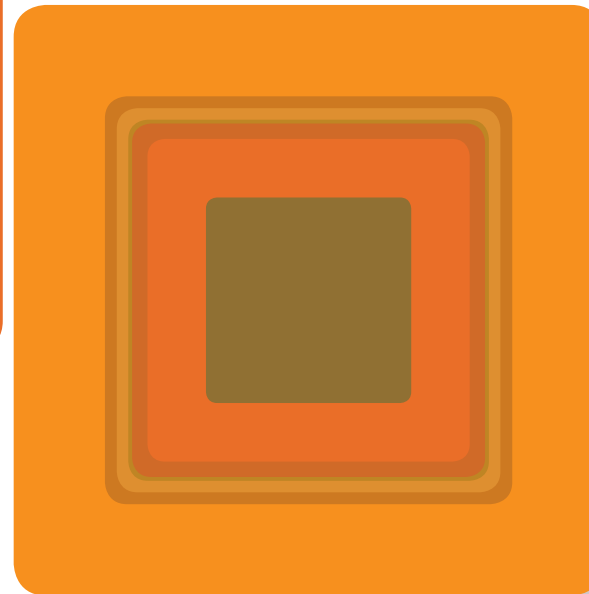














Newsletter



April - May 2013 Edition

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Ericsson sues Micromax for infringement of wireless patent rights

Ericsson, the Swedish giant in mobile network infrastructure manufacturing, has recently filed a patent infringement suit against Micromax (Indian handset maker) before the Delhi High Court, claiming damages to the tune of INR 100 crore (approx. US \$16 million). The claimed damages make it the largest patent suit in India's IT and telecom space. Ericsson has alleged that it has filed the suit, after three years of negotiations with Micromax, when it failed to yield a solution in the form of a license agreement on certain Standard Essential Patents (SEPs) relating to wireless technology standards such as GSM, EDGE and 3G.

On the other hand, Micromax has refuted Ericsson's allegations and counter-alleged that the Swedish company had failed to adhere to the global commitments on providing its industry-essential patents to handset makers under the so-called Fair, Reasonable and Non-Discriminatory (FRAND) terms.

In the form of an interim order, the Delhi High Court ordered Micromax to pay between 1.25% and 2% of the sale price of the disputed devices and deposit the amount with the court. In addition, the court allowed officials from Ericsson to join customs officials in inspecting Micromax's consignments for devices violating its patents.

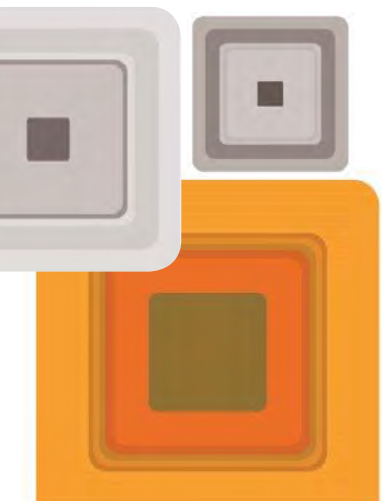
Novartis' anti-cancer drug not patentable: Supreme Court

The Supreme Court of India has upheld the rejection of the patent application for the beta-crystalline form of *imatinib mesylate*, an anti-cancer drug marketed under the brand name “Glivec” by Swiss drug-maker Novartis.

Novartis' patent application was first rejected by the Controller of Patents in 2006, based on the submissions filed by four generic drug manufacturers and a cancer patient group during the pre-grant opposition proceedings. Subsequently, an appeal was filed with the Madras High Court which was transferred to the Intellectual Property Appellate Board (IPAB). Even the IPAB upheld the rejection and consequently in 2009, Novartis moved the Supreme Court.

The case revolved around the interpretation of Section 3(d) of the (Indian) Patents Act, which mandates that the new versions of known drug molecules are not patentable unless they result in the enhancement of the efficacy of a known drug molecule.

The Supreme Court held that the term “efficacy” means “the ability to produce a desired or intended result”. Thus, the test of efficacy in terms of the statutory provision would depend upon the result and the function or the utility that the product under consideration is desired or intended to produce. Consequently, the court observed that in case of a medicine that claims to cure a disease, the test of efficacy could only be “therapeutic efficacy”, i.e. the capacity of the drug for beneficial change. It was further observed that a mere change of form with properties inherent to that form would not qualify as an enhancement of the efficacy of a known substance. Therefore, the court concluded that the physiological properties of the drug, i.e., more beneficial flow properties, better thermodynamic stability and lower hygroscopicity do not result in enhancement of “therapeutic efficacy”. In addition, in terms of the claim by Novartis that increase in bioavailability results in enhancement of therapeutic efficacy from the known substance, the Supreme Court held that the same requires to be corroborated with necessary research data in each case and as Novartis did not submit any material to establish this, the drug fails to satisfy the test laid down in Section 3(d) of the Patents Act.



Blue Grapes of Bangalore granted Geographical Indication (GI) status

The GI tag has been granted to Bangalore Blue grapes under the Geographical Identification of Goods (Registration and Protection) Act, 1999 for its specific geographic and indigenous variety. Characterized by its typical flavour and colour, Bangalore Blue grapes have been cultivated for the past 150 years in and around the city of Bangalore. With an annual production of around 450,000 tonnes, only about 4000 tonnes are purchased by the wine industry while the rest are used for raw consumption or for making jams and jellies.

EU-India Free Trade Agreement (FTA) draws flak over Geographical Indication (GI) issue

The EU-India FTA is under the scanner ever since India's largest dairy cooperative, Amul, has raised strong objections regarding the reduced import duties for EU dairy products in terms of the FTA.

It is feared that reduction in import duties would enable the EU to dump subsidized products in the Indian market. This will result in raising India's imports from the EU, while EU does not allow import of Indian dairy products citing strict sanitary standards. Besides this, another apprehension is with respect to the fact that the EU has a host of GIs for its various dairy products like Feta, Mozzarella, Emmentaler etc. and it is trying to extend protection of these GIs to countries outside the EU by requiring the country with which it is negotiating an FTA to protect its registered GIs. This pattern has been observed with regard to the EU-South Korea FTA and EU-Singapore FTA.

India joins International Trademark Registration System

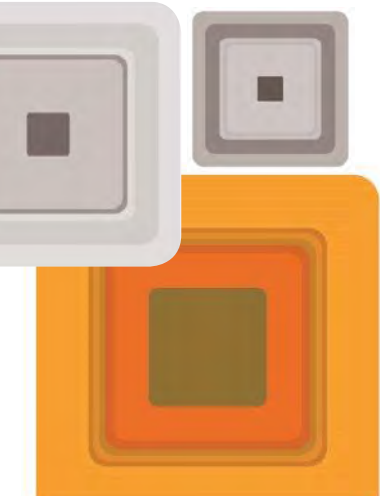
Minister for Commerce and Industry, Mr. Anand Sharma has submitted India's instrument of accession to the Madrid System for international registration of marks (Madrid System) at the World Intellectual Property Organisation (WIPO). The Madrid System offers a trademark owner the possibility to have his trademark protected in ninety member countries by simply filing one application directly with his own national or regional trademark office. Therefore, the Madrid System offers trademark owners a cost effective, user friendly and streamlined means of protecting and managing their trademark portfolio internationally.

With respect to India, the treaty will come into force on 8 July, 2013.

IPAB decides the 'Kit Kat' trade mark conundrum

In a dispute pertaining to 'Kit- Kat' trade mark, between Swiss multinational Societe des Produits Nestle S.A (Nestle) and Kolkata-based Kit Kat Food Products, the Intellectual Property Appellate Board (IPAB) has ruled in favour of Nestle, observing that the adoption of the impugned trade mark by Kit Kat Food Products was not *bona fide* and that it was merely an attempt on its part to ride on the goodwill of Nestle.

The IPAB observed that Nestle had been using the 'Kit Kat' trade mark in India since 1 November, 1987 and the same was proved by providing evidence in the form of an export sales invoice. It is pertinent to note that it was accepted by Kit Kat Food Products that it had been using the trade mark since 1991. Therefore, the IPAB ruled that as Nestle was the prior user of the trade mark, the public would identify the 'Kit Kat' trade mark with Nestle and not with Kit Kat Food Products.



Fem Care granted 'GATSBY' trade mark rights

In 2005, Mandom Corporation filed a rectification petition to remove the trade mark registration of 'GATSBY' registered by the Indian cosmetics company Fem Care Pharma Ltd. The petition was filed on the grounds of alleged non-use of the trade mark by Fem Care Pharma for a continuous period of five years, and no demonstrable *bona fide* intention to use it either. It alleged that Fem Pharma's claims of use since February 1994 were false. Further, Mandom Corporation claimed that they had been using the mark internationally since 1978, and had entered the Indian markets in 1999. In addition, it claimed that it had registrations for the mark in several countries and spent a substantial amount of money in advertising the brand.

In a recent ruling, the Intellectual Property Appellate Board (IPAB) upheld the validity of Fem Care's registration on the ground that although Mandom claimed to have adopted the mark as early as 1979, 15 years before Fem Care's adoption in 1994, Mandom could not establish by way of any documentary evidence that Fem Care had or could have had any prior knowledge of Mandom's mark. The IPAB ruled that there is not a single bill, invoice or document of any sort to establish that Mandom's mark 'GATSBY' is in use or even available in India prior to 2003. By applying for regulatory approval to manufacture perfumes in 2004, Fem Care succeeded in establishing its *bona fide* intention to use the mark beyond a reasonable doubt. It was also observed by the IPAB that a mere suspicion of Fem Care's *mala fide* intention in adopting an identical mark could not form the basis for cancellation of the registration. Further, the IPAB was convinced by Fem Care's explanation that the mark owed its origin to the novel 'The Great Gatsby' and was honestly conceived as a trade mark by its Managing Director in 1994, the year in which the book was republished.

IPAB rules in favour of Jaguar Cars

The Intellectual Property Appellate Board (IPAB) has issued an order in a trade mark dispute in favour of England's Jaguar Cars and against the Swiss company, Manufacture Des Montres Jaguar. This was an appeal by Jaguar Cars against the order of the Deputy Registrar of Trade Marks, Kolkata, wherein he dismissed their opposition to Swiss company's application for the registration of the trade mark 'Jaguar' for watches.

In 2006, while dismissing the opposition filed by Jaguar Cars, the Deputy Registrar held that they had not filed any evidence of using the trade mark 'Jaguar' for watches in India and it used the mark sparingly for clocks fitted to the dashboard. 'Jaguar' being a dictionary word, Jaguar Cars should not claim exclusive monopoly right in respect of totally different goods.

Aggrieved by the order, Jaguar Cars filed an appeal before the IPAB and the matter was decided in favour of England's Jaguar Cars. Observing that the Deputy Registrar had completely ignored the reputation of Jaguar Cars' mark as a luxury brand in India and the world over, the IPAB pointed out that Jaguar Cars is the prior registrant in India since 1945 for auto products. Further, it was held that even if the competing goods were dissimilar, there existed many possible avenues for confusion such as confusion of sponsorship, confusion of business affiliation, post-sale confusion etc. Therefore, Jaguar Cars' appeal was allowed by the IPAB.

Drug Price Control Order (DPCO) 2013 issued

On 15 May, 2013, the Department of Pharmaceuticals issued the DPCO, which will alter price regulation dynamics and substantially increase the number of medicines covered by price cap umbrella. The earlier DPCO regulated prices of only 74 bulk drugs, whereas the new DPCO order will regulate prices of as many as 348 medicines.

The new DPCO will come into effect in 45 days from the date of issue of the order. It will allow National Pharmaceutical Pricing Policy (NPPP) 2012 to regulate the prices of 348 drugs which are covered under essential meds list 2011.

Justice J S Verma passes away

Former Chief Justice of India, Justice J. S. Verma passed away at the age of eighty years. Recently, he headed the Committee which was formed by the Government, in the wake of gang-rape of a twenty-three year old woman in Delhi in December 2012.





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