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THE ‘TASTE’ OF COPYRIGHT: DELVING INTO THE REALM OF COPYRIGHTS IN THE CULINARY WORLD

By- Samridh Ahuja

The Cambridge Dictionary defines ‘TASTE’ as “*the flavor of something, or the ability of a person or animal to recognize different flavors*”.¹

Levola Hengelo BV v. Smilde Food BV²

Last year, an interesting issue with respect to copyrightability of unconventional works was raised before EU’s highest legal authority, the Court of Justice, European Union. A Dutch food producer, Levola Hengelo, had sued Smilde Foods, for infringing its copyright over the taste of a cheese spread. The Levola product, known as Heks’ nkaas, or also known as Witches Cheese, is made of cream cheese and herbs and vegetables including parsley, leek and garlic. On the other hand, Smilde’s herbed cheese dip contained many of the same ingredients, and was named Witte Wievenkaas, which also made a reference to witches. While, the issue with respect to trademark infringement was resolved, the issue now before the Court was – *can the taste of the food be subject to copyright protection?*

Does it smell like Copyright?

Levola, in this case, had relied on a Dutch Supreme Court ruling in *Lancôme v Kefoca*³

¹Cambridge Dictionary, Definition of Taste, also available at <https://dictionary.cambridge.org/dictionary/english/taste>, (last accessed on 8th February, 2019).

² *Levola Hengelo BV v. Smilde Food BV*, C-310/17.

³ *Lancôme v Kefoca*,

where it was held that the smell of a perfume is eligible for copyright protection. The Supreme Court of the Netherlands, in this case, stated that ‘scent’ was protectable under the Dutch copyright law, as it a) could be recognized by sensory perception; b) possessed an original character as it is composed of an original mix of ingredients that are not only quantifiable by the senses but are in fact substantial and constant enough to be considered as an authored work capable of copyright protection; and c) bore the personal stamp of the author as it was created by the famous "nose" Sophie Grossman, who called it her "Hug me" perfume.

This was in stark contrast to the judgment of the French Court de Cassation which had held that the smell of a fragrance was not eligible for copyright protection as it was a result of a 'simple implementation of a skill' that cannot be identified with sufficient precision.

The Judgment

For a work to fall under the ambit of Copyright protection, the same needs to be expressed in a manner that it is identifiable with ‘*sufficient precision and objectivity*’. The court formulated that taste of food cannot be identified objectively and that it is in fact ‘*subjective and variable*’ and open to personal biases, that is to say that the taste of a particular dish may be identified differently by different people and the same may change over time. Further, the court remarked that at present the world lacks the technical means to make a precise and objective identification of the taste of a particular food dish so that it is capable of being distinguished from any other food dish of the same kind/type.

Conclusion

In the light of this judgment, there is a high likelihood for future prosecution with respect to claiming copyright protection for non-conventional works. It would be interesting to see how courts would rule/order in extending copyright protection in relation to non-conventional works. The overall idea of seeking copyright protection with respect to the essence of a food dish gets increasingly blurred in a world that is obsessed with social media, where everything is showcased for the world to see. A freshly prepared dish is posted on social media platforms by food bloggers/Instagrammers for the world to see and admire, leading to rampant copying, further blurring the line between art and proprietary commerce⁴.

In order to succeed in a copyright case the proprietors/companies would have to uncover a way to objectively describe the taste of their food products.

The Berne Convention allows for a wide interpretation of what constitutes copyrightable material. India, even though, a signatory to the Berne Convention, follows a closed copyright regime. But with time and technological advancements, the Indian courts have also recently passed progressive judgments favoring copyright protection in non-conventional works like sound and combination of colors (even a single color). Hence, this decision might not pose an immediate legal impact on countries like India, owing to the closed copyright regime, but it would be exciting to see the legal ramifications of the same in near future.

⁴ Leslie Wu, "Can Taste Be Subject To Copyright?", FORBES, <https://www.forbes.com/sites/lesliewu/2018/07/31/can-taste-be-subject-to-copyright/#766e13b16c94> (last assessed on 18th February, 2019).

TRADEMARKING SOUND: AN EMERGENCE AFTER A DECADE

By- Khushboo Tomar

Over the years since its inception, the sole objective and purpose of the Intellectual Property Law has been to promote innovation and simultaneously protect the rights of true inventors whether as trademarks, copyrights or any other industrial designs. Along with the several developments introduced in the new Trade Marks Rules 2017, “sounds marks” have made its recognition as one of the most prominently registered marks in current times.

First and foremost, what kind of mark really constitutes a Sound Mark? The said Act does not define sound mark specifically but states that "a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours" are capable of registration under this Act. Such sound marks must be distinctive and unique so as to be registrable and deserve full protection under the Trade Marks Law. Such marks are not specifically defined under the said Act but are tagged along with other non- conventional marks. In India, sound marks such as the Ting –Ting-Ti-Ting of Britannia and Jack White of Coca – Cola are some of the famous and registered sound marks. The corporate jingle of ICICI Bank was the first sound mark to be registered in the name of an Indian entity.

Section 2 of the Copyright Act, 1957, also provides protection for sounds under the ‘musical works’ category. But both the laws i.e. the Copyright Act, 1957, and the

Trademark Act, 1999, involve completely different purpose and protect entirely different line of businesses. While the former protects the artistic/creative work displayed graphically, the later protects the goodwill of the business represented by the said design. However, obtaining trademark protection is still advisable, as the two laws protect completely different rights in the sound. For example, the logo of an Audi Car – the four circles; the four circles, on their own, constitute an artistic work. However, when placed on a car, they represent cars made by the company Audi. If one were to simply sell it as a drawing it would infringe the copyright in the work. On the other hand, if one were to use the logo on cars and subsequently sell those cars, then it would be infringing the trademark rights over the logo. It is a thin line of difference between the two but is extremely significant.

Registration Process of Sound Marks is as easy as a frequent trademark and can be registered under the Rule 26(5) of the Trademark Rules, 2017. It shall be reproduced in MP3 Format not exceeding a length of 30 seconds, recorded on a medium that allows for easy and clearly audible replaying quality along with a graphical representation of its notation. TM-A provides that in case of sound marks, representation of specific musical notes must be submitted at the place provided for the trademark.

While filing sound mark applications, proprietors/ their respective agents need to make sure that they are able to justify that the sound they are seeking are unique and distinctive in nature in order to protect the goodwill of their own business. Though it has taken a long while to acknowledge sound

marks in India, but this emergence will certainly take no time to set its recognition permanently in the business market.

All in all, with the occurrence of the new rules giving express clarity and importance to sound trademarks, several issues will arise, be dealt with and subsequently get resolved in the coming times.

WIPO DAS: SHARING PRIORITY DOCUMENTS BECOMES EASIER

By-Heena Lamba

WIPO DAS stands for World Intellectual Property Organization-Digital Access Service. It is a system which provides easy, fast, inexpensive and secure way to electronically transfer certified copy of priority and similar documents related to patents, utility models, industrial designs and trademarks between participating offices. However, the system is not yet extended to trademarks owing to a lack of operational and technical changes required at the participating offices⁵.

A participatory office is one which accepts to be a part of WIPO DAS system. A participating office can perform two types of functions i.e. 'Depositing' and 'Accessing'⁶. Depositing office serves as the office of first filing i.e. the office where documents are first submitted and which makes those priority documents digitally available to other participating offices or organizations. Whereas, an Accessing office serves as the office of second filing or an office which digitally accesses the priority document filed at depositing office on request of the applicant. There are 20 participating offices (Countries/ Organization) of WIPO DAS as in February 2019, which include Australia, Brazil, Chile, China, Denmark, Estonia, Eurasian Patent Organization, European Patent Office, Finland, India, Japan, Morocco, Netherlands, New Zealand, Republic of Korea, Spain, Sweden, United Kingdom,

⁵ DAS User Guide (Dec 1, 2017 ver. 2.4). Available at https://www.wipo.int/export/sites/www/das/en/pdf/das_user_guide.pdf

⁶ WIPO DAS: Participating Offices. Available at: https://www.wipo.int/das/en/participating_offices/

United States of America and World Intellectual Property Organization. Although WIPO has developed this service, when it comes to depositing or accessing any document, it is considered as any other participating office.

WIPO also offers a searchable index⁷ for getting details of participating offices regarding the kind of applications for which they can assist as depositing or accessing office. India as a depositing office offers services only for patent applications, while as accessing office, it can access Industrial Design, PCT International and patent applications from other participating or depositing offices.

For applications where first or second filing office is not a participatory office

In case first filing office or depositing office is not a participating office to this service, then applicant can obtain a certified copy of the document following the traditional method and submit it to WIPO such that the document becomes accessible for the accessing office. Whereas, if the office of second filing is not a participating office then the applicant may use the traditional method of issuing and later sending the certified priority document to the respective office.

DAS Applicant Portal

Through DAS Applicant Portal, applicants can manage and track retrieval of their priority documents by offices of second filing. Applicants need to have a WIPO account to access the services offered by the portal. Detailed features of this portal are provided in

⁷ WIPO DAS: Participating Offices. Available at: https://www.wipo.int/das/en/participating_offices/search.jsp?territory_id=80&depositing_id=2385&accessing_id=2389

WIPO DAS user guide⁸. Some of its key functions include tracking priority documents, viewing access history, downloading certificate (of availability), manage notification preferences, viewing or clearing notifications, managing unavailability of system components in any office, lost access control codes and support in any query.

The advantages of this system are not just limited to the applicant but are equally beneficial for the participating offices. The offices, through this system, can process the documents securely and with ease unlike the tedious process followed earlier i.e. scanning and certification of priority documents. This system thus fulfils the requirement of Paris Convention to provide certification of priority documents in an electronic environment⁹.

The Indian Patent Office (IPO) began its functions as a participating office to WIPO-DAS with effect from January 31, 2018. The same was notified to public vide public notice '*Availability of WIPO Digital Access Service (DAS) under WIPO-India Cooperation Agreement and its utilization by Applicants, Stakeholders and Public in general*¹⁰' issued on March 12, 2018, wherein IPO had given details of the salient features of the WIPO-DAS system and procedures for depositing or retrieving priority documents.

According to the above notice:

⁸ DAS User Guide (Dec 1, 2017 ver. 2.4). Available at https://www.wipo.int/export/sites/www/das/en/pdf/das_user_guide.pdf

⁹ WIPO Digital Access Service. Available at: <https://www.wipo.int/das/en/>

¹⁰ Public Notice- public notice '*Availability of WIPO Digital Access Service (DAS) under WIPO-India Cooperation Agreement and its utilization by Applicants, Stakeholders and Public in general*. Available at: http://www.ipindia.nic.in/writereaddata/Portal/News/397_1_WIPO_Digital_Access_Service.pdf

Procedure for depositing the priority document

For Patents: An application can be made by the applicant requesting* Indian Patent Office for deposition of certified copy of priority document to the WIPO DAS. This application can be made for ordinary patent and PCT International application filed with India as receiving office on or after January 31, 2018. Said application should be accompanied by the fee mentioned in Sr. No. 49 i.e. '*For preparation of certified copy of priority document and for transmission of the same to the International Bureau of World Intellectual Property Organization*' in the First Schedule of the Patent Rules, 2003. The applicable fee is INR 1000, INR 2500 and INR 5000 (up to 30 pages and, thereafter, INR 30, INR 75 and INR 150 for each extra page) for a 'Natural Person', 'Small Entity' and 'Large Entity' as applicants, respectively.

For Designs: Similar request* can be made on Form 16 i.e. 'Application for certified copy of registered design' along with fee of INR 500, INR 1000 and INR 2000 applicable for 'Natural Person', 'Small Entity' and 'Large Entity', respectively.

*Once the request is made, an access code for the particular priority document is shared with the applicant via email on the id submitted by the applicant/ authorized agent or attorney (validity and functionality of the email id should be duly confirmed by the applicant or his/her agent). Access code so generated ensures the security of the priority document. Hence, it should only be shared with participating offices of second filing, using which they can access the document from a secure server.

Procedure for accessing priority document

For Patent & Design applications: Request needs to be made to the accessing participating office for retrieval of the priority document through WIPO DAS. Request is made via a letter along with details of application number and specific access code.

For PCT International Applications: For filing a PCT International application priority document needs to be retrieved from the depositing office. For retrieval, applicant needs to submit the access code and tick the relevant box in the priority details section while filing PCT request form (PCT/RO/101).

After receiving a formal request from the applicant, IPO can directly access the priority document from any depositing country or organization.

Additional Instructions: Pursuant to public notice dated 12/03/2018 regarding availability of WIPO Digital Access Service, the following additional instructions were issued on November 22, 2018¹¹, for the applicants applying for the priority documents to be supplied to International Bureau (IB) through WIPO DAS after filing International Application:

- Applicant(s)/ Authorized Agent(s) or Attorney(s) should ensure that the submitted priority documents should only be in PDF format with all the fonts embedded with an exclusion for only 7 fonts i.e. Helvetica, Times, Courier, Symbol, Zapf Dingbats, Arial, Verdana.

- After receiving the access code, the Applicant(s)/ Authorized Agent(s) or Attorney(s) should request IB to retrieve the priority document from the DAS portal, in absence of which the priority documents will not be considered as transmitted to IB.
- If DAS code is not received, then the same can be informed to DAS support by sending an email to das.support@wipo.int, keeping a copy to the RO/IN. The mail das.support@wipo.int should be kept in loop for all communications regarding WIPO DAS.

¹¹ WIPO DAS Public Notice. Available at: http://www.ipindia.nic.in/writereaddata/Portal/News/474_1_WIPO_DAS_Public_notice.pdf

REGISTRATION OF CELEBRITY NAMES AS TRADE MARKS

By- Kartikeya Prasad

Barbadian singer, songwriter, and actress Robyn Rihanna Fenty recently decided to sue her father Ronald Fenty to stop him from using the “Fenty” trademark. Rihanna has registered the trademark “Fenty” and uses it for her range of cosmetic products, Fenty Beauty. Her father had been using this mark since 2017 as the name of his company, Fenty Entertainment, and it has been alleged by her that her father has been gaining undue profit by banking on the reputation of Fenty Beauty. She is also suing Moses Perkins, co-founder of Fenty Entertainment for fraudulently making bookings in her name, even though she is not associated with the company in any capacity.¹²

Situation Internationally - The above-mentioned situation is a bit tricky as the person being sued by the trademark owner is the one who gave her the name in the first place. There have been many instances where a person with a name same as a registered trademark, has been prohibited from using his own name due to the same being an existing registered mark in the same class of goods and services. Until recently, trademark registries around the world had been reluctant to register names as trademarks, due to the fact that the person trying to register his name wasn't the exclusive owner of the name. However, this approach has been revised and celebrities are now able to register their names. For example, in 1997, a UK Court

held that ‘Elvis Presley’ was not a registrable mark for memorabilia. A businessman named Sid Shaw had challenged the trademarks registered by a company selling toilet related products under the brand name ‘Elvis Presley’. It was held that neither the deceased singer nor anyone else exclusively owned the name “Elvis Presley” and that it had become so well known that it was no longer distinctive and therefore not eligible for trademark protection. However, in 2001, the UK Court held that the trademark “Arsenal” was correctly registered, irrespective of the fact that it had been used before its registration by others in a non-trademark sense. It was concluded that prior use of the name didn't render it non-distinctive for football related merchandise like shirts and scarves associated with the football club. Although Arsenal is the name of a football team, the UK IP Office has confirmed that a similar approach is taken with respect to names belonging to an individual or a group. The Trademarks Registry at the UK Patent Office issued a Practice Amendment Notice to regulate the names of famous people, either living or deceased. This amendment has enabled the celebrities to have a better control over the use of their names beyond the primary field of operation. This has given them a greater control as compared to others who register the names of their businesses for typical commercial activity.¹³

With the incessant celebrity worship that is prevalent in India and everywhere else, there has been a growing practice of using the name of a celebrity for unscrupulous businesses. The reason behind such dishonest practices is

¹² Ben Beaumont-Thomas, 'Rihanna Sues Father Over Use Of Fenty Brand Name' (*the Guardian*, 2019) <<https://www.theguardian.com/music/2019/jan/16/rihanna-sues-father-over-use-of-fenty-brand-name>> accessed 5 February 2019.

¹³ Knspartners.com. (2011). [online] Available at: <http://www.knspartners.com/assets/files/ARTICLE%20CELEBRITY%20MARKS.pdf> [Accessed 5 Feb. 2019].

that usage of a celebrity name increases visibility of the respective goods or services as well as creates an impression in the minds of customers that the said celebrity has endorsed these goods or services. Such malpractices have made the celebrities aware of their rights and the commercial value of their names. Many celebrities, especially in the US, have started registering their names as trademarks for various classes of goods and services. Getting a trademark registration allows celebrities to prevent others from using their name for dishonest commercial purposes. Also, the viability of any product enhances as soon as it gets endorsed by a celebrity, so registration of a name as a trademark is another way of enhancing the sources of income. For example, Beyoncé has reserved the exclusive right, with respect to baby goods, for the usage of 'Blue Ivory Carter', her daughter's name.¹⁴ Angelina Jolie also strived to fight for such exclusivity for her daughter's name, 'Shiloh'. She was allegedly in a legal fight with Symine Salimpour, to protect the usage of 'Shiloh' for the new range of perfume.¹⁵

Situation in India - Although celebrities in India lag behind their western counterparts in registering their names as trademarks, they can't really blame the law for this. It is evident that there is no specific provision in Trademarks Act, 1999, which allows or disallows registration of names, thus it is safe

¹⁴ Steve Brachmann, 'Beyoncé Seeks Trademark on Daughter Blue Ivy Carter Name for Everything from Cosmetics to High Chairs - Ipwatchdog.Com | Patents & Patent Law' (*IPWatchdog.com | Patents & Patent Law*, 2017) <<http://www.ipwatchdog.com/2017/02/14/beyonces-trademark-blue-ivy-carter/id=78276/>> accessed 5 February 2019.

¹⁵ 'Angelina Jolie Fights To Save Misuse Of Shiloh's Name' (*Chinadaily.com.cn*, 2019) <http://www.chinadaily.com.cn/entertainment/2007-05/14/content_871851.htm> accessed 5 February 2019.

to assume that registration of a personal name is allowed. As per Section 2(zb) of the Act, "trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors. A perusal of the above definition will make it abundantly clear that a trademark cannot be registered in isolation so as to protect the brand value of a person. Therefore, if a celebrity is desirous of registering his/her name it should be with respect to a particular class of goods or/and services. For instance, Paris Hilton got a trademark for her name for sale of clothes and perfumes, whereas David Beckham has a trademark registration for clothing, footwear and headgear. Shah Rukh Khan too has filed applications to register trademark 'SRK', in almost all the 45 classes.

Without a rich body of case laws and a comprehensive statute governing image or publicity rights, the Indian legal system has proven to be quite inadequate when it comes to dealing with the modern trend of registering names as trademarks. However, the law has started to mature and evolve in this area. The right to publicity as an independent right was first time recognized by the Delhi High Court in *ICC Development (International) Ltd. v. Arvee Enterprises*¹⁶ where the court held that the right to publicity does not extend to events and is confined to persons.¹⁷ Section 14 of the Trade Marks Act has been significantly instrumental in

¹⁶ *ICC Development (International) Ltd. v. Arvee Enterprises*, (2003) 26 PTC 245 Del).

¹⁷ Cheshta Sharma, 'How Indian Celebrities Are Protected By IP Laws? - IIPTA' (*IIPTA*, 2019) <<https://www.iipta.com/indian-celebrities-protected-ip-laws/>> accessed 5 February 2019.

regulating an unchecked use of celebrity names. It prohibits the use of personal names under section 14 where an application is made for the registration of trademark which falsely suggests connection with a living person, or person whose death took place within 20 years prior to date of application for registration of trademark. Certain names like, Sri Sai Baba, Lord Buddha, Sri Ramakrishna, the Sikh gurus cannot be registered under section 16(1) of 1940, 23(1) of Trade & Merchandise Act, 1958, Mark &159(2) of the Trade Mark Act, 1999.¹⁸

¹⁸ *Ibid.*