



### **IPAB's Power to Collect Additional Evidence Clarified by the High Court**

The Petitioner had filed an application before the IPAB seeking leave to produce additional evidence (which it could not produce before the Registrar of Trademarks). The application was dismissed by IPAB, against which the Petitioner approached the High Court [*M/s Agar Distributors (India) & Anr. v. IPAB & Ors. (W. P. No. 364/2011)*].

The High Court held that a party cannot have an absolute or unconditional right to adduce additional evidence at every stage. Although under section 92(1) the IPAB is not bound by the procedure laid down in the Code of Civil Procedure, the principles on the basis of which additional evidence may be permitted must accord with the rules of reasonableness, justice and fair play. The IPAB is not bound to indiscriminately permit parties to lead further evidence in an appeal. That would be detrimental to proceedings filed before an appellate forum. The principles enunciated in Code of Civil Procedure furnish at least important basic guidelines.

The High Court upheld the order (dismissed the application of the Petitioner) of the IPAB but clarified that it would be open to the IPAB to consider the failure to adduce any evidence as a factor while considering whether the IPAB itself requires the documents to pronounce judgment or for any other substantial cause.

### **Mere Silence is Not Acquiescence**

The Bombay High Court recently examined the issue whether delay in filing a claim (if such a delay is proved) is fatal to the Plaintiff's claim [*Emcure Pharmaceuticals Ltd. v. Coron Remedies Pvt. Ltd., Suit No. 734/2013*].

The Court held that a mere failure to sue without a positive act of encouragement is no defence and is no acquiescence. The question of acquiescence arises where a mark's proprietor, being aware of his rights, and being aware that the infringer may be ignorant of these, does some affirmative act to encourage the infringer's misapprehension so that the infringer worsens his position and acts to his detriment. A Defendant who infringes the Plaintiffs' mark with knowledge of that mark can hardly be heard to complain if he is later sued upon it.

Acquiescence is sitting by when another invades your rights and spends money in the doing of it. It is conduct incompatible with claims of exclusivity, but it requires positive acts, not mere silence or inaction (of the stripe involved in the concept of laches). Acquiescence is not mere negligence or oversight. There must be the abandonment of the right to exclusivity.

The Court accordingly held that there is no evidence of acquiescence and granted injunction in favour of the Plaintiff.

## **Delhi High Court held no Copyright in Database Comprising of Email Addresses**

The Plaintiff, a publication house, filed a suit of permanent injunction against its former Management Executive [*Tech Plus Media Pvt. Ltd. v. Jyoti Janda & Ors.*, CS(OS) 119/2010] for restraining infringement of copyright, passing off and unfair competition.

The Plaintiff claimed to be a leading industry publication house in the sphere of Information Technology having a print media publication called IT Price Var and online news portal called ITVARNEWS.NET dedicated to Information Technology channels and professionals. Over a period of time, the Plaintiff had developed its detailed confidential electronic databases not just of existing clients and customers of the Plaintiff but also containing their contact points; the Plaintiff had also developed detailed database of entities which could be targeted for subscription of its magazine.

The Plaintiff claimed that the aforesaid confidential data and information are the original literary and artistic works of the Plaintiff and are stored on computers and computer systems and communication devices of the Plaintiff and that the Plaintiff has copyright in the said information being the expression of the Plaintiff's original and inventive thoughts and the Plaintiff had expended immense original skill, thought process, imagination in the same.

The Defendant was employed as Management Information Systems Executive with the Plaintiff to assist the Director of the Plaintiff and to keep

on regularly checking out all online activities and back office electronic activities of the

Plaintiff. The Defendant resigned from the Plaintiff and started its own website offering similar service at almost 50% lesser price.

The subsequent investigations by the Plaintiff revealed that the Defendant had copied the confidential information and databases constituting the trade secrets of the Plaintiff on a pen drive and sent them through e-mail to the personal e-mail ID, and thus infringed the copyright of the Plaintiff.

The Plaintiff submitted that Section 2(O) of the Copyright Act, 1957 includes 'databases' within the definition of "literary work" - the database of the Plaintiff is therefore a literary work and Plaintiff owns copyright therein.

The Defendant submitted that as per Section 17 of the Copyright Act, 1957 in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical or to the reproduction of the work for the

purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work; and the Plaintiff has not disclosed the author of the alleged database. It was contended that the Plaintiff, which is a juristic person, cannot be the owner of the copyright in the databases alleged. It is argued that the Defendant as Journalist would have copyright in what is published by them and the Plaintiff has not pleaded any agreement to the contrary; that though the plaintiff had also filed a complaint against the defendants, but after investigation, no First Information Report (FIR) was registered.

The Court observed that the said databases are nothing but a collection of the e-mail addresses of the visitors to the website/news portal of the Plaintiff. The Plaintiff cannot be said to be the author or composer or having any contribution in the same.

The Court further observed that:

*“Judicial notice can be taken of the practice which has evolved, of employers filing suits as the present one against the employees quitting employment. The judicial stream is today inundated with such suits. Judicial notice can also be taken of the fact that such suits are often vehemently pressed only till the stage of interim injunction and rarely succeed after trial. Today when the entire judicial system reels under the burden of arrears, and when it is found that suits are being filed not to vindicate any violation of rights but to teach a lesson to an employee wanting to move to greener pastures and/or to curb competition, the Courts would be doing a*

*disservice if they do not take cognizance of such developments in the passage of time and turns a blind eye thereto, mechanically frame issues and put the suit to trial ...The principle behind Section 27 of the Indian Contract Act, 1872 making agreements in restraint of trade void, is to prevent anti-competitive practices. With the same intent the legislation in the form of Competition Act, 2002 has been brought. When the pleas of copyright are found to be non-existent and the intent and motive in institution of the suit is to curb and prevent competition, the Courts should not hesitate in curbing such an action, which is contrary to the public policy of India, at the threshold. In my opinion, allowing such suits to go through the gamut of trial itself has tendency to curb competition, irrespective of the outcome of the suits.”*

The Court dismissed the suit without framing issues on the ground that the Plaintiff does not disclose a cause of action since there is no copyright in the alleged database of the Plaintiff. The Plaintiff does not contain sufficient pleading of the existence of a copyright in favour of the Plaintiff, in which case, the matter need not go through rigmarole of trial. It is the settled position in law that evidence beyond pleadings cannot be led. The Plaintiff is a juristic person and is incapable of being the author of any work in which copyright may exist. However, the Plaintiff can be the owner of a copyright under an agreement with the author of the said work. For the plaintiff to maintain the present suit, it was incumbent upon the Plaintiff to disclose the said work and the author thereof and the agreement under which the author had made the Plaintiff the owner of the copyright in the said work, but the Plaintiff had not done so.

## Novartis Obtains Quia-timet Injunction against Ranbaxy for sale of Generic Version of Vildagliptin (Galvus)

Novartis AG had filed suit of permanent injunction in respect of sale of generic version of Vildagliptin (sold under the brand Galvus) against Ranbaxy Laboratories Limited [*Novartis AG v Ranbaxy Laboratories Ltd.*, CS (OS) 2703/2014].

Novartis submitted that it is seeking quia timet injunction from the Court since it is believed that Ranbaxy is planning to manufacture, launch or sell Vildagliptin in India. The anticipatory cause of action of Novartis was based on the fact that (a) Ranbaxy's website is listing Vildagliptin in the active pharmaceutical ingredient product category as an anti-diabetic drug; and (b) a survey report from Strategic Analysis India Pvt Ltd.

Ranbaxy asserted that it intends to market Vildagliptin in crystalline form (Form A). It further submitted that Novartis had previously applied for a patent for Form A on June 13 2007, and such application was subsequently abandoned. Hence, Ranbaxy asserted that Novartis could claim no rights with respect to Form A. It further submitted that since Novartis concealed this material information from this Court, it is not entitled to any interim relief.

The Court held that Novartis had made an application for Form A while the application for the suit patent was pending. The application for Form A was also abandoned before the injunction suit was commenced. Thus, the court held that at such a preliminary stage, non-disclosure of the abandonment of the Form A application did not amount to the concealment of material facts.

The court further held that while the suit patent was granted to Novartis in 2007, a revocation petition has been filed by Ranbaxy only in 2014, which is a *prima facie* evidence to show that Ranbaxy is intending to market/sell the compound patented under the suit patent.

The Court further held that the balance of convenience lay in preserving *status quo*, as Ranbaxy was yet to market Vildagliptin, whether in crystalline form or otherwise.

Novartis had, in the past, also filed similar injunction suits against six generic manufacturers (viz. Alembic Pharmaceuticals, Bajaj Healthcare, Biocon, Cadila, Glenmark and Wockhardt) and obtained similar injunctions against them as well.

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