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IP ERA

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INKING ASSETS

Aakriti Raizada Sharma
Founder & Managing Editor
IP Era - Legal Media Group

'*The Times They Are a-Changing*' crooned music legend Bob Dylan back in 1964. Indeed, they are! Imagine Warner Brothers getting sued by a tattoo artist from nowhere Missouri for allegedly using his creation without permission in their 2011 sequel, Hangover 2. Or back home, Bollywood actor Shah Rukh Khan getting copyright reservation for his tattoo the very same year.

While these are clear cases of tattoos as inking assets and copyrightable intellectual property (IP), the jurisprudence around this seemingly new-age art form is anything but. The questions around tattoos as IP range from whether they are copyrightable at all, to the extent of rights to be granted to tattoo artists and tattoo bearers, to the enforceability of intellectual property rights (IPRs) without violating infringers' fundamental rights.

Copyrights are defined as rights granted to artistic forms of expression on tangible mediums. While US law requires "pictorial, graphic, and sculptural" copyrightable works to be "original works of authorship fixed on a tangible medium of expression", Indian law does not explicitly specify the need for a tangible medium of expression. Still, given the permanent nature of tattoos and the human body as a tangible medium of expression, reservations against tattoos being copyrightable ought to be ruled out. It may be noted, however, that only original and custom-made tattoos are copyrightable, not standard tattoos in catalogs and on walls of tattoo parlors.

As to the extent of rights bestowed on tattoo artists and tattoo bearers, there are varying arguments. Section (c) ii of the Indian Copyright Act, 1957 specifies that a copyright holder has the right to communicate his work to the public. Does this mean that in the exercise of his/her rights, the tattoo artist has the right to control and regulate the tattoo bearer's activities? If yes, this would violate the tattoo bearer's right to freedom guaranteed under Articles 19 and 21 of the Indian Constitution. One can argue differently that since the tattoo artist is a hired employee of the tattoo bearer, the latter becomes the first owner of the copyright in the absence of a contract between the two parties as per Section 17 (c) of the Indian Copyright Act, 1957. In practice, even tattoo artists believe that once the bearer pays for the tattoo, he/she owns the tattoo and all the rights that come with it. Notably, any argument, for or against tattoos as copyrightable IP, is like the proverbial coin having two sides.

With the tattoo industry reportedly billed to become a $1-billion industry, one can only hope that the legal framework around it evolves and becomes clearer with time.

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"I don't hate anybody. The Winklevi aren't suing me for intellectual property theft. They're suing me because for the first time in their lives, the world didn't work the way it was supposed to for them."

-Mark Zuckerberg, *Chairman, Facebook*

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With the luxury industry growing, the black market industry or counterfeiting industry is also growing - both in the real and virtual world. The intent of the Indian government is to curb this activity if not completely eliminate the menace. Thus, effective co-operation of both brand owners and authorities will help to send out a strong message to counterfeiters...

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Others

Brian Duffy's Estate Sues Hard Rock Cafe For Copyright Infringement

The estate of late photographer Brian Duffy is suing Hard Rock Cafe for copyright infringement for using a photograph of British singer David Bowie, who died last year, without permission. The case is being filed at the US District Court for the Southern District of New York. The photograph is registered under registration number VA 1-428-937.

Duffy took the photograph of the singer and it was placed on the front cover of Bowie's "Aladdin Sane" album, which was released in 1973.

Duffy, who died in 2010, is the author of the photograph and retained all rights and title in it. Hard Rock allegedly placed the photograph throughout at the front entrance and guest rooms of its hotel in Palm Springs, California.

Duffy's estate is requesting either Hard Rock pay the profits or gains brought about by infringement or statutory damages of up to $150,000 per infringement.

Duffy is seen as one of the most influential photographers of all time. His work can be found in galleries all around the world, including the Chris Beetles Gallery in London, the Alanari Photo Museum in Florence, the Monash Art Gallery in Australia, and the Centro De Historias Museum in Spain.

Photographer Sues Celeb Model Gigi Hadid, Her Agency, For Copyright Infringement

Fashion model Gigi Hadid is facing a copyright infringement lawsuit for allegedly posting a picture of herself on Instagram that belonged to a photographer. The July 2016 post by the model, wearing a customized Adidas jacket, has received over 1.2 million 'likes' on Instagram.

Filed at the US District Court for the Eastern District of Virginia recently, freelance photographer Peter Cepeda sued both Hadid and her agency IMG Worldwide for "willful and intentional" infringement.

He accused the defendants of then "copying and uploading the copyrighted photograph onto Hadid's Instagram account." Cepeda added that he had received a receipt (case number 1-5776412659) for his copyright registration application for the photograph from the US Copyright Office. The photographer is seeking an injunction against both Hadid and her agency, a transfer of profits, actual and/or statutory damages, and a jury trial. Disputes between photographers and celebrities using their works on social media have resulted in a number of copyright infringement lawsuits.

US President Donald Trump has been sued twice for copyright infringement relating to the use of a photograph on social media. In June, a photo which Trump posted online of four women wearing t-shirts spelling out Trump's

'Make America Great Again' election slogan ended up as a copyright infringement case. Julie Dermansky, the individual who took the photo, was seeking $150,000 in damages. Trump was also sued in October last year over a picture of a bowl of skittles, originally posted by Trump Jr, the President's son.

Trump Jr had tweeted the image with a message that read: "If I had a bowl of Skittles and I told you just three would kill you. Would you take a handful? That's our Syrian refugee problem." That case was voluntarily dismissed by the photographer in November 2016.

BuzzFeed At The Center Of Another Copyright Storm

Internet media company BuzzFeed has found itself at the center of another copyright dispute with a photographer.

New-York-based photographer, Gregory Mango, accused BuzzFeed of using his image of Raymond Parker, a man who won a $50,000 payout from the New York Police Department after being rejected from the role for being HIV-positive.

Mango filed the complaint at the US District Court for the Southern District of New York recently.

He claimed that in January 2017, the New York Post ran a story on the lawsuit being filed by Parker and featured the image with authorship credit, "clearly" identifying the image as Mango's. In April, BuzzFeed ran an article entitled "New York City to Pay HIV-Positive Man Denied Job with NYPD $50,000", which allegedly featured Mango's image.

The article has since been removed from the website. "The defendant did not license the photograph from the plaintiff for its article, nor did the defendant have the plaintiff's permission or consent to publish the photograph on its website," the complaint stated. "The Defendant removed Mango's authorship credit from the article on its website."

The suit added that the photograph was registered with the US Copyright Office and was given copyright registration number VA 2-036-434, effective as of March 26, 2017.

Mango is seeking $150,000 for infringement, actual damages and profits or statutory damages of at least $2,500 and up to $25,000 for each instance of false copyright management, attorneys' fees, and a jury trial.

UK Trademark Registrations For Beer Brands Jump 19 Percent In A Year

The number of UK trademark registrations for beer brands has jumped by 19% in a year, according to research.

Law firm RPC found that the figure rose from 1,666 in 2015 to 1,983 in 2016, following a long-term trend of growth. In 2007, the number was just 968.

Although the research didn't specify the biggest filers, RPC said one of the reasons behind the increase was the investment in craft beer products by supermarkets and larger drinks companies. The firm noted, for example, that earlier this year, discount supermarket chain Aldi added 16 new bottle brands to its craft beer range.

RPC added that the proliferation of new brands is also due to the rise of UK independent breweries. The firm pointed to research by UHY Hacker Young, a network of chartered accountants, showing that 520 new breweries opened in 2016, up from 336 in the previous year. Jeremy Drew, a commercial partner at RPC, said that with more players in the market, it was becoming more important for companies to protect their IP.

"This is an innovative area of the market as well as a fast-growing one. Craft beer brands are often prized by consumers for their unique methods of brewing or the original ingredients used," he said. "However, much of this does not lend itself to protection by registration, so the brand name and look of the packaging take on much more

significance in terms of protecting advantage at the point of sale." Commenting on the potential for IP disputes, Drew said that because consumers are interested in a range of "more differentiated products and brands", rather than just one flagship brand, "this means a greater chance of similar brands clashing".

Earlier this year, Scottish brewery BrewDog was forced to apologize after asking a pub to change its name, Lone Wolf. One of the co-founders admitted that the brewery's lawyers had been "a bit trigger happy". Jeremy Roe, primary counsel for AB InBev's US craft and import division, The High End, said that "one of the biggest issues" with regional craft brands is that they are traditionally not aggressive in enforcing their rights.

Hasbro Sues Warner Bros For Illegitimate Use Of 'Bumblebee' Trademark

Toy and game manufacturer Hasbro has sued Warner Bros for trademark infringement for allegedly using the 'Bumblebee' trademark without permission on its 'Super Hero Girls' line of action toys.

Hasbro owns the "Transformers" franchise, a group of robots with the ability to convert their appearance into that of vehicles, weapons, humans, animals and other items. One of the robots, which Hasbro claims is often a lead character, is called Bumblebee. Hasbro registered this as a trademark in 2015 and was granted US registration number 4,874,521, according to the complaint at the US District Court for the Southern District of New York.

It added that Warner Bros sells the 'Bumblebee Super Hero Girls' line of toys to the same market and this "is likely to cause consumers to mistakenly believe that the accused goods emanate from or are otherwise associated with Hasbro".

Hasbro is seeking a permanent injunction, compensatory, statutory and punitive damages, as well as costs and attorneys' fees. The company's claims also relate to building blocks which allow users to build their own transformer.

It claimed that building block toys sold and licensed by Warner Bros are also likely to cause confusion. Some reports are suggesting that the lawsuit comes at a time when Hasbro is seeking to wipe out competition ahead of the first "Transformers" spin-off, due in cinemas in the US this Christmas.

Harley-Davidson Files Another Trademark Infringement Lawsuit

Motorcycle manufacturer Harley-Davidson has filed another trademark infringement lawsuit recently at the US District Court for the Northern District of Illinois against a group of Chinese counterfeiters.

Harley-Davidson accused a group of counterfeiters who reside in China of running online stores designed to fool consumers into thinking they are buying legitimate products.

It claimed the group "further perpetuate the illusion of legitimacy by offering customer service and using symbols of authenticity and security that consumers have come to associate with authorized retailers, including Visa, MasterCard and/or PayPal logos".

The group allegedly sold products using counterfeit versions of Harley-Davidson's federally registered trademarks across the US. Harley-Davidson owns a number of trademarks, including US number 0,507,163 for the 'Harley-Davidson' name, first registered in 1949, and 3,447,304 for the logo with a bald eagle used for "a full line of clothing in class 25."

The motorcycle manufacturer said in the claim that consumers have come to expect the "highest quality from Harley-Davidson products offered under Harley-Davidson trademarks and the defendants' use is likely to cause confusion, mistake and deception."

As a result, the company is seeking $2 million for each use of the Harley-Davidson trademarks, a transfer of profits, injunctive relief, attorneys' fees and costs. The case continues what has been a busy year for Harley-Davidson on the IP front. In January, Harley-Davidson sued clothing company Urban Outfitters in a dispute centering on bodysuits, claiming that the retailer diluted Harley-Davidson's trademarks and was in breach of a contract between the companies.

Wrigley Sues A Company Owner For "Juicy Fruit" Trademark Infringement

Chewing gum company, Wrigley, has sued the owner of a company selling liquids for electronic cigarettes over the use of the 'Juicy fruit' trademark. Wrigley said that the complaint, filed at the US District Court for the Northern District of Illinois, was recently submitted after the defendants failed to reply to two cease-and-desist letters from Wrigley.

Mohammed Ibrahim Ghatala allegedly owns 'Dreamecore Enterprise', a company which runs the vapefab.com website and sells a range of e-cigarette products containing the 'Juicy fruit' trademark.

Wrigley also commented on the "growing concern, shared by the Food and Drug Administration (FDA) and the Senate, that the marketing of e-cigarette materials in chocolate, fruit and/or candy flavors harmfully targets children below 18 years of age."

The chewing gum company claimed that the defendants' "unauthorized and infringing use of Wrigley's 'Juicy fruit' trademark is likely to cause confusion and harm to the public."

Wrigley owns several US trademark registrations for its 'Juicy fruit' mark, including US numbers 105,032, 619,549

and 2,836,550, according to the suit. Ghatala could face injunctive action and a recall of the allegedly infringing products.

In August last year, the FDA finalized plans to regulate all tobacco products, including e-cigarettes. The agency said that this would enable it to protect children from the dangers posed by all tobacco products. In July last year, Wrigley sued Chi-Town Vapers, claiming that the e-cigarette seller had infringed its IP covering the Doublemint and Juicy Fruit brands of gum.

NFL Opposes Trademark Over Colts Logo Similarity

The National Football League (NFL) has challenged a trademark application which it claims is too similar to a logo used by the Indianapolis Colts, an American football team. The NFL and the Colts filed an opposition to the mark 'Believe in Blue' at the US Patent and Trademark Office.

Owned by an individual named Louis Zogaib, the mark was applied for in December last year and covers class 25 (clothing). The mark was published for opposition in the Official Gazette in May 2017.

The NFL and the Colts — one of 32 member clubs that make up the NFL — alleged that the mark would cause a likelihood of confusion. According to the opposition, the Colts have used the mark 'Believe in Blue' and other variations in connection with the promotion of the Colts football franchise, including using the mark on t-shirts.

"Opposers and their licensees and sponsors have sold and offered for services and goods (including clothing) bearing opposers' 'Believe in Blue' mark in a trading area of broad geographical scope encompassing the US, including its territories," said the opposition.

The NFL and Colts added that the mark is "symbolic of the extensive goodwill and consumer recognition" that they have established.

Zogaib has to, until October 16, answer the opposition. The Colts last won the Super Bowl, an annual game that determines the champion of the NFL, in February 2007, when they beat the Chicago Bears 29-17.

Supermarkets Kroger And Lidl To Dismiss Trademark Infringement Claim

Supermarkets Kroger and Lidl have agreed to dismiss a trademark infringement claim centering on a food range launched by Lidl. In July, it was reported that just after opening its first store in the US, budget retailer Lidl was hit with a lawsuit over its 'Preferred Selection' range.

The suit was filed by Kroger at the US District Court for the Eastern District of Virginia, Richmond Division. Kroger, which has over 2,000 retail stores in the US, claimed that Lidl had created its range to "capitalize on and benefit from the goodwill" of Kroger's 'Private Selection' range.

In September 2016, Lidl had applied to register the 'Preferred Selection' mark (US application number 87,175,637) to be used in connection with meats, alcohol, coffee, and fruit and vegetables.

Kroger owns six trademarks and service marks for its 'Private Selection' range, including US registration numbers 2,685,492 and 2,740,565 for goods in classes 29, 30, 31, 32 and 35, dating back to 2003.

According to Kroger, correspondence between Lidl and Kroger's in-house and outside counsel saw Lidl reject objections to the name raised by Kroger, which later went on to oppose a Lidl trademark registration in March 2017.

Lidl hit out over the accusations made by its rival, denying that its use of 'Preferred Selection' would cause confusion or dilution. "If Kroger were truly concerned about its brand, it would not have purposefully delayed for six months after knowing that Lidl was developing and planning to launch a store brand called 'Preferred Selection'," claimed Lidl. The budget retailer also alleged that Kroger has used the suit to disrupt the launch of a new, emerging competitor.

But now, the dispute has come to an end; US District Judge John Gibney signed the voluntary dismissal submitted by the parties.

Apple Reaches Settlement With CCE Over Patent Infringement Case

Apple has reached a settlement with Cellular Communications Equipment (CCE), a subsidiary of patent licensing company Acacia, a year after the technology company was ordered to pay CCE more than $22 million in damages.

All claims have been dismissed with prejudice under the settlement, and each party will bear its own costs and attorneys' fees. Apple was ordered to pay $22.1 million in damages at the US District Court for the Eastern District of Texas for "willful infringement of US patent number 8,055,820."

The '820 patent was originally registered by Nokia Siemens Networks (now Nokia Networks) at the US Patent and Trademark Office in November 2011.

It covers "an apparatus, system and method for increasing buffer status reporting efficiency and adapting buffer status reporting according to uplink capacity." CCE has a patent portfolio which covers wireless user equipment relating to 3G, 4G and LTE-advanced wireless networks.

In April 2017, CCE filed another suit against Apple, AT&T and Verizon in the US District Court for the Eastern District of Texas.

Acacia's subsidiary argued that the defendants had infringed US patent numbers 6,892,074; 8,902,770; 8,254,872; and 9,037,129.

The patents relate to a variety of technologies used in mobile phones and tablets, including the ability to make emergency calls when the phone is locked. Yesterday's dismissal also stated that CCE's suit against Apple, AT&T and Verizon will be dismissed with prejudice.

Financial elements of the dismissal were not disclosed.

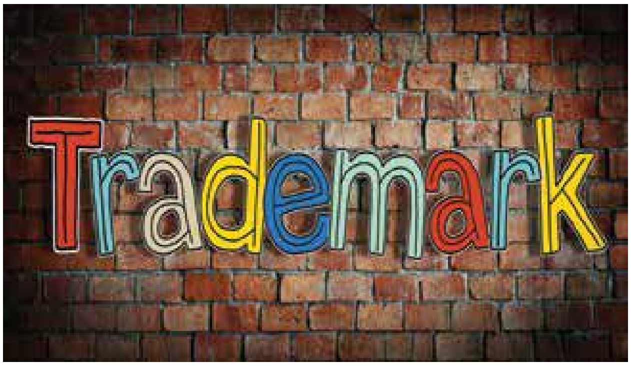
Huawei Files For 'Selfie Toning Flash'

Huawei Technologies Co. Ltd., a Chinese multinational networking and telecommunications giant, has recently filed a trademark application for the mark 'Selfie Toning Flash'. The mark has been filed with the European Union Intellectual Property Office (EUIPO) under class 9.

The trademark application didn't reveal much about the features of the Selfie Toning Flash but the name alone is suggestive that the feature would likely be related to the selfie camera. The term could mean Huawei is planning to include a soft flash along with the selfie camera or if the technology would involve using the display to provide the illumination.

It is uncertain if Huawei would utilize the technology on the Mate 10, which the company officially hinted will launch on October 16. If indeed the feature would be available on the Mate 10, then we'll find out what it entails soon.

NBA, MLB And NHL File Trademark Infringement Case Against Counterfeiters



The National Basketball Association (NBA), Major League Baseball (MLB) and National Hockey League (NHL) have united in a bid to take down a group of counterfeiters.

In a claim filed at the US District Court for the Northern District of Illinois, Eastern Division, recently, the sports associations alleged that an interrelated group that resides in China or "other foreign jurisdictions" had infringed their trademarks.

Each of the associations owns a host of trademarks, registered at the US Patent and Trademark Office.

NBA Properties, the owner and licensee of the 'NBA' trademarks, owns more than 150 trademarks in the US, covering jerseys, shirts, caps and wrist bands.

In a bid to protect their marks and in collaboration with the Coalition to Advance the Protection of Sports logos (CAPS), the associations have established a program of trademark protection. The program regularly "investigates suspicious websites and online marketplace listings identified in proactive Internet sweeps and reported by a variety of informants in response to the significant counterfeiting of plaintiffs' trademarks."

Over the past few years, CAPS has identified thousands of domain names linked to fully interactive, commercial websites and marketplace listings which were selling fakes. Fake merchandise is nothing new in the world of sports and the associations regularly take on counterfeiters.

In December last year, the NBA, MLB and NHL had filed a trademark infringement suit in the same court against unidentified counterfeiters. Then, in February 2017, the NBA warned fans who planned to attend an All-Star event involving the sale of fake merchandise.

The 2017 NBA All-Star Game, an exhibition match between Eastern and Western-based NBA players, was hosted in New Orleans between February 17 and February 19.

"Tactics used by defendants to conceal their identities and the full scope of their counterfeiting operation make it virtually impossible for plaintiffs to learn defendants' true identities and the exact interworking of their counterfeit network," said the latest suit.

The associations are seeking injunctive relief, a transfer of infringing domains and damages for willful counterfeiting of $2 million for each infringing use and $100,000 per infringing domain.

Federal Circuit Rejects Uber's Bid For Arbitration In Patent Infringement Case With Waymo

The US Court of Appeals for the Federal Circuit has rejected Uber's bid to move its trade secrets clash with Waymo into arbitration. The high-profile battle began in February this year when Waymo, formerly Google's self-driving car division, targeted Uber and its subsidiary Otto over alleged patent infringement and theft of trade secrets.

The Federal Circuit recently held that the dispute should be heard at the US District Court for the Northern District of California, San Francisco Division, rather than go into arbitration. Waymo accused former manager Anthony Levandowski, who is not a defendant in the dispute, of downloading more than 14,000 highly confidential and proprietary files shortly before resigning.

The files included Waymo's LiDAR (a laser-based scanning and mapping technology) circuit board designs. Waymo also claimed that Uber had infringed its patents concerning the LiDAR technology. In March, Waymo added a new patent claim to its infringement suit, and pushed for an injunction. District Judge William Alsup, the judge overhearing the dispute, referred the suit to federal prosecutors in May, and Waymo dropped three patent claims. Alsup also granted an injunction against Uber, ordering the company to return all of the materials downloaded by Waymo's former executive.

Uber was ordered to keep the executive away from any role or responsibility related to LiDAR and to conduct an investigation into the downloaded documents. Levandowski claimed in a filing that the judge's order was unlawfully forcing Uber to fire him, and at the end of May, he was fired by Uber, after he failed to hand over documents at the center of the dispute, according to a letter filed by Uber. Alsup also denied Uber's motion to compel arbitration of its pending litigation with Waymo in May, and so, Uber appealed to the Federal Circuit. Uber argued that Waymo should be compelled to arbitrate the dispute because of the arbitration agreement between Waymo and Levandowski.

Two employment agreements between Waymo and its former-employee Levandowski, entered into in 2009 and 2012, each contain an arbitration clause. But the Federal Circuit affirmed the lower court, finding that arbitration should not be compelled.

Michigan Motor Files Patent Infringement Case Against Hyundai In US District Court

Car manufacturer Hyundai has been sued for patent infringement over a range of technologies used in its current and previous models.

The complaint was filed by Michigan Motor Technologies at the US District Court for the Eastern District of Michigan recently. Hyundai was accused of infringing 22 patents relating to car technology, including US patent numbers 6,588,260 for electronic throttle valve systems and 6,443,128 for a method of controlling an internal combustion engine.

The cars named in the lawsuit were the Hyundai Sonata, Genesis Coupe, Santa Fe, Tucson and Sonata Hybrid. The 180-page document listed dozens of car parts that "have and continue to infringe" patents owned by Michigan Motor Technologies.

Michigan Motor Technologies is seeking a jury trial, attorneys' fees and damages.

Hyundai is no stranger to patent litigation cases in the US. In April, Hyundai Mobis, the parts and services arm of companies including Hyundai, received a mixed patent verdict from the US Court of Appeals for the Federal Circuit relating to air bag technology.

TomTom Moves Patent Infringement Case From Virginia To Massachusetts

Dutch navigation technology company TomTom has successfully moved a case in which it was sued for patent infringement from Virginia to Massachusetts.

In July 2016, Smart Wearable Technologies sued TomTom for alleged infringement of US patent number 6,997,882, which relates to "subject monitoring device and method".

The complaint, which was filed in the Charlottesville division of the US District Court for the Western District of Virginia, stated that TomTom had "committed such purposeful acts in the state of Virginia that it reasonably knew and/or expected that it could be hailed into a Virginia court as a future consequence of such activity".

Smart Wearable Technologies alleged that the Spark Cardio + Music products created by TomTom had infringed its patent. The products store data obtained from a tracking device on fitness apps onto smartphones, tablets and laptops. TomTom stated that venue was improper, "since it is not incorporated in the Commonwealth of Virginia and has no regular and established place of business in this district".

Despite agreeing that the venue was improper, Smart Wearable Technologies claimed that TomTom waived the defense of improper venue by not challenging the venue sooner. TomTom in turn said that before the US Supreme Court's ruling in TC Heartland, "defense of improper venue was not available", and asked for the case to be moved to the US District Court for the District of Massachusetts.

District Judge Glen Conrad agreed with TomTom, stating that TC Heartland had "significantly" changed the law of venue in actions for patent infringement.

"As a practical matter, the legal basis for TomTom's motion was unavailable until the Supreme Court decided TC Heartland," he said in the decision, released recently.

He added: "TomTom therefore did not waive the venue challenge by failing to assert improper venue as an affirmative defense in its answer or as a basis for judgment on the pleadings."

Smart Wearable Technologies had previously been forced to move jurisdictions in litigation concerning the same patent. Last week, in a case with Fitbit, the case was moved from the same Virginia court to California, with the judge citing TC Heartland.

IPR Readers Split Over Andrei Iancu's Nomination As USPTO Director

IPR readers are split over Donald Trump's decision to nominate Andrei Iancu as director of the US Patent and Trademark Office (USPTO) to replace Michelle Lee. In an exact 50/50 split, some of those against the nomination claimed that he was not sufficiently qualified. One reader stated that Iancu's experience as a litigation lawyer will not be a great fit for the role. The reader stated that somebody with some firsthand professional experience of the USPTO, "particularly during examination, would have been much better" as USPTO examination is "terrible and is the root of all problems with the US patent system".

Another stated that they won't be supporting the candidate as they felt he is not as capable as his predecessor Lee, "who has no second copy in her expertise at the USPTO".

Of the respondents who agreed with the nomination, many pointed to Iancu's "extensive experience" in the field as a reason for agreeing with the nomination.

One stated that Iancu has "excellent judgment and is an effective leader" and that his "vast IP experience" makes him a good fit, while another stated that "it's time for a change".

Federal Circuit Invalidates Kraft's Cookie Packaging Patent

The US Court of Appeals for the Federal Circuit has affirmed invalidation of a patent covering cookie packaging in a dispute between Intercontinental Great Brands (earlier Kraft) and Kellogg's. US patent number 6,918,532, which is owned by Kraft and covers a resealable food container, was invalidated by the court recently.

The patent describes a combination of two known kinds of packaging: one, common for cookies, uses a frame surrounded by a wrapper, while the other, common for wet wipes, uses a package on which the label may be pulled back to access the contents.

Issued in 2005, the patent was supplemented with additional claims on re-examination in 2011. The re-examination had been sought by a Swedish company that produces resealable packages.

Kraft sued Kellogg's in the US District Court for the Northern District of Illinois in 2013, alleging that Kellogg's had sold cookies in resealable packages that a Kellogg's document suggested were designed to "'circumvent the Kraft patent while maintaining similar properties".

The district court held that Kellogg is entitled to summary judgment of invalidity for obviousness of the asserted claims of the '532 patent. According to the district court, the patent was obvious in light of two articles called "Machinery Update" (published in 2001/02), when combined with existing cookie packages.

The court also held that Kraft was entitled to summary judgment rejecting Kellogg's counterclaim of unenforceability of the patent due to alleged inequitable conduct by Kraft.

Both parties appealed. In a 2-1 split decision, the Federal Circuit confirmed the district court's decision. Kraft claimed that the district court had treated its objective indicia as an "afterthought", "writing off the patent before turning to objective indicia", but the Federal Circuit disagreed.

On behalf of the court, US District Judge Richard Taranto said, "Kraft cannot complain that the district court failed to credit its evidence regarding objective indicia: the district court accepted the facts Kraft asserted about commercial success, industry praise, and copying."

Read More: http://www.ipera.in/patent/federal-circuit-invalidates-kraft-cookie-packaging-patent.html

Starbucks Settles Infringement Case With The End Brooklyn

Multinational coffee company Starbucks has settled a dispute over the alleged infringement of a unicorn-themed drink. Back in May, a New York City café, The End Brooklyn, sued Starbucks at the US District Court for the Eastern District of New York, accusing the conglomerate of infringing The End's trademark for 'Unicorn Latte'. Starbuck's limited-edition drink, the Unicorn Frappuccino, was at the center of the clash. Launched in April, the drink is described as a "flavor-changing, color-changing, totally not-made-up" drink by Starbucks. The End has marketed its own colorful beverage under the name Unicorn Latte since December last year, according to the lawsuit.

But unlike the Frappuccino, which is a "concoction of milk, artificial sweeteners, color additives, and pinches of fruit juice concentrate for flavor" (according to The End); the Latte is a "blend of fresh juices and healthy ingredients".

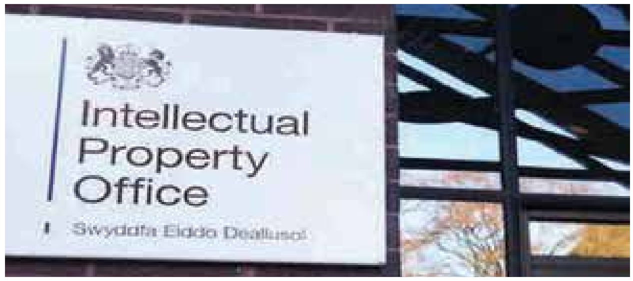
The café had claimed that the "size of and scope of Starbucks' product launch was designed so that the Unicorn Frappuccino would eclipse the Unicorn Latte in the market". The End added that its customers were confused by the similarity, with some assuming that its drinks were a "copy-cat or knockoff" of Starbucks' products. US District Judge Arthur Spatt signed the dismissal order — a stipulation of voluntary dismissal with prejudice against Starbucks. According to the order, the parties entered into a settlement agreement, effective August 22. Terms of the agreement were not disclosed.

Counterfeits' Threat Being Dealt With Innovative Approaches: UKIPO Report

The availability of counterfeits has continued to increase with the expansion of e-commerce platforms, but this threat is being met head-on with an innovative range of approaches. This is according to Giles York, Chief Constable of Sussex Police, in the UK Intellectual Property Office's report "IP Crime Report 2016/17", released recently.

York explained that the growing threat of fakes being sold underpins the need to focus on helping consumers understand that products purchased in this way are "often unsafe or potentially harmful with profits supporting criminal lifestyles and organized crime investing in other types of crimes." Trade association, Anti-Counterfeiting Group (ACG), explained that the increased use of Facebook Marketplace by counterfeiters to "engage at a 'local' level with consumers opens up new avenues for criminals to dupe unsuspecting shoppers into buying often counterfeit and unsafe/dangerous goods."

The report documents the work achieved in tackling IP crime in the UK over the last year. One approach to tackle online infringement is an initiative announced in February 2017. Led by the Alliance for Intellectual Property, the British Phonographic Industry and the Motion Picture Association, and Google and Bing, the initiative's aim is to reduce availability of infringing content accessed through online searches. A voluntary code of practice kick-started the collaboration between the parties to demote links to websites that are dedicated to infringing content for



consumers in the UK. Illegal streaming devices, which undermine the creative industries, have also hit the headlines this year. The products were named as an emerging threat in last year's IP Crime Report.

Recently commissioned research from the IPO estimate 15%, approximately 6.7 million, of UK internet users consumed at least one item of online content illegally during the 3 months prior to March 2017. The report also provided some patent statistics — during 2016, more than 2 million suspected infringing items were detained by the Border Force in the UK. The number of items detained at the EU external border hit 26 million, with the majority of items being tobacco products from China and Hong Kong. According to UK's Ministry of Justice, 433 people were found guilty of offenses under the Trade Marks Act and 47 people under the Copyright, Designs and Patents Act during 2016, compared with 490 and 69, respectively, in 2015.

No Relief For Bakshi In McDonald's India Franchise Agreement Termination

The National Company Law Appellate Tribunal (NCLAT) did not give any interim relief on a plea filed by Vikram Bakshi against the termination of the franchise agreement by McDonald's India. The tribunal said it will hear the plea along with the main appeals (filed by McDonald's and Bakshi) on September 21. Earlier, the main appeal was filed by McDonald's India challenging the reinstatement of Bakshi as the Managing Director of CPRL, post an order by NCLT. With this, the operation of 169 outlets in the North and East of the country is under a cloud.

On August 21, McDonald's India had terminated its franchise agreement for 169 restaurants across north and east India with Connaught Plaza Restaurants Pvt. Ltd (CPRL), a joint venture between the former and Bakshi. According to the termination notice, Bakshi is no longer authorized to use McDonald's names, trademarks, designs, branding, operational and marketing practice and policies and food recipes and specifications.

Bakshi had moved NCLAT with a fresh appeal to seek relief against the termination, a day after NCLT dismissed his plea challenging the termination and asked him to approach the appellate tribunal. However, the tribunal denied immediate relief and said that the matter will be heard in due course of time.

Indian Patent Office Gives CRIs A New Lease Of Life

With the advent of AI, Big Data and the IoT, there have been further challenges on how to apply law and protection mechanisms to innovations. The latest guidelines released by the IPO are a step forward in this direction...

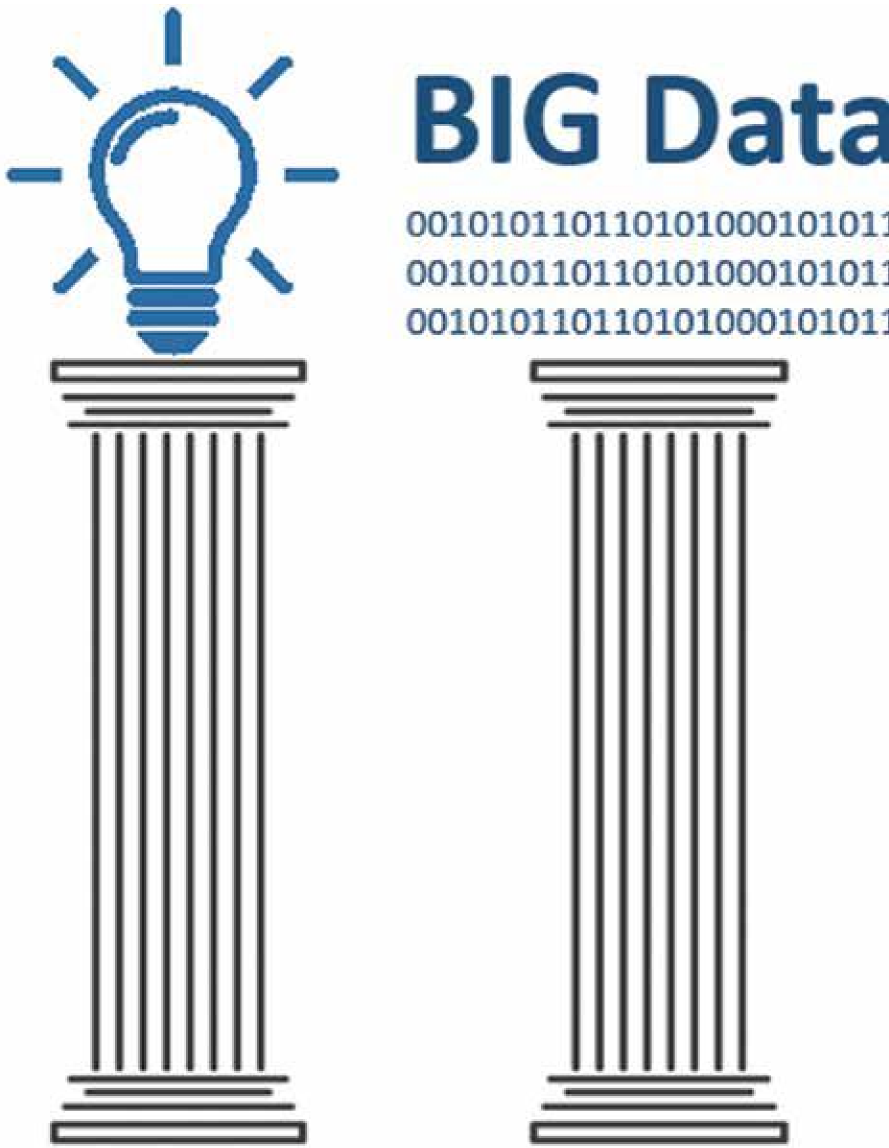
New CRI Guidelines Introduced

The patentability requirements and examination criteria for computer-related inventions have been under scrutiny in major jurisdictions of the world. Considering the special nature of this ever-evolving field, there have been discussions and changes as well as interpretations of legislation on how best to protect this fast-paced innovation where each invention has a short life. The advent of AI, Big Data, and the Internet of Things has further brought new challenges into the forefront requiring clarity on how to apply the law and protection mechanisms to inventions in these high-tech fields. The latest guidelines released by the IPO are a forward and welcome step in this direction.

Initiatives by the IPO

In India specifically, there has been increasing interest in both software products and services. There has been growth in the industry as well as the market for ICT products. The Indian ICT sector has several Indian as well as multinational R&D innovation centers and is a hotbed of innovation. Consequently, this has led to an increase in patent filings and has resulted in initiatives by the IPO in the form of examination guidelines for CRI. In the past few years, these have gone through a lot of changes.

The guidance for examining software-related inventions was first introduced in the 'Manual for Patent Practice and Procedure' in 2005. It underwent several changes and different versions of this manual released thereafter in 2008, 2010 and 2011. In 2013, a separate



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draft set of guidelines apart from the manual was released dedicated only to the examination of computer-related inventions. These were revised in 2015, but were soon put in abeyance with a new set replacing them in early 2016. However, these seem to have been released under pressure since the SFLC had written a letter directly to the PMO complaining about the “unfair” protection offered under the 2015 guidelines. These guidelines could not hold water since they were against the legislative intent and had been formed without giving much thought. Since then, after extensive deliberations and several stakeholder meetings, the latest guidelines have recently been released on 30th June 2017.

Major Changes

The guidelines of 2016 had placed the presence of “novel hardware” as a patentability requirement for software-related inventions. One of the major changes brought about in the latest version is that this requirement has been removed as it was clearly against the intention of the legislature. Apart from that, all examples of non-patentable inventions which were earlier given have been removed. It has also been clarified that systems for encoding, reducing noise in communications/ electrical/electronic systems or encrypting/ decrypting electronic communications will not be regarded as mathematical methods and will be considered patentable.

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Medical Devices Industry Wants Conducive Government Policy

The Ministry of Health and Family Welfare has notified the Medical Devices Rules, 2017 on January 31, 2017. These new Rules have been framed in conformity with the Global Harmonisation Task Force (GHTF) framework, and conform to best international practices

While the Indian medical devices industry supports the government's move to help the common man get access to low-cost knee implants, it has questioned the government's piecemeal approach, capping prices first of stents and then knee implants instead of a smooth transition.

It has recommended to the government for basic import tariff to be 10% for medical devices (whose export is over ₹5 crores) and duty on components to be 5% from next year and 7.5% thereafter as "Make in India" enabler, concessional duty on raw material may be retained at 2.5% for now, and to cover the devices which had not been addressed in the Jan 2016 notification.

Expedite medical devices law to regulate all devices and ensure a clear-cut definition of 'manufacturer' to disallow legalization of pseudo manufacturers and traders to pass themselves off as manufacturers, voluntary compliance backed by 3rd party ICMED certification to be considered as a compliance option/ reduced oversight, buy Indian policy of preferential market access and preferential pricing (as per World Bank terms) for Indian medical devices for Indian public healthcare tenders and have weightage of 5% for ICMED certification, 2% for ISO 13485 certification, and 3% for design India certification for promoting quality and indigenous development.

It recommends a ban on refurbished medical equipment for the next 5 years till such time we have a strong regulatory regime to ensure validated and calibrated equipment for limited access for enabling patient safety.

It has also recommended maximum retail price (MRP) to be enforced on unit of sale of medical devices. The industry suggests that no NPPA / DPCO for medical devices other than in case of stents (combination device, having drug), to introduce price cap mechanism of ex-factory / import landed price in a phased manner or bring in a 1% cess on GST to act as disincentive for putting exorbitant MRP and to incentivize ethically correct low MRP.

The Medical Devices Promotion Council – to focus on aspects of sectoral export promotion and indigenization, to address India's 70% import dependency, 90% on medical electronics.

The Ministry of Health and Family Welfare notified Medical Devices Rules, 2017 on January 31, 2017. The new Rules have been framed in conformity with the Global Harmonisation Task Force (GHTF) framework and conform to best international practices. Only 15 categories of medical devices are, at present, regulated as drugs and to that extent, the current regulatory practices in India were not fully geared to meet the requirements of the medical devices' sector in the country. The new Rules seek to remove regulatory bottlenecks for "Make in India" and facilitate ease of doing business while ensuring availability of better medical devices for patient care and safety.

Medical devices will, under the new Rules, be classified as per GHTF practice, based on associated risks, into Class A (low risk), Class B (low moderate risk), Class C (moderate high risk) and Class D (high risk). The manufacturers of medical devices will be required to meet risk-proportionate regulatory requirements that have been specified in the Rules and are based on best international practices.

With a view to bringing in the highest degree of professionalism in regulation of medical devices, a system of 'Third Party Conformity Assessment and Certification' through Notified Bodies is envisaged. The Notified Bodies will be accredited by the National Accreditation Board for Certification Bodies (NABCB). The NABCB will, before accrediting Notified

Bodies, assess their competence in terms of required human resources and other requirements. These Bodies will undertake verification and assessment of Quality Management System of Medical Device Manufacturers of Class A and Class B categories, and may, as required, be called upon to render assistance for regulation of Class C and Class D medical devices also.

The Rules also seek to evolve a culture of self-compliance by manufacturers of medical devices, and accordingly, the manufacturing licenses for Class A medical devices will be granted without prior audit of manufacturing site. The manufacturer will, in such a case, be required to do self-certification of compliance with the requirements, and based on such certification, the license will be issued. However, post approval audit of manufacturing site will be carried out by the Notified Bodies to check conformance with Quality Management System. Manufacture of Class A and Class B medical devices will be licensed by State Licensing Authorities concerned after Quality Management System audit by an accredited Notified Body. For all manufacturing sites, Quality Management System will need to be aligned with ISO 13485. Manufacture of Class C and Class D medical devices will be regulated by the Central Licensing Authority, and where required, assistance of experts or notified bodies will be sought. Import of all medical devices will continue to be regulated by the Central Drugs Standard Control Organization (CDSCO). A network of NABL-accredited laboratories will be set up by both the government and other entities for testing medical devices.

Separate provisions for regulation of Clinical Investigation (clinical trials) of investigational medical devices (i.e. new devices) have also been made on par with international practices, and like clinical trials, these will be regulated by CDSCO. Conduct of clinical investigations will, while following international practices, be conducted in a manner that ensures realization of the twin objectives of patient safety and welfare and discovery of new medical devices. Medical management and compensation will be provided to subjects of clinical investigation in accordance with predefined and objective criteria laid down by the government.

The new rules have many other unique features. There will be for the first time no requirement of periodic renewal of licenses. Accordingly, manufacturing and import licenses will remain valid till these are suspended or canceled or surrendered. Further, the entire process starting from submission of application to grant of permission/license will be processed through an online electronic platform. Timelines have been defined for most activities at the regulators' end. The issuance of licenses for Class A medical devices on the basis of self-certification coupled with a system of checks and balances for ensuring compliance is a departure from the inspection-based regulatory regime. Risk-based audit of manufacturing units will be carried out to assess conformance with standards and quality parameters. These Rules envisage creation of a robust eco-system for all stakeholders, including innovators, manufacturers, providers, consumers, buyers and regulators.

There will be for the first time no requirement of periodic renewal of licenses

The Rules will provide a conducive environment for fostering India-specific innovation and improving accessibility and affordability of medical devices across the globe by leveraging comparative cost advantage of manufacturing in India. The objective, transparent and predictable regulatory framework will boost confidence of investors, and as a consequence, the quality and range of products and services will improve and business burdens will be reduced. The new Rules will help in developing a quality standardization framework in India on par with international standards. The implementation of these Rules will provide assurance of best quality, safety and performance of medical devices. These Rules coupled with other measures, taken by the government in the recent past, are expected to sharpen the competitive edge and provide incentives to firms to become more efficient, innovative, and competitive. All this will support entrepreneurship, market entry and economic growth, which, in turn, will produce high-paying, high-quality jobs.

The government has recently released the "Draft Pharmaceutical Policy – 2017" which has called for capping trade margins and promoting the sale of medicines using salt name instead of brand names.

The draft policy laid down several policy prescriptions that include enhancing quality standards, reining in unfair trade practices, faster approvals, boosting indigenous manufacturing, and encouraging research and development.

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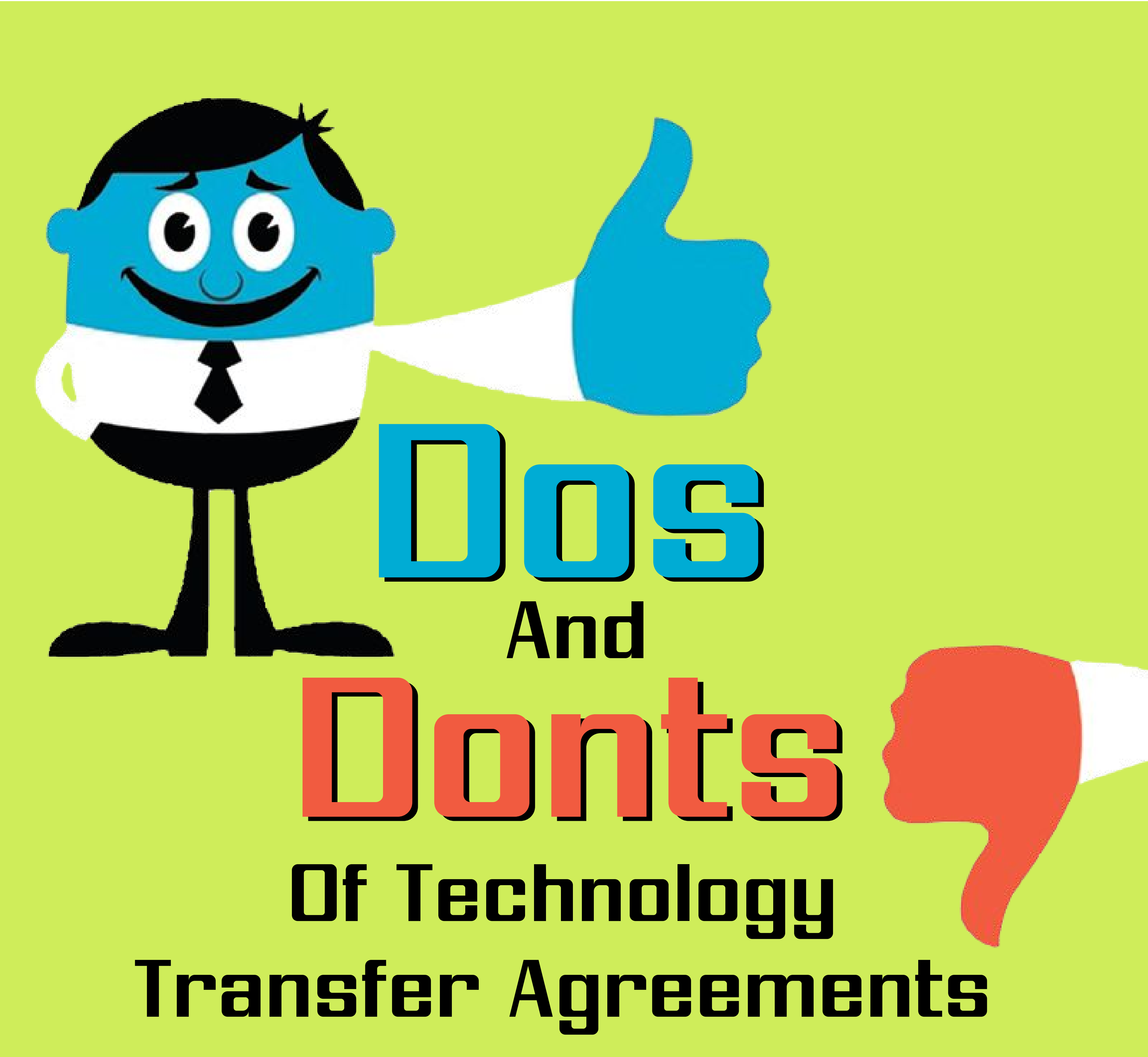

Dos And Donts Of Technology Transfer Agreements

Transfer of technology has become one of the eminent factors driving economic growth of a country, especially in case of developing countries. The Indian government has also stressed exponentially on technology transfer in the past few years and recently expressed the issue of technology transfer with great importance in its opening statement at the 25th Session of the Standing Committee on the Law of Patents. The Department of Industrial Policy & Promotion (DIPP) has also formed a committee to identify areas where developed countries can be urged to share technology with India on the basis of bilateral trade agreements, not only for economic growth but also for the purpose of clean energy and on the issue of climate change. The prospective areas of technology transfer are food processing, energy, the environment, etc.

While transfer of technology involves a number of financial and legal aspects, including IP issues, there are certain key elements that every technology transfer agreement must have. Read on to find out...

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However, many technologically developed countries and organizations have exhibited their interest in sharing technology with India but their main concern remains the domestic commercial environment. Foreign officials acknowledged the developing transparent, predictable and open business environment with the minimum administrative burden in India and cited that intellectual property protection is essential for attracting cross-border monetary as well as technological investment.

In such a contemporary scenario, it is of paramount importance to understand what aspects an organization should adhere to while entering a technology transfer agreement. Many financial aspects and a number of legal issues, including intellectual property issues, are associated with the transfer of technology or commercialization of technology. It is impractical to generalize the terms of contracts on such an issue as majority of the particulars of contracts depend on facts and circumstances of the respective technology transfer. But there are certain key elements that almost every technology transfer agreement must have. These key factors are discussed briefly for the purpose of efficient and productive transfer of technology by strengthening the protection of Intellectual Property Rights.

The Dos

At first instance, it is important to decide that the Transfer of Technology (TOT) agreement is a licensing agreement of intellectual property or just a know-how agreement concerned with the transfer of statutory recognized knowledge or skills. The content of such TOT agreement should be determined on the basis of the motive, strategy, capability, and resources of the organization which wants to draw technology from the licensor. It will act as guiding factor in determining the secrecy and confidentiality feature of the agreement.

Typically, the content of TOT agreement can be divided into three parts: mode of transfer, extent of transfer and use of technology under certain terms and conditions. The provisions related to all these should be drafted with utmost caution keeping the following heads in mind:

- **Specifying the Technology, Rights & Territory**

  It is fundamental to describe the technology and the rights which are being transferred in detail whether being in the form of product or service or just technological knowledge. In the case of complex technologies, the specification of the same with the help of drawing blueprints are important and should cover even minute details so that uncertainty on any aspect of the particular technology should not be left unaddressed. It is suggested that a separate schedule including all rights being transferred should be incorporated in the contract and explicit proviso stating what things are excluded.

  In the same manner, the territoriality for commercial exploitation of the subject technology should also be determined so that the licensor of the subject technology does not directly or indirectly become the competitor of the license. In general practice, parties opt for an exclusive licensing agreement for a specified period in which the licensee has to pay royalty on a per-piece basis or according to the volume of sales and the license may become non–exclusive if the licensee is unable to meet the target in the stipulated time period, at the discretion of the licensor. The issue of sub-licensing by the licensee should also be addressed, and terms and conditions in case of such right granted.

- **Future Improvement and Updates**

  It is essential to include the proviso in the agreement that will cover rights in future improvement in the particular technology. Such proviso will specifically provide that the updated technology is available to the licensor on specified set of consideration or attracts renegotiation of the contract. In case where improvement of technology is a result of the licensor's efforts, such proviso will sort the ownership issue whether the technology is owned jointly or by the licensee alone. In case the licensee has sole ownership over the improved technology, the licensor can implicit a "Grant-Back Clause" in the agreement which will bind the licensee to give the licensor rights over the improved technology.

- **Warranty or Indemnity Clauses**

  The main objective of the warranty clause is to save parties from any kind of losses incurred by them because of default on the part of other parties. The licensor will expressly indemnify the licensee that the technology licensed provides specific results and the said technology does not violate the rights of any third party. Such express proviso in the contract binds parties to compensate an innocent party suffering losses.

- **Confidentiality**

  Before framing the confidentiality clause, it is crucial to identify confidential information. Such provisions should expressly provide for the standard of responsibility that the licensee should adhere to while handling the confidential data, especially protecting physical files containing confidential information, enter into a non-disclosure agreement with the allies' whether employees or distributors, vendors, etc. The TOT agreement should also provide a list of persons to whom disclosure of such confidential information can be made and what will be the security procedures that have to be followed for maintaining secrecy according to

industry standards. In case of breach of confidentiality by any party, indemnity clauses will be attracted.

- **Terms**

  In general practice, the patented technology is transferred till expiration of statutory period, but in case of sharing of know-how or technology for foreign organizations, the Reserve Bank of India has fixed payment of royalty till a period of seven years from commencement of commercial production or 10 years from the date of agreement, whichever is earlier.

- **Prerequisite**

  The Reserve Bank of India (RBI) and Secretariat for Industrial Assistance are authorities whose prior approval is mandatory and it is also obligatory to include all terms and conditions of the agreement specified by the RBI in its letter of approval in case of Foreign Technology Transfer.

Donts of Technology Transfer Agreements

Falling short while negotiating a TOT agreement may result in inefficient use of transferred technology. Presence of certain provisions in a TOT agreement may affect productivity in a negative manner. Therefore, it is advisable that attorneys of parties, whosoever are evaluating or drafting TOT agreements on behalf of their clients, should avoid inclusion of the following:

- **Unjustified Obligations**

The obligations, especially on the licensee, in any manner which adversely affect productivity, profitability or efficient working of the said technology should be avoided. The licensor having monopoly over the technology tries to impose certain restrictions on the licensee like obligating him/her to acquire raw material, source capital goods, etc. from a distributor specified by the licensor, or engaging the specified class of work force to deal with the subject technology indicated by the licensor. All this may disrupt the purpose of transfer of technology, so all those provisions should be avoided in TOT agreement. There are some other restrictions that should be avoided while drafting a technology transfer agreement which are as follows:

- Fixing the price and resale price of the end product manufactured with the use of subject technology.
- Limiting the volume and structure of production.
- Clauses which obligate the licensee to pay for the patents or for other industrial property even after expiration of its statutory term.

- **Absolute Right Over Future Improvement**

The clauses providing absolute ownership to either party over future improvement carried out by the licensee should also be avoided. Such provisions increase the possibility of dispute at a later stage in case of improvement. So, the issue of future improvement should be properly addressed in the agreement and the rights of all the parties to the agreement should be balanced.

- **Unreasonable Restrictions**

Some unreasonable restrictions that parties try to incorporate in the TOT agreement which the opposite party should consider carefully before approving these clauses are:

1. Restriction on the export of the licensed product even if it is not hampering the legitimate interest of the licensor.
2. Restricting use of technology where the technology transfer agreement has expired except where the termination of the agreement took place at an early stage under the reasons specified in the agreement.
3. In case of a non-exclusive technology transfer agreement, restricting the use of competitive technology.
4. Restricting the licensee not to contest the validity of patents.
5. Restricting the research and development programs on the technology transferred.

These are some of the key features that organizations should look forward to while entering into a transfer of technology agreement. Though this is not an exhaustive analysis, there are many other attributes which should also be considered. Parties to such an agreement are expected to be sufficiently vigilant and shall opt for mutual benefiting terms so that rights and liabilities of the parties can be balanced and adequate protection to technology can be provided. The main motive of technology transfer should be economic growth and overall technological development.

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COUNTERING COUNTERFEITS

With the luxury industry growing, the black market industry or counterfeiting industry is also growing - both in the real and virtual world. The intent of the Indian government is to curb this activity if not completely eliminate the menace. Thus, effective co-operation of both brand owners and authorities will help to send out a strong message to counterfeiters...

The Hurun Global Rich list 2017 recently ranked 2,257 billionaires from 68 countries. India was fourth on the list with 100 billionaires, after China, US and Germany. A CII-Kantar IMRB report pegged India's luxury market growth at 25% in 2016 to USD 18.5 billion. According to KPMG International, India is a potential destination for growth of luxury brands which can be judged by the fact that a number of premium luxury brands are increasingly interested in or have already entered the country. With increased awareness and purchasing power of Indian consumers, luxury brands are no longer an out of bounds proposition.

In fact, India has become one of the fast-growing markets for high-end luxury products. As per statistics, it has been growing by more than USD 255 million a year in absolute terms, on par with the United Arab Emirates and considerably stronger than Singapore and Australia.

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Further, there is a growing concept of affordable luxury targeting millennials who aspire to own luxury brands and their rising disposable incomes has ensured a steady growth for luxury goods. In addition, brand awareness has infiltrated tier 2 and tier 3 cities. Further growth of the digital retail landscape and e-commerce players foraying into the luxury space has all contributed to the growth of the industry.

Counterfeiting Industry

With the luxury industry growing, the black market industry or counterfeiting industry is also growing - both in the real and virtual world. Gone are the days that counterfeit luxury products would be confined to an alleyway market or a fashion street such as Gaffar Market and Palika Bazaar in New Delhi; Ritchie Street and Burma Bazaar in Chennai; Heera Panna, Lamington Road and Fort District in Mumbai. The market for counterfeits is now rapidly moving from fashion streets to online platforms where anonymity helps sell and distribute counterfeit goods with ease. Further, this has also taken counterfeiting goods to tier 2 and tier 3 cities. According to ASSOCHAM, the market for fake luxury goods in India is likely to touch ₹6,000 crore this year. Globally, the fake luxury products market accounts for 7 percent of the overall global luxury industry worth about USD 320 billion with an estimated value of over USD 22 billion.

Recent trends in distribution of counterfeit goods that are causing worry to high-end fashion brands are a) import of factory seconds and offering them at heavy discount online and by organizing special sale in five-star hotels without disclosing that the products are not under warranty; b) creating groups on WhatsApp to offer counterfeit products; c) copying designs to produce replicas (more common in the apparel industry); d) using other social media platforms to sell/distribute counterfeit products.

Standpoint of Courts in India

When it comes to counterfeits of high-end luxury brands being sold by small brick and mortar shops, the companies are in a dilemma whether to take an aggressive approach or ignore the poor-quality counterfeits considering they will be bought by consumers who are not the target audience for luxury brands. On the other hand, when it comes to online sale of counterfeit goods, the brand owners are more careful as these have higher visibility and undermine the brand image. Further, brand owners worry that multiplicity of fakes of a specific brand available in the market leads to brand dilution and withering away of the selling power of a brand often termed as 'brand dilution'.

There are various instances where international high-end brands have sued local players in the court of law for passing off. In a landmark case ***Hermès v. Da Milano***, in order to stop the sale of handbags that resembled Hermès' noted Birkin Bag, French luxury brand Hermès filed an action against Indian leather goods company Da Milano. One of the arguments taken by the defendants was price difference between the products and thus, low likelihood of confusion. The Birkin Bag by Hermès priced around ₹600,000 (approx USD 9000) whereas the defendant's bag would be around ₹10,000 (approx USD 150). However, the defendants were injuncted from selling these bags by an order of the Delhi High Court in 2013. Three years down the line, a settlement was entered whereby the defendants were allowed to sell their handbag; however, they were prohibited from showing "ornamental or decorative part of the plaintiff's handbag viz., a horizontal belt and flap having three protruding lobes," which was a registered element of the Hermès Birkin bag.

Faking is not a luxury in the eyes of law

In the case of ***Christian Louboutin Sas v. Nakul Bajaj & Ors***, it was observed that the defendants had been selling shoes online on their website. They claimed that they were the original make of the plaintiff Christian Louboutin. By prominently displaying the mark CHRISTIAN LOUBOUTIN on their website, they further claimed that they were associated with the plaintiffs. Louboutin, on the other hand, contended that the goods were being sold without the company's authorization and quality control and thus, would be deemed to be counterfeit (despite them being authentic). Further, Louboutin contended that grey market rule (doctrine of exhaustion) would not apply to products available online as quality control measures would be missing. Therefore, the Delhi High Court provided protection to Louboutin.

Cartier International Ag & Others v. Gaurav Bhatia & Ors is an instance where a heavy discount was offered by the defendants on goods sold online alleged as counterfeits. The pertinent marks were CARTIER PANERAI, VACHERON CONSTANTIN, and JAEGER LECOULTRE. On the basis of complaints made by various beguiled customers to authorities and relying on several screenshots from the website and other evidence, the court granted a decree of permanent injunction and heavy punitive damages of INR 10 million (USD 156,773).

Louis Vuitton Malletier v. Plastic Cottage Trading Co. is another instance where M/s. Plastic Cottage Trading Co. under Bill of Entry No. 8154543 shipped counterfeit Louis Vuitton ladies' bags into India on 8th October, 2012.

The commissioner seized the consignment and thereupon issued a show cause notice to the importer. Consequently upon adjudication, the said goods were disposed and destroyed. Furthermore, a penalty of INR 140,000 (USD 2194) was imposed on the importer.

Burberry Limited and Ors. v. Digaaz.Com/Digaaz-Ecommerce Pvt. Ltd. and Ors. In this case, defendants were using the registered trademarks BURBERRY and BURBERRY CHECK of the plaintiff BURBERRY LTD. to sell counterfeit products on their website www.digaaz.com. The court decided the matter ex-parte after repeated unsuccessful attempts to cause appearance of the defendants. Further, an order of permanent injunction was passed, restraining defendants from using the plaintiff's mark in any manner including for advertising on their websites.

Gucci v. Gautham Chand. In the present case, the plaintiff contended that "GUCCI" has attained worldwide reputation in terms of its goods and the products manufactured under the name of GUCCI. Further, the brand name GUCCI is registered in a number of countries around the world including India for the last several decades. On the other hand, the defendants, a company selling cables and wires, adopted a similar trade name and logo with clear intention to ride upon the goodwill and reputation of GUCCI. The Delhi High Court on such basis recognized the statutory and common law rights of the luxury brand GUCCI in their mark. Thereafter, the defendants were categorically restrained from using any such mark/logo/trade name which is deceptively similar to that of GUCCI, even when the trade sector of the parties was entirely different. Thus, in the present case, irrespective of the different business sectors, the defendants were asked to stop their illegal activities with immediate effect.

As can be seen from the above, courts in India have come down heavily on copycats and resultantly, created the image of India not being an easy destination for counterfeiting activities.

Strong Enforcement is the Way Forward

With the demographic advantage that India has, the luxury goods market will continue to grow, but at the same time, brand owners would want that the markets are free from replicas of their products. While India has strong laws to address the problem, but it is the implementation of the legal provisions and procedural delays that are of concern to IP owners. This is also one of the reasons that India continues to be under the watch list of the US Trade Commission under its annual review also termed as Super 301. With India coming out with its National IP Policy and constituting a special cell (CIPAM) for implementation of various objectives which include improving enforcement and adjudication, the future looks promising.

Tools to Tackle

To tackle the availability of counterfeit goods online, brand owners are now investing in knowing the problem better by using forensic tools to gather web traffic analytical data etc. Further combining the information in the second phase to use traditional on the ground investigators to verify identity of counterfeiters and track their location. Recording IP with custom authorities to prevent import of counterfeit goods is also a useful tool.

Further, the legal measures must work in tandem with educating the end consumer of perils of buying counterfeit goods. At the same time, law enforcement authorities have to be made aware of the new trends in counterfeiting and that criminal syndicates are often involved in running the counterfeit operations. Thus, treating IP crimes as not serious crimes will only embolden them to take this route to make easy money that can finance their other criminal activities.

Overall, the intent of Indian government is to curb this activity if not completely eliminate the menace. Thus, effective co-operation of both brand owners and authorities will help to send a strong message.

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Are Online Companies Compromising User Privacy?

A look at the recent ruling against Monster.com and implications for other Internet giants...

By Madhavi Gokhlay

Not long after a nine-judge bench of the Supreme Court headed by former Chief Justice of India, J.S. Khehar, unanimously ruled that Right to Privacy is part of Right to Life and Liberty enshrined under Article 21 of the Indian Constitution, reports surfaced that a trial court had ordered an investigation into online job portal Monster.com's alleged sale of user data to third parties.

Chief Metropolitan Magistrate (CMM) Naresh Kumar Laka reportedly said, "It is common knowledge that when a person applies for a job on the Internet, s/he feeds personal information which includes name, address and mobile number. In my opinion, the said data being personal information cannot be transferred/shared/sold to some third person without the consent of the said person."

According to Laka, just because users agreed to the portal's terms of use and privacy policy, it did not automatically mean that the portal could share or sell their information. Qualifying it further, Laka said that online companies could not share users' personal information with third parties without the users' informed consent.

"At the time of entering personal information or data, job-seekers are not aware that the said data can be sold to any third person or that it can be misused. Accordingly, the said ostensible consent of the said applicant/individual cannot be said to be a free, voluntary or informed consent," Laka said.

Citing the historic Supreme Court judgment, the CMM directed the police to conduct a probe into Monster.com's alleged sale of user data and nab the culprits who were involved. The CMM went on to say that such fake job rackets were proliferating across the country, and needed to be checked with a firm hand.

Monster.com, on its part, claimed that it had entered into a lawful contract for selling user data. The online jobs' portal said that it depended on the agreement between job-seekers and itself, terms of which were tantamount to Monster.com taking consent of users for sharing their data.

In a statement issued on its website, Monster.com said, "By registering or by using this site, you explicitly accept, without limitation or qualification, the collection, use and transfer of personal information provided by you in the manner described in this statement. Please read this statement carefully as it affects your rights and liabilities under law. If you do not accept the privacy statement stated herein or disagree with the way we collect and process personal information collected on the website, please do not use it."

Monster.com released a separate statement which read: "Monster.com is currently awaiting a copy of the court's order and direction to understand the specifics of this matter. We will fully cooperate with the regulatory authorities and comply with all processes laid down by them to take necessary action against errant parties."

"At the outset, we would like to officially state that Monster.com is a fully compliant organization in all its transactions with its customers, job-seekers, and all other related stakeholders. We encourage all our stakeholders, including our customers and associates, to comply with the terms of use and privacy norms of Monster.com websites as per applicable laws. Ethics, transparency, and ensuring data privacy and integrity is of the utmost importance to Monster.com," the statement read.

Monster.com maintained that users, while signing up for its service, gave their consent to the company to collect personal, demographic, behavioral, and indirect information. Personal information comprised users' names, addresses including email addresses, contact information including telephone numbers, and billing information. Demographic information referred to users' ZIP or postal code, age, preference, gender, race/ethnicity, occupation, career history, interests and favorites. Whereas behavioral information included how users used the site, areas of the site they visited, services they accessed, and computer hardware and software information.

Monster Impact

Popular perception of portals such as Monster.com has so far been that these are authentic repositories of accurate data of users actively looking for jobs. However, the trial court's order strikes at the very heart of this conception. Not surprisingly, other Internet giants too have been feeling the heat of the court's decision ever since.

In one of the cases following the trial court's ruling, the Supreme Court issued notices to Google and Twitter in connection with a PIL filed against them, voicing concerns over privacy of data shared across borders. The petition reportedly stated, "Privacy rules do not apply to body corporates like Facebook, Twitter and Google outside India. The situation is alarming because Indian arms of these body corporates have stated that they have no control over content/data/information generated from India and pertaining to Indian users. The content, website and data/information generated on facebook.com, twitter.com, and Google.com is controlled by Facebook Inc., Twitter Inc. and Google Inc., respectively, all of which are body corporates outside India exempt from Privacy Rules, 2011."

In another instance, a five-member bench of the Supreme Court directed Facebook and WhatsApp to file sworn declarations as to whether they had indulged in any kind of data-sharing activity with third-parties. The order came after two students approached the court over changes made in WhatsApp's privacy policy following its acquisition by Facebook. The petitioners alleged that post the merger, WhatsApp was sharing all its user data with Facebook, thereby violating users' Right to Privacy.

When a leading publication quizzed a Bombay High Court lawyer, who specializes in data theft, on the matter, he explained that while data sharing depended on mutual agreements between users and online portals, the latter needed to take permission from users before sharing sensitive data such as financial and health information and passwords. In the event, online portals were sharing such data without an explicit agreement, they were committing data theft as per Section 43(b), read along with Section 66 of the Information Technology Act, 2000. In such cases, users could simultaneously resort to civil and criminal remedies. About Laka's ruling, the lawyer said that Right to Privacy came into the picture only when users had not already surrendered their rights by signing agreements or accepting conditions that explicitly allowed online portals to sell their data. He cited the example of professional networking website, LinkedIn, which, on June 7, 2017, updated its terms of service, privacy policy and user agreement. The new terms explicitly stated that LinkedIn, would allow certain third-parties to view user profiles so that users could get more opportunities to connect with people. However, the site also gave users the option of not going for such broader distribution of their profiles.

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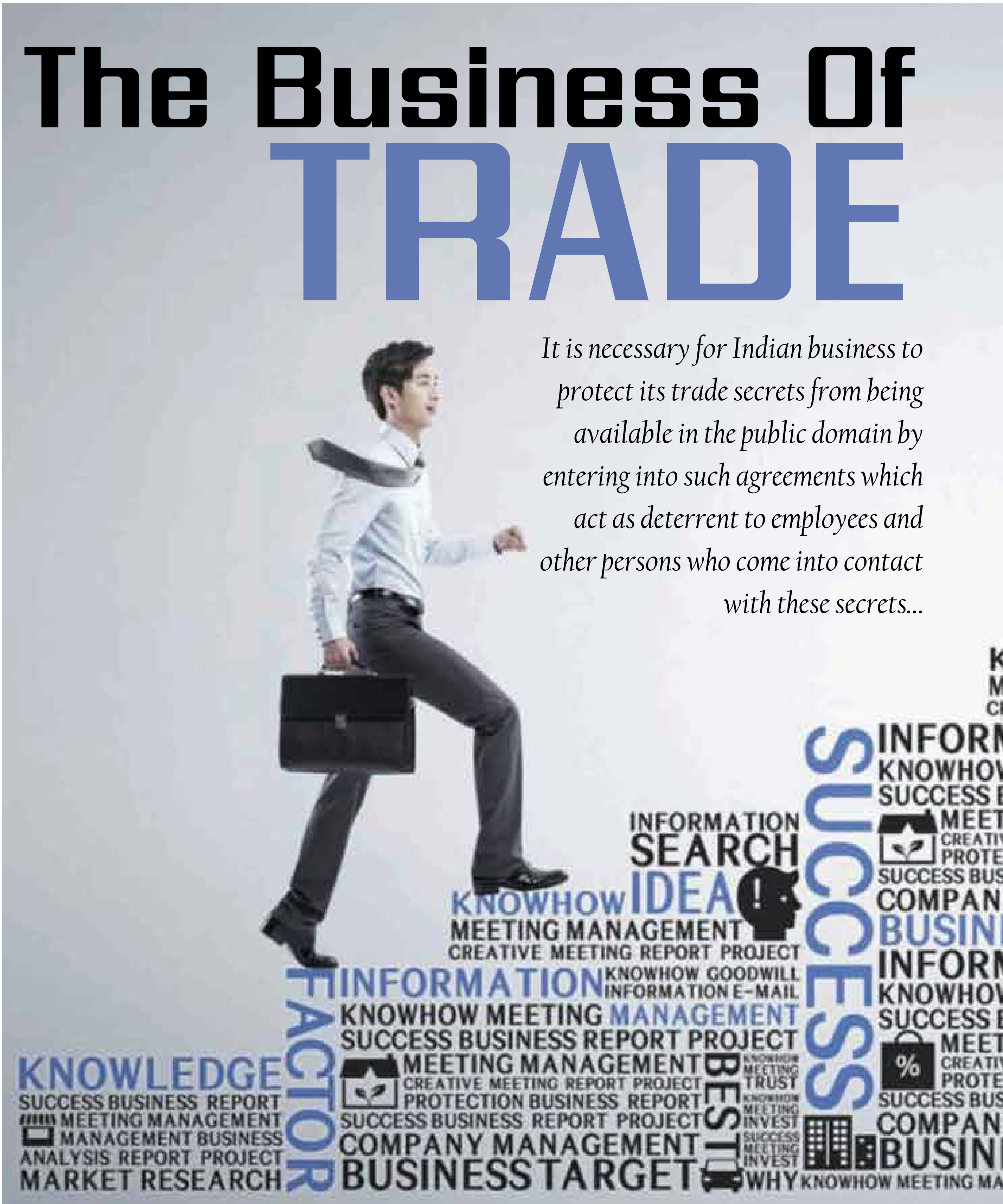
The Business Of TRADE

It is necessary for Indian business to protect its trade secrets from being available in the public domain by entering into such agreements which act as deterrent to employees and other persons who come into contact with these secrets...



SECRETS

B GOPALAKRISHNAN[1]
Senior Partner
S K Singhi and Co, Mumbai

I have often wondered as to the secret of my grandma's recipe with respect to the special mango pickle prepared by her. Whether it had a trade value or not never occurred to me. Over the years, I understood that the secret of my grandma's recipe is nothing but a trade secret which is passed down generations.

The term trade secret has no specific definition per se. However, the generic definition is as follows:

Trade secret is a formula, process, device or other business information that is kept confidential to maintain an advantage over competitors. It is information which includes the formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value from not being generally known or readily ascertainable[2].

North American Free Trade Agreement (NAFTA) defines a trade secret as *"information having commercial value, which is not in the public domain, and for which, reasonable steps have been taken to maintain its secrecy."*

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) lays down three essential conditions which are to be fulfilled by any information before it can be considered undisclosed information (trade secret). These are:

- *such information must be secret, i.e., not generally known or readily accessible to "persons within the circles that normally deal with the kinds of information in question",*
- *the information must have commercial value because it is secret, and*
- *the information must be the subject of reasonable steps by its owners to keep it secret.*

The Uniform Trade Secrets Act, 1970 also provides for definition of trade secrets, which is as follows:

"Information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy".

In India, there exists no specific legislation with regard to protecting a trade secret and/or remedies available in the event of a breach, while the concept of trade secret is well recognized in India through various judge-made laws. Before we proceed to refer to those judge-made laws, it is imperative to note that the absence of legislation is not a deterrent for the affected party to deal with and enforce a case relating to breach of a trade secret. **Legislations that have a connection with trade secrets can be summed up as follows:**

1. Copyright Act, 1957 [Sections 51, 55 and 63]
2. The Designs Act, 2000
3. The Information Technology Act, 2000 [Sections 65, 72]
4. Indian Penal Code [Sections 408, 415]
5. The Indian Contract Act [Section 27]
6. The Competition Act, 2002 [Section 3]
7. Civil Procedure Code
8. Criminal Procedure Code

The judge-made laws are as follows:

Calcutta High Court in **Fair Fest Media Ltd vs LTE Group Plc and Ors**[3], while summarizing the legal status of trade secret protection in India, stated that *"the essence of this branch of law whatever the origin it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication."*

American Express Bank Ltd. vs. Priya Puri[4]: Delhi High Court defined trade secrets as *"...formulae, technical know-how or a peculiar mode or method of business adopted by an employer which is unknown to others."*

Anil Gupta and Anr. vs. Kunal Dasgupta and Ors[5]: The Delhi High Court held that *"the concept developed and evolved by the plaintiff is the result of work done by the plaintiff upon material which may be available for use by anybody but what makes it confidential is the fact that the plaintiff has used his brain and thus produced a result in the shape of a concept."*

In India in the past, we made an attempt for protection of trade secrets by drafting a Bill, namely, National Innovation Act, 2008 as also a National IPR Policy. Unfortunately, neither the Bill nor the Policy saw the light of day.

Therefore, in the Indian context, the protections that are available for breach of a trade secret and tools which one should use to protect interests of the business are mainly through agreements, namely, employee confidentiality and non-compete agreements. However, it is necessary that the said agreement should contain the following clauses:

- We need to define what is covered as confidential information broadly
- The validity of the agreement [it is only during employment and if not, it is perpetual]
- What is considered as non-authorized disclosure [if so, what is the remedy]

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[1] The author can be reached at bgk@sksinghiandco.com. [2] Black Law's Dictionary Eight Edition as cited in Bombay Dyeing and Manufacturing Co. Ltd. vs Mehar Karan Singh, 2010 (112) BOMLR 3759]. [3] 2015 (2) CHN (CAL) 704. [4] (2006)III LLJ 540(Del). [5] 97 (2002) DLT 257. [6] 637 F.3d 604 (5th Cir. 2011). [7] [1948] 65RPC 203. [8] 122 (2005) DLT 421.

- What constitutes an inevitable disclosure
- Limiting access to confidential information [this is to be strictly followed by the company, namely, who all can access the information]
- Non-compete clause and the need to state what are the actions which will be construed as a competition activity
- Bar in joining a competing employment
- Mode of Adjudication if a breach occurs [arbitration, litigation subjected to territorial jurisdiction]
- The right to move for injunctive relief

There is always a misconception that a trade secret can be patented. However, the Courts abroad have clearly held that a trade secret cannot be patented.

In **Tewari De-Ox Systems Inc. Vs. Mountain States/ Rosen L.L.C.**[6], the plaintiff and the defendant were parties to a non-disclosure agreement. Under the agreement, the plaintiff showed the defendant a packaging process and oxygen evacuation method to extend the shelf life of meat. The plaintiff also filed a patent application relating to this process. The patent application was published, but it was never issued as a patent.

The plaintiff sued the defendant for breach of contract and misappropriation of trade secrets. After the lower court granted summary judgment in favor of the defendant, the U.S. Court of Appeals for the 7th Circuit considered whether the defendant waived trade secret protection by including details about the meat-packing method in a published patent application. As trade secrets are governed by state law, the court applied Texas law and noted that:

"There can be no dispute that a published patent application is readily available [and] information that is generally known or readily available... is not secret for the purposes of trade secrecy."

However, the Court also noted that a trade secret is "one of the most difficult and elusive concepts in law to define," and that defining a trade secret requires a full presentation of facts.

Although the patent application disclosed many details about the plaintiff's process, under the non-disclosure agreement, the plaintiff demonstrated to the defendant additional methods that would adapt the plaintiff's process to the defendant's "open nozzle" meat-packing system. Noting that "unique combinations of previously-disclosed elements" can be trade secrets, the 7th Circuit stated that the plaintiff had raised an issue of material fact as to whether the additional methods were trade secrets.

While acknowledging that a "simple and obvious change" to a known process is not a trade secret under Texas law, the Court said that the question of whether the plaintiff's additional methods were trade secrets was a question of fact for the jury to decide, and not an appropriate subject for summary judgment.

Some of the important judge-made laws with regard to the breach of a confidentiality agreement/non-disclosure Agreement which has the effect of disclosing the trade secret are as follows:

The decision of the Court of Appeal in **the Saltman Engineering Co. vs Campbell Engineering Co Ltd.**[7] case is an important judgment extensively relied upon by Indian courts to establish whether information shared between the owner and the recipient is indeed confidential. The court in this case had held that confidential information *"must not be something which is public property or public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process."*

In the same vein, the Delhi High Court in the **Ambience India Pvt. Ltd vs Shri Naveen Jain**[8] case in 2005 held that "trade secret is protected and confidential information which the employee has acquired in the course of his employment and which should not reach others in the interest of the employer. However, routine day to day affairs of the employer which are in the knowledge of many and are commonly known to others cannot be called trade secret."

In conclusion, it is necessary for the Indian business community to protect its trade secrets from being available in the public domain by entering into such agreements which will act as deterrent to employees and other persons who come into contact with the trade secrets, since they have a huge financial implication. This is more so in view of the fact that globalization has done away with geographical boundaries. Equally, it is necessary for Indian Courts to act proactively and restrain leakage of such trade secrets.

Notwithstanding the above, in order to keep pace with other developed countries, it is necessary for the Government of India to put in place a high-powered committee to draft an all-encompassing legislation to protect age-old trade secrets.

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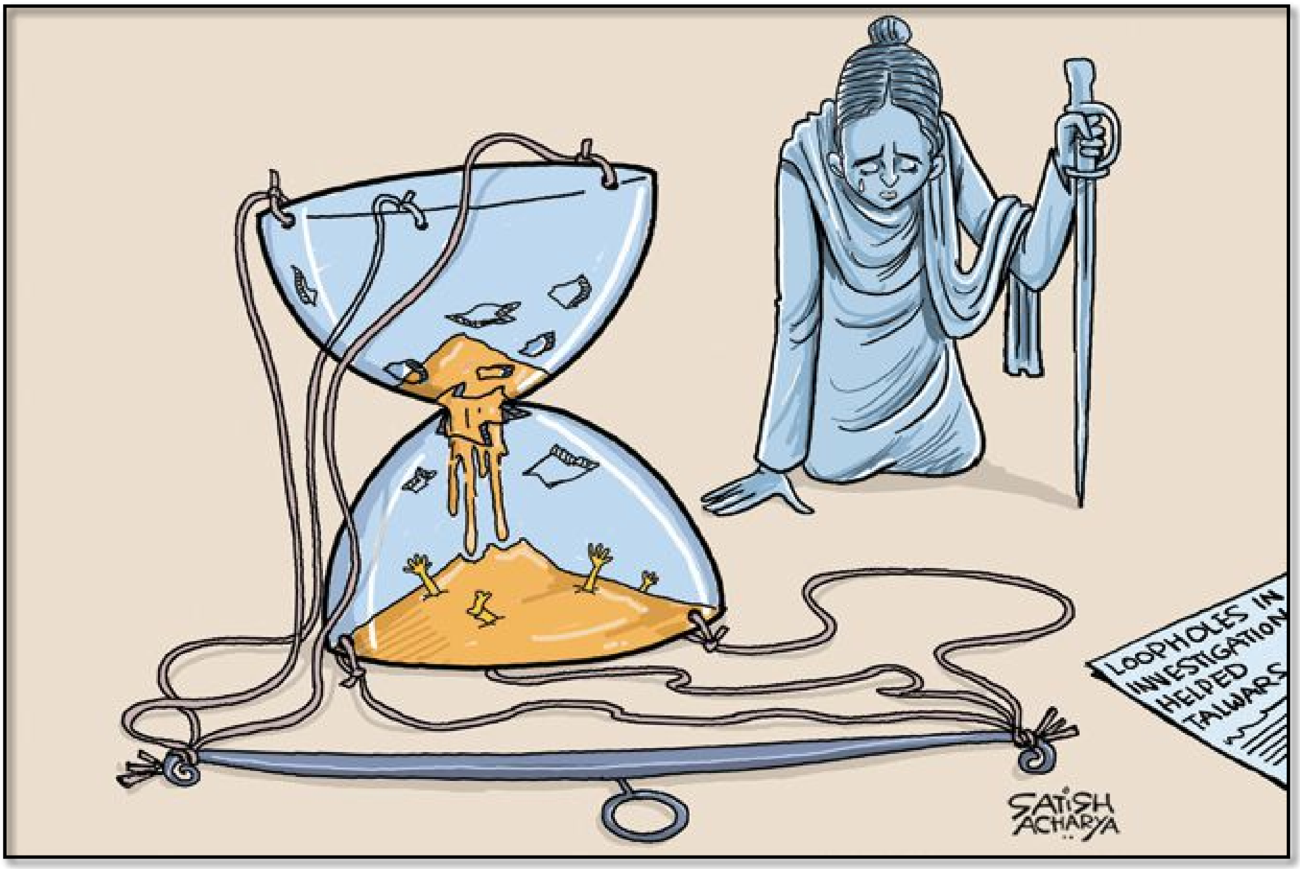
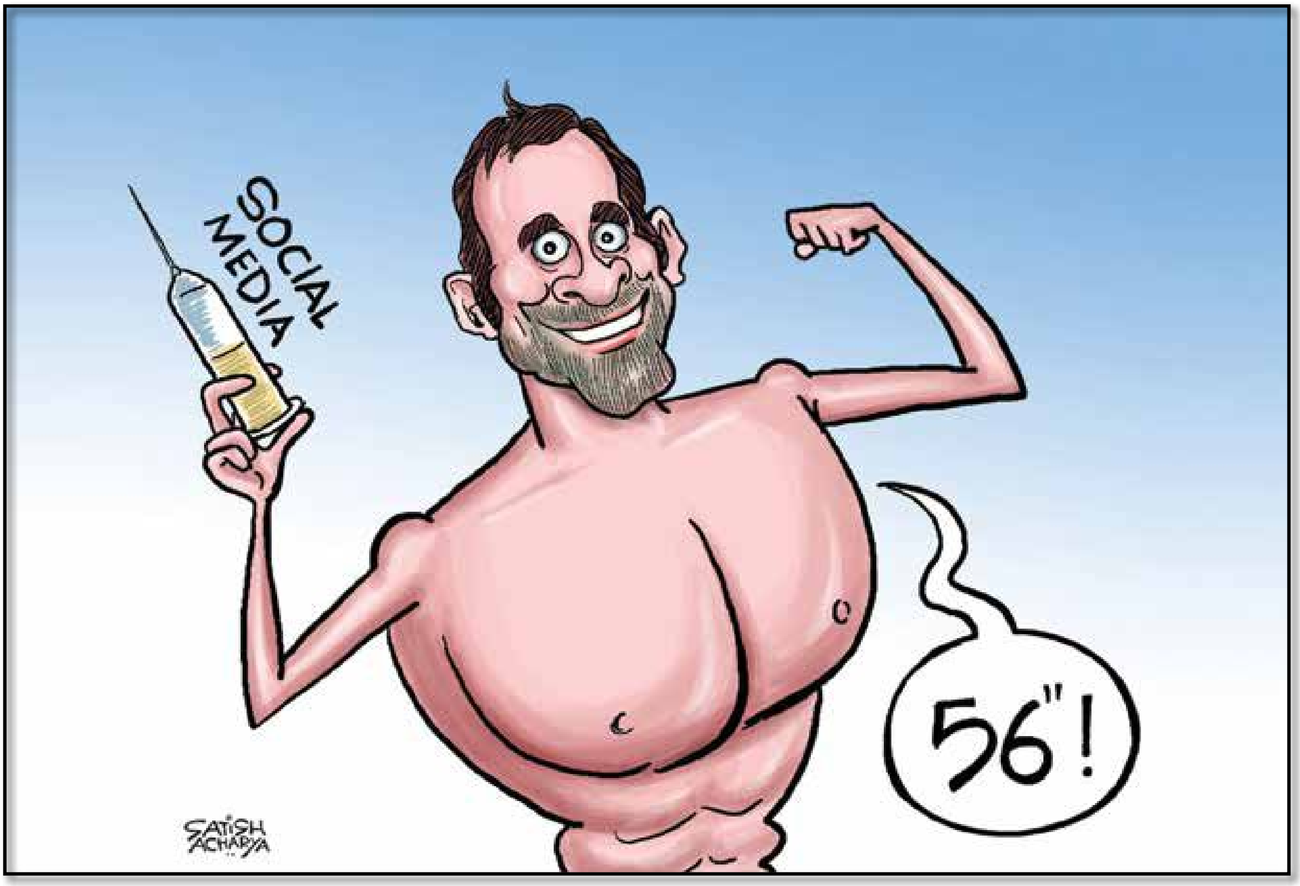
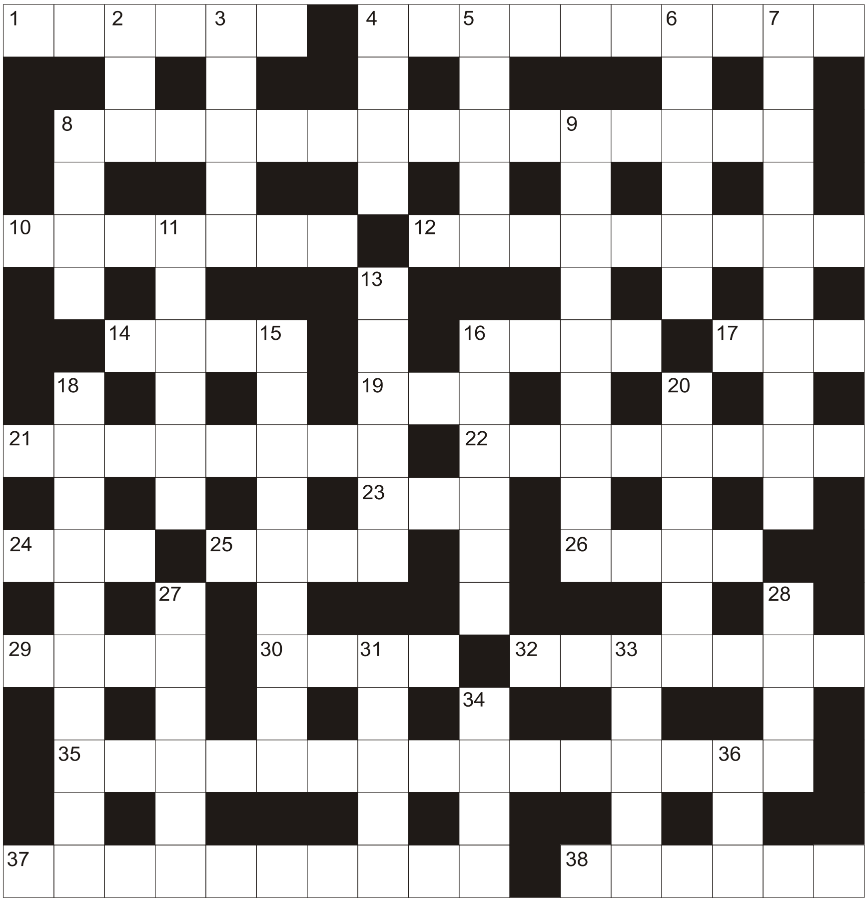

LOOPHOLES IN INVESTIGATION HELPED TALWARS
SATISH ACHARYA


SOCIAL MEDIA
56"!
SATISH ACHARYA


BJP
WELCOME
MUKUL ROY JOINS BJP
CBI
WASH YOUR LEGS!
SATISH ACHARYA


WOH TAJ!
SATISH ACHARYA

Legal Crossword



Nitaa Jaggi

ACROSS

1. Company investor who only shares the profits and losses (6)
4. Undertaking (10)
8. Lawyers representing individuals charged with criminal conduct (7,8)
10. Settle on, as terms (5,2)
12. Lady's escort (9)
14. Equals (4)
16. Kind of imprisonment for a serious crime (4)
17. Warning colour (3)
19. Second person (3)
21. Other self (5,3)
22. Come back before the court (8)
23. Romanian currency (3)
24. Agreement (3)
25. Argument (4)
26. Extreme trouble (4)
29. Foreign Exchange Management Act (4)
30. Unusual order (4)
32. Proclaim (7)
35. 'The necessary changes' in Latin (7,8)
37. Conventional image (10)
38. Prison breakout (6)

DOWN

2. Untruth (3)
3. Female relative (5)
4. Fifty-fifty chances of winning a case (4)
5. Legal right (5)
6. Leased (6)
7. Surveilling devices (3,7)
8. Venetian magistrate (4)
9. Situation beyond control (3,2,4)
11. Copyread (6)
13. Bribe (6)
15. Be suspicious (5,1,3)
16. One who prowls (6)
18. Hat for a U.N. peacekeeper (4,6)
20. Petition (6)
27. Legal case (6)
28. Indian Act of 1959 to curb illegal weapons and violence (4)
31. Uncertain venture (5)
33. Flogging rods used for punishment (5)
34. Dictum (4)
36. Information Technology Authority (3)

Sudoku

			7					8
6		4		2		7	1	
7			5	4	3			6
			2			8		9
		5	9	7	1	2		
4		9			8			
2			3	8	7			1
	9	8		6		4		3
1					5			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even when today's game gets hot.
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FEEL 3°C COOLER*
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MICRO SKIN CONDITIONERS
COOL BURST
Menthol Crystals
FOR BODY AND HAIR
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With a burst of all-day freshness^, to take on the competition.
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Join the conversation at #FiamaCoolestPlayer. *Based on consumer feedback and mean decrease in surface skin temperature as per instrumental measure. Skin temperature returns to normal subsequently. ^Based on consumer feedback.

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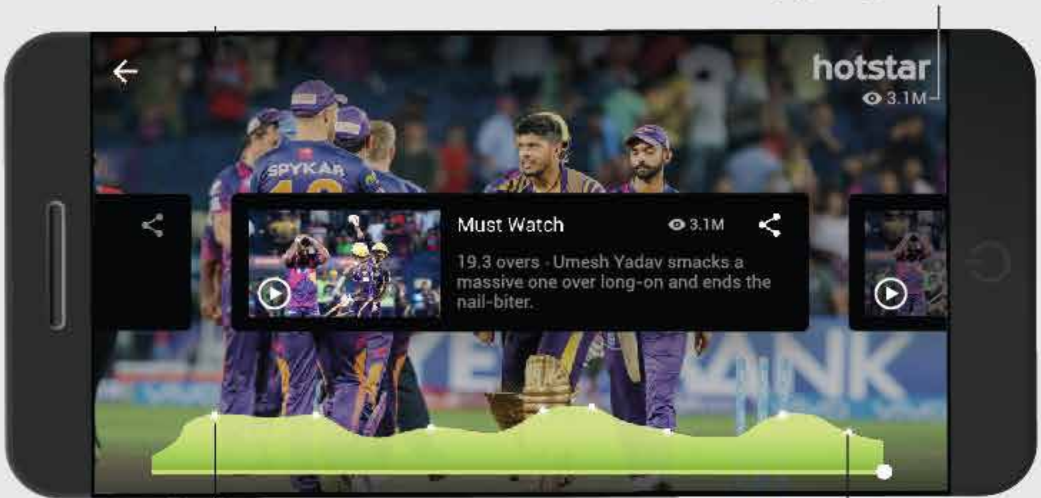

Fan graph
to watch with your friends

Hottest moments
at your finger tip

hotstar

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Across 1 million+ cities