

# INTELLECTUALIS

INTELLECTUAL PROPERTY RIGHTS COMMITTEE | SCHOOL OF LAW,  
CHRIST (DEEMED TO BE UNIVERSITY) | EDITION 1

## Trouble for Tesla

Tesla has been accused of violating copyright. Allegedly, Elon Musk has used an image that he had found on a mug to market Tesla's new sketch pad feature without compensating or even attributing the artist.

## Fiat v Mahindra & Mahindra

Fiat has filed a complaint against Mahindra & Mahindra in the United States alleging that certain features of the Mahindra's ROXOR infringe Fiat's jeep design.

## Sardarji-Buksh!

Starbucks filed a complaint against Delhi-based start-up "Sardarbuksh" on the ground that the trademark was deceptively similar to "Starbucks". The Delhi High Court, in an interim order, instructed the defendants to change their name to "Sardarji-Buksh" as well as to change the logo.

INTELLECTUAL PROPERTY IS THE OIL OF THE 21  
CENTURY. LOOK AT THE RICHEST MEN A HUNDRED  
YEARS AGO; THEY ALL MADE THEIR MONEY  
EXTRACTING NATURAL RESOURCES OR MOVING  
THEM AROUND. ALL TODAY'S RICHEST MEN HAVE  
MADE THEIR MONEY OUT OF INTELLECTUAL  
PROPERTY.

- MARK GETTY -

LINQUOTES.COM

## Allowing Software Patents

- Rohan Jacob

### The Indian Scenario

The Copyright Act, 1957 provides for the protection of computer programmes by bringing it within the definition of literary works in S. 2(o). It further provides special protection to computer programmes in S. 14(b), by including the provisions of sub-section (a) and providing for the "right to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme." However, with regards to the extent of protection afforded to computer programmes, the Act only provides for "a set of instructions expressed in words, codes, schemes or in any other, including a machine readable medium, capable of causing a



## Samsung Electronics Company Ltd. V Akhilesh Tiwari

The Plaintiff Company filed the petition in the Hon'ble High Court of Delhi to avail declaration of trademark/logo SAMSUNG, GALAXY and its overall devices as a well-known trademark. They also prayed for the court to declare injunction against all the 90 defendants not to use any mark/logo/label/writing style/packaging as part of any of their products either in print or electronic form, if done would result in trademark infringement. Court decreed in favour of the Plaintiff Company giving a statutory right of trademark/trade name over SAMSUNG/GALAXY and said oval device



represented in a stylized manner is stated to be an artistic work under the Copyright Act, 1957.

Thus Court held the defendants liable, ordering them to destroy all those products infringing the rights of the plaintiff and also ordering costs against them as prayed by the plaintiffs.

computer to perform a particular task or achieve a particular result.” [Section 2(ffc)] However, upon examining this definition, one notices that it falls within the scope of how the existing copyright system is insufficient in spurring further innovation in computer software. The protection extends solely to the set of codes and instructions that has the capability of bringing about a desired function, but it doesn't protect the utility brought about by performing the desired function, which is not only the essential tenement of patent law but is also the very reason why the programmer invests his time and money in writing the particular software. The Patents Act 1970 excludes computer programmes from being patented. [Section 3(k)] However, recent Guidelines published by the Government provide that computer programs tied to a tangible invention may be granted a patent.

### Why Allow Patents for Software?

The case against software patents stands on two grounds. Firstly, the philosophical ground believes that computer programs, being based off of algorithms, operate in the same manner as mathematical formulae, and because they further the overall progress of humanity in the intellectual arts, their patenting would be morally wrong. The patenting of software would effectively prevent the further progress in information sciences, as they would be deterred from writing innovative programs, being shadowed by the fear of infringement suits.

The practical ground however feels that the current system of patent law already acts as an impediment to the proliferation of useful knowledge in the information sciences. A greater proportion of the investment put into software innovation is involved in enforcing the patent. Also, high licensing fees create





## Glenmark Pharmaceuticals v. Curetech Skincare

Petitioner Company is a generic manufacturer based in Mumbai producing anti-fungal cream called Candid-B. Defendant Company also a generic company who on a later date started selling a very similar product, with similar trade packaging and trade dress. Therefore Petitioner filed a suit for trademark infringement. Defendant contended that it was an honest mistake and was not to degrade or infringe the Petitioner's rights, thus does not want to contest the suit. Court held that:

“ P h a r m a c e u t i c a l companies which provide medicines for health of the consumers have a special duty of care towards them. However, nowadays, the corporate and financial goals of such companies cloud the decision of its executives whose decisions are incentivized by profits, more often than not, at the cost of public health. This case is a perfect example of just that.”

barriers of entry to new entrants, and so effectively prevent the creation of competing products.

The case for software patents holds that without any incentive to protect their inventions, there would be similar substitutable products that would have drawn from their invention. While the computer source code is protected by copyright, and the implementation is covered by trade secret law, these two fields do not cover the essential aspects of writing an innovative computer software that would be protected by a patent. Additionally, software patents operate on the ground rule that they ensure economic rewards to the inventor for writing the patented software.

The reason why we must change the existing system to allow patents for software programs is because the current systems do not afford sufficient protection while attempting to ensure incentives to the inventor for developing the software program. While a patent claim allows for the protection of software that produces a specific output and performs a specific function in a computer, a copyright on the software code merely encompasses the set of statements and instructions that are used to operate a computer. The distinction therefore lies in the function of the software and the commands used to instruct the computer. While patent law would protect the functions of the software, copyright law does not extend towards this functional aspect as it only looks at the creativity and does not enshrine the industrial utility principle that patent law upholds. While looking at the reverse, copyright law protects the set of statements and instructions, while patent law does not protect these statements and instructions as they only involve an idea without a practical application. Protecting a computer program under copyright law does not block others from developing functionally equivalent systems through similar instructions.



## Burger King corporation v. Techchand Shewakramani

The plaintiff has filed the present suit seeking permanent injunction restraining the infringement of trademark, passing off, damages, etc. in respect of the trademark 'Burger King' and 'Hungry Jacks' both as a trademark and as also a part of their corporate names. The plaintiff is a U.S. based company. The defendants are common directors of the company Ras Resorts and Apart Hotels Pvt. Ltd. They had also registered the domain name 'theburgerking.in' which is very similar to the official website of the plaintiffs. The defendants had also set up the 'Burger King Restaurant' and 'Hungry Jack's Fast Food Pvt. Ltd.'

The plaintiff contends that there is imminent threat of the defendants launching the Burger King carts and outlets in Delhi which would affect the franchise. It also contended that the defendants have plans to expand all over India and then go international.

Thus, the plaintiff has filed the present case seeking permanent injunction of the restraining the infringement of trademark by the defendants in this case.

(Delhi High court)



### *A tale of Four Fingers*

- Sudarshan Mj

"Even if it looks like a Kit-Kat, it might not be"- David Molloy

If one were to guess the name of the chocolate upon hearing its description - " a four finger shaped chocolate covered wafer bar confection", it is almost certain that they would guess the chocolate to be Kit-Kat. Originally created by Rowntree's of York in the United Kingdom, Kit-Kat is now globally produced by swiss giant Nestle. Nestle have been involved in a ten year legal tussle with Mondelez (formerly known as Cadbury Holdings), an American food company over a trademark. The trademark in question is the four-finger 'shape' of Kit-Kat and not the brand name 'Kit-Kat'. Before understanding the questions of law in the present case, it is very important to understand the procedural history of the case.



#### Brief history of the dispute

Nestle filed an application before the European Union Intellectual Property Office (hereinafter referred to as EUIPO) in 2002 to register the four finger shape of the Kit-Kat bar as a trademark under Council Regulation (EC) No 207/2009. The registration of the trademark was sought under Class 30 of the Nice Agreement in respect of "Sweets; bakery products; pastries; biscuits; cakes; waffles".

In 2007, Cadbury filed an application before the EUIPO and sought for this registration to be invalidated. Upon considering Cadbury's application, the EUIPO's cancellation division declared the trademark invalid. This decision was then appealed by Nestle before the second board of appeal of the EUIPO. In 2012, the board of appeal reversed the decision of the cancellation division and deemed the trademark to be valid.

In 2013, aggrieved by the decision of the second board of appeal, Mondelez appealed the decision before the General Court of the Court of Justice of the European Union and plead before the court to annul the decision of the board of appeal. The General court ruled that the four-fingered shape of the Kit-Kat chocolate bar does not merit trademark protection and therefore, must not be registered as a trademark. Aggrieved by this ruling of the court, Nestle then appealed this decision before the Court of Justice and this appeal was rejected and the General court's verdict was upheld.

**Pertinent questions and issues**

In the general course of business activities, a trademark has two functions - It identifies the source of the goods and it distinguishes goods of one manufacturer from another. In other words, a trademark must have distinctive character and must not be generic or common. In many jurisdictions, a trademark must be inherently distinctive in order to merit registration .

However, if the mark in question is a generic mark but the proprietor of such mark can prove that such a mark has acquired distinctiveness over a period of time as a result of constant usage by a relevant population, then it can be awarded protection.

The fundamental issue in this case revolved around the distinctiveness of the shape of the four-fingered chocolate bar. Nestle continually argued that the chocolate bar had acquired distinctiveness in many parts of the European Union as it is a very famous snack and it has been in the markets since 1935. Therefore, Nestle argued that the shape of the chocolate bar in itself was capable of indicating the source of the product and could successfully distinguish itself from chocolate bars produced by other manufacturers.

Mondelez is an American company that produces a chocolate called 'Kvikk Lunsj' (pronounced Quick Lunch) which is also a four-fingered trapezoidal wafer chocolate bar. Mondelez has consistently argued and maintained that the four-fingered shape of Kit-Kat was devoid of any distinctive character. If Nestle were to be awarded trademark protection for the shape of Kit-Kat, it would mean that Mondelez can no longer make and sell Kvikk Lunsj as Mondelez would then be infringing on Nestle's trademark.

Both the General Court and the Court of Justice in the European Union were of the opinion that Kit-Kat had acquired distinctiveness through use but held that it was distinctive only in some parts of the European Union. The courts maintained that in order for a trademark to merit protection, it must be distinctive in all parts of European Union and not merely in some parts of the European Union and thereby increasing the threshold for seeking trademark protection. The General Court ruled that Kit-Kat had not acquired distinctiveness in countries like Belgium, Ireland, Portugal and Greece and that Nestle had not provided sufficient evidence to prove the same.

**Conclusion**

The European Court of Justice has sent the matter back to the EUIPO and has directed it to re-consider the decision given by its second board of appeal in 2012 by re-evaluating by considering fresh evidence submitted by the parties. For the time being, Nestle does not have trademark protection for the shape of its world famous chocolate bar.

**M. Kumaaravel v  
Ashok Nagar  
Madras Coffee  
House**

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This case was filed under Sections 134 and 135 of the Trade Marks Act, 1999. The plaintiff in this case had a registered trade mark for "Madras Coffee House". They had filed this suit to restrain the defendant from, in any manner passing off their Hotel, Restaurant, Coffee shop, Snack bar as that of the plaintiffs' by using the offending Trademark "Ashok Nagar Madras Coffee House". This suit, however was withdrawn by the plaintiff.

(Madras High court)



## **Hindustan Unilever v. Harpreet Singh**

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Plaintiff is the registered proprietor of the trademark 'Surf Excel' and 'Active Wheel' and has Copyright protection over both of the product's artwork on the packaging which makes the products of the plaintiff distinctive. 'Surf Excel' detergent powder has been sold all over India with its distinctive packaging, which have become very well-known and have acquired substantial reputation and goodwill. The same also applies to the product 'Active Wheel'.

In July 2018, through a market survey carried out by the plaintiff in Jalandhar, Punjab, it was found that the Respondent were manufacturing, selling and distributing detergent soap under the mark 'Vishal Excel' and 'Vishal Advance' with an extremely similar trade design and packaging compared to the plaintiff's products. Plaintiff claimed trademark infringement over the use of the plaintiff's product name and design. On production of evidence, the court was satisfied that the defendant had infringed the plaintiff's registered mark and copyright subsisting in the designs. The Calcutta High Court passed the interlocutory order for ceasing such infringing material from the godown of the defendant.

(Calcutta High court)

## **TATA sons v. Krishna Kumar**

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The Plaintiff is the proprietor of the name/ trademark TATA and holds exclusive rights in the said trademark and their trademark TATA and the 'T' within a circle Device mark have been acknowledged as a well-known trademark. This case pertains to the impugned domain name www.tatafinserve.com. and the website which is parked on the said domain name

The plaintiff proved that the defendants adoption and using of trademark, trade dress, deceptively similar domain name, unequivocally amounts to the infringement of the their registered domain name, trademark, trade dress etc and amounts to passing of their goods and business hence, they are entitle to a decree for reliefs prayed for.

(Delhi High court)



## **Burger King corporation v. Techchand Shewakramani**

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The plaintiff has filed the present suit seeking permanent injunction restraining the infringement of trademark, passing off, damages, etc. in respect of the trademark 'Burger King' and 'Hungry Jacks' both as a trademark and as also a part of their corporate names. The plaintiff is a U.S. based company. The defendants are common directors of the company Ras Resorts and Apart Hotels Pvt. Ltd. They had also registered the domain name 'theburgerking.in' which is very similar to the official website of the plaintiffs. The defendants had also set up the 'Burger King Restaurant' and 'Hungry Jack's Fast Food Pvt. Ltd.'

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(Delhi High court)

## Protection of Domain names as Trademarks

-Meghna Menda

The significance of Domain Names on the internet has become much more than mere representation of the websites of different companies on the internet. In this age of developing information technology and worldwide businesses through internet, domain names have attained the status of being business identifiers and promoters.

The function that is performed by a domain name on the webserver is similar to that performed by a Trademark offline. The domain name acts as a virtual image and virtual identifier to one's business. A protected domain name acts as a reliable source/identifier for the entity's goods or services on the internet. Since the commercial activities on the internet are increasing day by day, the importance and usefulness of domain names too, are enhancing.

The functions of domain names are now quite similar to the functions of a trademark. Thus, a domain name seeking proper protection should be unique from all other domains names and well-known trademarks on the internet, so that it does not mislead, confuse, or deceive customers or violate public order or morality.

## *Compulsory licensing, the no win solution? - Mukund*

*Mobapatra*

Hitherto, the conflict between the valid requirements of the pharmaceutical industry for patent rights and the important human right of universal access to medicine has been addressed, in part, by the means of 'compulsory licensing'. Compulsory licensing cannot be considered to be the most efficient solution to the conflict. From the perspective of the pharmaceutical industry, the patent-holder loses a substantial portion of his potential revenue. From the perspective of the States (and the public-at-large), the use of compulsory licensing is limited to life-saving drugs. Recognising the deficiencies of compulsory licensing, it becomes imperative to propose an alternate, efficient solution.

Essentially, the nature of problem has resulted in maladjusted and maladaptive policies with significant disadvantages, to the companies who've invested heavily onto the creation of drug and securing it's patent. Yet with Government intervention, compulsory licensing, where the patent holder on average has invested 10 years and \$2.6 billion .

This maladroitness calls for necessity of bringing the pharmaceutical companies into a better position, having greater bargaining power. Here a platform, where both the parties the State and the patent holder respectively can negotiate with one another. It is recommended that a mechanism for such negotiation is established under the aegis of WIPO. This mechanism would involve WIPO as an overseeing entity. As such it will provide for facility to the stakeholders to freely negotiate terms favourable to every party in auspices of such facility. Negotiation facilities matters as stakeholders now have a platform where they can have bargaining powers that have balanced out, and no party is in position of disadvantage compared to the other, thus setting out fair terms of the bargain with no side facing any loss.

(Side Note: Implementation of Solution)

To understand how WIPO acts as an overseer of negotiations between the two stakeholders, it is vital to look into how WIPO envisages this role. In WIPO's General Rules of Procedure, Chapter 1, Rule 5 shows that there are two types of session the General Assembly engages in, on being the ordinary session, where members meet upon convocation of the director (Also see Article 6, clause 3 (a) of the Convention Establishing the World Intellectual Property Organization) and the extraordinary session, where members meet by convocation of director general upon request from the Coordination Committee (Article 8 of Convention) or one-fourth of the State Members of the General Assembly. (Also see Article 6, clause 3 (b) of the Convention Establishing the World Intellectual Property Organization). Either ways the discretion to propose WIPO as an overseer of negotiations is left to the Director General, who can include this proposition while preparing the draft agenda for ordinary session, (Rule 5, clause 1) and sending it

at the same time as the letter of convocation (Rule 5 Clause 3), on other hand after the date of ordinary session is fixed along with the draft agenda, one month prior to the fixed date(Rule 5 Clause 4), where any member state can request the Director General for supplementary items to be added at to the Draft Agenda, who will notify the other state members accordingly.

Also in case of extra-ordinary sessions, the draft agenda can be established by the Member State or Member States (Including Coordination Committee, of which of one-fourth of member states are it's members). So the initiative to make the WIPO as an overseer of negotiations, is left to the Director General, the Member States, or the Coordination Committee. Having initiated such a proposal in the agenda for the session, it's the General assembly, where during the session the members can discuss and deliberate and may change the order of the items on its agenda, amend some of those items, or delete them from the agenda. (Rule 21)

Through these pathways, the WIPO, can establish itself as an overseer over the negotiations, between the stakeholders. The draft agenda introduced during the session should include, the way negotiations should be conducted, by establishing a negotiation centre, seeing how an Arbitration and Mediation Centre was already introduced in 2007. The agenda should clarify that the centre isn't an adjudicatory body, but a facility where WIPO can act as an overseer for the deliberations between the stakeholders. The General Assembly should also understand that this negotiation is not just between Member States or pharmaceutical companies alone as stake holders, but also other International Organisations, such as World Trade Organisation and WHO. WTO and WIPO, by virtue of TRIPS Agreement and the Agreement Between the World Intellectual Property Organization and the World Trade Organization, where the Council for TRIPS of the WTO (Article 68 TRIPS) can have a consultative status with WIPO, to facilitate negotiations, and provide for consultation, at times where negotiating parties are in situation of information asymmetry, and are unable to engage in mutually favourable terms, can together consult Council For TRIPS, to negotiate in future with a better understanding.

Lastly seeing the WHO/WIPO/WTO Trilateral Symposium on Public Health, Intellectual Property and TRIPS at 20: Innovation and Access to Medicines; Learning from the Past, Illuminating the Future, held in Geneva on October 2015, WHO must play the role of a consultative body, where it is vital, that statistics, the situation of access to medicines is not misrepresented, in terms of negotiation, and be not an adjudicating body but rather a position of authority over vital information.

## Fun facts about Intellectual Property

### Simple is always good!

The entire description of the safety pin in its patent application was only two sentences: "The distinguishing features of this invention consist in the construction .of a pin made of one piece of wire or metal combining a spring, and clasp or catch, in which catch, the point of said pin is forced and by its own spring securely retained. They may be made of common pin wire, or of the precious metals."

### What an irony!

Former Alaska Governor Sarah Palin's bid to trademark her name and that of her daughter, Bristol was denied due to the fact that the names on the forms were unsigned.

### Clever Lee!

In 2013, Harper Lee filed a suit against her literary agent in order to keep her copyrights over the book "To Kill a Mockingbird", which her agent wanted transferred to his company.

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## Editor's Note

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

Intellectual property is entirely based on one's ability to understand things, specially complicated ideas and thus through '*intellectualis*' we wish to make more and more people aware about the importance of the subject. We believe that this newsletter is just getting us one step closer to our goal!

We would like to extend our gratitude to the student body of School of Law, Christ (Deemed to be University) for their overwhelming response to the newsletter. 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

10th September 2018

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