

# INTELLECTUALIS

INTELLECTUAL PROPERTY RIGHTS COMMITTEE | SCHOOL OF LAW,  
CHRIST (DEEMED TO BE UNIVERSITY) | EDITION 2

## Sun Pharmaceutical Industries vs Infocom Network Limited & Ors on 12 October, 2018

(Delhi High Court)

The plaintiff filed a petition seeking permanent injunction to restrain the defendants from using the terms 'Sun pharmaceutical' or any of its variants with minor changes like 'Rising Sun Pharma'. The defendants had infringed the trademark of the petitioner by conducting business in deceptively similar names thereby utilizing the good will of the plaintiff who is a well-known pharma company with a turnover of about 30 thousand crore. The court granted a decree in favour of the petitioner restraining the defendants from using the particular domain name.

## Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.

[2003 (27) PTC 305 (Del) (DB)]

-Diksha Arora



### Introduction to Comparative Advertising in IPR

Advertising is an important part of the sale and marketing process of any product today. It has proved to be the fastest and most successful mode of grabbing the attention of the public and generating potential consumers for the product. Advertisers often resort to the practice of comparing their product with others in



**Ritnand Balved**  
**Education vs**  
**Ranchhod M Shah &**  
**Ors on 16 October,**  
**2018**

**(Delhi High Court)**

A petition was filed by the plaintiff seeking an injunction to restrict the defendant from using the same name- 'Amity International School'. The Plaintiffs are acclaimed institutions for education with branches all over the country. The defendant school in Baruch was established with the exact same name. According to the plaintiff the use of the same name 'AMITY' especially in the field of education would breach Section 2(1)(zg) of the Trademarks Act which explains about 'well-known trademark'. The defendant argued that their school was registered with CBSE and the name was used by them in 1986, prior to the plaintiff who started using the same only in 1991. It was held that the said court had jurisdiction to hear this case and the name adopted by the defendant was exactly identical to that of the plaintiff which would cause confusion to the parents, children who wished to apply to the plaintiff school.

the same field. And though this practice is allowed in the marketplace, it also does lead to instances where advertisers may mislead consumers or defame the competitor's products. This is where the concept of Comparative Advertising comes into picture. This is a unique concept of advertisements where using of another's trademarks is allowed as long as the advertiser doesn't disparage the goods and services of the competitor. If such disparagement takes place, not only will it constitute an infringement of trademark but also constitute product disparagement. Comparative Advertisement is beneficial to consumers as it compares products based on price, value, quality, merits, etc., and this improves consumer knowledge. But this improvement in consumer knowledge can only be done as long as it doesn't cause misinformation by stating that the competitor's products are of inferior or bad quality. This would cause 'product disparagement'.

Case Analysis: Pepsi Co. Inc. v. Hindustan Coca Cola Ltd.

**Facts** – In the present case, the appellants Pepsi Co. filed a suit against the respondents, Hindustan Coca Cola. They were seeking for an ad interim injunction against the respondents, restraining them from infringing upon the registered trademark of the appellants in their commercials. The respondents used the word 'Peppi', which was deceptively similar to the appellant's product 'Pepsi'. Further, the respondents also infringed the appellant's copyrighted words 'Yeh Dil Maange More' and the roller coaster theme was also copied. The appellant is the registered trademark owner of 'Pepsi', 'Pepsi Cola' and 'Global Device'. They also claim that the copyrighted words 'Yeh Dil Maange More' is a trademark under the Trade and Merchandise Marks

**Ultratech Cement  
Ltd. And Anr vs Jai  
Shree Kripa (P) Ltd.  
And Anr on 15  
October, 2018**

**(Bombay High Court)**

The suit was filed by the petitioner seeking a temporary order and injunction because the defendant company was carry out its business with the name and logo 'Ultra Strong Cement The engineer's choice' which is very similar to plaintiff's company 'Ultra Tech Cement'. It was argued by the petitioner that the defendant company was making profits by utilizing their good will, which is detrimental to the plaintiff's business. Since neither the advocates nor the defendants presented themselves in the court, it was ordered that they should present themselves on the next hearing date; otherwise the court shall issue a warrant of arrest.



Act, 1958.

**Issues** –

- a) whether prima facie the respondents have disparaged the products of the appellants;
- b) whether the globe devise and the phrase "Yeh Dil Maange More" is copyrightable and if so, whether this copyright has been infringed by the respondent;
- c) whether the essence of the roller coaster has been copied by the respondents and if so the effect of the same.

**Laws Involved** –

- Sections 14, 51 and 52A of Copyright Act, 1957
- Order 39 and Rules 1 and 2 of Code of Civil Procedure, 1908
- Sections 29 and 29 (1) of Trade and Merchandise Marks Act, 1958

**Arguments** – In the commercial of the respondent, the word on the bottle was 'Peppi' but clearly stood for 'Pepsi' and this could be understood through the mouthing of the word by the child actor in the commercial. Furthermore, at the time the commercial was aired, there existed only 3 cola drinks out of which two belonged to the respondent. Thus, it could be clearly understood that the respondent was referring to the appellant's product in the commercial. In understanding what amounts to 'disparagement', the court laid down a crucial test where certain factors need to be observed, which are - (i) Intent of commercial (ii)



## La Opala R.G. Ltd vs Cello Plast & Ors on 11 October, 2018

### (Calcutta High Court)

The defendant and the petitioner engage in the manufacture of opal glassware. The Petitioner has been in this business longer than the defendant and they created certain unique designs with respect to the 'opal glass tableware' and they invented designs for packaging the product which were inimitable to only their products. Consequently applications were filed by the petitioner to register these trade dresses and the present case is filed against the defendant to restrain them from using petitioner's marks with respect to four trade dresses- "mystrio black", "crimson bloom", "golden fall" and "dazzle purple". The defendant countered this petition by stating that they have been manufacturing the opal ware using German technology and selling it through the house name cello. They further stated that it is not possible to protect the products of the petitioner under the Trade Marks Act 1999 and that it is a design which has not acquired the characteristics of being a distinctive artistic work. The court held that the designs on the defendant's glassware were deceptively similar to the plaintiff's la opal. Therefore, injunction was granted with respect to first three marks. However the fourth mark was held not to be similar since the defendant's 'Ornate black' was different from 'Mystrio black'.

Manner of the commercial (iii) Story line of the commercial and the message sought to be conveyed by the commercial. Considering these factors, the manner of the commercial here discredited the appellant's product by not only calling it 'baccho waali drink' and stating it was only to children's liking but also the reaction of embarrassment of the child actor in created the impression of 'Pepsi' being inferior in quality. These advertisements are not only made in mocking manner but in fact denigrate the goods of the appellant. The court stated while citing the case of *Reckitt & Colman of India Ltd.*, that one can boast about technological superiority of their products while comparing it to that of its competitors and also state that his technology is far more superior but he cannot state that the other products are harmful and bad and inferior in quality. In the present matter, the commercials make a clear indication that the product of the appellant is inferior.

Further, regarding the infringement of the appellant's copyright over the slogan and the rollercoaster theme, the appellant claims the slogan to be a 'literary work' under the Copyright Act as it is an original combination of words which has acquired distinctiveness and the advertisement of the respondent infringes this. In response to the rollercoaster theme being copied, the appellants cited the case of *R.G Anand v. Delux Films*, stating that a substantial portion of their commercial was copied and communicated to the public amounting to infringement. The court held that the rollercoaster commercial was an original work of the appellant and so, it is covered under Section 14 of the Act.

**Conclusion and Analysis** – The test laid down by the Delhi High Court in this judgement regarding factors that need to be considered while determining 'disparagement' has been paramount in understanding this concept and distinguishing it from comparative advertising. The court looked into the instances where the trademark of a rival is involved in advertising and whether those references denigrate the rival

product. The Court also looked into instances which do not qualify to be mere 'puffing', as the manner of the commercial and its intention was not to merely to boast their product but was to represent the other's product to be inferior.

This law is largely similar to the one in the United Kingdom as it is a product of the influence on laws during the British Rule. But the status of comparative advertising in U.K and U.S.A has been more advanced than India's laws. These nations allow advertisers to refer to competitor's products as inferior as long as they have a reasonable and valid claim along with it.

The aim of comparative advertising, which is to provide healthy competition in the market and also to add to the consumer's information regarding products and services, is not being met today. The marketplace is being used by advertisers to make exaggerated claims about their product. This is where the law becomes extremely crucial to ensure that there is free and fair competition in the marketplace. The law is required to regulate the manner and content of commercials. Disparagement of rival products would be a common practice if the laws in the statutes and judgements weren't available today. It is imperative that advertisers understand where to draw the line between puffing and disparagement, to provides consumers with the necessary and relevant information about their products.



## **Orangefish Entertainment Pvt. vs NGC Network (India) Pvt. Ltd on 15<sup>th</sup> October 2018**

### **(Delhi High Court)**

The petitioner and respondent entered into an MOU which was followed by an addendum to organize an event known as 'India Bike Week (IBW)' which was being conducted by the parties for three years with no problems. The issue arose when the respondent applied for a trademark to register IBW exclusively in its own name excluding the petitioner. The respondent contended that the single district judge who decided the case did not have the jurisdiction to do so because a tribunal had been constituted. The court held that the application was filed by the petitioner before the tribunal was constituted. There was also an arbitration agreement between the parties in the MOU which stated that they would resort to a single arbitrator and the place was decided as Delhi International Arbitration Centre. Owing to this the court held that the court in whose jurisdiction the arbitration proceeding has been conducted also has the jurisdiction to hear the case.

**Impresario  
Entertainment &  
Hospitality Pvt Ltd  
v. Mocha Blu Coffee  
Shop (decided on 30  
October, 2018), In  
The High Court Of  
Delhi**

The present suit has been filed seeking permanent and mandatory injunction restraining infringement of trade mark MOCHA against the defendant. The defendant was operating a coffee shop using the trademark MOCHA BLU with emphasis on the plaintiff's trademark MOCHA. Considering the fact that the plaintiff is the registered owner of the mark MOCHA and none has entered appearance for the defendant, the Court held that the defendant has no justification for the adoption and use of virtually identical trade mark as that of the plaintiff in relation to identical services. Accordingly, the present application is allowed and the suit is decreed against the defendant.

**Body Basic  
Healthcare Pvt Ltd vs  
Sachin Raghunath  
Shinde (decided on 25  
October, 2018), In The  
High Court Of  
Judicature At Bombay**

The Plaintiff has filed the present suit against the Defendants for infringement and passing off. It was submitted that the adoption and use of the identical trade mark NEW BODY ART by the Defendants is dishonest and with an intention to trade upon the goodwill and reputation acquired by the Plaintiffs. The mere addition of the word NEW is dishonest.

The court stated that the use of the trade mark BODY ART by the Defendants in respect of the same services undoubtedly violates the rights of the Plaintiffs including the statutory rights. The use of the trade mark BODY ART by the Defendants cannot be termed as honest. Considering the similarities in the rival trade marks and the nature of rival services, there is a very strong possibility of confusion and deception amongst the general public.

**Birla Edutech Ltd  
vs Open Minds Birla  
School And Othrs.  
(decided on 22  
October, 2018), In  
The High Court Of  
Judicature At  
Bombay**

It was submitted that the Plaintiff has been regularly, openly, continuously and extensively using the said trademarks in respect of educational services since the last several years and that amongst schools and students and in the education sector, the Plaintiff is known as OPEN MINDS / BIRLA OPEN MINDS and the said trademarks OPEN MINDS / BIRLA OPEN MINDS are identified with the Plaintiff and no one else. It was held that the Plaintiff has made out a strong prima facie case and irreparable harm an injury would be caused to the Plaintiff if the Defendants are allowed to continue with their infringing activities



**Amilal Ramkishan  
Dass vs Ashok  
Kumar Sethi on 27  
September, 2018 in  
the High Court of  
Madras.**

The plaintiff is a manufacturer and exporter of hair dyes and other products made from Henna and was the sole and absolute owner of products manufactured under the title 'AMIN'S' since 1998. In 2007 the plaintiff discovered that the defendant was violating their copyright. The defendant argued that they were not within the territorial jurisdiction of the court as it did not carry on business within those confines and further mentioned that a leave under Letters Patent had to be taken prior to the institution of the suit. However, the plaintiff argued that an application was made under clause 14 of the Letters Patent. After much deliberation, the court dismissed the application filed by the defendant where they requested for the rejection of the plaint under Rule VII Order 11 of the CPC.

**M/S. Vini Cosmetics Pvt. Ltd. vs M/S. Abhay  
Enterprises & Ors decided on 1 October, 2018  
by the High Court of Delhi**

In the present case the court granted a permanent injunction as requested by the plaintiff. The plaintiff is a company that is engaged in the manufacture and sale of various products including a face powder manufactured under the label of 'GLAMP UP' which had a distinct red colour packaging. The same was in use since August 2013. The plaintiff came to know of the Defendant's purchase of the same product from foreign countries and the deceptive packaging deceptively similar to that of the plaintiff's after a notice was sent to one of the manufacturers from the Commissioner of Customs, Mumbai. In the notice, the manufacturer was notified about the arrival of a 14,400 consignment of 'GLAM UP POWDER CREAM' products and was instructed to deposit a security bond and bank guarantee to detain the counterfeit products. The plaintiff then sued the defendant 1 and the custom authorities as well. The court held that the carton and packaging were identical to that of the plaintiff's and amounts to infringement of their rights. Further the court delved into the issue with regards to the quality of such counterfeit products mentioning that it caused great harm both to the producers and to the consumers. It granted the prayer of permanent injunction and also awarded a penalty of 5 lakhs which was 20% of the total value of the consignment. The court also ordered for the release of the bank guarantee and the handing over of the 14,400 counterfeit pieces to the plaintiff to be destroyed and erased.

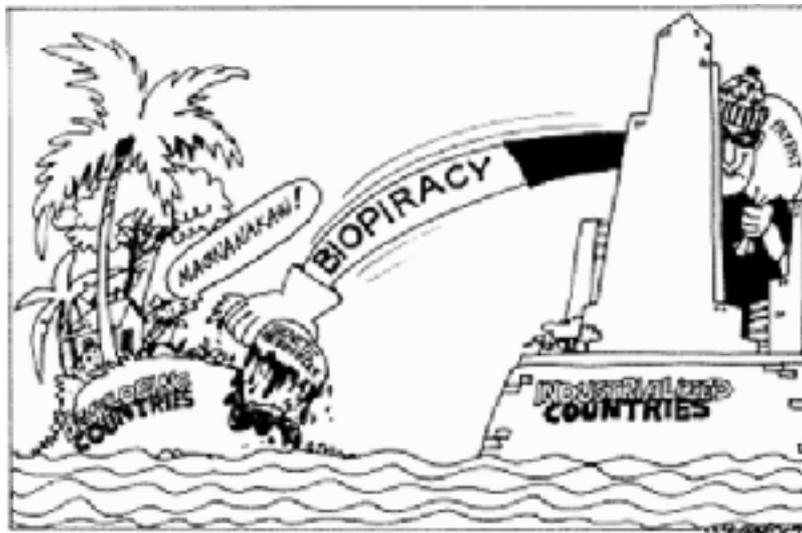
**M/s. Greenply Industries Ltd. v M/s. Aggarwal  
Plywood Co. and Anr decided on 4 October  
2018 in the Delhi District Court**

The plaintiff filed a suit for permanent injunction for violation of its registered Trademark 'GREEN' which is used in the production of most of its plywood products with a high level of goodwill attached to it. The products have been known for its reliability, efficiency and excellent quality. In January 2004 the plaintiff published a Trademark/ Copyright Caution Notice in the Ply Gazette and in 2016 came to know about GREEN VATIKA a product manufactured by the Defendant in respect of plywood and other allied contents. It was also stated that the defendant along with other unscrupulous traders have gained unfair advantages by misrepresenting the inferior quality goods. The defendants stated that the plaintiff had filed for a composite trademark which as per the Act mandated that there exists two words and distinct elements and that they cannot sue for an infringement of one word. The court held that the plaintiff had failed to prove the burden of proof and failed to discharge the onus placed on them and dismissed the petition.

## *Balancing IPR, Biodiversity and Indigenous Communities*

- Eshani Ashutosh Vaidya

Biological diversity has been deemed to include living organisms from terrestrial, marine and other aquatic ecosystems, including diversity within species, and between species and ecosystems.



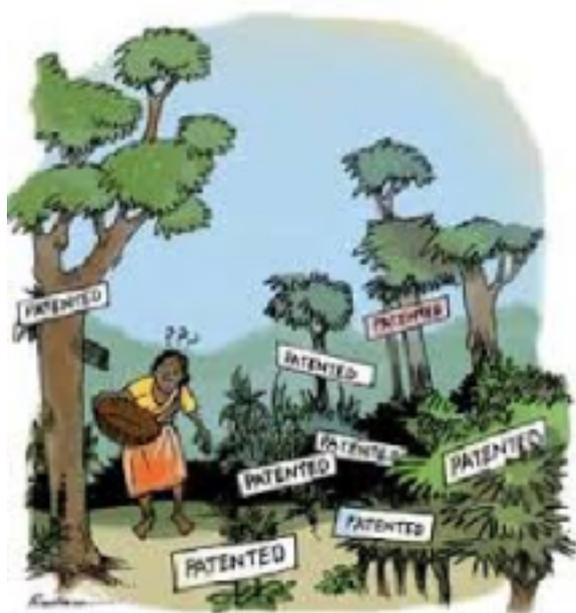
Biological resources or the Traditional Knowledge (TK) associated with the same do not necessarily restrict the number of users, being non-excludable and supposedly non-rival in nature, therefore allowing continuous expansion of the community of users. Brazil, once exporting 98% of the rubber trees in the world, was exporting virtually nothing once Malaysia planted the seeds for the same, followed by Singapore, which eventually became the rubber capital of the world.

Patents, process and product, provided to those who exploit biological resources lead to community exclusion. The community that held the resource and relied on it for their livelihood and medicinal value are excluded from accessing the resource unless they pay the necessary royalties for the same. The very concept of granting patents for existing Traditional Knowledge and associated genetic resources has been challenged by several countries, primarily India, on the grounds that to patent a product, there must be an element of novelty. Developing a product out of resources and knowledge that are pre-existing, is not novel at all. Simply extracting the required compounds from the resource and claiming to have “discovered” them would not amount to an invention, thus limiting the potential of having a patent granted. Therefore, India does not permit product patents but only process patents over biochemical, biotechnological and microbiological processes in extraction and subsequent derivation of profits of and from the resource. However, India permits product patents for agrochemicals and pharmaceutical compounds.

Allowing patenting of Traditional Knowledge has been the most common suggestion to protect the communities and the source country. The indigenous communities that own the resource do not understand rights and property in the capitalist manner. Conferring a right upon someone that is

unaware of what it entails, including its enforcement and the redressal mechanisms that are associated with it, does not have much practical value. The corresponding duty associated with the right however is one that can be enforced by several others with the recent citizen-standing justice system, through Public Interest Litigations, for example.

The foremost challenge of such a protection is the collective nature of the resource. The resource is one that is interlinked with the preservation and protection of the ecosystem and species. People belonging to past generations, several members of several communities, and several tribal chieftains are one among those to have contributed to the aforementioned resource. Granting IPR protection to a single member or a single community would not be just and would pave the way for more conflict. Barton suggests that the multi-source problem may be re-solved through a blanket license such as the one ASCAP (American Society of Composers, Authors and Publishers) holds for musical recordings: (A set fee is paid to ASCAP each time a song is performed, with a portion distributed to the artist.) However, use of genetic material may be much more difficult to monitor than music broadcasts.



Technology transfer and R&D in the agricultural sector to encourage promotion and dissemination of technology are part of the objectives of TRIPS (The Agreement on Trade-Related Aspects of Intellectual Property Rights). The Convention on Biological Diversity (CBD) too provides for technology transfer between the collector country and/or the exploitative country and the source country. The views on the effect of patents of technology transfer are divided. The published patent makes the information accessible to other researches, which would encourage development in the field. Simultaneous control retained over the technology, however, allows the company to transfer complementary skills to other countries, either through compulsory licensing, which restricts owners' rights to exclude others, or through FDIs. The other view is that the patent restricts the access to information, thus hindering research and development of the same; has the potential to increase the cost of drugs and other important products; promote competition instead

of cooperation; and focus attention on a few cultivated species or varieties. The inhibition of creativity and subsequent scientific innovation through imitation has simply no true long-term benefits. While compulsory licensing agreements are permitted under TRIPS, they are not an essential requirement. Therefore, there aren't many companies willing to indulge in overseas transfer of skills.

Ultimately, the developing nations believe that treating biodiversity as a common property resource hinders conservation and does not promote equity between the developed and the developing nations. While the CBD provides for national sovereignty over biodiversity, TRIPS, which says nothing in that regard, takes priority, considering the trade sanctions that can be employed to ensure its compliance. Ultimately, an Intellectual Property Rights approach to bio prospecting is necessary, but alone cannot achieve conservation, sustainable development or protection of the indigenous communities. A robust framework for protection of intellectual property, coupled with provisions for compulsory licensing and Prior Informed Consent, can be used to limit the exploitation by commercial enterprises while simultaneously allowing R&D to prosper.

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## Editor's Note

The Intellectual Property Rights Committee is excited to present to you another monthly edition of their Newsletter '*Intellectualis*' (*Latin*), which is the literal translation of the English word Intellectual.

The committee is overwhelmed with the response from the student body and cannot wait to publish further editions of *Intellectualis*. We are looking forward to your contributions about the various unexplored and controversial aspects of the subject. So look out for our further newsletters!

We would like to extend our gratitude to the student body of School of Law, Christ (Deemed to be University). We would also like to thank our Chairmen Dr. Avishek Chakraborty and Dr. Jayadevan Nair for constantly supporting us and guiding us through the drafting of this newsletter.

We hope that you enjoy reading our newsletter every month!

Suramya Uppal

19th November 2018

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