Nishith Desai Associates

LEGAL AND TAX COUNSELING WORLDWIDE

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The Way Forward

Learnings from Important Intellectual Property Case Laws & Developments from 2014

March 2015

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For any help or assistance please email us on ndaconnect@nishithdesai.com or
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Prologue

The Intellectual Property (“**IP**”) regime in India has undergone various developments in the year 2014 with respect to laws and policies. At the very outset, two note-worthy mentions are the constitution of the joint India - US working group on intellectual property rights (“**IPR**”) and a national IPR Think Tank group set-up to draft a national IPR policy. One of the objectives, *inter alia*, of setting up the IPR Think Tank group was to identify areas in IPRs where a further study needs to be conducted and to furnish recommendations to the Ministry of Commerce and Industry.[1] This initiative taken by the Indian Government is seen as a proactive step and one in the direction of public interest.

With the new Narendra Modi-led Government taking over the realms in 2014, there has been much debate and expectations over an improved and refined intellectual property law regime in India, aimed at achieving equilibrium between protecting the IPRs of the inventor and catering to public interest at large.

One important topic on the agenda during the recent US President Barack Obama’s visit to India in January was on Intellectual Property issues including piracy of films and software. The joint statement issued by both countries stated that there will be enhanced engagement on Intellectual Property Rights (IPR) in 2015 under the High Level Working Group on Intellectual Property, to the mutual benefit of both the countries. This statement has received mixed reactions from various facets of the industry and society. Health activists in the country have become suspicious that India might agree to TRIPS-Plus requirements whereas there have been positive overtones received by this initiative from the pharma industry in India.[2] It might be a bit pre-mature to raise concerns based solely on this statement. However, it is good to see that both governments have recognized IPR as an important policy issue that needs to be looked at holistically to stimulate foreign investment into India.

The need for robust IP policy has been long felt. The first draft of the IPR Policy was released on December 19, 2014 and highlighted the various objectives of the government to maximize Intellectual Property rights and enhance innovation in the various fields that may be able to generate Intellectual property rights. The national IPR Draft Policy has already seen 2 rounds of consultation. Currently, it is still at the stage of formulation as various stakeholders have been invited to provide feedback towards such a policy and further steps shall be taken by the Government after taking into consideration the comments of the various stakeholders. It is interesting to see that the draft National IPR policy advocates the importance of protecting trade secrets in India. Currently, trade secrets, a recognized form of IP, are not protected by statute in India and have and continue to be enforced contractually. Various courts have interpreted and given meaning to the term ‘trade secret’ and have applied common law principles in determining matters pertaining to breach of trade secrets.

During the course of 2014, the Indian Patent Office has released the guidelines pertaining to issuance of pharmaceutical patents. These guidelines were issued with the intention of incorporating various decisions of the court so as to assist the Patent Office in establishing uniform standards of patent grant and examination. These guidelines are likely to bring in uniformity to examinations of the patent applications across the patent offices in India and as a result will also

1. Press Release dated October 22, 2014 Available at: http://dipp.nic.in/English/acts_rules/Press_Release/ipr_PressRelease_24October2014.pdf. Last accessed: February 16, 2015.
2. http://www.ip-watch.org/2015/01/31/special-report-will-india-bend-to-us-pressure-on-ip-rights/ Last accessed: February 17, 2015.

give the patent applicants more certainty on how their application will be examined by the Indian Patent Office.

On the registration front, patent filings have increased by 10.56% from 2008-2009 to 2013-2014. Approximately 8,000 industrial design applications are filed annually. Two hundred registrations have recently been granted with respect to geographical indications and 8,000 applications have been filed for plant varieties since 2007. Furthermore, the first registration under the Semi-Conductor Integrated Circuits Layout Design Act, 2000 was granted in October, 2014.[3]

Furthermore, various administrative and procedural mechanisms have also been improved in the field of intellectual property law. The infrastructure of the Indian Patent Office has been improved greatly wherein the government has invested significant amounts for 'Modernization and Strengthening of Intellectual Property Offices' scheme, so as to develop facilities for proper management of International Searching Authority / International Preliminary Examining Authority operation under the Patent Cooperation Treaty.[4] Furthermore, a new payment gateway has been set up integrated to the e-filing system of the IP Office which enables payment using internet banking of more than 70 banks as opposed to 2 banks initially. Along with development of these mechanisms, a facility of "stock and flow" which existed for trademarks has also been extended to patents.

The Indian IPR laws are TRIPS compliant. However, the issues faced by business from India or outside India are perceived lack of robust and fast mechanism for enforcement. There are no specialized courts or fast track forums for enforcing IPR's in India. The issue really is in relation to piracy and counterfeiting arising out of fly by night operators.

The position on the protection and enforcement of trademarks and copyrights through court system in India has been commendable. Courts have been adeptly equipped to examine and analyze the nature and extent of a trademark or copyright with that of its proprietor or author respectively, and grant relief, whether interim or permanent to protect such rights. This has given a sense of comfort to various players in the Indian market, whether it be a stalwart retail brand in protecting its brand logo, or a film production company in protecting its copyright and broadcasting rights in an upcoming film. The Delhi High Court has been in the forefront of granting quick interim relief to protect the interests of IPR holders. In many cases the courts have granted ex-parte injunctions also, which is absolutely essentially in enforcing IPR especially in piracy cases. The Delhi High court over the past ten years has been instrumental in developing a vast jurisprudence IPR due to the reasoned decisions passed by the High court. This is also very much evident from the fact that a significant number of important IPR decisions have been passed by the Delhi High Court.

- **Aaron Kamath, Ajay Chandru, Aarushi Jain, Rakhi Jindal & Gowree Gokhale**

3. National IPR Policy submitted by the IPR Think Tank, dated December 19, 2014. Available at: http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/IPR_Policy_24December2014.pdf. Last accessed: February 15, 2015.

4. *New Payment Gateway Integrated to e-Filing System Launched*, dated September 10, 2014. Available at: http://www.business-standard.com/article/news-cm/new-payment-gateway-integrated-to-e-filing-system-launched-114091000937_1.html. Last accessed: February 15, 2015.

Contents

1. Regulatory Updates

I. Domain Names Go 'Desi'

The International Domain Names (IDNs) Registry, in August 2013 instituted a policy framework to proliferate '.भारत' domain names in the internet space.[1] In August, 2014, the National Internet Exchange of India ("**NIXI**") launched the Bharat domain name (भारत written in Devanagari script). [2]

At present, the ".भारत" IDN in Devanagari script covers eight Indian languages i.e., Bodo (Boro), Dogri, Hindi, Konkani, Maithili, Marathi, Nepali, and Sindhi-Devanagari. This means that individuals will now be able to register domain names in their native language, followed by the top-level domain (TLD) ".भारत", in Devanagari script. The Government is set to extend coverage beyond these eight Indian languages and cover as much ground as possible. NIXI will soon launch IDNs in six other languages as well, i.e., Bengali, Urdu, Punjabi, Telugu, Tamil and Gujarati. The IDN Registry will not carry out ".भारत" domain registrations itself but would appoint Registrars to carry out an open process of selection on the basis of a 'transparent eligibility criteria'.

Proliferation of internet and use of local languages is sure to encourage increased usage among individuals, which in turn will facilitate the growth of business and dissemination of information in today's technology driven era. This initiative will go a long way in helping individuals who use Hindi or any other regional Indian language as their first language, and face trouble in accessing internet using the English script.

1. "भारत" (.BHARAT) Country Code Top Level DOMAIN (ccTLD) NAME, Internationalized Domain Names (IDNs) - .IN Domain Registry Policy Framework & Implementation. Government of India Ministry of Communications & Information Technology Department of Electronics & Information Technology (www.deity.gov.in and www.registry.in) August, 2013 http://cdac.in/index.aspx?id=pdf_IDN_policy_framework
2. *Bharat Domain Name* - Press Information Bureau, Government of India, Ministry of Communications & Information Technology, August 27, 2014. Available at: http://pib.nic.in/newsite/PrintRelease.aspx?relid=109116. Last visited: January 12, 2014.

2. Patent Cases

I. India's First Compulsory License Order: Natco v. Bayer Corporation

A. Background

In March, 2008, Bayer Corporation ("**Bayer**") was granted an Indian patent for the drug "Nexavar", which is used for treating patients suffering from advanced stages of kidney cancer (Renal Cell Carcinoma) and liver cancer (Hepatocellular Carcinoma). On December 6, 2010, Natco Pharma Ltd. approached Bayer for grant of a voluntary license. However, the negotiations did not conclude. After the expiration of three years from the date of the grant of the patent to Bayer Corporation with respect to the drug, Natco applied to the Controller General of Patents for a grant of a compulsory license as per Section 84(1) of the Patents Act 1970 proposing to manufacture and sell the drug at a price of INR 8800/- per month of therapy. Despite the opposition by Bayer, the Controller granted the compulsory license to Natco to manufacture and sell the drug.

An appeal was filed by Bayer challenging the order of the Controller before the Intellectual Property Appellate Board (IPAB). However, this appeal was dismissed in March 2013, upholding the decision of the Controller, whilst the rate of royalty for the compulsory license as prescribed by the Controller was reduced from 7% to 6%. A detailed analysis of a compulsory license provision under the Act and the analysis of the Controller's order is available in our IP Lab at http://www.nishithdesai.com/fileadmin/user_upload/Html/IP/IPLab_March2112.pdf. Thereafter, a writ petition was filed by Bayer before the Bombay High Court ("**BHC**") challenging the order of the IPAB but the BHC held in Natco's favor. A detailed Hotline on this case is available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/bombay-hc-upholds-indias-first-compulsory-license.html?no_cache=1&cHash=ceced11d03fb7bb01546c405a6b76dcf.

B. Section 84

Under Section 84 of the Patents Act, 1970 an application for Compulsory License ("**CL**") can be made by any person interested after a period of three years have elapsed from the date of grant of a patent on any of the following grounds:

i. the reasonable requirements of the public with respect to the patented invention have not been satisfied, or

ii. the patented invention is not available to the public at a reasonably affordable price, or

iii. the patented invention is not worked in the territory of India.

Bayer's contention before BHC in relation to the above requirements:

Firstly, Natco did not make a bonafide effort to obtain a voluntary license due to the reason that they failed to approach Bayer again after the rejection of the application for a voluntary license and hence, failed to satisfy the conditions for an application for CL considered by the Controller.

Secondly, the onus was on Natco to establish reasonable requirement of the public so as to obtain a CL has not been satisfied. Bayer also contended that the sales made by Cipla Limited ("**Cipla**"), who were producing the patented drug, infringing the rights of Bayer should also be taken into account while considering the total quantum of the patented drug made available in India.

Thirdly, prior to determining whether the drug was available to the public at reasonably affordable price, it was important to first determine what can be construed as reasonable affordable price in relation to the drug and this determination was done by the Patent Controller. Along with this, Bayer also contended that Bayer had made available some of their patent drugs at much lower costs through their patient assistance program.

Finally, Section 84(1)(c) of the Indian Patents Act, 1970 i.e. working requirement does not indicate that the patented product has to be locally manufactured.

C. Decision of the Court

Regarding the first contention, the BHC was of the view that Bayer had clearly declined the request for licensing and Bayer's vague statement after rejecting the application of voluntary licensing of the drug was merely a request to add to the existing application of the voluntary license. Hence, the Court stated that Natco had satisfied the requirement under Section 84 of the Indian Patents Act, 1970.

Regarding the second contention, the BHC observed that "reasonable requirement of public" test cannot be met on a mathematical basis and it can only be determined based on the evidence produced. As per the evidence provided, (affidavit of Dr. Manish Garg, Country Medical Director of Bayer), an aggregate of 8842 patients suffering from kidney cancer and liver cancer would require the drug. However, Bayer had sold only 593 boxes of the drug which was sufficient only for 200 patients. Furthermore, the BHC held that the sale by Cipla cannot be considered as Bayer had filed an infringement suit against Cipla. The BHC held that even if the supply of the drug by Cipla was added to Bayer's supply, the BHC held that it would still be insufficient and the reasonable requirements of the public would not have been met. It concluded that in respect of medicines the adequate extent has to be 100%.

On the third contention, the BHC held that the Indian Patents Act, 1970 does not bestow any investigative powers on the Controller. The Controller can only ensure that the patented article is available at a reasonably affordable price based on the relative price offered by the patentee and the applicant. The BHC held that a patent controller can determine what is a reasonable affordable price based on the evidence produced before him. Bayer had not reproduced accounts before the patent controller even after his request for the book of accounts and Balance Sheet in determining the reasonable price at which Bayer could have made the drug available to the public. Further, the BHC also observed that 50% of the cost had already been reimbursed by the US government since the drug had been classified as an orphan drug. Thus, the BHC held that Bayer was not selling the drug at a reasonably affordable price since Natco was offering the drug at INR 8,800 per month of therapy as compared to Bayer's price of INR 284,000 per month of therapy. This shows that the reasonably affordable price is that of Natco and not Bayer.

With respect to the final contention, the BHC held that the patentee is required to make some effort to manufacture the patented product within the territory of India. The BHC agreed with the view of IPAB that the matter should be considered on a case to case basis and manufacturing in India is not the sole method of working a patent in India. A patent can be worked in India by importing the patented article in adequate quantity and supplying it. However, working by import can be accepted only after the patentee provides satisfying reasons for not manufacturing the patented product in India.

D. Impact and Analysis

This case has drawn a great deal of attention to the interpretation concerning the various requirements to be fulfilled prior to granting a compulsory license to an applicant as envisaged under Section 84 of the Indian Patents Act, 1970. However, there are still certain questions that have been unanswered by the court. For instance, the issue concerning the reasonable affordable price was not considered in detail so as to enumerate any indicators for determining the same. The court merely held that due to non-production of accounts of Bayer and due to the fact that 50% of the costs incurred by Bayer was covered, the drug was not sold at a reasonable affordable price. Furthermore, the question concerning a de facto license was also neglected in relation to the reasonable requirement of the public.

However, this case has elaborated various requirements for granting a compulsory grant of license in an effective manner. Yet, such an order may raise serious concerns to patent holders, especially of drugs. This case does not provide a clear cut precedent with respect to how to strike a balance between the protection of the rights of the patent holders and rights of the users of such patented products.

II. Ericsson Patent Dispute

A. Background

Telefonaktiebolaget L. M. Ericsson ("**Ericsson**") is a Swedish Multinational company and is the registered owner of eight patents pertaining to AMR technology, 3G technology and Edge technology in India. It is amongst the largest patent holders in the mobile phone industry along with Qualcomm, Nokia and Samsung.[3] The patents owned by Ericsson are considered to be Standard Essential Patents. Standard Essential Patents are those patents that form a part of a technical standard that must exist in a product as a part of the common design of such products. In the past two years, Ericsson has been suing various mobile handset companies on the ground of patent infringement in India. Companies such as Xiaomi Technology ("**Xiaomi**"), Micromax Informatics Limited ("**Micromax**"), Mercury Electronics ("**Mercury**") and Intex Technologies (India) Limited ("**Intex**"), which are major handset and smartphone provider companies in India and are being issued with ex-parte injunction orders by courts in India with respect to selling, advertising, importing and/or manufacturing devices that infringe the patents owned by Ericsson.[4]

B. Contentions of Ericsson

Ericsson contended that the licenses on the standard essential patents were offered to be granted to these companies on fair, reasonable and non-discriminatory (FRAND) terms, however, these companies had refused to undertake such licenses and were using these patents without license and accordingly were infringing Ericsson's patents. [5]

C. Decision of the Courts

The High Court of Delhi, held that prima facie Micromax and Xiaomi were dealing with a patent infringing product and therefore granted ex-parte injunction orders against them.[6] Furthermore, the court also directed the Custom Authorities to take note of any consignment of the products undertaken

3. Soma Das & Anandita Singh Mankotia, *Patent row: Delhi High Court asks Micromax to pay royalty to Ericsson*, ET BUREAU, November 20, 2014, Available at http://articles.economictimes.indiatimes.com/2014-11-20/news/56304154_1_several-wireless-technology-standards-low-cost-business-strategy-digital-india (Last visited 7th January, 2015).
4. Neeraj Saxena, *Xiaomi banned from selling, importing phones in India*, TOI TECH, December 10, 2014, Available at http://timesofindia.indiatimes.com/tech/tech-news/Xiaomi-banned-from-selling-importing-phones-in-India-Report/articleshow/45457541.cms (Last visited 7th January, 2015).
5. *Ericsson takes Intex to court over patent infringement*, THE HINDU BUSINESS, April 24, 2014, Available at http://www.thehindu.com/business/Industry/ericsson-takes-intex-to-court-over-patent-infringement/article5944361.ece (Last visited 7th January, 2015)
6. *Telefonaktiebolaget LM Ericsson v. Xiaomi Technology & Others*, CS (OS) 3775/2014; *Telefonaktiebolaget LM Ericsson v. Mercury Electronics & Another*, CS (OS) 442/2013.

by these companies.[4] In the case of Xiaomi, Flipkart was also impleaded in the order and directed Flipkart to get rid of all the products of Xiaomi that may be patent infringing.4 Although, Xiaomi managed to acquire an order allowing the company to import and sell the devices that use the chipsets imported from Qualcomm Inc., a licensee of Ericsson, it was asked to deposit an amount of INR 100 for the sale of every device February 3, 2015.[7] Furthermore, the High Court of Delhi also directed Micromax to pay certain set royalty rates to Ericsson pending the final outcome of the patent infringement suit, if Micromax wanted to continue selling the devices. [8]

Surprisingly, in the case of Intex, the High Court of Delhi did not issue an injunction and instead held that a hearing would be scheduled for the case of infringement as both the companies, Ericsson and Intex, were engaging in negotiations since 2008 and had also communicated on the previous day before filing the suit. [9]

D. CCI Investigation Orders

Both the aggrieved parties, that is, Micromax and Intex decided to file a complaint under Section 19(1)(a) of the Competition Act, 2002 before the Competition Commission of India (“**CCI**”) against Ericsson.[10] Both these parties claimed that Ericsson did not negotiate the terms of the license for the Standard Essential Patents as per FRAND (Fair, Reasonable and Non-Discriminatory) terms. The main contention raised by both the parties was that the royalty rates prescribed by Ericsson were excessive and discriminatory and Ericsson, being a dominant player in the relevant market with respect to the essential patents, had taken advantage of its position and charged exorbitant rates for royalty to the companies for use of its patents. The CCI considered this contention and after examining the evidence presented, the commission agreed with the companies and passed an investigative order. However, this order suffered a major blow as the Delhi High Court passed an order restraining the CCI from passing final orders with respect to the contention of the companies.[11] The Delhi High Court held that the CCI’s order resulted in raising a question of conflict of jurisdiction with the orders of the Delhi High Court. The High Court held that the order of CCI was adjudicatory and determinative due to the nature of the order being detailed and as a result of which the remedy available to Ericsson had been discarded.

E. Analysis

The above series of cases displays the willingness of the courts to protect rights of patent holders. In fact, the courts even granted ex-parte injunction orders, without hearing any arguments on merits from the alleged infringers. Furthermore, the courts failed to observe that the patents in these cases were Standard Essential Patents. This would have major implications with respect to development of technology and protection of consumers who may not be given enough choice due to such ex-parte injunction orders. Furthermore, the decision of the Delhi High Court pertaining to the CCI investigative orders also shows that there is a possibility in patent cases that CCI’s orders may result in

7. Apoorva, *Delhi HC allows Xiaomi to sell in India subject to conditions*, LIVEMINT, December 16, 2014, Available at http://www.livemint.com/Companies/BP69vGrbfM2JGWTt593dqO/Delhi-HC-allows-Xiaomi-to-sell-in-India-till-8-January-subje.html?utm_source=copy (Last visited 7th January, 2015)
8. Telefonaktiebolaget LM Ericsson (Publ.) v. Mercury Electronics, CS (OS) 442/2013.
9. *Ericsson takes Intex to court over patent infringement*, THE HINDU, April 24, 2014, Available at http://www.thehindu.com/business/Industry/ericsson-takes-intex-to-court-over-patent-infringement/article5944361.ece (Last visited 7th January, 2015).
10. Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ), Case No. 50/2013 (CCI); Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson (Publ), Case No. 76/2013 (CCI).
11. Kaushal Shroff, *HC restrains CCI from passing final orders in Ericsson probe,* THE FINANCIAL EXPRESS, February 7, 2014, Available at http://archive.financialexpress.com/news/hc-restrains-cci-from-passing-final-orders-in-ericsson-probe/1219742 (Last visited 7th January, 2015).

the overlapping with the jurisdiction of the High Courts and result in intervening with the Jurisdiction of the High Court. The role of CCI in patent cases needs to be clearer. This case is the first time that CCI has actually issued an order in relation to patents. It will be interesting to see if in 2015 any new orders are delivered by CCI on patent related issues.

III. Roche Products India (India) Pvt. & Ors. v. Drugs Controller General of India & Ors.

A. Background

The market for biosimilar drugs are growing at a very high pace and more pharmaceutical companies are entering the race. 'Trastuzumab' is the drug produced by Roche for the treatment of breast cancer. It is sold in India under the brand names 'Herception', Herclon and 'Biceltis'. Even though there is no compound patent covering Trastuzumab, Roche got a patent for a formulation containing it which will expire on May 3, 2019.[12] They also filed three other patent applications. In November 2013, Mylan Inc and Biocon Ltd announced that they have jointly developed a biosimilar drug of Trastuzumab and received regulatory approval to market it under the brand names 'Canmab' and 'Hertraz'.[13] "Biosimilars" are biological products that are similar to the innovator biopharmaceutical product. In view of the structural and manufacturing complexities involved in the production of the biopharmaceuticals, a biosimilar product can only be similar to the innovator biopharmaceutical product; it cannot be a generic equivalent of the innovator biopharmaceutical product

B. Facts

In February 2014 Roche sued Biocon and Mylan ("**Defendants**") in the Delhi High Court. The Drug Controller General of India was also made party to the suit. Roche sought for an injunction and an *ex-parte* ad-interim order restraining defendants from relying or referring to Herceptin, Herclon and Biceltis or any form of reference to Trastuzumab for the purpose of launching, selling, marketing or distributing Canmab and Hertraz and claiming any similarity.

C. Contentions of Parties

Roche contended that the Defendants' drugs are being misrepresented as "Trastuzumab", "biosimilar Trastuzumab" and a "biosimilar version of HERCEPTIN®" without following the due process in accordance with the Guidelines on Similar Biologics for the purpose of obtaining appropriate approvals. Roche contended that after the issuance of the Guidelines on Similar Biologics, , all the applications for manufacturing and marketing authorization of similar biologics in India are to be examined based on standards set forth in the guidelines and only products approved under the these guidelines constituted Bio-similars.

Roche contended that registration of all phases of clinical trial was mandatory with the Clinical Trial registry before its initiation. However, there was no public record regarding the registration of Phase-I and II by the Defendants for the alleged bio similar version of Trastuzumab. Further, based on the annual report filed by Biocon, Roche contended that the Phase-III clinical trial was being contended by Biocon even before the guidelines were issued. Thus, the approval granted to Biocon cannot be said to have satisfied the requirements for a biosimilar drug. On the basis of the above, Roche wanted the

12. https://bricwallblog.wordpress.com/2014/05/21/an-overview-of-biosimilars-and-the-biosimilar-pathway-in-india/
13. http://www.livemint.com/Companies/ZFFCQ8ZWxlI17EeUAmYvuK/India-approves-first-biosimilar-of-Herceptin-made-by-Biocon.html

Defendants to be restrained from introducing the drug until the studies and tests under the guidelines had been complied with.

The second contention by Roche was that the Defendants were passing off their drugs as a biosimilar of Trastuzumab, a "Trastuzumab" and a "biosimilar version of Herceptin. Roche claimed that the Defendants are misrepresenting their drugs as being of the same quality and class as of Herceptin / Trastuzumab to take the unfair advantage of Roche's reputation and goodwill.

D. Decision

With respect to the first contention, the Court directed the Defendants to disclose the nature of the approvals granted to them. Further, the Court refused to grant an interim injunction at this stage, since the contentions of Roche were based on apprehensions surrounding the grant of the regulatory approval.

With regards to the second contention, the Court granted an interim injunction restraining the defendants from using or relying on any information/data related to Transtuzumab, Herceptin, Herclon or Biceltis and claiming any similarity with the above products for the marketing of Canmab and Hertraz.

E. Analysis

Biosimilar drugs are very important to address the health issues of the country since it is very cost effective. It is necessary to have guidelines on Biosimilar drugs to ensure the quality and efficacy of the drugs produced. But a longer procedure under the guideline along with the risk of patent litigation can deter the manufactures from investing in the biosimilar drugs. In this case, whether the defendants have complied with the guidelines is a matter of fact.

While granting injunction in passing off cases related to the pharmaceutical industries, court have always adopted a cautious approach. It is because any confusion can affect the public health. In this case also, the courts seem to have granted an injunction by keeping this in mind.

IV. Vringo Infrastructure Inc. & Anr. v. Indiamart Indermesh Ltd. & Ors.

A. Background

The plaintiff in this case Vringo Infrastructure is a wholly owned subsidiary of Vringo Incorporation who has applied for or has been granted over 25 Indian patents. Their patent portfolio consists of technologies pertaining to internet searches, search advertising, handsets, telecommunications infrastructure and wireless communications. One of the patents held by the plaintiff is *'a method and a device for making a handover decision in a mobile communication system'*, which it had acquired from Nokia Corporation through a Confidential Patent Purchase Agreement dated August 8, 2012. (Patent number 200572).

The defendants ZTE Corporation and ZTE Telecom India Ltd. are involved in the manufacturing and selling of communication equipment and devices such as mobile handsets, dongles, tablets, infrastructure equipment and devices, etc. The defendant Indiamart is a distributor of ZTE products in India.

The plaintiff approached the Delhi High Court to grant an *ad interim* injunction against the defendants by alleging infringement of its patent 200572.

It was also alleged by the plaintiff that the defendants have earlier infringed not only the patent in question but a number of other patents of the plaintiff across the globe which has been the source of continuous litigation between the plaintiffs and the defendants not only in India but in UK, Australia, Brazil, Germany, France, Netherlands, Romania, Spain, Malaysia and the USA. It was also alleged that as a matter of fact in Germany, Brazil and Romania, injunction orders, preliminary or permanent, had been passed in favor of the plaintiffs.

The court on February 3, 2014 granted an ad *interm* injunction against the defendants.

The plaintiff approached the Court for confirming the injunction granted on February 3, 2014. However, the injunction was not confirmed.

B. Contentions of the Parties

The court examined the three essential factors for the grant of interim injunction:

i. Prima Facie Case

Unlike Section 31 of the Trademark Act 1999, there is no presumption under the Patent Act regarding the validity of the patent. Thus, a plaintiff cannot have a prima facie good case on the basis of the registration of the patent alone. The burden of proof is on the plaintiff to show prima facie that the patent is being infringed upon by the defendants.

The Court did not consider the expert affidavit submitted by the Plaintiff. The Court held that an expert in telecommunications ought to have some basic degree in science or telecommunication or B.Tech engineering dealing in telecommunication and electronics and thereafter the completion of some research work to be considered as an expert within the definition of Section 45 of the Indian Evidence Act, 1872. The expert who had submitted the affidavit held a management degree and the nature of his work was general in nature. Thus, the court held that he cannot be termed as an expert within the purview of Section 45 of the Indian Evidence Act, 1872. Hence, the court held that the plaintiff had failed to establish a prima facie case.

ii. Balance of convenience

The Court observed that even though the patent which was granted in 2002 and was assigned by Nokia in 2006 to the plaintiff, Nokia did not take any action against the infringement which they were very well aware of before the patent was assigned to the plaintiff. The court referred to the judgment of the Delhi High Court in Franz Xaver Huemer vs. New Yash Engineers *AIR 1997 Delhi 79* wherein it was held that that 'a foreigner, who has registered patents in India and who has not kept them in use in India, thereby seriously affecting market and economy in India, cannot, in equity, seek temporary injunction against others from registering the use of patented device'. The court observed that in the complaint, the plaintiff had not disclosed that they were using the patents in India through their licenses and this fact was only disclosed in the rejoinder. The court observed that it was not favorable for the plaintiffs to state in the rejoinder without any averments in their plea that they are exploiting their patent through licensees. The court noted the fact that the licensees never raised a complaint to the original patentee with regards to infringement of its patent, the court held that this factor also favors the side of the defendants since an injunction will cause unnecessary harm to them.

iii. Irreparable Loss

The court observed that a loss which can be calculable in terms of money or for which money can be adequately compensated can never be said to be an irreparable loss. The court held that an injunction can be refused in case a party can adequately be compensated in terms of money or the court can sufficiently protect the interest of the plaintiffs by passing certain other directions.

The court also referred to an order passed by Division Bench in F.A.O. No.573/2013 ("**FAO Order**") between the same parties where the suit was in relation to trademark, copyright and another patent of the plaintiff. The court in the FAO Order had directed the customs authorities to intimate the plaintiff of the alleged infringing goods being imported into India by the defendants and had given the plaintiff the right to inspect such goods. Further, the court in the FAO Order had also ordered that the defendant deposit a bank guarantee for a sum of INR 50 million (approx. USD 800000) and also directed the defendants to file account of its sales to the court on a quarterly basis. By taking facts of the case into consideration, the court observed that there won't be any irreparable loss to the plaintiff, if an interim injunction granted by the court was vacated in this case, as the interest of the plaintiff was sufficiently protected under FAO Order.

By considering above three factors, the court vacated the injunction but imposed conditions of bank guarantee and appointed three experts to assist the court in determining infringement of the plaintiff's patent 200572.

iv. Analysis

This judgment makes important observation regarding expert witness. It provides for the standard of person to be considered as an expert witness in patent cases. It also outlines the factors that a court needs to take into consideration while determining balance of convenience in patent cases. On the procedurally side, it highlights of putting down all essential facts in the plaint itself.

V. Patent Counter Claim and Revocation Petition cannot be pursued simultaneously: the Enercon Dispute

A. Background

Under the current Indian patent law the validity of a patent can be challenged:-

Before grant of patent

- Pre-grant opposition before the patent office under

After grant of patent

- Post grant opposition before the patent office under
- Revocation of patent before the Intellectual Property Appellate Board **(IPAB)**
- Counter claim in the patent infringement suit

The Honorable Supreme Court (**SC**) in India, in this case examined whether a revocation petition before the IPAB and a counter claim for revocation of the patent are distinct remedies and whether both can be pursued simultaneously.

Enercon India Ltd had filed nineteen revocation petitions before the IPAB seeking revocation of Indian Patents held by Dr. Wobben. In retaliation, Dr. Wobben filed ten patent infringement suits before the

Delhi High Court against Enercon India Ltd. Enercon India Ltd. further filed four revocation petitions before IPAB resulting in the filing of twenty three revocation petitions in total.

Furthermore, in response to the patent infringement suit, a counter claim was filed by Enercon India Ltd. seeking revocation of the patents before the Delhi High Court.

The Delhi High Court passed an order dated September 1, 2009 wherein both the parties had mutually agreed to follow a schedule for an expedited trial in the patent infringement suit and the counter claims filed therein.[14] After such an order was passed, the IPAB had revoked six patents granted to Dr. Wobben.

B. Contentions of Dr. Wobben

The main issue raised by Dr. Wobben was that in a patent infringement suit, if a defendant files a counter claim challenging the validity of the patent before the High Court, only the High Court will have exclusive jurisdiction to decide on the validity of the patent and the IPAB will cease to have jurisdiction.

It was further contended by Dr. Wobben that as per Section 64(1) either a counterclaim or a revocation petition can be filed challenging the validity of the patent and both cannot be perused simultaneously.

C. Decision of the Supreme Court

The SC examined the locus of a person with regard to who can file a post grant opposition under Section 25 (2) and who can file a revocation petition or a counter claim under Section 64 (1). Under both sections a revocation petition or a post grant opposition can be filed by "*any person interested*" and a counter claim can be filed by a defendant in a patent infringement suit.

The SC observed that Section 64 was prefaced by the words *"Subject to the provisions of the Act"*. Thus, the provisions of Section 64 are subservient whenever there is a conflict with other provisions of the Act. Hence, if a post grant opposition is filed under Section 25 (2), the same will eclipse the right to file a revocation petition or a counter claim under Section 64 (1).

The SC accepted the contention of Dr. Wobben and held that both the counter claim and revocation petition cannot be availed simultaneously under Section 64 (1).

The question now before the SC was if a party is eligible to file either revocation petition as "any person interested" as well as a counter claim as defendant in a suit, which remedy can the party pursue?. The SC held that a counter claim is a separate suit in itself filed by a defendant. The SC based on the principle of res judicata embodied in Section 10 and Section 151 of CPC held that if a revocation petition has been filed before the IPAB first then the defendant in a patent infringement suit cannot file a counter claim on the same cause of action. This principle would also apply when a counter claim to a patent infringement suit is filed first then the defendant in the patent infringement suit cannot file for a revocation petition on the same cause of action.

In the present case, Enercon India filed twenty three revocation petitions before the IPAB and counter claims in the ten patent infringement suits before the Delhi High Court. . It was contended by Dr. Wobben that in the consent order of the Delhi High Court dated 1.9.2010, both parties had agreed that the patent infringement suit and the counter-claims pending between the parties should be consolidated and heard together by the High Court. Thus, vide this consent order Enercon India cannot pursue the revocation petitions before the IPAB.

The SC accepted the contention of Dr. Wobben and held that having consented to one of the

14. The Court consolidated various suits filed by the Plaintiff against the same defendant for infringing different patents and both the parties agreed on an expedited schedule for trial.

available remedies postulated under law, it would not be open to either of the consenting parties, to seek redressal from another forum in addition to the consented forum. The SC affirmed the consent order passed by the High Court. Thus, Enercon India will have to pursue the counter claims before the High Court and not the revocation petitions before the IPAB due to the consent order passed by the Delhi High Court.

D. Impact and Analysis

This case mainly highlights the fact that the ambit and the scope of the two proceedings namely revocation petition and the counter claim for cancellation of a patent in an infringement suit are the same in essence. Hence, only one of the two proceedings can survive. This judgment effectively streamlines the patent litigation process and avoids multiplicity of proceedings. It ensures simplicity as it eliminates the confusion pertaining to the forum that may be approached by patent opponents and also ensures that such patent opponents do not undertake excessive litigation costs.

However, there are certain questions that are still unanswered in the case. As per the decision, a party who is sued for patent infringement cannot file a counter claim in the High Court if revocation proceedings are initiated by such a party before the IPAB. In the event that the party decides to continue the revocation proceedings, the decision has not answered the question with respect to whether the High court should stay with the infringement proceedings until such revocation proceedings are concluded. This would be the case under Section 124 of the Trademarks Act, 1999 which would be able to fill the gap under the Patents Act, 1970, if such a similar provision is adopted under it.

3. Updates from the Patent Office and Trade Marks Registry

I. 'Substantial Alterations' in Applications Filed for Registration of Trade Marks Restricted

A. Fee Revisions

Indian Patent (Amendment) Rules 2014 has introduced a third category of applicant such as "small entity", and provided procedural rules for governing the same. Furthermore, it has revised the rates of basic filing due to the introduction of the e-filing system of patents wherein the rates for e-filing are lower than those involved in physical filing. Similarly, the Trademarks (Amendments) Rules, 2014 have revised the rates with respect to trademark filing and increased the fees for certain entries under Schedule I of the Trademarks Rules, 2002, from INR 3500 to INR 4000. The fees for an expedited examination have also been increased significantly.

B. Amendment of trademark applications

The Trade Marks Registry issued Office Orders on June 8, 2012 (**"Order"**) with respect to alterations that may be made to an application for trademark registration. This Order enlists certain 'substantial alterations', which would not be allowed; and other alterations, primarily clerical in nature that would continue to be accepted by the Registrar. Clause 3 of the Order (**"Impugned Clause"**) stated as follows:

> *"No request for amendment shall be allowed which seeks substantial alteration in the application for registration of the trade mark. The substantial amendment in the trade mark, proprietor details, specification of goods / services (except deletion of some of the existing items), statement as to the use of mark shall not be permitted. However, request for amendment in the proprietorship of the trade mark on the basis of valid assignment or transmission; amendment in the address of the application or in the applicant's address for service, deletion or confinement of any item in the specification of goods / services, confinement / limitation in the area of sale of goods / rendering of service may be allowed."*

The Intellectual Property Attorney's Association (**"IPAA"**) challenged the Impugned Clause of the Order before the Delhi High Court (**"Court"**) by way of a writ petition on various grounds.[15] The Government Counsel assured the Court that the issue would be disposed-off by the Registrar of Trade Marks (**"Registrar"**). The matter was then heard by the Controller General of Patents, Designs & Trade Marks (**"CGPDTM"**).

15. W.P. No. 3679/2014

C. IPAA's Contentions

The IPAA contended that Section 22[16] of the Trade Marks Act, 1999 (**"TM Act"**):

i. Permits correction of any error in / or in connection with the application, or

ii. Permits an amendment of application any time before registration

which implies that the legislature did not intend to impose any restrictions on the corrections of error and amendments in trade mark applications. The imposition of an absolute restriction on amending the statement of use would be contrary to Section 22 of the TM Act.

The IPAA submitted that the expressions 'trade mark' and 'applications' are different and hence an amendment or correction to an application is different from an amendment or correction to a trade mark. Information such as user date is part of the application and not the trade mark and hence would not attract Rule 41[17] of the Trade Mark Rules, 2002 (**"TM Rules"**), as Rule 41 imposed restrictions on amendments which have the effect to substantially alter the trade mark applied for.

Further, Section 22 also provides for the exercise of discretionary powers of the Registrar which have to be in line with Section 128.[18] Thus the imposition of absolute restrictions on amendments / corrections to the user data without a hearing also makes the Impugned Clause of the Order *ultra vires* the TM Act.

It was further contended that the restriction on making amendments in the statement of use is also contrary to Section 58 [19] of the TM Act, which provides that the Registrar may correct any error in name, address or description of the registered proprietor or any other entry relating to the trade mark.

16. Section 22: Correction and Amendment –

The Registrar may, on such terms as he thinks just, at any time, whether before or after acceptance of an application for registration under section 18, permit the correction of any error in or in connection with the application or permit an amendment to the application.

provided that if an amendment is made to a single application referred to in subsection(2) of section 18 involving division of such application into two or more applications, the date of making of the initial application shall be deemed to be the date of making of the divided applications so divided.

17. Rule 41. Correction and amendment of application.

An applicant for registration of a trade mark may, whether before or after acceptance of his application but before the registration of the mark, apply in Form TM-16_accompanied by the prescribed fee for the correction of any error in or in connection with his application or any amendment of his application:

Provided, however, no such amendment shall be permitted which shall have the effect of substantially altering the original trade mark or substitute a new specification of goods or services not included in the initial application.

18. Section 128. Exercise of discretionary power by Registrar

Subject to the provisions of section 131, the registrar shall not exercise any discretionary or other power vested in him by this Act or the rules made thereunder adversely to a person applying for the exercise of that power without (if so required by that person within the prescribed time) giving to the person an opportunity of being heard

19. Section 58. Correction of register

i. The Registrar may on application made in the prescribed manner by the registered proprietor:-

a. correct any error in the name, address or description of the registered proprietor of a trade mark, or any other entry relating to the trade mark:

b. enter any change in the name, address or description of the person who is registered as proprietor of a trade mark:

c. cancel the entry of a trade mark on the register:

d. strike out any goods or classes of goods or services from those in respect of which a trade mark is registered and may make any consequential amendment or alternation in the certificate of registration and for the that purpose, may require the certificate of registration to be produced to him

ii. The Registrar may, on application made in the prescribed manner by a registered user of a trade mark, and after notice to the registered proprietor, correct any error, or enter any change, in the name, address or description of the registered user.

D. Observations & Decision of the CGPDTM

The CGPDTM was of the view that under Section 18[20] of the TM Act, the application for registration of a trade mark is filed by a person *who claims to be the proprietor of the trademark.* Further, proprietorship over a trademark can be claimed only by *use of the trademark or by intention to use the trademark.*

The CGPDTM found that many a time, after receiving applications for trademark registration, applicants would request amendments seeking to incorporate the prior date of use of the trademark applied for. It was further observed that an objection may be raised against the registration of the trademark and that the trademark applied for is not capable of distinguishing the goods or services of one person from those of others, or it is descriptive of the goods or services, or it has become customary in respect of such goods or services. An objection may also be raised that the trademark applied for is identical with or similar to earlier trademarks on records in respect of same or similar description of goods or services.

The CGPDTM acknowledged that the user statement has immense importance in determining the validity of the trademark. It plays such a vital role that even a proprietor of an unregistered trademark claims advantage over the registered trademark.

Many unscrupulous traders concoct the user statement and seek amendment as an afterthought by way of filing form TM-16 with an ulterior motive of treading upon the bona fide use of trademarks by rivals.

The CGPDTM held a trader and / or his agent is expected to ensure due diligence at the time of filing of the trade mark applications. The CGPDTM found it inconceivable that the trader would not know the period for which his trademark has been used at the time of filing the application. The CGPDTM held that *"since the change in the statement of use at a later stage would adversely affect the bona fide rights of continuous use of the trademark by rivals in trade, the balance of convenience lies in the trader filing a fresh application if he wishes to claim a change in the statement of use."*

Reportedly, the order of the CGPDTM has not subsequently been challenged to date.

II. Central Government Amends Trade Marks Registry Fees for various Trade Mark Applications

The Central Government has, with effect from August 1, 2014, amended the amount payable on filing various applications with the Trade Marks Registry.[21] This proposal was first made available to the public on August 26, 2013

20. Section 18. Application for registration
    - i. *Any person claiming to be the proprietor of a trade mark used or proposed to be used by him, who is desirous of registering it , shall apply in writing to the Registrar in the prescribed manner for the registration of his trade mark*
    - ii. *A single application may be made for registration of a trade mark for different classes of goods and services and fee payable therefor shall be in respect of each such class of goods or services.*
    - iii. *Every application under sub-section (1) shall be filed in the office of the Trade Marks Registry within whose territorial limits the principal place of business in India of the applicant or in the case of joint applicants the principal place of business in India of the applicant whose name is first mentioned in the application as having a place of business in India, is situate :*

      Provided that where the applicant or any of the joint applicants does not carry on business in India, the application shall be filed in the office of the Trade Marks Registry within whose territorial limits the place mentioned in the address for services in India as disclosed in the application, is situate.
    - iv. *Subject to the provisions of this Act, the Registrar may refuse the application or may accept it absolutely or subject to such amendments, modification, conditions or limitations, if any as he may think fit.*
    - v. *In the case of a refusal or conditional acceptance of an application, the Registrar shall record in writing the grounds for such refusal or conditional acceptance and the materials used by him in arriving at his decision.*
21. Trade Marks (Amendment) Rules, 2014.

inviting objections and suggestions from the public likely to be affected by the proposal. The fees for filing various applications with the Trade Marks Registry were previously revised on December 29, 2010. [22]

It is key to note that the cost for filing a Form TM – 1 (application to register a trade mark for a specification of goods or services included in one class) has been revised from INR 3500 to INR 4000. For a full list of the fee revisions, please refer to Annexure - 1.

The revision of fees for filing various applications with the Trade Marks Registry is insignificant and is not expected to deter potential proprietors from filing applications for registration of their trademarks.

22. Vide notification dated December 29, 2010. Available at: http://ipindia.nic.in/tmr_new/tmr_act_rules/Notification_TMR_29December2010.pdf. Last accessed: February 4, 2015.

4. Copyright Infringement

I. Delhi HC Grants 'John Doe' Injunctions In Favor of Football & Cricket Tournament Broadcasters in India

The Delhi High Court (**"Court"**) had passed 'John Doe' / 'Ashok Kumar' orders in favor of licensed and exclusive broadcasters restraining various identified and unidentified websites from illegally streaming / hosting coverage of the 2014 FIFA Football World Cup (**"FIFA World Cup"**) and the 2014 India – England Cricket Series (**"Cricket Series"**) in the territory of India.

In both instances, the Court directed the Department of Telecommunications (**"DoT"**) and the Department of Electronics and Information Technology (**"DEITY"**) to comply with the order and initiate action against the defaulting websites, by directing the registered internet service providers (**"ISPs"**) to block access to such websites.

A. 2014 FIFA Football World Cup

On June 23, 2014, the Court granted Multi Screen Media Pvt. Ltd. (**"MSM"**) an ex-parte ad-interim order restraining more than 400 websites that were illegally streaming live or recorded footage of the FIFA World Cup. [23]

Our earlier hotline on the Court's order can be accessed at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/streaming-websites-caught-off-side-mid-way-through-the-2014-fifa-world-cup.html?no_cache=1&cHash=7f1906f.

MSM submitted to the Court that various websites both based in India and abroad were infringing its exclusive media rights as the sole broadcaster of the FIFA World Cup in the territory of India. In particular, it's exclusive right to stream or broadcast the tournament online through its dedicated digital sports entertainment portal, Sony Liv. This caused irreparable loss and harm as such infringing acts directly impacted viewership on MSM's channels.

The Court was of the view that MSM had established a *prima facie* case, i.e., its broadcast reproduction rights under Section 37 [24] of the Copyright Act, 1957 (**"Copyright Act"**) were being infringed upon.

Apart from the websites enlisted in MSM's petition, there were also other websites that were potentially infringing MSM's media rights by streaming live coverage. The number of websites and the identity behind these websites were generally unknown. The Court felt this would amount to unfair competition and commercial misappropriation of MSM's rights. Therefore, the Court took an extra step to issue John Doe orders.

The Order directed the websites to restrain from indulging in *hosting, streaming, broadcasting, rebroadcasting, retransmitting, exhibiting, making available for viewing and downloading, providing access to or*

23. *Multi Screen Media Pvt. Ltd. v. Sunit Singh & Ors.*, CS (OS) 1860/2014
24. Under section 37(3), any person who performs certain acts without obtaining a license from the broadcaster is deemed to have infringed the rights of a broadcaster. These acts include:
    - *re-broadcasting the broadcast; or*
    - *causing the broadcast to be heard or seen by the public on payment of any charges; or*
    - *making any sound recording or visual recording of the broadcast; or*
    - *making any reproduction of such sound recording or visual recording where such initial recording was done without license or, where it was licensed, for any purpose not envisaged by such license; or*
    - *selling or giving on commercial rental or offer for sale or for such rental, any such sound recording or visual recording referred to above.*

communicating to the public, displaying, uploading, modifying, publishing, updating or sharing (including to its subscribers and users), through the internet in any manner whatsoever, the broadcast of the FIFA World Cup.

B. 2014 India – England Cricket Series

On July 28, 2014, the Court passed an ad-interim order of similar nature in favor of Star India Pvt. Ltd. (**"Star"**) & Anr. (hereinafter collectively referred to as **"Plaintiffs"**) restraining 107 identified 'rogue websites' along with various unidentified websites from hosting, streaming, broadcasting, rebroadcasting, retransmitting, exhibiting, making available for viewing and downloading, providing access to and / or communicating to the public, (including to its subscribers and users), through the internet, in any manner whatsoever, coverage of the Cricket Series. [25]

The Plaintiffs are the owners of a network of paid sports television channels such as Star Sports 1, Star Sports 2, Star Sports 3, Star Sports 4, Fox Sports News, Star Sports HD 1 and Star Sports HD 2 (**"Star Sports Channels"**) and by virtue of necessary downlink permissions from the Ministry of Information and Broadcasting (**"MIB"**) have the sole and exclusive right to broadcast and distribute the Star Sports Channels in India. The Plaintiffs also provides viewers sports content on live, delayed live, video-on-demand and pay-per-view basis, through its website and mobile application. Star was granted exclusive television rights, internet rights, mobile rights and on-demand rights in respect of the Cricket Series for various territories across the world, including but not limited to Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka to name a few. Further, Star paid a significant price for the acquisition of the exclusive broadcasting rights to the England & Wales Cricket Board (**"ECB"**).

The Plaintiffs felt that it was crucial to promptly restrain such internet piracy, unfair competition and infringement on the internet of the plaintiff's exclusive rights vesting by virtue of its arrangement with ECB and its exclusive broadcast reproduction rights in relation to the Cricket Series.

Star filed the suit against various websites it had monitored over the past 5 events for which the Plaintiffs had exclusive rights and prepared a list of 107 'rogue websites', some of which hid behind domain privacy services offered by domain name registrars, provided illegal content through:

i. hosting, streaming, broadcasting, making available for viewing and download, providing access to and communicating to the public, the content directly, for free, without any registration and such availability of content is supported by advertisements featuring on these websites; or

ii. through the mode of subscription video-on-demand or pay-per-view basis where users are required to first register on the these websites and then subscribe and make payments to access the illegal content hosted, streamed etc. by these websites.

The Plaintiffs contended that the 'rogue websites' were directly competing with the Plaintiffs as the Plaintiffs were targeting cricket fans who wanted to watch the Cricket Series through the internet and mobile platforms. The Plaintiffs further contended that these 'rogue websites' were collecting high advertising revenue at the cost of the Plaintiffs as advertising revenues were linked to the user traffic on the website.

The Court was of the view that the Plaintiffs had made out a strong *prima facie* case and the balance of convenience lay in their favor.

25. Star India Pvt. Ltd. & Anr. v. Haneeth Ujwal & Ors., CS (OS) 2243/2014

The Court directed the websites, their partners, proprietors, officers, servants, employees, and all others in capacity of principal or agent acting for and on their behalf, or anyone claiming through, by or under it, and any other website identified by the Plaintiffs as infringing their exclusive rights, to restrain from infringing the Plaintiff's broadcasting rights in the Cricket Series.

C. Analysis

A direct consequence of the Court's orders would be that a number of websites not indulging in the infringing acts may also be blocked. These websites have the opportunity to file an application to modify the order or appear before the Court and satisfy the Court of their non-infringement when they receive summons to appear before the Court.

The FIFA World Cup and the Cricket Series attracted a large audience in India. Although 'John Doe' orders are an effective tool indeed to prevent further losses to broadcasters, the ability to fully ascertain the number and identity of the websites violating the broadcaster's broadcasting rights is uncertain. Even if identified, the extent to which such websites may be able to pay damages may be limited. In business like this, where the investment amount is big but the period in which the broadcaster can make its money is rather short, obtaining an injunction before damage actually occurs is important. This may be conducive in minimizing and limiting possible damages that may be incurred by the broadcaster, as defaulting websites will further be liable for contempt of the court's order. A John Doe injunction is best served as a *quia timet* action rather than a last ditch roll of the dice.

D. Framework for ISPs

Section 69-A of the IT Act confers the power on the Central Government, where it feels necessary or expedient to do so, *in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence*, it may direct an intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

With the recent enactment of the Information Technology (Intermediaries Guidelines) Rules, 2011 (**"Intermediary Guidelines"**), intermediaries are mandated to observe due diligence while discharging his duties. An 'intermediary', with respect to any particular electronic records, means *any person who on behalf of another person receives stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online-payment sites, online auction-sites, online-market places and cyber cafes.*[26] The internet service providers and web-hosting service providers are required to publish rules and regulations, privacy policies and user agreements for access or usage of the intermediary's computer resource by any person. Such rules and regulations, terms and conditions and user agreements must inform users not to host, display, upload, modify, publish, transmit, update or share any information that infringes any patent, trademark, copyright or other proprietary rights. [27]

The Intermediary Guidelines further place an obligation on internet and web-hosting service providers to not "*knowingly host or publish any information or initiate the transmission, select the receiver of transmission, and select*

26. Section 2(1)(w) of the IT Act.
27. Rule 3(2)(d) of the Intermediary Guidelines.
28. Rule 3(3) of the Intermediary Guidelines.

or modify" the information contained in the transmission of any information that infringes any patent, trademark, copyright or other proprietary rights.[28] The IT Act further provides that an intermediary must disable information that infringes any patent, trademark, copyright or other proprietary rights, within 36 hours from obtaining knowledge independently or through an affected person about such information stored, hosted or published on its computer system.[29]

II. "Digital Offenders" may now be Preventively Detained under new Karnataka Law

Introduction other states also have done this I think... you need to show how it has helped at all in other states

The Government of Karnataka has recently amended [30] the Karnataka Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers and Video or Audio Pirates Act, 1985 ("**The Karnataka Goondas Act**") to extend the scope of the Karnataka Goondas Act to include "Digital Offenders." The Karnataka Goondas Act was enacted to provide for preventive detention of bootleggers, drug-offenders, gamblers, immoral traffic offenders, slum-grabbers and video or audio pirates to prevent their dangerous activities prejudicial to the maintenance of public order.

In recent years, the Bengali music industry has urged the West Bengal Government to introduce a 'Goondas Act' of its own and include music piracy as a major offence.[31] As it could not have been specifically dealt with under the National Security Act, states such as, *inter alia*, Tamil Nadu and Maharashtra have previously introduced specific legislations dealing with such classes of offenders. Tamil Nadu was the first state in 2004 to bring digital pirates under the ambit of its version of the 'Goondas Act'. Maharashtra followed suit in 2009. In 2010, Tamil Nadu admitted that it had imprisoned 675 people under their version of the 'Goondas Act', its high number since 2002.[32]

A. Public Order

Under the Karnataka Goondas Amendment Act, Public Order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely, *inter alia*, if any of the activities of any of the persons referred to in this clause directly or indirectly, is causing or is calculated to cause any harm, danger or alarm or a feeling of insecurity, among the general public or any section thereof or a grave or widespread danger to life or public health.[33]

B. "Digital Offenders"

As defined under the Karnataka Goondas Amendment Act, a "Digital Offender" is a *"person who knowingly or deliberately violates, for commercial purposes any copyright law in relation to any book, music, film, software, artistic or scientific work and also includes any person who illegally enters through the identity of another user and illegally uses any computer or digital network for pecuniary gain for himself or for any*

29. Rule 3(4) of the Intermediary Guidelines.
30. The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders, Slum-Grabbers and Video or Audio Pirates (Amendment) Act, 2014 ("**The Karnataka Goondas Amendment Act**")
31. *Bengali music industry wants Goonda Act to tackle piracy*; dated: June 21, 2013. Available at: http://zeenews.india.com/entertainment/musicindia/bengali-music-industry-wants-goonda-act-to-tackle-piracy_137346.html. Last accessed: February 5, 2015.
32. *Why many states are using the 1923 Goondas Act to curb digital piracy*; dated August 6, 2014. Available at: http://scroll.in/article/673042/Why-many-states-are-using-the-1923-Goondas-Act-to-curb-digital-piracy. Last accessed: February 5, 2015
33. Explanation to Section 2(a) of the Karnataka Goondas Act
34. Section 2(f) of the Karnataka Goondas Amendment Act

other person or commits any of the offences specified under section 67, 68, 69, 70, 71, 72, 73, 74 and 75 of the Information Technology Act, 2000."[34] Further, 'acting in a manner prejudicial to the maintenance of public order' means in the case of a "digital offender", *"when he is engaged, or is making preparations for engaging in any of his activities as a digital offender which affects adversely or are likely to affect adversely, the maintenance of public order."*

C. Preventive Detention

As a result of the Karnataka Goondas Amendment Act, the Karnataka State Government has the power to preventively detain "Digital Offenders". Such an order may not be for more than three months. The order may be amended to extend such period from time to time by any period not exceeding three months at a time.[35] The maximum period that any person may be detained for under the Karnataka Goondas Act shall be twelve months.[36]

D. Analysis

The Karnataka Goondas Amendment Act has not been welcomed with open arms but has instead seen a fair bit of criticism.

i. Legislative Competence

The amendments introduced vide the Karnataka Goondas Amendment Act seem unconstitutional at the outset. The Parliament has the exclusive powers to make laws in respect to any of the matters enumerated in List I in the Seventh Schedule ("**Union List**") while the State Legislature has the exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule ("**State List**").

Patents, inventions and designs; copyright; trademarks and merchandise marks are enumerated under the Union List and hence only the Parliament has the exclusive power to make laws in respect to such matters. Public Order falls under the State List,[38] leaving the State Legislature to make laws on such matters. However, patents, inventions and designs; copyright; trademarks and merchandise marks are matters upon which the Parliament, and not the State Legislature, can exclusively legislate on. Therefore, it is seen that the State Government of Karnataka has overstepped its legislative powers.

ii. The Element of 'Suspicion'

"Digital Offenders" may be preventively detained on mere them suspicion of them engaging in copyright infringement activities. This would even result in preventively detaining persons, without bail, for performing activities permitted under the Copyright Act, 1957, such as issuing a copy of the copyrighted work to the public in any accessible format to facilitate disabled persons to access the copyrighted works.[39]

III. Vishakhapatnam Hotel 'Candy Crush-ed' by King.com

*King.Com Limited ("**Plaintiff / King.com**")* filed an action against *Apeejay Surendra Park Hotels Limited* ("**Defendant**") [40] in Bombay High Court ("**Court**"), seeking a restrain order against the Defendant from using the words 'Candy Crush' and the 'Candy Crush Saga' logo

35. Section 3(2) of the Karnataka Goondas Act
36. Section 13 of the Karnataka Goondas Act
37. Article 246(1) of the Constitution of India
38. Entry 1 of the State List, Constitution of India
39. Section 52(zb) of the Copyright Act, 1957
40. Notice of Motion (L) 1353 of 2014 in Suit (L) No. 576 of 2014; Bombay High Court; decided on June 12, 2014.

in respect to promoting an upcoming musical event at their hotel.

The Court, protecting King.com's intellectual property (“**IP**”) in the words ‘Candy Crush’ and the ‘Candy Crush Saga’ logo, granted an *ex-parte ad-interim injunction* against the Defendant from infringing King.com's copyright in the logo and from passing-off their events, advertisements, products or services as those of the King.com by using King.com's IP, whether in the logo or in the words ‘Candy Crush’.

‘Candy Crush Saga’ logo mark

A. Background

The Plaintiff is a Malta-based leading interactive entertainment company in the mobile world, engaged in creating various digital games that are made available on digital platforms. ‘Candy Crush Saga’, a digital game widely available on digital platforms, is one of its most successful games globally and is a hit across all age groups. The Plaintiff is the proprietor of the trademarks ‘Candy Crush Saga’, ‘Candy Crush’ and their variations, embodied in ‘Candy Crush Saga’.

B. Facts

The ‘Candy Crush Saga’ mark is well-known globally, having several global trademark registrations and pending applications. There were also seven trademark applications in respect to the same mark pending in India at the time of the Court's order. The digital game's logo consists of a blue panel containing three types of candies / confectionaries framed by a red and white candy-like border.

The Defendant, engaged in the hospitality business, used the words ‘Candy Crush’ as well

41. ‘Power to extend copyright to foreign works’

42. Rights of authors of member countries of the Berne Convention and Universal Copyright Convention are protected under Indian Copyright law.

as the logo for the online advertisement and promotion of a musical event organized at their hotel. It was shown that the art work and the logo distinctive of 'Candy Crush Saga' were predominantly displayed on the Defendant's publicity material. Aggrieved by this, the Plaintiff moved the Court for restraining the Defendant from using the name 'Candy Crush' and any of the Plaintiff's copyrighted material, either in conjunction with the words 'Candy Crush' or separately. No order was sought by the Plaintiff against the musical event.

C. Court's Order

The Court, considering that the Plaintiff had obtained copyright registrations in respect to its distinctive logo in the USA, was of the view that the Plaintiff's copyrighted works would be protected under Indian copyright law by virtue of Section 40[41] of the Copyright Act, 1957 read with the International Copyright Order, 1999.[42]

The Court granted an ex-parte ad-interim injunction restraining the Defendant from:

i. infringing the Plaintiff's copyrighted works and from reproducing, copying, displaying or using the Plaintiff's copyrighted works or a substantial part of the Plaintiff's copyrighted works in relation to the said musical event or any other manner;

ii. passing-off the Defendant's musical events, advertisements, products or services as those of the Plaintiff in any manner or as being associated or connected with the Plaintiff in any manner and from using the Plaintiff's intellectual property (**"IP"**) (including trademark) in 'Candy Crush'.

The injunction granted by the Court was applicable to all publicity material, whether in physical or digital form. Further, the Defendant was restrained from using the words 'Candy Crush' or the Plaintiff's game even in "*emails, newsletters, soft copy brochures, entry tickets, passes or in any other manner".*

D. Out-of-Court Settlement

As per media reports, subsequent to the Court's order, King.com realized that 'it was merely a location of an event' organized by the Defendant and the Defendant 'was not directly involved in the infringing activity'. Further, the event was later cancelled. King.com decided to settle the suit and entered into consent terms with the Defendant. [43]

E. Analysis

The decision in this case is definitely a welcome step for King.Com, as the Court recognized its IP rights in the mark and logo of 'Candy Crush' and granted injunctions against the Defendant, thereby preventing any free-riding on King.com's goodwill and international reputation.

It is yet to be seen whether King.com will get registration of its trademarks in India. The words 'Candy Crush Saga' or 'Candy Crush' appear to be generic and lacking distinctiveness. Further, the use of images of candies or the word 'candy' as a part of the mark is not unheard of, as there are several games crafted on candy themes. In addition to this, the artistic work which comprises the 'Candy Crush Saga' logo, is also not unique in nature. Thus, the mark 'Candy Crush' may not be a strong mark on the face of it. However, the juxtaposition of these three candies against a blue background with the candy-like border, and the word marks in view of the reputation of the game, may merit protection through acquired distinctiveness.

43. *King.com in Bombay HC to protect Candy Crush IP*, dated September 23, 2014. Available at: http://ipera.in/ip-era-news/ip-copyright-news/item/215-king-com-in-bombay-hc-to-protect-candy-crush-ip.html. Last accessed: January 7, 2014.

5. Trade Mark Infringement

I. Bombay HC Adjudges ShaadiHiShaadi.com an infringement on the Popular Shaadi.com in Meta-Tag Infringement Suit

A. Background

In the case of *People Interactive (I) Pvt. Ltd.* ("**Plaintiff**") *v. Gaurav Jerry* ("**Defendant No. 1**") *& Ors.* (hereinafter collectively referred to as "**Defendants**"),[44] a Single Judge bench of the Bombay High Court ("**Court**") found the meta-tags used in the Plaintiff's website Shaadi.com ("**Plaintiff's Website**") to be similar to the Defendant No. 1's website *ShaadiHiShaadi.com* ("**Impugned Website**"). The Court passed an *ex-parte ad-interim injunction* restraining the Defendants from using the trademark (or anything similar to the trademark) in the Impugned Website, including using it as a part of the domain name or use in meta-tags or in any other form in relation to matrimonial or matchmaking services so as to infringe the Plaintiff's trademark Shaadi.com used in the Plaintiff's Website. The Court further directed Defendant Nos. 2 and 3, *GoDaddy USA* and *GoDaddy India* respectively, to terminate the Impugned Website and restrained them from hosting the Impugned Website.

B. Plaintiff's Contentions

The Plaintiff claims to be *"the first in the country to provide online matrimonial services and has used its marks openly, continuously, exclusively and extensively in respect of such matrimonial and matchmaking services, wedding planning services and the like for a considerable period of time."* The Plaintiff has been providing matrimonial and matchmaking services under the domain name of *Shaadi.com* and *Shadi.com*; and its brick and mortar matrimonial service, S*haadi Centre*; and has been vigorously promoting and publicizing its brand, mark and services, under the said names. The Plaintiff has a registered trademark in Shaadi.com and Shadi.com. There has been much publicity in the form of printed material, television, print and online advertisements, etc. in relation to the said names. The Plaintiff contended that they had spent an amount of INR 172 crores on publicity, promotion and advertising in respect to the Plaintiff's Website which produced total annual sales of INR 430 crores between 2005-06 and 2012-13.

The Plaintiff found that the Impugned Website and the Plaintiff's website depicted a startling comparison. On the Plaintiff's website, below the words 'Shaadi.com' with its symbol, was the tagline "*The World's Largest Matrimonial Service*". On the Impugned Website, below the domain name *ShaadiHiShaadi.com* was an identical tagline *"World's Biggest Matrimonial Service"*. The Plaintiff's analysis showed that Defendant No. 1, by illicitly plugging the Plaintiff's mark and domain name into the Impugned Website meta-tags, diverted as much as 10.33 per cent and 4.67 per cent of the internet traffic away from the Plaintiff to Defendant.

The Plaintiff's cease and desist notice to Defendant No. 1 was unanswered. Therefore, Plaintiff filed a suit and sought an injunction against Defendant No. 1 from *"using the domain name ShaadiHiShaadi.com or any other word or expression identical or confusingly similar to the Plaintiff's registered trademark Shaadi.com and Shadi.com in any manner, including as part of the domain name*

44. Notice of Motion 1504 of 2014 in Suit (L) No. 622 of 2014, decided on July 7, 2014

for an internet or web-based service."

C. 'Meta-tags'

The Court, defined 'meta-tags', and stated as follows:

"Meta tags are special lines of code embedded in web pages. All HTML (hyper text markup language), used in coding web pages, uses tags. Meta tags are a special type of tag. They do not affect page display. Instead, they provide additional information: the author of the web page, the frequency of updation, a general description of the contents, keywords, copyright notices and so on. They provide structured data (actually, meta-data) about the web page in question. Meta tags are always used in a web-pages '<head>... </head>' section, before the display section that begins with the tag '<body>... ... </body>'.

The Court stated that 'meta-tags' are utilized by search engines and various search engine robots to assess webpage contents and produce search results to an internet user. Therefore, if an internet user enters the meta-tags of one website that is used in another website as well, a search engine, being robotic in nature, is bound to confuse the two websites and display both websites at the top of the search results page. Hence, by copying 'keywords' or 'description' meta-tags of one website in another, a search engine could direct a user to the mimic website.

D. Court's Observations

The Court was of the view that the Plaintiff's property had achieved a unique status and a significant reputation and goodwill. The Court found the services offered by both the Plaintiff's Website and the Impugned Website to be identical. Further, on the Plaintiff's website, below the words Shaadi.com was the tagline *"The World's Largest Matrimonial Service*", while on the Impugned Website, just below the domain name *ShaadiHiShaadi.com* appears an almost identical tagline *"World's Biggest Matrimonial Service."* The Court pointed out that this statement on the Impugned Website was puffery and was intended to deceive the public and cause confusion.

The Court stated that the *"Defendant No. 1 had hijacked the Plaintiff's reputation and goodwill and rode piggyback on the Plaintiff's valuable intellectual property."* The Defendant No. 1 had also made false claims regarding the extent and size of his services and hijacked internet traffic from the Plaintiff's Website.

E. Court's Decision

The Court held that the Plaintiff had made out a *prima facie* case and the balance of convenience lay in his favor. This was a case of online piracy as Defendant No. 1 had merely added the Plaintiff's mark *Shaadi.com* as a suffix in the Impugned Website address, thus diluting the character of the Plaintiff's mark.

The Court passed an *ad-interim* injunction restraining the Defendants by itself, through its partners, proprietors, servants and agents and / or otherwise howsoever from using the trade mark *ShaadiHiShaadi.com* and / or any other word or expression identical or similar to it, including using it as a part of the domain name or use in meta-tags or in any other form in relation to matrimonial or matchmaking services so as to infringe the Plaintiff's registered trademark *Shaadi.com*. The Court further restrained Defendant Nos. 2 and 3 *vis-a-vis GoDaddy USA* and *GoDaddy India* from hosting the Impugned Website and directed them to terminate the Impugned Website.

F. Analysis

This is reportedly the first Indian case that deals with meta-tags. The Court took a step forward in defining meta-tags and their role in determining search engine results. The Court observed that Defendant No. 1 had used the Plaintiff's mark and name in the meta-tags of the Impugned Website. In respect to the meta-tags, the Court accepted the similarity in the meta-tags between the Plaintiff's website and the Impugned Website and the confusion caused by such similarity among internet users.

Such a decision rendered on the basis of similar meta-tags leading to trade mark infringement may lead to issues in the future with websites of similar nature. As we have seen in the present case with matrimonial services websites, other websites belonging to the travel, food and beverage, and telecom services industries may face similar issues as they use similar meta-tags associated with their industry. For example, while a user may enter keywords such as "airfare", "lowest price" and "travel", a host of websites offering the same services may appear in the search engine results. While websites may legitimately use appropriate use meta-tags as a mode of advertisement of their websites and helping their users find the websites on search engines, rival websites may see this as a form of trade mark infringement.

II. Calcutta HC Gives Protection to Trademark of Foreign Manufacturer of Goods Sold in India; Importer Unable to Prove Ownership of Mark

In a recent case of *Sunny Sales & Ors.* (**"Plaintiff"**) *v. Binod Khanna* (**"Defendant"**)[45], the Calcutta High Court (**"Court"**), refused to grant injunction in favor of Plaintiff as it found that the Plaintiff was only an importer of the goods and not owner of trademark 'LIPU'. The Court applied the test of 'reverse passing off'.

The Court held this to be a case of 'reverse passing-off', meaning a situation where a person passes off goods of a third party as his own without having any right in the goods itself. However, it appears that it was more a case of wrongful claim of ownership. While the Court recognized that the trademark right is territorial in nature, it was also proactive in protecting the trademarks of foreign exporters / manufacturers who do not do business themselves in India but have established some amount of goodwill in their trademarks.

Our detailed hotline on the topic can be accessed accessed at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/calcutta-hc-gives-protection-to-trademark-of-foreign-manufacturer-of-goods-sold-in-india-importer-u.html

45. G.A. No. 910 of 2014; decided on November 10, 2014.

6. Jurisdiction

I. Delhi HC: A Virtual Presence May Mean 'Carrying On Business' for Jurisdiction in IP Cases

A Division Bench of the Delhi High Court ("**DB**") in the case of *World Wresting Entertainment, Inc. v. M/s Reshma Collection & Ors.*[46] in an appeal order, held that the online sale of merchandise to customers in Delhi by *World Wresting Entertainment, Inc.* amounted to 'carrying on business' in Delhi, under Section 62(2)[47] of the Copyright Act, 1957 and Section 134(2)[48] of the Trade Marks Act, 1999.

The DB held that the WWE 'carried on business' in Delhi merely due to sales effected through the Appellant's website accessed / accessible in Delhi, thus conferring jurisdiction on the Delhi High Court ("**Court**") to try a suit for trademark and copyright infringement.

Our detailed hotline on the topic can be accessed at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/delhi-hc-a-virtual-presence-may-mean-carrying-on-busines-for-jurisdiction-in-ip-cases.html?no_cache=1&cH.

46. FAO (OS) 506/2013 and CM Nos. 17627/2013 & 18606/2013, decided on October 15, 2014.
47. Section 62 - Jurisdiction of court over matters arising under this Chapter

    (1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.

    (2) For the purpose of sub-section (1), a "district court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.
48. Section 134 - Suit for infringement, etc., to be instituted before District Court

    i. No suit–

    a. for the infringement of a registered trade mark; or

    b. relating to any right in a registered trade mark; or

    c. for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered, shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

    ii. For the purpose of clauses (a) and (b) of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain.

    Explanation.–For the purposes of sub-section (2), "person" includes the registered proprietor and the registered user.

7. Defamation

I. Delhi HC Applies Single Publication Rule in Determining Limitation Period for Suits for Online Defamation

A. Background

The High Court of Delhi ("**Court**") in the case of *Khawar Butt* ("**Plaintiff**") *v. Asif Nazir Mir & Ors.* ("**Respondents**")[49] came to the conclusion that the period of limitation would run from the date of publication of material for the purpose of filing a suit for libelous online defamation. In this case involving allegedly defamatory material being posted on a social media website, the Court applied the 'single publication rule' and made no distinction between publication over print and digital media for the purpose of determining the period of limitation for filing a suit for defamation.

B. Facts

The case involved allegedly false allegations posted on Facebook by the Plaintiff's wife and another man whom the Plaintiff's wife was engaging in an adulterous affair. The Plaintiff filed the suit seeking damages of INR 1 crore and for a mandatory injunction against the libelous internet posts.

The period of limitation for filing a suit for compensation for libel is 1 year from the date of publication, as per the Limitation Act, 1963 ("**Limitation Act**").[50] However, the present suit was filed by the Plaintiff after more than a year from the date the allegedly defamatory post was published on Facebook.

C. Issue

The issue before the Court was whether *"the leaving of the allegedly defamatory material on the internet page gives rise to a fresh cause of action every moment the said offending material is so left on the webpage – which can be viewed by others at any time, or whether the cause of action arises only when the offending material is first posted on the webpage / internet."* The issue did not extend to determining the limitation period for re-publication, i.e., fresh publication of defamatory material, as it was clear that the period of limitation would commence from the date the publication was re-published, whether in print or digital media.

The Court did not come across Indian precedents on the subject and hence proceeded to examine the legal positions in various foreign jurisdictions.

D. 'Multiple publication rule'

The effect of the 'multiple publication rule' is that the limitation period runs from the date of the last publication of the defamatory statement, allowing the affected party to sue many years after the statement was first made.

The Court observed that the 'multiple publication rule' was first developed in England in the case of *Duke of Brunswick v. Harmer*[51] ("**Brunswick Case**") where the Duke was given a copy of a newspaper that contained defamatory material of him which had been published 17 years earlier. The court upheld the Duke's claim for damages as being within limitation and held that the limitation

49. 206 (2014) DLT; decided on November 11, 2013.
50. Sr. No. 75, Schedule 1, Limitation Act, 1963
51. (1849) 14 QB 185

period of 6 years re-started when the Duke viewed the publication. Subsequently, in the case of *Godfrey v. Demon Internet Limited*[52] the court applied the 'multiple publication rule' to the internet. Although the 'multiple publication rule' was followed in the UK by courts since the *Brunswick Case*, it has recently been statutorily overruled[53] through the enactment of the Defamation Act, 2013.

E. 'Single publication rule'

The 'single publication rule' gives rise to only one cause of action for defamation, in the case of defamatory material published in a book, newspaper or periodical, which implies that the limitation period begins to run at the time the first publication is made, even if copies continue to be sold several years later.

The Court observed that the 'single publication rule' has been encapsulated in the American Law Institutes Uniform Single Publication Act, 1952. The US courts have applied the 'single publication rule' in cases of publication over the internet.[54] In the case of *Firth v. State of New York*,[55] the court held that if the 'single publication rule' is not upheld with regard to internet publications, then *"inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the internet, which is, of course, its greatest beneficial promise".*

The Court found the reasoning of the US courts to be more appealing than the reasoning behind the enactment of the Defamation Act, 2013 in England.

F. Judgment

The Court pointed out that the *legislative policy would stand defeated if the mere residing of the defamatory material or article on a website would give a continuous case of action to a party to sue for libel.* However, if there is re-publication, i.e., fresh publication of the same article on the internet, such re-publication would give rise to a fresh cause of action.

The Court was of the view that the 'single publication rule' is more appropriate and pragmatic to apply, rather than the 'multiple publication rule'. It is the policy of the law of limitation to bar the remedy beyond the prescribed period. The legislative policy would stand defeated if the mere continued residing of the defamatory material or article on the website were to give a continuous cause of

52. (2001) QB 201

53. Section 8 has introduced the Single Publication Rule, which reads as follows:

"8. Single publication rule

i. This section applies if a person—

a. publishes a statement to the public ("the first publication"), and

b. subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

ii. In subsection (1) "publication to the public" includes publication to a section of the public.

iii. For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

iv. This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

v. In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—

a. the level of prominence that a statement is given;

b. the extent of the subsequent publication.

vi. Where this section applies—

a. it does not affect the court's discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and

b. the reference in subsection (1)(a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section."

54. *Scott Churchill & Anr. v. State of New Jersey*, 378 N.J. Super 471, 478 (App. Div. 2005)

55. (2002) NY int 88

action to the Plaintiff to sue for libel.

In India, the limitation period prescribed under the Limitation Act for filing a suit for compensation for libel is 1 year from when the libel is published. Applying the 'single publication rule', the Court held that the claim for damages for libel was barred by limitation, as the suit was not filed within the limitation period from the date when the cause of action arose.

G. Analysis

This is indeed a path-breaking decision from the Court as it has not made a distinction between digital media and print media for the purpose of establishing the cause of action for determining the limitation period in cases of libel. As a publication over digital media would be widely accessible and viewable to readers, as a counter argument, a publication over print media would also be accessible and viewable to a similar extent. As seen in the *Brunswick Case*, a publication in a newspaper was read after 17 years from the date of publication. Therefore, by this logic, publications over digital and print media would give rise to multiple causes of action.

Therefore, it is erroneous to say that over digital media, a new cause of action would arise every time the post is accessible and viewable online, thereby giving a party the right to institute a suit well after the limitation period from the first date of publication. As seen under the Limitation Act was that the period of limitation would run from when the "*libel is published*." The legislative intent behind this was that the period of 1 year would begin from the date of publication. This legislative intent is not to be deviated from with the advancements in digital media and the extensity of its outreach to users. The same rule must apply to both print media and digital media. Of course, an exception lies when the publication is re-published.

8. Celebrities Defend Their Personality Rights

The previous year saw famous actors like Rajinikanth and Sridevi attempt to safeguard their personality rights. While Rajinikanth had successfully moved the Madras High Court for relief, Sridevi resorted to sending Ramgopal Varma a legal notice, to which she received a response via social media.

I. The Rajinikanth Case

The case of *Shivaji Rao Gaikwad* (**"Rajinikanth"**) *v. Varsha Productions* (**"Defendant"**)[56] witnessed the celebrated actor 'Rajinikanth' approach the Madras High Court (**"Court"**), seeking an interim injunction restraining the Defendant from using his name, image / caricature / style of delivering dialogues in the film "*Main Hoon Rajinikanth*" (**"Impugned Film"**) and other forthcoming films so as to infringe his copyright, infiltrate his personality rights or cause deception in the minds of the public leading to passing-off. The Court granted the interim injunction and stayed the release of the Impugned Film, whose name was later changed to "*Main Hoon Rajini*".

A. Rajinikanth's Affidavit

Rajinikanth had previously filed an affidavit[57] stating that he is a famous and well known actor in the Indian film industry for the past several decades and has garnered immense reputation and goodwill. He has won several accolades and his wide-spread fan-base is considered to be one of the largest in the world. Rajinikanth had not authorized any biopic or other project based on his personality. Rajinikanth claimed that any misuse of his name / image / caricature / style of delivering dialogues would cause considerable confusion amongst the trade and public.

Rajinikanth claimed that the feature film '*Main Hoon Rajinikanth*' (**"Impugned Film"**) embodies his super-hero image along with immoral scenes thus causing defamation, slander and gross damage to his goodwill and reputation built over several years of hard work. Rajinikanth felt that the Impugned Film was portrayed to the public that he had approved the title of the film and that the Impugned Film was based on himself. Rajinikanth claimed that the unauthorized use of his name / image / caricature / style of delivering dialogues in the Impugned Film amounted to infringement of copyright, infiltration of his personality rights, passing-off, violation of his right to privacy and defamatory in nature. Rajinikanth alleged that the Defendant had misused his name to promote the Impugned Film and cash-in on his "superhero" image and goodwill, without his authorization.

Rajinikanth prayed for *ad-interim* interim injunction to restrain the Defendant from using his name, image / image / caricature / style of delivering dialogues in the Impugned Film or any other forthcoming films so as to infringe his copyright, infiltrate his personality rights or cause deception in the minds of the public leading to passing-off.

B. Court's Order

On September 17, 2014, a Single Judge bench of the Court granted an interim injunction in Rajinikanth's favor and stayed the release

56. CS(OS) 598/2014
57. Available at https://www.scribd.com/doc/240042376/Rajnikanth-Affidavit Last accessed: January 12, 2015. We do not have a copy of the signed affidavit submitted to the court.

of the Impugned Film.[58] The Court felt that Rajinikanth had made out a prima facie case and the balance of convenience lay in his favor.[59] On February 3, 2015, the Court upheld the interim injunction and held that the Defendant was not entitled to use the name without Rajinikanth's permission.[60] The Court found that *"on seeing the name of Rajinikanth in the title of the impugned movie, the persons who are coming across the title of the impugned movie, are identifying the name only with the petitioner herein, which is evident from the website pages hosted by different persons."*

According to recent media reports, the producers had amended the title of the Impugned Film to "*Main Hoon Rajini*".[61]

II. Sridevi's Legal Notice to Ramgopal Varma

Sridevi too, seems to have joined the bandwagon in a bid to protect her personality rights and right to privacy. As per media reports,[62] the actress recently sent a legal notice to the well-known filmmaker, Ramgopal Varma, in relation to his forthcoming film "Sridevi". The film, initially titled "Savitri" was later changed to "Sridevi". Sridevi alleged that film was 'obscene, sleazy and vulgar'. Sridevi, being a well-known celebrity, claimed that misuse of her name, image, likeness etc. would cause considerable confusion amongst the trade and would violate her right to privacy recognized under Article 21[63] of the Constitution of India. Sridevi further stated that the contents of the film were obscene and immoral and would defame her and grossly violate her reputation and goodwill.

Sridevi's legal notice called upon Ramgopal Varma to:

i. Restrain from using Sridevi's name, singularly and / or with any suffix, prefix or other word in the film or any other project,

ii. Restrain from using the image, persona and other attributes of personality rights of Sridevi in the film or any other project,

iii. Change the title of the film, and

iv. Publish an unconditional apology to Sridevi in a national newspaper along with the new title of the film.

Ramgopal Varma responded to the legal notice via a Facebook post.[64] In his reply to the legal notice, Ramgopal Varma stated that the title of the film was given to him by the Andhra Pradesh Film Chamber which is the authorized body for such deeds. Further, films with the title "Sridevi" have been made and released at least 3 times in the last 2 decades. The Film chamber already sent a reply saying that they are well within their rights to grant the title to us. Ramgopal Varma further stated that the name "Sridevi" would not be copyrighted and claimed that the film had nothing to do with Sridevi as the protagonist was not even an actress and that the subject matter of the film was previously dealt with in films such

58. *On Rajinikanth's complaint, Madras HC stays the release of Hindi film 'Main Hoon Rajinikanth'* dated September 17, 2014. Available at: http://indianexpress.com/article/entertainment/regional/on-rajinikanths-complaint-madras-hc-stays-the-release-of-hindi-film-main-hoon-rajinikanth/. Last visited: January 12, 2015.

59. *Rajinikanth moves court against 'Main Hoon Rajinikanth' makers;* dated: September 18, 2014. Available at: http://www.thehindu.com/entertainment/rajinikanth-moves-court-against-main-hoon-rajinikanth-makers/article6419434.ece. Last visited: January 12, 2014

60. *HC restrains Mumbai firm from using Rajinikanth name*, dated February 6, 2015. Available at: http://www.financialexpress.com/article/miscellaneous/hc-restrains-mumbai-firm-from-using-rajinikanth-name/39859/. Last visited: February 6, 2015.

61. *Faisal Saif changes title of 'Main Hoon Rajinikanth' film*, dated October 14, 2014. Available at http://indianexpress.com/article/entertainment/bollywood/faisal-saif-changes-title-of-main-hoon-rajinikanth-film/. Last accessed: February 15, 2015.

62. *Sridevi sends Legal Notice to Ram Gopal Varma*; dated October 10, 2014. Available at: http://www.aptoday.com/newsnpolitics/sridevi-sends-legal-notice-to-ram-gopal-varma/3871/ Last visited: January 12, 2015.

63. Article 21. Protection of life and personal liberty
No person shall be deprived of his life or personal liberty except according to procedure established by law

64. *Ram Gopal Varma Names Film Sridevi, Refuses to Change it*; dated October 14, 2014. Available at: http://movies.ndtv.com/bollywood/ram-gopal-varma-takes-on-sridevi-over-controversial-film-title-679057 Last visited: Jan 12, 2015

as *Malena, Cinema Paradiso, Summer of 42, Rajkapoor's Mera Naam Joker* etc.

A. Analysis

Claims based on publicity rights, also known as personality rights, image rights or celebrity rights, have been on the rise. Of late, the judicial position also seems to favor individuals, and is included to protect personality rights *vis-a-vis* those who try to piggyback on the persona and reputation of a personality without their consent. However, unlike other jurisdictions such as the State of California – The Celebrities Rights Act, 1985, and Washington - Washington Personality Rights Act, codified at 'Wash. Rev. Code Ann. § 63.60', India does not have any specific legislation to protect personality rights. With several personalities realizing the worth of their image rights and resorting to legal recourse against misuse of their name or likeliness, we do expect substantial jurisprudence develop on this issue in the near future.

Annexure I
Revision of Trade Mark Filing Fees

The Trade Marks Registry has revised fees for the following particulars from INR 3500 to INR 4000.

Serial Number	Particular	Corresponding Form Number
1	On applications to register a trademark for a specification of goods or services included in one class [Section 18(1)]	TM-1
2	On application to register a trade mark for goods or services included in a class from a convention country under section 18(1) & 154(2)	TM-2
3	On a single application under section 18(2) for the registration of a trade mark for different classes of goods or services from a convention country under section 154(2)	TM-52
4	On a single application under section 18(2) for the registration of a trade mark for different classes of goods or services	TM-51
5	On application to register a series trade mark under section 15 for a specification of goods or services included in a class or classes	TM-8
6	On application to register a series of trade mark from a convention country under section 154(2) for a specification of goods or services included in a class or classes	TM-37

Further, the Central Government has increased fees from INR 12,500 to INR 20,000 in respect to the following:

Serial Number	Particular	Corresponding Form Number
1	On application under rule 38(1) for the expedited examination of an application for the registration of a trademark.	TM-63

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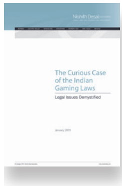

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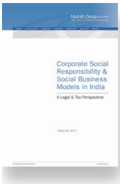

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Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI

93 B, Mittal Court,Nariman Point,
Mumbai 400 021 India

Tel: +91 - 22 - 6669 5000
Fax: +91 - 22 - 6669 5001

SILICON VALLEY

220 S California Ave., Suite 201,
Palo Alto, CA 94306, USA

Tel: +1 - 650 - 325 7100
Fax: +1 - 650 - 325 7300

BANGALORE

Prestige Loka, G01, 7/1 Brunton Rd,
Bangalore 560 025, India

Tel: +91 - 80 - 6693 5000
Fax: +91 - 80 - 6693 5001

SINGAPORE

Level 30,Six Battery Road,
Singapore 049909
Tel: +65 - 6550 9855
Fax: +65 - 6550 9856

MUMBAI BKC

3, North Avenue, Maker Maxity
Bandra – Kurla Complex,
Mumbai 400 051, India
Tel: +91 - 22 - 6159 5000
Fax: +91 - 22 - 6159 5001

NEW DELHI

C-5, Defence Colony
New Delhi - 110024, India

Tel: +91 - 11 - 4906 5000
Fax: +91 - 11- 4906 5001

MUNICH

Maximilianstraße 13
80539 Munich, Germany

Tel: +49 - 89 - 203006 - 268
Fax: +49 - 89 - 203006 - 450

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