Single Judge further noted that in *Bharti Airtel* case the Supreme Court had upheld the decision of the Bombay High Court, wherein the Bombay High Court itself had expressed its the view that the role of TRAI was different than the role of a Controller of Patents and, therefore, the decision of Ericsson case was not applicable in *Bharti Airtel* case.

Reasonableness requirement under sub-section (5) of Section 3 of the Act

The Single Judge held that sub-section (5) of Section 3 of the Act does not enable a Patentee to include onerous conditions under the guise of protecting its rights. It was held that right to restrain infringement of IPR under Sub-section (5) of Section 3 of the Act was not an unqualified right and was allowed only to the extent it was “necessary for protecting any of his rights which have been or may be conferred upon him”.

The Single Judge cited sub-section (5) of Section of the Act “... (5) *Nothing contained in this section shall restrict— (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under— ...*” and held that Section 3(5)(i) cannot be dissected into two limbs as suggested by the Petitioners. The Single Judge reasoned that the words “or to impose reasonable conditions” were placed between two commas and, thus, must be interpreted as being placed in parenthesis that explains and qualifies the safe harbor of sub-section (5) of Section 3.

Reiteration of pertinent Ericsson Case findings

The Single Judge noted that in *Ericsson* case,¹⁵ it was held that there was no irreconcilable repugnancy or conflict between the Act and the Patents Act and, therefore, the jurisdiction of the CCI to entertain complaints regarding abuse of dominance in respect to patent rights could not be excluded. The Single Judge noted that it was previously¹⁶ noted that even though there were similarities between provisions of Section 84(7) and 140 of the Patents Act with respect to provisions of the Act,

¹⁵ *supra* note 4.

¹⁶ *Ibid.*

the remedies under Section 27 of the Act are materially different from that of Section 84 and 85 of the Patents Act.

The Single Judge noted that it was previously¹⁷ held that although Section 60 of the Act expressly provided that the Act would be given an overriding effect, the same would not whittle down the provisions of the Patents Act. It also¹⁸ noted that Section 62 of the Act, expressly provided that the Act would be in addition to and not in derogation of the provisions of any other law for the time being in force. The Single Judge further noted that¹⁹ the provisions of Section 21A and 21 of the Act provided an opportunity to CCI and relevant statutory body to make reference to each other to ensure that no decision is taken in contravention of the provisions of relevant statute and the Act respectively. It was, thus,²⁰ held that the legislative intent was clearly that the Act is in addition to other statutes and not in substitution thereof.

The Single Judge of the Delhi High Court in the instant Judgement decided the writ petitions and refused to interfere with the impugned order or other related orders by the CCI. The Single Judge refused to look into the merits of the case at this stage. The Court held that it could not interfere with CCI order under Section 26(1) of the Act because review on merits was impermissible at that stage and, therefore, arbitrariness and unreasonableness of the impugned administrative order could not be tested based upon *wednesbury* test.

Conclusion

The Court has upheld the CCI's jurisdiction in matters concerning alleged anti-competitive practices for protection of the Patent Rights but at

the same time upheld his previous decision clearly holding that the domain of CCI and Patent Controller are distinct and not necessarily in conflict. The analogy of *Bharti Airtel* case involving role of TRAI was held to be inapplicable to the Patent Controller who does not have a pervasive and regulatory role like TRAI. Importantly, the exclusion under sub-section (5) of Section 3 of the Act, 2002 was held not be giving an unqualified right to the IPR holder.

Another issue that the Court could have examined to decide the jurisdiction of the Patent Controller was interpretation of Section 69(3) of the Patents Act read with Section 140 of the Patents Act, particularly proviso of Section 69(3). Section 69 provides for, *inter alia*, registration of patent licenses between patentee and licensee or other type of stake holders in a patent while Section 140 lists out principles governing patent licenses. The proviso to Section 69(3) states that in case of any disputes between the parties to a license, the Controller 'may' refuse to enter notice of such license in the register of patents until the rights of the parties have been determined by a competent Court.

The interface between competition law and intellectual property laws is perennial and there are bound to be conflicts and overlap of powers of authorities established thereunder. Interestingly though, the unique facts of this case did not seem to suggest a conflict of powers/roles between the CCI and the Patent Controller. The IPR laws such as the Patents Act, are complete codes in themselves and usually provide clear role for authorities established therein, much like the CCI.

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¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*



Ratio decidendi

Copyrights – Expression of a story – Abstraction process and similarity of central theme/concept

Noticing similarities of a fundamental or substantial nature in respect of the mode of expression of a story, the Bombay High Court, in a case involving alleged copyright infringement of the plaintiff's story 'Singardaan' by the Defendants' web series by the same name, has directed the defendant to maintain accounts of the profits made from the web series. The Court was of the view that instead of granting a temporary injunction against exhibition of the web series, interests of justice would be served better if the suit itself is directed to trial and the defendant is asked to maintain accounts of the profits made from the date of publication of the web series.

The Court though acknowledged that an idea by itself is not entitled to any copyright protection, it held that the case was of actionable plagiarism. Deliberating on the question as to what is meant by 'copyright in the story', the Court applied the process of 'abstraction' and observed that the theme, plot and story line of the story in question were clearly expressions of the 'central' theme or concept and that they contained sufficiently developed elements of expression or realization so as to have a life of their own for copyright protection. Noticing that substantial part of the web series, was exclusively devoted to, and was a copy of the plaintiff's theme, plot and story line, it was held that the defendant's story had a close similarity to the plaintiff's story and that it could be said that practically it was the same story or idea as the plaintiff's story, though admittedly

adapted it to a different format, namely, a web series. [*Shamoil Ahmad Khan v. Falguni Shah* – Order dated 26-05-2020 in Commercial IP Suit No. 1193 of 2019, Bombay High Court]

Pharma trademark infringement – Likelihood of confusion – Importance of sale in India

The Delhi High Court has declined to grant interim injunction in a dispute involving alleged infringement of the mark 'Amaday' by the defendant's mark 'Anaday'. The Court noted that though words were deceptively similar, there was no material on record to show that the defendant dishonestly adopted the mark to ride on the reputation and/or goodwill of the plaintiff's mark. Defendant's explanation as to why it coined the word 'Anaday' was taken note of by the Court in this regard. It also observed that the plaintiff had no sales in India and thus no corresponding goodwill in India. Further noting that the plaintiff's drug was sold for a different ailment i.e. for treating high blood pressure, heart disease, etc., whereas the defendant's drug was used for treatment of breast cancer, it held that the goodwill if any earned by the plaintiff's product could not be utilized by the defendant.

The Single Judge of the High Court also rejected the contention regarding confusion and the disastrous consequence if 'Anaday' was given instead of 'Amaday' by the chemist. It held that there was no likelihood of confusion due to bad handwriting on the prescription slip inasmuch as the plaintiff was only exporting its drug 'Amaday' and not selling the same in India. The Court also observed that there was delay in bringing the

action by the plaintiff as it had not bothered to find out whether defendant's drug was being sold in the market under the mark despite due notice. [*Ajanta Pharma Ltd. v. Zuventus Healthcare Ltd.* – Order dated 06-05-2020 in CS (COMM) 336/2019, Delhi High Court]

Plant variety protection – Suit for infringement not maintainable before registration

The Delhi High Court has held that prior to obtaining registration under the Protection of Plant Varieties and Farmers' Rights Act, 2001, a suit to restrain the defendants from infringing the rights which are yet to be conferred on the plaintiff on grant of registration, is not maintainable being without any cause of action. Plaintiff's plea of rights as common law rights was thus rejected. The Court noted that a reading of the PPVFR Act would show the structure thereof to be similar to that of Trade Marks Act, 1999, Copyright Act, 1957, Patents Act, 1970 and Designs Act, 2000.

The Single Judge however rejected the defence that there is a statutory bar to the jurisdiction of the Civil Courts in matters pertaining to the intellectual property rights of seeds/hybrids and parents thereof, under the PPVFR Act. The Court though noted that Section 24(5) of the PPVFR Act protects the interest of a breeder during the period between filing of application for registration and the decision taken by the Registrar on such application, and thus the jurisdiction of the Court was barred under Section 89, it observed that the Division Bench of the High Court had in the case of *Prabhat Agri Biotech Ltd. v. Registrar of Plant Varieties* struck down the provisions of Section 24(5). The Court, hence, was of the view that there being no other provision in the PPVFR Act empowering any of the authorities created thereunder to grant relief at the pre-registration stage, this Court would have jurisdiction.

Dismissing the suit, the Court in respect of rights in any work / development of variety carried out by the 2 people who were in employment with plaintiff before joining defendant No. 3, observed that confidentiality and secrecy obligations can only be with respect to a right which the person is entitled to protect. [*Sungro Seeds Ltd. v. Dr. S.K. Tripathi* – Judgement dated 15-05-2020 in CS (OS) No.1163/2013, Delhi High Court]

Trademarks – No similarity between 'TYPBAR-TCV' and 'ZYVAC-TCV'

The Delhi High Court has rejected the prayer for grant of interim relief seeking a restraint against the defendants from using the mark 'ZYVAC-TCV' as infringing the rights of the plaintiff in using the mark 'TYPBAR-TCV / TCV' for the same vaccine. The Court noted that the mark 'TCV' was an abbreviation / acronym of '*Typhoid Vi Capsular Polysaccharide Tetanus Toxoid Conjugate Vaccine*' / '*Typhoid Vi Conjugate Vaccine I.P. / ViP's – TT*', which is a descriptive word / generic term with regard to one vaccine for treating Typhoid. Holding that *prima facie* the mark 'TCV' could not have been registered and the registration to that extent is illegal, it held that after excluding 'TCV' (being common to trade and not a coined word) what remains in the two marks were 'TYBAR' and 'ZYVAC', which were not deceptively similar with no reasonable probability of confusion between the words either visually or phonetically. The High Court also stated that the question as to whether the marks 'TCV' / 'TYPBAR-TCV' had attained distinctiveness / secondary meaning, can only be established during trial. The Single Judge while also noting that 'TCV' *per se* was not being used by the plaintiff, it did not find the plea that since plaintiff was the first manufacturer of the 'Typhoid Conjugate Vaccine' it is entitled to exclusive use of the trade mark 'TCV', appealing. Difference in the colour of the packaging was also taken note

of by the Court for the purpose. [*Bharat Biotech International Ltd. v. Optival Health Solutions Pvt. Ltd.* – Order dated 26-05-2020 in CS(COMM) 1248/2018, Delhi High Court]

Copyright in shape even when same is necessary to obtain a technical result, when available

The Court of Justice of the European Union has held that copyright protection is available to a product when its shape is in part necessary to obtain a technical result. The Court however observed that the product should be an original work resulting from intellectual creation, i.e., through that shape, its author expresses his creative ability in an original manner by making free and creative choices in such a way that that shape reflects his personality.

In this case involving copyright in the shape of a bicycle, the defendant had contended that since the appearance of its bicycle was dictated by the

technical solution sought, which was to ensure that the bicycle can fold into three different positions, such appearance could be protected only under patent law and not under copyright law. However, the applicant had plead that since the three positions of its bicycle can be obtained by shapes other than those given to that bicycle by its creator, its shape may be protected by copyright.

The CJEU was of the view that in order to establish whether the product falls within the scope of copyright protection, it is for the referring court to determine whether, through that choice of the shape of the product, its author has expressed his creative ability in an original manner by making free and creative choices and has designed the product in such a way that it reflects his personality. [*Brompton Bicycle Ltd. v. Chedech/Get2Get* – Judgement dated 11-06-2020 in Case C-833/18, Court of Justice of the European Union]



News Nuggets

Extension of deadlines – Delhi High Court stays two Public Notices issued by Controller

The Delhi High Court has on 21-05-2020 stayed the operation of Public Notices dated 18-05-2020 and 20-05-2020 issued by the Controller General of Patents, Designs and Trademarks. The Single Judge of the Delhi High Court relied upon the Supreme Court decision dated 23-03-2020, extending the periods of limitation irrespective of the limitation period prescribed under the general law or any special statute. The Apex Court had

stated that the extension is to continue until further orders passed by that Court. The High Court held that the Order of the Supreme Court is as much binding on the Controller as on any other Court or Tribunal. It may be noted that Public Notices dated 20-05-2020 states that Petition (without fee) under sub-rule (6) of Rule 6 of the Patents Rules has been provisioned through E-Filing mode (under form 30) and through physical filing at the Patent office counters (other than Patent agents), and that delay in transmitting or re-submitting documents be

condoned / timeline be extended by the Controller on a petition made in that respect. Public Notice dated 18-05-2020 extended the deadlines falling between 15-03-2020 and 17-05-2020 to 01-06-2020. The matter in the case *Intellectual Property Attorneys Association v. Controller General of Patents, Designs and Trademarks*, will now be listed on 17-06-2020.

Release of infringing goods seized by Local Commissioner

In a case involving alleged infringement and passing-off of a trademark, the Delhi High Court has set aside the Order of the Trial Court rejecting the application of the defendant seeking release of the goods (soft drinks) seized by the Local Commissioner pursuant to an earlier Order of the Court restraining the defendant. The High Court was of the view that the rationale of the Trial Court that the goods were an important piece of evidence and articles may be required during proceedings of the case and in case they are released at this stage an integral and important part of the evidence would be lost, was not sustainable. It noted that the petitioner/defendant did not dispute seizure of goods (bearing the disputed marks) in 2500 boxes. The Court in its Order dated 01-06-2020 in the case *Pt. Ved Prakash Beverages v. Crystal Beverages* however directed that one carton out of the 2500 cartons be retained as a sample and handed over to the representative of the respondent/plaintiff for being produced before the Trial Court. It also directed that the labels on all the goods (except the sample carton) be removed and sealed in a container and the container be handed over to the representative of the respondent.

Copyright infringement by 'Betaal' – Bombay High Court rejects ad interim relief

In an alleged copyright infringement in literary work 'Vetaal' of the plaintiff by the story of a web series 'Betaal' of the defendant, the Bombay High Court has refused to grant *ad interim* relief. The Court in the case *Sameer Wadekar v. Netflix Entertainment Services Pvt. Ltd.* observed that except for the plaintiff saying that one of the film maker/director, with whom the plaintiff had shared the copyright work, had told the plaintiff that he has some contacts in the defendant, there was nothing else to show any link with the defendant. Upholding the defendant's plea on delay and laches, the Court rejected the plaintiff's plea that he was not aware of the earlier press release of the defendant which carried description of the web series. It noted that publications were in public domain. Lastly, the Court noted that the name 'Betaal' of the defendant's web series originated from 'Vetalam' relevant in Hindu mythology and everybody would have read the stories of Vikramaditya and Vetaal.

Disparagement by comparative advertisement in TV commercial – Voiceover or sufficient time to read disclaimer, important

The Delhi High Court has granted interim injunction in a case involving alleged disparagement of the mark 'Horlicks' by the mark 'Complan' in a TV commercial. The Court observed that the comparison based on the recommended serve size by the parties can be done in a commercial advertisement, however there was no voiceover with regard to the disclaimer in reference to the serve size nor was the time sufficient to read the said

disclaimer in the six second commercial. It noted that the viewer only saw a comparison of one cup of

‘Complan’ with two cups of ‘Horlicks’, with no reference to the serve size. Observing that a *prima facie* case was made in favour of the plaintiff, the Court in *Horlicks Limited v. Zyduz Wellness Products Limited*, restrained the defendant from advertising the impugned TVC in its present form. An earlier dispute between the same parties in respect of a print media advertisement, where the defendant had modified the advertisement and clarified that the comparison was based on the recommended serve size, was relied upon.

No distinctive character in word sign ‘XOXO’ – EU Court denies trademark protection

European Union’s General Court has upheld the Board of Appeal’s denial of trademark protection to the word sign ‘XOXO’ for *inter alia* being devoid of any distinctive character. Referring to the evidence in the file relating to the proceedings before the EUIPO, the Court noted that the sign ‘XOXO’ will be understood by the relevant public as meaning ‘hugs and kisses’. It observed that the examiner had taken note of the online dictionaries for the purpose. Applicants contention that the mark may have the said meaning but only for part of the relevant public, namely teenagers and very young women, was rejected by the Court observing that they nevertheless constituted a non-negligible part of the relevant public. Further, observing that the goods in question were capable of being offered as gifts, the Court in the case *Global Brand Holdings, LLC v. EUIPO*

upheld that finding of Board of Appeal that the mark in question will be perceived as a promotional message conveying feeling of love and affection.

No copyright on notion of using a color to represent a mood or emotion

In an interesting order involving character copyright and idea expression dichotomy, the USA’s 9th Circuit Court of Appeals has affirmed the denial of plaintiff’s claim alleging copyright infringement by the Disney movie Inside Out, of plaintiffs’ characters called The Moodsters. The panel held that The Moodsters, lightly sketched anthropomorphized characters representing human emotions, did not qualify for copyright protection because they lacked consistent, identifiable character traits and attributes and were not especially distinctive. The Moodsters were five characters that were color-coded anthropomorphic emotions, each representing a different emotion: pink (love); yellow (happiness); blue (sadness); red (anger); and green (fear). The Court also noted that the notion of using a color to represent a mood or emotion is an idea that does not fall within the protection of copyright. It was also of the view the The Moodsters also did not qualify for copyright protection under the alternative “story being told” test as they were mere chessmen in the game of telling the story. The panel has on 04-05-2020 further denied a petition for panel rehearing and petition for rehearing en banc.

Plants and animals exclusively obtained by essentially biological processes are not patentable

The Enlarged Board (7 members) of Appeal of the European Patent Office has issued an Opinion and concluded that plants and animals exclusively obtained by essentially

biological processes are not patentable. However, in order to ensure legal certainty and to protect the legitimate interests of patent proprietors and applicants, the Enlarged Board ruled that the new interpretation of Article 53(b) of EPC given in the Opinion dated

14-05-2020 had no retroactive effect on European patents containing such claims which were granted before 01-07-2017, or on pending European patent applications seeking protection for such claims which were filed before that date.

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