Newsletter

August-September 2014 Edition

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News from the Controller General of Patent, Designs and Trademarks (CGPDTM)

Fee hike for trade mark applications

Vide notification dated August 1, 2014, the Central Government amended the Trade Marks Rules, 2002, to the effect that the official fees for filing the trademark applications under entries 1,3,4,5,6 and 7 for Forms TM-1, TM-2, TM-52, TM-51, TM-8 and TM-37 of the First Schedule and in Forms TM-1, TM-51 and TM-52 in the Second Schedule of the Trade Marks Rules, 2002 has been increased from Rs. 3500 to Rs. 4000.

Further, the fees for obtaining expedited search report under serial no. 71 in First Schedule and in Form 63 in Second Schedule has been increased from Rs. 12500 to Rs. 20000.

Consequently, office of the CGPDTM issued public notice dated August 7, 2014, requesting applicants/agents who have filed applications or requests for expedited examination after August 1, 2014 to pay the difference in the fees in respect of applications/requests filed from the date of notification till issuance of the notice, on or before September 30, 2014.

If deficient fees is paid after September 30, 2014, the filing date will be considered to be the actual date of payment of balance fees.

Revised Draft Guidelines issued by the Indian Patent Office

Taking into account the reviews and remarks made by the stakeholders, the Indian Patent Office (IPO) issued Revised Draft Guidelines for Examination of Patent Applications in Pharmaceuticals. The guidelines are to be supplementary to the practices adopted by the patent office. In case of any conflict with the Patents Act, 1970 and the Rules made thereunder, the Act and Rules shall prevail. The provisions which have been emphasized in the context of examination of applications in pharmaceutical and allied fields are Sections 2(1)(j), 2(1)(j)(a), 2(1)(ac), 3(b), 3(c), 3(d), 3(e), 3(i), 3(j), 3(p), 10(4) and 10(5).

The revised guidelines have been amended after careful consideration of the suggestions received from the stakeholders, such as forgoing the requirement of disclosing INN name by the applicants, removing the reference to negative examples in respect of inventive step and restricting the requirement of invention disclosure to representative compounds only instead of disclosing every possible embodiment.

Intellectual Property Office takes steps towards modernization and transparency

A new office building for the Intellectual Property Office (IPO), having state of the art infrastructure and a hall of fame to showcase and highlight the notable products protected by intellectual property has been constructed in New Delhi under the Government of India's plan, 'Modernization and Strengthening of Intellectual Property Offices'. Inaugurated on September 8, 2014 by Mr. Amitabh Kant, Secretary of Department of Industrial Policy and Promotion (DIPP), the building is earmarked for functioning of the Patent Office as International Searching Authority (ISA) and International Preliminary Examining Authority (IPEA) under the Patent Cooperation Treaty (PCT).

At the same event, the Secretary of DIPP released the first issue of "IP Expressions". Starting out as a bi-annual technical publication, "IP Expressions" is expected to be a source of information, sharing the knowledge and experience of IPO officials. A new payment gateway integrated to the e-filing system of the Intellectual Property Office was also inaugurated. The gateway will facilitate payment using internet banking, credit cards, etc. of more than 70 banks which was previously limited to 2 banks.

Also launched was the 'Stock and Flow' facility for the Indian Patent Office. Already operational in respect of trademarks, the facility was extended to patents to track the progress of work at the Patent Office.

Update – Ministry of Corporate Affairs

Amendments and clarifications with regard to provisions of Corporate Social Responsibility

The Ministry of Corporate Affairs amended, *inter alia* Rule 4(6) of the Companies (Corporate Social Responsibility Policy) Rules, 2014 (hereinafter CSR Rules) *vide* notification dated September 12, 2014. Rule 4 of the CSR Rules is in respect of CSR Activities and sub-rule (6), allows companies to build CSR capacities of their own personnel and of their Implementing agencies, however, mandates that such expenditure be limited to five percent of the total CSR expenditure of the company in one financial year. Rule 4(6), has been amended to the effect that the expenditure on building a company’s CSR capacities now includes expenditure on administrative overheads.

Consequently, the Ministry of Corporate Affairs issued a clarification *vide* General Circular No. 36/2014 dated September 17, 2014, omitting clarification (iv) of General Circular No. 21/2014 which stated that salaries paid to regular CSR staff as well as to volunteers in proportion to company’s time/hours spent specifically on CSR can be factored into CSR project cost as part of the CSR expenditure.

Ministry of Corporate Affairs announces Company Law Settlement Scheme for “Defaulting Companies”

The Companies Act, 2013 requires companies to file annual returns and financial statements on the MCA21 electronic registry within prescribed time limits. The quantum of punishment in case of non-compliance or default has been enhanced under the 2013 Act. Further, enhanced fine has also been prescribed for repeated default. Section 164(2) of the 2013 Act provides for disqualification of Directors of any company which has *inter alia*, not filed annual returns and financial statements for a continuous period of three financial years.

Various stakeholders sent representations to the Ministry of Corporate Affairs, requesting for grant of transitional period/one-time opportunity in view of the enhanced fine and punishment for default in filing annual returns and financial statements. Pursuant to the representations, the Ministry of Corporate affairs has introduced a scheme named “Company Law Settlement Scheme 2014” *vide* General Circular No. 34/2014 dated August 12, 2014 condoning the delay in filing the documents, granting immunity from prosecution and charging a reduced additional fee of 25% of the actual additional fee payable. Moreover, the scheme also permits inactive companies to get their companies declared as “dormant companies” by filing a single application at reduced fees.

The scheme shall remain in force from August 15, 2014 up to October 15, 2014. The applicability of the scheme extends to any defaulting company which had documents due for filing till June 30, 2014. Apart from laying down the manner and procedure to be followed for availing the benefits under the scheme, it also specifies the classes of companies that will not be able to avail of the scheme.

Amendments to conditions for certain related party transactions - The Companies (Meetings of Board and its Powers) Rules, 2014

The Ministry of Corporate Affairs amended the Companies (Meetings of Board and its Powers) Rules, 2014 *vide* notification dated August 14, 2014. Notable are the amendments made to Rule 15(3) which prescribes the conditions and threshold limits subject to which a company may enter into related party transactions without prior approval by a special resolution.

- *Prior to amendment, rule 15(3)(i) specified that a company having a paid-up share capital of ten crore rupees or more cannot enter into a related party transaction without prior approval by a special resolution – this provision has been omitted;*

- Limit prescribed for <u>*sale, purchase or supply of any goods or materials*</u> without prior approval by a special resolution changed to - **10% of turnover of company / Rs. 100 crore, whichever is lower** *(earlier - 25% of Annual turnover);*

- Limit prescribed for <u>*selling or otherwise disposing of, or buying, property of any kind*</u> without prior approval by a special resolution changed to **- 10% of Net worth / Rs. 100 crore, whichever is lower** *(earlier - 10% of Net worth);*

- Limit prescribed for <u>*leasing of property of any kind*</u> without prior approval by a special resolution changed to -10% of the Net worth / **10% of turnover of company / Rs. 100 crore, whichever is lower** *(earlier - 10% of Annual turnover / 10% of Net worth);*

- Limit prescribed for <u>availing or rendering of any services</u> without prior approval by a special resolution changed to **-10 % of turnover of company / Rs. 50 crore, whichever is lower** *(earlier - 10% of Net worth);*

The explanation to the amended rule 15(3) provides that the limits prescribed shall apply for transactions taken individually or with transactions entered into in the previous financial year.

Amendment in Schedule II of the Companies Act, 2013

Pursuant to the powers conferred under Section 467(1) of the Companies Act, 2013, the Central Government amended Part 'A', paragraph 3, sub-para (i)of Schedule II (USEFUL LIVES TO COMPUTE DEPRICIATION) which deals with computation of depreciation of assets. As per the amendment in paragraph 3, the residual value of an asset shall not be more than 5% of the original cost of the asset and if the company adopts a useful life or uses a residual value different from the limit specified above, the financial statement shall disclose such difference.

There are amendments in paragraphs 4 and 7 as well.

Amendment in Schedule VII of the Companies Act, 2013

Ministry of Corporate Affairs *vide* its notification dated August 6, 2014, amended Schedule VII of the Companies Act, 2013 (Activities which may be included by companies in their corporate social responsibility) by inserting item (xi) followed by an 'Explanation'. "Slum area development" has been inserted as item (xi) and the 'Explanation' to the insertion states that 'slum area', for the purposes of this item, shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.

The notification has come into force on August 7, 2014.

The Companies (Removal of Difficulties) Seventh Order, 2014

In exercise of the powers conferred by sub-section (1) of Section 470 of the Companies Act, 2013, the Central Government issued the Companies (Removal of Difficulties) Seventh Order, 2014 dated September 4, 2014, to remove the difficulties arisen in implementation of the provisions of sub-section (5) of Section 143 (Powers and duties of auditors and auditing standards). The order widens the scope of Section 143(5) by substituting "a Government Company" for "a Government company or any other company owned or controlled, directly or indirectly by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments".

Update - FDI Guidelines

Cabinet opens up Railways to FDI; DIPP notifies rules raising cap in Defence

The Union Cabinet has finally opened up the railways to Foreign Direct Investment (FDI) which was long overdue. It is a welcome measure as the Indian Railways needs rapid modernization.

Hundred percent FDI has been allowed in several sectors through the automatic route including high-speed train systems, suburban corridor projects through the public private partnership (PPP) route, rolling stock including train sets, coaches manufacturing and maintenance facilities, railway electrification, signalling systems, freight terminals, passenger terminals and infrastructure in industrial parks like railway line and sidings. It will also be allowed through the Special Purpose Vehicle route to provide last mile connectivity to ports and mines. However, FDI has not been permitted in train operations and safety.

Department of Industrial Policy & Promotion (DIPP) has released a Press Note on August 26, 2014 stating that the FDI cap has been increased in the Defence sector from 26 to 49 percent. Proposals beyond 49% will be cleared by Cabinet Committee on Security (CCS) without requiring clearance from Cabinet Committee on Economic Affairs (CCEA) on case-by-case basis, even when the proposed inflows are in excess of Rs. 1200 Crores. This is as per the new rules notified by the DIPP. Earlier, all FDI proposals with foreign investments over Rs. 1200 Crores had to be cleared by the CCEA. FDI proposals within 49 percent will be cleared by CCEA if the investment is in excess of Rs. 1200 Crores.

Securities Laws Amendment Act, 2014: New powers to fast track prosecution, refunds

The Union Government notified the Securities Laws Amendment Act, 2014 on August 25, 2014. The Act amends the Securities and Exchange Board of India Act, 1992, the Securities Contracts (Regulation) Act, 1956 and the Depositories Act, 1996. The Act was necessitated by increasing number of fraudulent investment schemes and lakhs of investors being deceived by them. The Saradha Group financial scam in West Bengal is of special significance in this context.

The purpose of the Act is to grant Securities Exchange Board of India (SEBI) with additional powers to put a check on unregulated and illegal deposit taking and Ponzi schemes.

The Securities Laws Amendment Act, 2014 empowers SEBI to regulate any pooling of funds of Rs. 100 crores and above, that are not overseen by any regulator under any law. It can also conduct search-and-seizure operations on any suspected securities law violator's premises after obtaining permission from a magistrate or judge of a court in Mumbai. SEBI is also empowered to recover monetary penalties imposed by it through attachment and sale of assets, arrest and detain an individual for any failure to comply with its orders, call for information and records from any person, including banks or other authority, to aid its investigation, establish special courts for fast-tracking cases under the SEBI Act, re-examine an adjudicating officer's orders and raise the penalty amount if it is in the interest of the securities market and enter into agreements for exchange of information with foreign financial regulators.

India to bring out its first Intellectual Property Rights (IPR) Policy

The Government, in a move to strengthen its IPR regime, has announced that it shall come out with a comprehensive IPR Policy in six months. Commerce and Industry minister Nirmala Sitharaman made a formal statement regarding the same. The announcement is in the backdrop of recent criticisms faced by India from US and EU regarding its stringent IPR laws as a result of which many pharmaceutical companies from US and EU were allegedly denied patents in the Indian courts.

India has for long been criticised for its weak and restrictive IP practices. The new IP Policy is set out to be more liberal in nature and at the same time take into account the challenges of a developing country and protect the country's own indigenous interests.

Delhi High Court rules on deceptive similarity

Allied Blenders and Distillers v. Shree Nath Heritage Liquor Pvt. Ltd.

Vide judgment dated July 1, 2014, the Delhi High Court made absolute the ex-parte interim injunction granted against the proprietors of the trademark “Collector’s Choice” till the decision of the suit.

The plaintiff, Allied Blenders and Distillers submitted that it is the registered proprietor of the mark “Officer’s Choice” and has been using it in the course of its business since 1988. Further, it is only in 2007 that it sought to register the mark. The plaintiff also submitted that it became aware of the defendant selling the whiskey under the mark “Collector’s Choice” in November 2013 and claimed that it is conceptually identical and deceptively similar to its trademark “Officer’s Choice”.

The court while deciding the same looked at the case from the buyer’s perspective and also considered associative thinking. The defendant had contended that there is no likelihood of confusion as the customer segments of the product of the two are different owing to the price of the defendant being double the price of the product of the plaintiff. The court observed that since both plaintiff’s and defendant’s products were rum and alcoholic beverages, considering the class of consumers hardly any distinction will be made by them. It was noted that the price difference between them was not that high so as to strictly distinguish between the two. Moreover, even if the customer remembers the mark "Officer’s Choice", he can be easily fooled into buying a superior product of the same manufacturer or another product of the same manufacturer.

The court, relying on its decision in *Mohan Meakin Ltd. Vs. A.B. Sugars Ltd.* where it was held that the two marks “Old Monk and “Told Mom” were deceptively similar, came to the conclusion that there is likelihood of confusion between Officer’s Choice and Collector’s Choice. The court also relied on the findings of the Supreme Court in *Cadila Healthcare Ltd. v. Cadilla Pharmaceuticals Ltd* and held that in a multi-lingual country like India, where large proportion of population is illiterate and very small fraction of people know English, even slight difference in the spellings may sound phonetically same.

Citing several articles on human psychology and human tendency to associate similar objects and also a book named “Thinking, Fast and Slow”, the court came to the conclusion that the customer’s / consumer’s memory is likely to mix "Officer" with "Collector", the possibility of trademark "Officer’s Choice" of the plaintiff being remembered / recalled as "Collector’s Choice" cannot be ruled out. While deciding, the court also took into consideration the fact that Officer’s Choice has overtaken Diageo’s Johnnie Walker Scotch to become the largest whisky brand in the world.

Diageo Brands B.V. and others v. Khoday Breweries Ltd.and others

Plaintiffs, Diageo Brands B.V. and other associated and affiliated companies of Diageo Brands B.V., filed a suit seeking injunction against Khoday Breweries Ltd.

The plaintiffs are the owner of the globally popular brands such as Johnnie Walker Red Label, Johnnie Walker Black Label, Vat 69, Smirnoff, Black and White, Baileys, Guiness, etc. It was alleged by the plaintiffs that the defendants have applied for and also got registered many marks which were confusingly and deceptively similar to their registered trademarks. Some of the confusing marks were Khodey Black and White, Vat 999, Gudness, Bond's Green Label, Nof, etc.

The plaintiffs *inter alia* sought a restraint order restraining the defendants from applying to register or to maintain the applications or to register any of the trademarks mentioned in the application. The court noted that the plaintiffs have the remedy of initiating proceedings for cancellation of the registered marks of the defendants at their disposal and held that a restraining order as sought on registered trademarks and application for registration could not be granted at the interim stage. Pertaining to the marks which are pending registration, the court observed that the procedure for the registration is contained in Sections 18 – 23 of the Trade Mark Act, 1999. In view of the specific procedure laid down for registration and opposition to registration, it was held that it is not permissible to grant the injunction as stated above.

The plaintiffs had also sought an injunction restraining the defendants from using or attempting to use or asserting any right to use the deceptive and confusing trademarks. The court granted interim injunction to the plaintiffs on the basis of its findings that as many as 20 marks sought to be registered by the defendants are similar to that of the plaintiffs.

Delhi High Court vacates injunction against ZTE for patent infringement

Vringo Infrastructure Inc. and others (collectively referred to as Vringo) had filed a law suit against *inter alia*, ZTE Telecom India Pvt. Ltd., ZTE Corporation, etc.(collectively referred to as ZTE) for infringing Indian patent 200572 in January 2014. In February, an ex-parte preliminary injunction was granted against ZTE. The same has been vacated by the Delhi High Court *vide* order dated August 5, 2014.

In its written statement and reply to the application seeking injunction, ZTE contended that the plaintiffs, in their cause of action clause, have stated that the cause of action accrued to them in December 2012, when the cease and desist notice was sentby the plaintiffs to ZTE, while the fact is that the predecessor-in-interest (Nokia Telecommunication) did not take any action against defendants knowing that they were using the technology since 2002. Further, the plaintiffs had conceded the fact of having knowledge since 2002 and had pleaded cause of action to have arisen in the year 2012. ZTE also stated that the original deed of assignment from Nokia Telecommunication, has not been placed before the court, rather the deed presented before the court had the value of 10 USD for the patents assigned to the plaintiffs, which is a sham. Moreover, the affidavit filed by the plaintiffs cannot be treated as an affidavit of an expert since the deponent had a degree of management while he was testifying the affidavit as an expert on science.

The court, in view of the above contentions, accepted ZTE's contention that the expert relied on by Vringo was not an expert for the purpose of showing infringement and validity of the patent since he does not qualify to be a scientific advisor in terms of clause (b) of Rule 103 of the Patent Rules, 2003 and Section 45 of the Evidence Act, 1872. Hence, no prima facie case was made out by the plaintiffs since the affidavit could not be treated as expert affidavit.

Further, Vringo had themselves admitted in the rejoinder that they had given the license to exploit their patented technology to certain parties like NSN (Nokia), Alcatel, Samsung, etc. Such parties are entitled to call upon the patentee to take proceedings to prevent any infringement of the patent under Section 84 of the Patents Act, 1970. Since in this case, no such objections were raised by the licensee to the original patentee and similarly, no action was brought by the original patentee before assignment to the plaintiffs, the court was of the opinion that the technology of the plaintiffs is not being infringed.

The court was not satisfied that non-grant of ad interim injunction would result in irreparable loss to the plaintiffs. Hence, the injunction was vacated and the application under Order 39 Rule 1 and 2 of the Civil Procedure Code was disposed of. The defendants were asked to deposit a bank guarantee in favour of Registrar General of the court for a sum of Rs. 5 crores or for a sum of Rs. 2.5 crores and secure the remaining 2.5 crores by way of security offered to the satisfaction of the Registrar General within 2 weeks.

Vringo appealed against the aforesaid order dated August 5, 2014.While examining the Single Judge's observation to the effect that a person not holding a degree in science could not be held an expert in the telecommunications field under Section 45 of the Evidence Act, the two-judge bench held that an expert need not have a specialised degree but can become an expert by virtue of his occupation or experience as Section 45 does not mention educational qualifications but only requires a person to be "specially skilled" in the particular field. The injunction, however, stands vacated.

Bombay High Court recognises IP rights of Candy Crush Saga

The Bombay High Court *vide* order dated June 12, 2014 granted an ex-parte ad interim injunction in favour of King.Com Limited, the owner of the most popular game "CANDY CRUSH SAGA" and proprietor of the trade marks Candy Crush Saga/Candy Crush and owner of copyright registrations in respect of its game in the United States. The plaintiff had claimed protection under Section 40 of the Copyright Act, 1957 read with International Copyright Order, 1999, submitting that the rights of authors of member countries of the Berne and Universal Copyright Conventions are protected under Indian copyright law. The Bombay High Court restrained the defendant, Apeejay Surrendra Park Hotels Limited, a company engaged in the hospitality business, from using the plaintiff's copyrighted work and intellectual property (including trade mark CANDY CRUSH) in respect of advertisements and promotional material of an event proposed by it at its hotel. The Hon'ble Court directed that injunction will extend to all publicity material, whether in hard copy or in digital form and is not restricted to printed material only and the defendant shall not be entitled to use the words "CANDY CRUSH" or the plaintiff's copyrighted material even in emails, newsletters, soft copy brochures, entry tickets, passes or in any other manner.

Subsequently, the parties agreed to settle the matter amicably and filed their consent terms with the court. The suit was decreed in terms thereof and disposed of accordingly on June 24, 2014.

Multi-billion retail brand Ikea opposes registration of textile brand Ekaya

A notice of opposition was filed in the Trade Mark Registry by Swedish retailer Ikea in 2013 opposing the registration of the mark 'Ekaya'. Ikea is the largest single-brand retail company, dealing in furniture and furnishings and has recently received the approval of Foreign Investment Promotion Board (FIPB) and will be opening its retail chain in India soon. It contended that Ikea is an internationally well-known brand name and it has a strong presence in India. Therefore, the phonetic similarity between Ikea and Ekaya will cause deception.

The Trade Marks Registry has recently forwarded the notice of opposition to the applicant, SND andCo., calling upon it to file a Counter Statement. SND and Co. claims to be in the textile business for four generations and had applied for registration of the mark in 2012. The applicant states that it has a totally different business model and further, that rejecting its trade mark application would clearly be in violation of the normal principle of comparison of marks. Matter is pending before the Trade Marks Registry.

Registrar not empowered to reject an application preferred to the Copyright Board on merits

The petitioner (Dandi Salt Pvt. Ltd.) had filed an objection with the Registrar of Copyrights against the registration of one of the respondent's copyright, which was rejected. The rejection was challenged by the petitioner in an appeal under Section 72(1) of the Copyright Act, 1957 before the Copyright Board. The petitioner had also filed an application for condonation of delay. The appeal was dismissed by the Copyright Board on the ground that it was delayed and beyond the period of 3 months prescribed under Section 72(1) of the Act. All the subsequent applications of the petitioner to the Copyright Board seeking review of the order were rejected by the Deputy Registrar of Copyright. The petitioner moved the Delhi High Court challenging the orders of the Deputy Registrar rejecting the review applications.

The issue before the court was whether the Registrar of Copyrights has the jurisdiction to reject an application of review preferred before the Copyright Board and whether the Board has the power to review its own decision in the facts and circumstances of the case.

The court held that the Registrar of Copyrights does not have the power to reject a review application on merits though it has the power to decide whether the application is in the correct form or complete in all particulars or otherwise competent.

The court relied on the findings of the Supreme Court in Kapda Mazdoor Ekta Union v. Birla Cotton Spinning and Weaving Mills Ltd. where the Apex Court has held that though it is settled law that in the absence of an express power of review, the Tribunal would not have the power to review its own decisions, however, there is a distinction between the power to review a decision on merits and to correct a fundamental procedural infirmity and if a fundamental procedural infirmity goes to the root of the proceedings, even in absence of express provisions the adjudicating authority will have the power to review the same. The court, however did not opine on whether condonation of delay is a procedural matter or on the merits of the controversy. The court set aside the orders of the Registrar or Copyrights and the application for review was remanded back to the Copyright Board for appropriate decision.

Public Interest Litigation (PIL) over Patent Office's Disclosure Policy

A PIL was filed by a patent's activist in Delhi High Court in August, 2014, claiming that India's Patent Office should follow provisions of the Right to Information (RTI) Act in order to make its information dispensation system more transparent and easily accessible to public.

Reportedly, he submitted that the choice of seeking information whether through the RTI Act or the specific legislation should lie with the citizen. Further, he added that pre-existing laws drastically cut the amount of information one can ask for. It is his case that the information seeker is faced with two big challenges in the present scenario, firstly, the Patents Act only offers access to limited set of information, much lesser than what can be obtained through RTI and secondly, procuring information through Patents Act can be exorbitantly expensive.

The court has issued notice to the Government.

No reason required for seeking information under the Right to Information (RTI) Act

The Madras High Court on September 23, 2014, suo motu reviewed its earlier judgment on the RTI Act and rectified it stating that it was an error apparent on the fact of the record as they had passed the judgment without noticing certain provisions.

The court had, by an (earlier)order dated September 17, 2014, ruled that the RTI applicant must furnish reasons for seeking information. The court held that a person while seeking information under the RTI Act must show that it is either for his/her 'personal interest' or 'public interest'.

Legal activists vehemently opposed and criticized the order pointing out that it defeats the purpose of the RTI Act and some also stated it to be illegal. The court, while passing the order failed to take into consideration that Section 6(2) of the Act expressly states that "an applicant making request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him".

The clarified position after rectification is now at par with Section 6(2) of the RTI Act and the earlier observations were set aside.

National Stock Exchange (NSE)fined 55 Crores for abusing its dominant position in the Currency Derivatives (CD) market

In an appeal by the NSE against the Competition Commission of India (CCI) before the Competition Appellate Tribunal, the Tribunal upheld the order passed by CCI holding that NSE had abused its dominance and directing NSE to pay a fine of Rs. 55.50 crores which is 5% of its average turnover.

The Tribunal upheld the findings of the CCI to the effect that NSE is a dominant player in the relevant market and had abused that position under Section 4 of the Competition Act, 2002 by introducing predatory pricing i.e. the sale of goods or provision of services at a price which is below the cost. CCI had found that MCX-SX was permitted to do business only in the CD segment and it was the only other player in this segment other than NSE. Since, NSE waived all transaction fee in respect of all currency future trade in this segment, MCX-SX had to do the same. As a result, MCX-SX's business ran in huge losses.

The Tribunal took account of the fact that CCI, to arrive at its findings, had considered *inter alia* the concept of unfair pricing, the Director General's findings in respect of NSE's waiver policy, and that NSE had no justifiable reason to offer its services for free.The Tribunal observed that NSE held an absolute position of dominance in the stock exchange market, a market share of 71.43% in the equity segment in 2008-2009, above 90% in the Wholesale Debt Market (WDM) segment since 2001-2002 and 47-48% in the CD segment. As NSE had huge profits in the other sectors it could balance the same. This waiver in respect of the CD segment was done intentionally to outcast competition and maintain supremacy.

The Tribunal duly noted CCI's observations and rejected NSE's contention that it had taken this step to invite larger participation to revive the market from a nascent stage and it did not have the history of doing it in any other sector. NSE's fee waiver did not only eliminate the business of MCX-SX but also eliminated potential and efficient competitors from entering the market. The Tribunal was hence, in agreement with the findings of the CCI and the Director General and found no justification on the part of NSE to continue with the predatory pricing.

The Tribunal however did not concur with the majority decision of CCI on the point that NSE used its dominant position in the Future and Options (F and O), equity and WDM market to enter into, or protect, CD segment market as envisaged in Section 4(2)(e) of the said Act. It had been observed that for constituting abuse of dominant position under Section 4(2)(e) there have to be two markets, one in which the enterprise has a dominant position and the other in which it intends to enter or protect. However, both the markets must be relevant markets distinct from each other. The Tribunal considered the finding of CCI, as also the finding by the Director General that the relevant market in this case was the services by the stock exchange and held that the question of two markets does not even arise.

On the quantum of fine, the Tribunal stated that charging of 5% fine is totally justified taking into account the huge profits of NSE and its unmatched position in the market.

Competition Commission of India (CCI) fines automobile manufacturers for anti-competitive conductDerivatives (CD) market

The CCI by a recent order, fined 14 automobile manufacturers Rs. 25.5 billion for restricting access to spare parts and pricing them exorbitantly for consumers. The initial information was filed by Shamsher Kataria against the Opposition Parties (OPs) alleging anti-competitive practices under Section 19(1)(a) of the Competition Act, 2002. Apart from the spare parts, even the technological information, diagnostic tools and software programmes required to maintain, service and repair the technologically advanced automobiles were not freely available. It was alleged by the informant that the restrictive and monopolistic trade practices of OPs and their authorised dealers have a negative effect not only on the consumers but also on the whole Indian economy since such practices increase the cost of the consumers to maintain the vehicle. Such practices are in direct contravention of Section 3(3)(a) and 3(3)(b) of the Act.

The OPs had come up with an interesting defence that Section 3(5)(If the Competition Act, 2002 confers on them the right to lay down reasonable conditions as are necessary for the protection of rights conferred by the various IP statutes. The measures that they had taken in course of exclusively providing the spare parts would fall under the ambit of the same.

CCI observed that the OPs could not successfully establish the fact that they have any IP rights in respect of the spare parts in India. Moreover the Technology Transfer agreements through which they operated also did not grant them any patent rights in India. Thus it was decided that they cannot avail the exemption provided in Section 3(5)(If the Act. The Commission insisted that these foreign registered Intellectual Property Rights (IPRs) must be registered in India or their registration must be imminent in order to attract the exemption under Section 3(5).

The car companies were directed to cease and desist from indulging in conduct that has been found to be anti-competitive and in violation of the provisions of the Act. CCI has also directed the companies to undertake corrective measures for the same.

Monkey takes selfie, controversy over who owns copyright

Some interesting propositions of copyright law arose when a selfie taken by a Macaca Nigara monkey went viral as soon as Wikimedia put it up in its Wikimedia commons. The origin of the picture is in 2011 when a British photographer went to study the macaques in Indonesia and the monkeys swiped his instruments. The photographer claimed the copyright to the photo arguing that although the female macaque in the picture stole the camera and took the selfie, he had set up the camera on a tripod in the Indonesian forest with the correct lighting before letting the monkey press the button on it.

The US Copyright Office (USCO) clarified its position on the same by publishing in the third edition of Compendium of US Copyright Office Practices that it will not register works produced by nature, animals or plants or created by divine or supernatural beings. In the UK, the law around animals producing copyrightable works is somewhat similar to the position adopted in the US.

Cutting edge Hepatitis C drug to be available in the Indian market at 99% lesser price than in the USA

US Pharma Company Gilead has announced that it will be introducing the drug Sofosbuvir (trade mark Sovaldi) in India for $ 900 i.e. about Rs. 54000 for a 12 week treatment course. This news is significant as the drug is being introduced at nearly 99% discount of the US Price ($ 84000).

This reduction in the price comes as a part of its larger policy of differential pricing or tiered pricing for the drug, which means that the patent holder charges each consumer based on their ability and willingness to pay. The categorization for the pricing, according to WHO categorization are low-income, low middle-income and upper-middle income. Since India has been categorized as a low income country, the drug is being made available to India at the base price of $300a bottle.

To bring down the prices further, Gilead has entered into licensing agreements with seven Indian generic manufacturers namely Cipla, Cadila Healthcare, Hetero, Strides, Arcolab, Ranbaxy, Sequent Scientific and Mylan to manufacture Sofosbuvir and the investigational single tablet regimen of Ledipasvir for distribution in 91 developing countries. The license will reportedly allow the manufacturers to sell the drugs at a price fixed on their own and only a royalty rate of 7% on the sales shall be payable to Gilead. The licenses also permit the manufacture of Sofosbuvir or Ledipasvir in combination with other chronic hepatitis C medicines.

Indian firm wins 5 years long patent battle against German pharma giant B Braun

Poly Medicure, an Indian company dealing in medical devices won a five years long patent battle against B.Braun, a leading German medical devices and pharma company. European Patent Office (EPO) in a recent decision sided with Poly Medicure and revoked two of B Braun's patents related to intravenous safety catheters.

B. Braun appealed against these decisions at the Board of Appeals, a redressal forum within the EPO structure, but it was turned down and the patents of B. Braun reportedly, stand revoked.The win is significant in the sense that it will aid Poly Medicure to establish its business in the European Markets. It has been reported that B Braun will not be turning back from the patent battle and is hopeful about win in a regional court of Germany and few other countries with respect to pending applications.

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