

## FOREWORD



**Manoj K Singh**  
Founding Partner

It gives me immense pleasure to introduce the latest November 2013, edition of our Newsletter "Indian Legal Impetus". The entire team of Singh and Associates thank its readers for their overwhelming responses towards fulfilling our endeavor in making the legal information more accessible to you all.

At the outset we would like to inform our readers regarding our upcoming Conference "**The IPR Exchange, An India US IPR Summit**" to be held on December 6, 2013 at The Leela, Mumbai. The Corporate Registrations are open online @ <http://www.theiprexchange.com/>.

Moving forward, advertisement and marketing have become one of the most essential ingredients of any successful business and consequently, in the past few years, there has been a constant struggle in the companies to come up with new and innovative ideas for selling their brands. Our cover article in this edition deals with "**The Three C's with regard to using animals as Trademarks**" where the 3 Cs are- Competition, Controversy and Compromise.

India is one of the most rich and prosperous countries when it comes to cultural and Traditional knowledge starting from "Ayurveda" to "Yogasan" and our second article "**Protection of Traditional Knowledge as Trade Secrets**" deals with the protection and preservation of such knowledge and the challenges thereto.

Coming up with the revolutionary change in the corporate sector our article on "**One Person Company- A concept for new age business ownership**" gives an insight on the recent concept of a single person company inserted by the Companies Act, 2013.

Our next article highlights yet another recent development in the field of tax for the nonprofit organizations in India through "**Whether DIT [Exemption] is justified in refusing renewal/ registration u/s 80G of the Income Tax Act when registration has already been granted once.**"

Intellectual Property has been emerging as a great asset, not only for the individual entities but also for the national economies as well. Our next article "**Contribution of IP in growth of FDI's in India**" elaborates how IP has been bringing in FDIs in India and the challenges which are yet to be addressed.

Focusing on recent legislative changes, the articles "**PFRDA ACT, 2013**" and "**SEBI (Real Estate Investment Trusts) Regulations, 2013**" deal with the same.

The pros and cons of Cloud Computing in India have been addressed by the article "**Privacy issues in Cloud Computing with reference to India**". The article also discusses the challenges and status of Cloud Computing in Indian scenario.

Last but not the least article in our edition "**ICANN'S UDRP as a domain name dispute redressal mechanism**" deals with the provisions and benefits of the Unique Dispute Resolution Policy in resolving the disputes related to domain names.

Then we have our regular section of newsbytes for our readers, which provides a brief overview of some recent developments in legal world.

We, sincerely hope that our readers find the articles provided herein useful and informative. Any comments, suggestions, opinions or comments from our readers would be highly welcome. Please send us your valuable insights and reviews on [newsletters@singhassociates.in](mailto:newsletters@singhassociates.in).

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# THE THREE C'S WITH REGARD TO USING ANIMALS AS TRADEMARKS

By: Ruchika Gohil

What happens when lions, tigers and jaguars need to protect their trademark? First, they roar. Then they allow us to fight over for it. This article makes an attempt to analyse the **Competition Controversy** and **Compromise** of using these familiar and catchy animal figures as trademarks.

## INTRODUCTION

It is a well known fact that, when a company launches itself or any of its products the first thing that runs into its mind is the mechanism to sell the same. Marketing the product and selling it is the main objective behind every step of the company. It is for this same reason that the company uses its trademark or trade logo. These trademarks and logos are designed in a way that they should be catchy and should approach the appropriate class of the society so as to sell their products. The company designs its trademark in such a fashion that apart from being distinctive it also has the element of representing the company itself or the owners in any which way. For this cause the companies put in their best on certain trademarks and logos which are although generic in nature but also can be distinguished from the other trademarks and logos. Animal and plant names tend to be quite memorable and, if used appropriately, can convey a good image while still being distinctive. Apple Computers, Tiger Direct and Ford Mustang are good examples<sup>1</sup>. So in order to market their products the use of animals as their trademarks has been in fashion ever since the beginning of the trade culture. People easily remember and identify these trademarks, but the companies need to be cautious in their usage because of the "Competition" "controversy" and "compromise" they might have to undergo.

1. <http://sbinfocanada.about.com/od/trademarks/a/trademarkeb.htm>
2. <http://www.foodpanda.my/>
3. <http://worldwildlife.org/>
4. <http://idioms.thefreedictionary.com/First+come,+first+served>

## THE COMPETITION

The competition amongst the companies with regard to using animals as their trade names or marks can be as; Panda<sup>2</sup> being used with several companies like food panda etc but with the use of panda as the logo for WWF<sup>3</sup> generates competition amongst the companies using Panda as their trade mark or logo.

Basically the competitive factor amongst the same trade names is twofold: Firstly; to have an animal as your trademark or as your trade logo it is necessary that you should be the first one to use it. Although the same animal can be used by other companies but the policy of the *first come first serve*<sup>4</sup> will come into play. If a company is using any particular animal for the first time as their trademark then it will be very easy for the consumer to relate with it. Kiwi polish<sup>5</sup> uses the bird Kiwi for the first time ever and it is very obvious for the consumer to relate the bird kiwi with polish every time they see the bird. The second aspect to it is that, Camel<sup>6</sup> the hundred year old brand for cigarettes has the generic name of that of an animal "camel". The competition arises when Apachecam<sup>7</sup> comes up with new software or the camel productions<sup>8</sup> come up with new materials. Herein the cigarette brand Camel needs to maintain its popularity way higher than these two other brands in order to maintain its independent identity. In other words if people have begun to relate camel as a brand for cigarette then this image should not fade in comparison to the other upcoming brands.

## THE CONTROVERSY

The controversy involved in using animals as their trademarks or logos has been very widespread. The controversy can arise out of every factor as involved with the use of animals as trademarks. It can be with regard to the mis-representation or confusion or similarity or any other possibility. In this respect it is

5. <http://www.kiwicare.com/>
6. <https://camel.tobaccopleasure.com/>
7. <http://camel.apache.org/>
8. <http://www.camelproductions.com/>

pertinent to mention the dispute between Tony the Kellogg's Tiger and Rory the Bourne Leisure's tiger in the case of *Bourne Leisure Limited (BL) v. Kellogg Company (KC)*<sup>9</sup> wherein the BL filed an application for the registration of tiger as their trademark which was opposed by the KC. However the BL contended that its tiger looked different from the KC's tiger as Rory is light orange and black with more curved features whereas Tony is almost red and black with chiseled features and he always wears a red handkerchief around his neck and Rory has no clothes. But having gone into the particulars of similarity of marks and details of average relevant consumer and purchasing process it was held that; there is a possibility for the likelihood of confusion and therefore BL was not allowed to register Rory. Similar was the case with *Tony Kelloggs v. Exxon Tiger*<sup>10</sup>. The controversy or the disputes may also arise merely with names as well. The same happened online retailer Tiger Direct who filed a lawsuit against Apple claiming that the company infringed on its trademark with Mac OS X 10.4 Tiger. The suit, which was filed in the United States District Court for the District of Florida, alleges that Apple "engaged in trademark infringement and unfair trade practices in connection with its recent marketing campaign for the latest version of its Mac OS X operating system," Tiger Direct said in a statement. "As a result of the perceived confusion between the products now being marketed by Apple under the 'Tiger' brand, Tiger Direct has asked for a temporary restraining order and injunction against Apple Computer to stop further damage to Tiger Direct's well-known Tiger brand."<sup>11</sup>

Another very well known controversy raised with the Jaguar the animal and its name was resolved by the High Court of Ireland in *Jaguar Cars Ltd v Controller of Patents, Designs and Trade Marks* [2006] IEHC 103;<sup>12</sup> wherein; The appellant (J), a car manufacturer and distributor, appealed against the dismissal of its opposition to the registration of a trade mark by the second respondent (M). J was the registered proprietor in Ireland of the trade mark JAGUAR for sports clothing, games, leather goods and spectacles in Classes 25, 28, 18 and 9 as well as for cars. M was the registered proprietor of the trade mark JAGUAR for watches in

Class 14 in a number of jurisdictions, and sought to register the trade mark in Ireland. J objected on the grounds that (1) M was not the registered proprietor of the mark; (2) there was a likelihood of confusion arising from the identity of the marks and the similarity of the goods; (3) M's application was made in bad faith and the court should exercise its discretion against granting it. *Held*, dismissing the appeal, that (1) the test of ownership of a mark was who first used it for the goods in a particular jurisdiction. The use had to be for something that could realistically be called a business, however small. In the instant case, J had failed to establish that it had any business in Ireland concerning the sale of watches bearing the JAGUAR mark prior to the date of its application. (2) In order to determine whether there was a likelihood of confusion, it was necessary to establish whether M's use of the mark in a fair and normal way for watches was likely to lead to confusion in the minds of a substantial number of persons by virtue of J's user in the same jurisdiction, and possibly in other jurisdictions, There was no evidence of J's sale of watches bearing the JAGUAR mark through general retail outlets in Ireland, and so the risk of confusion was minimised in the event of a sale of one of M's products. Furthermore, at the date of the application, the extent in Ireland of J's brand extension from motor cars to watches and similar goods was very limited and largely confined to promotion associated with the sale of automotive products.

It is further to be noted that; in *Jaguar Cars Limited, England v Manufacture Des Montres Jaguar S. A, Switzerland and another* **OA/21/2008/TM/KOL** wherein the same issue was debated in the Intellectual Property Appellate Board; the Technical Member dismissed the argument of the Registrar who believed that 'JAGUAR' is a common dictionary word and the name of an animal and therefore no exclusive monopoly rights can be conferred. This reasoning is completely misplaced as in that event how can trade marks like Camel, Caterpillar, Fox, Kiwi, Eagle etc. be regarded as well-known international brands and therefore allowed the petitioner's application to quash the order of the deputy registrar.

9. <http://www.ipo.gov.uk/types/tm/t-os/t-find/t-challenge-decision-results/o18108.pdf>

10. [http://www.eura.com/steffen/jura/aktuelles/texte/tony\\_kelloggs\\_vs\\_exxon\\_tiger.htm](http://www.eura.com/steffen/jura/aktuelles/texte/tony_kelloggs_vs_exxon_tiger.htm)

11. <http://www.macnews.com/content/apple-sued-over-tiger-trademark-injunction-sought>

12. [2006] E.T.M.R. 72

Therefore it can be noticed that, there can be rampant controversy in respect of using animals as the trademarks or logos.

## THE COMPROMISE

The use of animals as trademarks also comes with another draw-back. The reason being that once the company registers a particular animal as its trademark in any fashion it starts to get recognised by the same mark. However it is pertinent to note here that, the registration of the trademark is specifically done for the particular product so made by the company. In other words it becomes the face of the company. Once the company flourishes and wishes to expand and generate new and different products other than the one it is already into, it will wish to use the same trademark which is already well known in the public. The problem arises when some other company is already using the same animal in a different posture or colour for another business which the first company wants to move into. There can be disputes in using the same trademark and if the same known trademark is not used then the new mark will again take time to become popular amongst the crowd. This is the compromise that a company might have to undergo in case of having animals as their trademarks. For example Pidilite Fevicol<sup>13</sup> a company which makes adhesives and Muthoot Finance<sup>14</sup> a company which is into finance both use elephant as their trademarks, the problem will arise if either of the two wishes to move or expand into the business of the other. The same can be issue with Sharekhan<sup>15</sup> and tiger balm.<sup>16</sup>

## DISCUSSIONS AND CONCLUSION

Having known that the use of animals as trademarks is very fruitful for the promotion of business, it is essential to know the necessary precautions that need to be taken while choosing any particular animal. There should not be any similarity or confusion or even likely hood of confusion. The consumer should not land up to comparing the trademarks; it should be distinctive on a single glance. Further the class of the usage should also be categorically different<sup>17</sup>. At the end, as the usage of animals as trademarks brings to more business it

though has several disadvantages as mentioned above. However, copyrighting the logo and the trademark can be treated as one of the possible solutions in order to protect your trademark and company image. Further the user of such trademarks should be very vigilant when it comes to the infringement of their rights as the chances for infringement is way higher than the other marks and logos. Though the question which still remains unanswered is; a tiger is a tiger and can be used by anyone as their trademark, so there cannot be any generalized rule for infringement.

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13. <http://www.pidilite.com/brands/fevicol-1.html>

14. <http://www.muthootfinance.com/>

15. <http://www.sharekhan.com/stock-market/11/home.htm>

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16. <http://www.tigerbalm.com/sg>

17. <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch2.pdf>

# PROTECTION OF TRADITIONAL KNOWLEDGE AS TRADE SECRETS

By: Vaibhavi Pandey & Shweta Adhikari'

## I. TRADITIONAL KNOWLEDGE

Traditional knowledge (TK) may be described as knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. As such there is no definition of TK, it is integral to the identity of most local communities and is an ever evolving body of knowledge.<sup>2</sup>

The attempts by a US Company to get Indian traditional products such as the active element of Turmeric and the anti fungal properties of Neem patented raised much hue and cry. All of these instances and many more raised eye brows of the common people because what was being exploited was the Traditional Knowledge (TK) of particular communities. Moreover, such acts also posed to be great economic threats as well to these people.

Basically TK can be provided two types of protection:

- **Defensive protection-** this aims to stop people who are not a part of the community from acquiring intellectual property rights over traditional knowledge. One of the excellent examples of defensive protections is India's Traditional Knowledge Digital Library which is formed after collaboration between Council of Scientific and Industrial Research (CSIR) and Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (Dept. of AYUSH), Ministry of Health & Family Welfare.
- **Positive protection-** this is the granting of rights that empower communities to use and benefit from their TK.

Recently, attempts have been made to exploit TK for industrial and commercial benefits often leading to

misappropriation of knowledge. Problems are not always commercial in nature and often involve ethical, cultural, historical, spiritual and moral considerations. For example, inappropriate use of sacred cultural artifacts, processes, or designs may be offensive to the community. Since as of now TK is not recognized as a separate IPR therefore one has to resort to other forms of intellectual property to protect it. It is hereby contended that trade secret is one of the most desired forms of IPR to protect TK.

## II. TRADE SECRET

Trade secret as defined in the Black's Law Dictionary means:

*"A formula, process, device or other business information that is kept confidential to maintain an advantage over competitors; information including a formula, pattern, compilation, program, device, method, technique or process- that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by other who can obtain economic from its disclosure or use, and (2) is subject of reasonable efforts, under the circumstances, to maintain its secrecy."*<sup>3</sup>

Article 39.2 of the Agreement on Trade Related Intellectual Property Rights which talks about the IP protection of Trade Secret, reads as follows:

"Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

- a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

1. 3rd Year Student of GNLU.

2. "Traditional Knowledge," World Intellectual Property Organization, accessed November 12, 2013, <http://www.wipo.int/tk/en/tk/>.

3. 9th edition Black's Law Dictionary Bryan A. Garner, editor, (West Group, 2009).

- b) has commercial value because it is secret; and
- c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.”

### III. TRADITIONAL KNOWLEDGE AS TRADE SECRET

Combining the conditions enumerated in the TRIPS and what is being followed as a general trade secret law it can be said that protection under this form of IPR is provided when the following conditions are satisfied:

- Information has actual or potential economic value;
- Reasonable steps have been undertaken to protect it; and
- The defendant obtained the secret by violating an express/implied duty, or resorted to other “improper means.”

Here, drawing a reference to the already cited requirements of a trade secret it is contended that generally TK qualifies all the requirements mentioned above. TK has great economic value and can be used to develop products and processes which are profitable. Because of this economic worth TK is generally considered as an economic asset.

As for the requirement of secrecy in the TK context, the courts look to a group’s local customary law and demeanor as evidence of efforts to constrain the diffusion of TK with respect to outsiders. Also for this purpose the entire community is considered to be a single unit.<sup>4</sup>

Trade secrets can be specifically helpful in protection of secret or sacred TK. Customary laws of communities often require that certain knowledge be disclosed only to certain recipients. Courts have awarded remedies for breach of confidence when such customary laws were violated.<sup>5</sup> A group of North American indigenous communities, the Tulalip Tribes, have an international application under the Patent Cooperation Treaty (PCT) on the use of traditional Chinese medicine (TCM) to reduce the level of fat in blood, which claims an invention that combines teaching of TCM with modern

medicine to developed Story base, a digital collection of their TK. A part of TK is exposed for patent review whereas the rest is kept undisclosed.

Publication of sacred-secret materials has been successfully prevented in *Foster v. Mountford*,<sup>6</sup> members of the Pitjantjatjara Council of Australia obtained an interlocutory injunction, on the basis of breach of confidence, to restrain the publication of a book entitled “Nomads of the Australian Desert.” The inhabitants argued that the book contained information that was revealed in confidence to anthropologist Dr Mountford, thirty-five years ago. Here the court held that there was an implied duty to maintain secrecy.

The law of confidentiality and trade secrets has been successfully used to protect non-disclosed TK, including secret and sacred TK. Courts may award remedies for breach of confidence when customary laws of secrecy are violated. Quite a few communities have come up with the idea of protecting their TK as trade secret; an example may be Ecuador where various indigenous and local groups have participated in an experimental project to treat traditional knowledge as trade secret, in conjunction with the NGO Ecociencia.

Even if a person reveals a secret to another under an obligation on that person not to reveal it, that does not amount to a breach of secrecy. It is not lost even if it is known to the entire community but those outside it do not have much knowledge about it.

In case TK is protected under trade secrets there is no requirement of specific right holder and the community is deemed to have collective personality.<sup>7</sup>

4. Deepa Vardharajan, “A Trade Secret Approach to Protecting Traditional Knowledge,” *Yale Law Journal* 36 (2011): 402, accessed November 12, 2013, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1892359](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892359).

5. *Foster v. Mountford*, (1976) 29 FLR 233, *Tilousi v. Arizona State University*, Case No CV2004-0115 (Ariz Sup Ct, 2004); *Havasupai Tribe v Arizona State University*, Case No. CV2004-0146 (Ariz Sup Ct, 2004); *Bulun Bulun v. Nejlam Investments and Ors.*, Unreported, Federal Court of Australia, Darwin (NTG 3 of 1989).

6. *Foster*, *Supra* n. 4.

7. Shri Sundaram Varma, “Traditional Knowledge: A Holder’s Practical Perspective,” (paper presented at the WIPO Round Table on Intellectual Property and Traditional Knowledge, Geneva, November 1-2, 1999).



TK is often conceptualized as a form of collective intellectual property.

If the above conditions are satisfied and the knowledge is then acquired either by means of bio-prospecting or other illegal or deceptive means this knowledge can be protected under trade secrets.

Trade secret is recognized as one of the best forms of IPR to protect TK. It protects the owner against disclosure or unauthorized use of knowledge. It is certainly better than other IPR protections because under trade secrets there is no general requirement of disclosing the information in the public domain after a certain period of time. Also even in case the trade secret has been sold to the other party under a licensing agreement, the general law that applies is that the licensee cannot exceed the purpose for which the knowledge has been transferred to him. If he does, it would be violation of the licensors right under the trade secret. Also, in case of trade secret the information is protected for perpetuity, there is no requirement of criteria like novelty, non-obviousness etc. However absence of any specific trade secret legislation in India can be a serious detriment to this type of protection. But nevertheless there are cases whereby the Indian courts have imported common law principles for protection of secret knowledge.<sup>8</sup>

#### IV. CONCLUSION

Propagators of TK protection have been advocating for official recognition of TK within the international IPR regime, however they have failed so far. In light of this some other way has to be found to protect TK, a lot of people have resorted to human rights for protection. The authors here, like to put forward the point that the existing IPR regime can be used to protect TK and among the existing IPRs Trade Secret is the most accepted form.

It is therefore paramount that national legislation shall be expanded to include specific measures that would enable indigenous and local people to protect traditional knowledge and innovations by way of trade secrets. Such measures may include explicit articulation of traditional knowledge as subject matter for protection through trade secrets.

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8. *Zee Telefilms Ltd. v Sundial Communications Pvt. Ltd.*, 2003 (5) BomCR 404.

# ONE PERSON COMPANY- A CONCEPT FOR NEW AGE BUSINESS OWNERSHIP

By: Vatsala Singh

## INTRODUCTION

The revolutionary new concept of 'One Person Company'(OPC) has been introduced by the Companies Act, 2013. This concept of OPC was first recommended by the expert committee of Dr. JJ Irani in 2005. OPC provides a whole new bracket of opportunities for those who look forward to start their own ventures with a structure of organized business. OPC will give the young businessman all benefits of a private limited company which categorically means they will have access to credits, bank loans, limited liability, legal protection for business, access to market etc all in the name of a separate legal entity.

Though the concept of OPC is new in India but it is a very successful form of business in UK and several European countries since a very long time now.

### The concept with special features

One Person Company is defined in Sub- Section 62 of Section 2 of The Companies Act, 2013, which reads as follows:

*'One Person Company means a company which has only one member'*

It shall also be important to note that Section 3 classifies OPC as a Private Company for all the legal purposes with only one member. All the provisions related to the private company are applicable to an OPC, unless otherwise expressly excluded.

The only exception provided by the Act to an OPC is that according to the rules only "NATURALLY-BORN" Indian who is also a resident of India is eligible to incorporate an OPC. Meaning thereby, the advantages of an OPC can only be obtained by those INDIANS who are naturally born and also a resident of India. At the same, it shall also be worth mentioning that a person cannot form more than 5 OPC's.

## OPC AND ITS FORMATION

An OPC is incorporated as a private limited company, where there is only one member and prohibition in regard to invitation to the public for subscription of the securities of the company.

The Salient features of an OPC include the following:

- An OPC can be formed under any of below categories :
  - Company limited by guarantee.
  - Company limited by shares
- An OPC limited by shares shall comply with following requirements :
  - Shall have minimum [paid up capital of INR 1 Lac
  - Restricts the right to transfer its shares
  - Prohibits any invitations to public to subscribe for the securities of the company.
- An OPC is required to give a legal identity by specifying a name under which the activities of the business could be carried on. The words 'One Person Company' should be mentioned below the name of the company, wherever the name is affixed, used or engraved.
- The member of an OPC has to nominate a nominee with the nominees written consent, and file it with the Registrar of Companies (RoC). This nominee in the event of death or in event of any other incapacity, shall become a member of an OPC. The member of an OPC at any time can change the name of the nominee providing a notice to the RoC in such manner as prescribed. On account of Death of a member, the nominee is automatically entitled for all shares and liabilities of OPC.

### Exemptions available to one person company – legal provisions.

An OPC has certain privileges and exemptions which are not available to private companies. Such exemptions are enlisted for your ready reference:

- Signatures on Annual Returns – Section 92 of the Companies Act, 2013  
It is provided in section 92 of The Companies Act, 2013, that the annual returns in the case of One

Person Company shall be signed by the company secretary or where there is no company secretary, then by the director of the company.

- Holding Annual General Meetings – Section 122 of the Companies Act,2013

Section 122(1) of The Companies Act,2013, provides that the provisions of S.98, S.100 to S.111(both inclusive) are not applicable to One Person Company. Therefore, provisions relating to General Meetings, Extra Ordinary General Meeting and Notice Convening to General Meeting are not applicable to One Person Company. However, for fulfilling the purposes of S.114 of the Companies Act,2013, where any business is required to be transacted at an Annual General Meeting, or other General Meeting of the company by means of an ordinary or special resolution, it shall be sufficient if the resolution is communicated by the member of the company and entered in the minutes book which is required to be maintained U/s 118 and signed and dated by the member and such date shall be deemed to be the date of meeting under the purposes of Companies Act,2013.

- Board Meetings and Directors – Section 149, 152 & 173 of the Act

One Person Company needs to have one director. It can have maximum of 15 directors which can also be increased by passing a special resolution as in case of any other company.

For the purposes of holding board meetings, in case of a OPC which has only One director, it shall be sufficient compliance if all resolutions required to be passed by such a company at a board meeting are entered in a minute book – signed and dated by the member and such date shall be deemed to have the date of the board meeting for all the purposes under Companies Act, 2013.

- Signatures on Financial Statements - Section 134 and 137 of the Act.

The OPC shall file with the RoC a copy of financial statements duly adopted by its members along with all the documents which are required to be attached to such financial statement, within 180 days from the closure of the financial year along with cash flow statements. The financial statement shall be signed by only one director and the

annual return shall be signed by the company secretary and the director, and in case if there is no company secretary then only by the director.

- Contracts by One Person Company – Section 193 of the Act.

The new Companies Act, 2013 gives special attention to the contracts which will be entered by One Person Company.

If the company fails to comply with the provisions as to providing the information to the RoC then it shall be liable for punishment of fine which will be not less than twenty thousand rupees and extend to one lakh rupees and the imprisonment for a term which may extend upto 6 months.

## HOW IS AN OPC DIFFERENT FROM SOLE PROPRIETORSHIP

The concept of OPC allows a single person to run a company limited by shares, and Sole proprietorship means an entity where it is run and owned by one individual and where there is no distinction between the owner and the business. The distinction between both the structures is as follows:

- Limited Liability - Fundamentally the basic difference between a sole proprietorship and an OPC is the way and manner in which the liability is treated in an OPC. OPC is different from sole proprietorship because it is a completely separate entity and that is the distinction between the promoter and the company. The liability of the share holder will be limited to the unpaid subscription money in his name. On the other hand the liability in a sole proprietorship, the person/owner is alone liable for the claims which will be made against the business.

- Tax Bracket - Though the concept of an OPC has been incorporated in the Companies Act, 2013 but the concept of same does not exist in tax laws as yet, as a result an OPC can be put in the same bracket of taxation as other private companies. According to Income TA,1961 a private limited company is under the bracket of 30% on total income with an additional surcharge of 5% if the income exceeds 10 million with an addition to 3% of education cess.

- **Succession** - In an OPC there is a nominee designated by the member. The nominee which will be a Natural Born citizen of India and who resides in India. The nominee shall in the event of death of the member become a member of the company and will be responsible for the running of the company. But in the case of sole proprietorship this can only happen through an execution of WILL which may or may not be challenged in the court of law.
- **Compliances** - A One Person Company has to file annual returns etc just like a normal company and would also need to get its accounts audited in the same manner. On the other hand a sole-proprietorship would only need to get audited under the provisions of Section 44 AB of the Income Tax Act, 1961 once its turnover crosses the certain threshold.

## THE IMPACT OF OPC IN INDIAN ENTREPRENEURSHIP

Though the concept of an OPC is still very new in Indian entrepreneurship and thus very revolutionary, it will take time for such a new concept to be incorporated with complete efficiency, but as and when the time will pass, an OPC will have a sparkling future and it will be embraced as a most successful business concept. The reason behind it is the incorporation of same is less paper work, one person can form a company without any additional shareholder, and if the member is willing to add shareholders, all he needs to do is to modify the Memorandum of Association and file it before Roc. Small entrepreneurs will grow in Indian entrepreneurship, be it weaver, traders, artisans, small to mid level entrepreneurs, OPC is a bright future for them to grow and to get a recognition globally. Foreign Investors will be dealing with one member to establish a corporate relationship and not with a score of shareholders/directors where there are more chances for disparity in Ideas, concepts etc for a business to grow. Any foreign company who wishes to establish in India through an Investment, through a merger or through a Joint venture will have to just lock the deal with the member of an OPC, and the venture will be expected to start sooner with more effective results. In upcoming years the impact of an OPC will be remarkable and it is a promising future for Indian Entrepreneurship. Expectedly, there will be good

Foreign Investments, Joint Ventures, and Mergers etc. An OPC is doing well in European Countries, In United States, Australia the same is resulting in strengthening the economy of the countries. In India when the expert committee of Dr. JJ Irani proposed the concept of an OPC, it was solely aimed for the structured organized business, with a different legal entity altogether and to organize the private sector of the entrepreneurship, which indeed is expected to be done, alongwith a significant growth in Indian Economy benefiting the country on the Global Level.

## END NOTE

The Ministry of Corporate Affairs is yet to issue the commencement notification for the provisions dealing with One Person Company. This concept of One Person Company is set to organize the unorganized sector of proprietorship firms and other entities which will be convenient to regulate and manage if the same is in the form of One Person Company. It will also be favorable for boosting of foreign funding from the investors who keen to expand their ventures in India. One Person company is next big thing in India, and it will be favorable for the economic conditions in India through its small to medium sized entrepreneurship. An OPC will have the accessibility to target the markets, executin of business places in a corporate framework, loans, banks etc directly, there will be no middleman conjuring the profits.

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# DNA FINGERPRINTING: HELPING HAND IN SOLVING CRIME

By: Anjali Srivastava

**“We must be vigilant in our actions towards criminals and innovative in our approach towards solving crime”: Thomas Menino**

## INTRODUCTION

Science plays a very important role in our lives. Our day to day activity is surrounded by science. Dictionary meaning of Science is “the intellectual and practical activity encompassing the systematic study of the structure and behavior of the physical and natural world through observation and experiment.”

There are many branches of science one of which is life science, under which one studies about the cellular biology. DNA comes under the cellular biology. DNA, or deoxyribonucleic acid, is the hereditary material in humans. DNA is a nucleic acid generally regarded as a blueprint, a recipe or a code of an organism. The blueprint contains instructions which enable development of cells in to the body. And also controls the characteristics featured in a fully functional living structure through genes.

## DNA FINGERPRINTING: WEAPON TO SOLVE CRIME

DNA fingerprinting is a technique which helps forensic scientists and legal experts solve crimes, identity thefts, legal suits and terrorism cases. DNA samples are been collected for analyzing whether person is guilty or innocent. The possible locations of DNA on the evidence are as under<sup>1</sup>

Evidence	Possible Location of DNA	Source of DNA
hat	inside	sweat, hair, dandruff
eyeglasses	nose or ear pieces, lens	sweat, skin
facial tissue, cotton swab	surface area	mucus, blood, sweat, semen, ear wax

dirty laundry	surface area	blood, sweat, semen
toothpick	tips	saliva
used cigarette	cigarette butt	saliva
hat	inside	sweat, hair, dandruff
stamp or envelope	licked area	saliva
bottle, can, or glass	sides, mouthpiece	saliva, sweat
blanket, pillow, sheet	surface area	sweat, hair semen, urine, saliva
bullet	outside surface	blood, tissue
bite mark	person's skin or clothing	saliva
finger nail	scrapings	blood, sweat, tissue

The introduction of DNA fingerprinting helps solving crime and our Indian system is also not untouched with the same. In 2005 the Criminal Code of Procedure, 1973 was amended to allow for medical practitioners, after authorization from a police officer who is not below the rank of sub-inspector, to examine a person arrested on the charge of committing an offence and with reasonable grounds that an examination of the individual will bring to light evidence regarding the offence. Section 53 as amended includes:

*“the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples, and finger nail clippings, by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case”*

DNA analysis is also of utmost importance in determining the paternity of a child in the cases of civil disputes. Need of this evidence is most significant in the criminal cases, civil cases, and in the maintenance proceeding in the criminal courts under section 125 of the Code of Criminal Procedure, 1973. Also, the Hon’ble Supreme Court’s acceptance of Delhi High court judgment of ordering Veteran Congress Leader N.D. Tiwari to undergo the DNA test is very important from

1. <http://www.nij.gov/topics/forensics/evidence/dna/basics/identifying-to-transporting.htm>.

the viewpoint of the admissibility of such evidence. In this case, Rohit Shekar has claimed to be the biological son of N.D. Tiwari. It would be very interesting to see that how courts in India would allow the admissibility of DNA technology in the future.

In furtherance of the above there are certain provisions in the Indian Evidence Act, 1872 such as section 112 which reads as follows:

***“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”***

DNA fingerprinting has been used to solve many cases such as ***Priyadarshini Mattoo (Santosh Kumar Singh v. State thr. CBI)***<sup>2</sup>, she was a 25-year-old law student who was found raped and murdered at her house in New Delhi in 1996. In the year 2006, the Delhi High Court found Santosh Kumar Singh guilty on both counts of rape and murder. Yet another case is of ***Naina Sahani murder case (State vs Sushil Sharma)***<sup>3</sup>, ***Rajiv Gandhi assassination (State through superintendent of police CBI/SIT vs. Nalini and Ors.)***<sup>4</sup> The infamous Rajiv Gandhi assassination case of 1992 using DNA fingerprinting technology and many more cases are present as example.

## CONCLUSION

DNA is a very important invention which helps the legal experts to solve many such crimes which were not possible to solve before as no evidence were present. These inventions saved many lives. We should thank science which is very useful for public at large because there are many examples present with us which shows that it really helped the common person. Courts have accepted the reliability of DNA testing and included DNA test results as evidence. The DNA evidence in the court of Law can punish or acquit a suspect. However, the accuracy of the technique has

been challenged. This is one example of how scientific technology has reached the common man. It helps to resolve paternity cases, and is useful in identification, crime investigations.

***“Any sufficiently advanced technology is indistinguishable magic”: Arthur C. Clarke***

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2. (2010) 9 SCC 747

3. 2007 CriLJ 4008

4. AIR1999SC2640

# EXPANSION OF THE SCOPE OF THE TERM 'UNFAIR TRADE PRACTICE' BY THE PROPOSED 2011 AMENDMENT TO THE CONSUMER PROTECTION ACT, 1986

By: Kasturika Sen and Shivani Gaba<sup>1</sup>

## CONSUMER PROTECTION AMENDMENT BILL 2011:

The Consumer Protection (Amendment) Bill, 2011 ('the Bill') was introduced in the Lok Sabha on December 16, 2011 by Mr. K.V. Thomas. It has been referred to by the Standing Committee on Food, Consumer Affairs and Public Distribution.<sup>2</sup> The amendments can be broadly classified into two categories: one, widen the scope of the law by adding some new definitions and expanding the scope of some existing provisions; and two, structuring and strengthening the implementation machinery.

A key change that has been proposed by this amendment is the much desirable expansion of the scope of the term 'Unfair Trade Practice'. Unfair Trade Practice can be broadly described as the use of various deceptive, fraudulent or unethical methods to obtain business. According to the Consumer Protection Act 1986, clause (r) of sub-section (1) of Section (2) listed 10 activities which would constitute an unfair trade practice but through the proposed amendment, the definition of unfair trade practice is to be expanded to include the unforeseen modus operandi of traders as offences. It will allow the law to not specify every unfair practice in the law.<sup>3</sup>

This is a significant step towards safeguarding the consumers who are fleeced by the sellers through various contracts or conditions which place them in "unequal bargaining capacity" or puts the seller in an unfair strong position. The 199th report of the Law Commission had suggested bringing about this change to bring the consumers on a stronger footing to

challenge any unfair practice.<sup>4</sup> To ensure this, a new concept of 'unfair contracts' was included in the proposed amendments with a view to provide for a definite concept through which the consumers can be safeguarded and a category is created which would amount to unfair contracts.

According to the Bill, the term 'unfair contracts' includes a contract which has one or more of the following clauses

- (a) excessive security deposit;
- (b) imposition of disproportionate penalty;
- (c) refusal to accept early repayment of debt and;
- (d) termination of contract without reasonable cause.<sup>5</sup>

## BACKGROUND TO UNFAIR TRADE PRACTICE:

The concept of Unfair Trade Practice draws a parallel from the previously applicable Monopoly Restrictive Trade Practice (MRTP) Act, 1969 which has now been replaced by the Competition Act, 2002. Section 36A of the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act), where 'unfair trade practice' was defined as *a trade practice, which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services adopts any unfair method or unfair or deceptive practice including oral, written or visible misrepresentations regarding standard, quality, status, condition usefulness and price of goods or services; false warranty, guarantee or promise regarding goods or services; disparaging of goods and services of another person; and false advertising and misrepresenting with regard to the gifts, prizes and offers in sale etc.*<sup>6</sup>

But consequently, in the current Competition Act, there is no definition for the concept of unfair trade practices. In this situation it will be wrong to say that the concept is completely ignored, and hence it just has to be implicit that instead it is now categorized under other

1. 5th Year student of School of Law, Christ University.

2. Referred to <http://www.prsindia.org/billtrack/the-consumer-protection-amendment-bill-2011-2123/>

3. Sec c2 (1) (r) of Consumer Protection Act 1986

4. Referred to <http://www.consumerlaw.in/consumer-protection-amendment-bill-2010/>

5. Sec 2 (1) (s) of Consumer Protection Amendment Bill, 2011

6. Section 36A Monopoly Restrictive Trade Practice (MRTP) Act, 1969

terms such as False Representation, False Offer, Price Scheme, Non-Compliance of prescribed standard, Hoarding etc of the Competition Act 2002.<sup>7</sup>

Therefore, it is apparent that there is a huge distance concept of Unfair Trade Practice as it was defined under the now-abolished Monopolies and Restrictive Trade Practices (MRTP) Act but finds no mention in the new Competition legislation.<sup>8</sup> So it solely depends on the Consumer Protection Act for clarity of this term.

Changes proposed to Unfair Trade Practice:

When we look at the proposed expansion of the concept of Unfair Trade Practice in the 2011 Amendment Bill there is also an addition of three new clauses in the definition.

- a) *Failure to provide a bill, cash-memo or a receipt to a consumer will be deemed an unfair trade practice.*
  - b) *Failure to take back the goods or withdraw the services within a period of 30 days after the receipt of the goods by the consumer.*
  - c) *Disclosure of confidential personal information.<sup>9</sup>*
- So in this way, the act of failing to issue a bill, cash-memo or a receipt would also constitute an Unfair Trade Practice and would in turn give the consumer a right to seek remedy for violation of such a right, and this privilege or protection was not given to the consumers earlier. The 2011 amendment also guarantees a right of return to the consumer and makes violation of this right an Unfair Trade Practice.

### **NECESSITY FOR EXPANSION OF THE TERM:**

We have seen the changes that are proposed to be made to the term, but to what end will they be effective. For this we need to look into the requirement for such a change and the need for which can be understood through the case of *Akhil Bhartiya Upbhokta Congress vs Aggarwal Jewellers*<sup>10</sup> where the respondent-jeweler issued cash memo which stated that in case of return of any of the products, only 80% value of the price will

be returned. This consumer raised an objection to this condition, but the State Commission could not disallow the respondent-jeweler from having such a condition as there was no law which restricted this. But according to the proposed amendment, if the trader refuses or restricts the right to return the good or stops the service within 30 days, he would be liable for carrying on an unfair trade practice. Therefore, a requirement to improve the protection granted to consumers against unfair trade practices is gauged herein, which may be achieved by providing a wider scope to the term as proposed by the amendment.

### **CONCLUSION:**

The Consumer Protection Act and the Bill are designed so as to prevent any kind of trade that engage in unfair trade practices whether specified or not and more importantly provides for protection for the consumers who are subject to this trade. This amendment is a step towards the importance of recognition of the concept of unfair trade practice which shall not be neglected at any cost, especially with the Consumer Protection Act being the sole defining authority for it, where the term shall be given additional attention in its definition in order to protect all the requisite rights of consumers in order to avoid any ambiguities. For example, when we look into the right of return given to the consumers, we notice that this is only possible if the goods remain unused or if the service is continuous in nature. Whereas, in situations when the goods or services are used only once and are extinguished, there is no mention as to whether, on being unsatisfied, any facility or option for the money to be returned to the consumer is available. Even though there are still such questions which remain unanswered, we have to appreciate these changes being made in the Bill, as they bring to our attention the safeguards that need to be provided to the consumers against unfair trade practices.

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7. Referred to <http://cci.gov.in/images/media/ResearchReports/SanchitInt260811.pdf>,

8. Referred to <http://www.indianexpress.com/news/mrtpc-s--unfair-trade--practices-not-in-new-act-govt-tells-watchdog/791244/>

9. *Supra* Note 1

10. I(2006)CPJ32(NC)



# WHETHER DIT [EXEMPTION] IS JUSTIFIED IN REFUSING RENEWAL/REGISTRATION U/S 80G OF THE INCOME TAX WHEN REGISTRATION HAS ALREADY BEEN GRANTED ONCE

*By: Shipra Makkar Devgun*

It has always been a subject of controversy that companies/trusts/ societies are first granted registrations as charitable organizations under the Income Tax Act; and then after few years the same Department who have provided the said registrations, question the charitable nature of the activities performed by such companies/trusts or societies. It is indeed surprising for such organizations to keep on proving their charitable nature for perpetuity.

We made an effort to create an awareness among our readers of the fact that **'Education as on object is Charitable per se under the Indian Income Tax Act'** through our article on the said topic in the May edition of our newsletter "Indian Legal Impetus, 2013". Moving ahead with the said objective through this article, we would like to highlight yet another recent development in the field of tax for the nonprofit organizations in India.

The Hon'ble Income Tax Appellate Tribunal, Mumbai in the a recent case of **Gia India Vs. Director of Income Tax** [Exemption] reported as ITA No.3921/ Mum/2010, decided on September 27, 2013 has categorically held that *it is clear while granting the registration u/s 25 of the companies Act and u/s 12A as well as Section 80G, the authorities were fully satisfied that the activities of the Assessee are of charitable nature. Therefore, in the facts and circumstances of the case when no such objection was raised at the time of granting the earlier registration not once but at four occasions and under different provisions of Income Tax Act as well as under Companies Act then the objections raised by the DIT are not sustainable. Accordingly, we set aside the impugned order and direct the DIT [Exemption] to grant approval/renewal u/s 80G(5)(vi) of the Assessee.*

In the present case, the Assessee Company was incorporated in India as a Section 25 Company, being an educational institution. It was further granted registration/approval u/s 80G(5)(vi) of the

Income Tax Act till 31.03.2006 which was renewed up to 31.03.2009. On expiry of the said extension and further applying for the renewal, the DIT[E] refused the grant of renewal of approval u/s 80G only on the ground that the some of the directors of the company are foreign nationals. It was the contention of the revenue that the Foreign Nationals are not allowed to perform the work of a trustee.

The Hon'ble ITAT, Mumbai while observing the above took note of Section 80G (5) of the Income Tax Act. The text of Section 80G (5) as observed by the Hon'ble ITAT is as follows:

*"5. This section applied to donations to any institutions or fund referred to in sub clause (iv) of clause (a) of sub section (2), only if it is established in India for a charitable purpose and if it fulfills the following conditions, namely:-*

- (i) .....
- (ii) .....
- (iii) .....
- (iv) .....
- (v) *The institution or fund is either constituted as a public charitable trust or is registered under the societies Registration Act, 1860 (21 of 1860), or under any law corresponding to that Act in force in any part of India or under Section 25 of the Companies Act, 1956 (1 of 1956), or I university established by law, or is any other educational institution recognized by the Government or by a University established by law, or affiliated to any university established by law, or is an institution finance wholly or in part by the Government or a local authority.*

In the light of the above provision of the Indian Income Tax Act, 1961, the Court noted that as per clause (v) of sub section 5 of section 80G there was no such requirement or condition that the institution should not have any director of foreign national. The Hon'ble ITAT further concluded that even otherwise trustee is the Assessee Company and not the directors therefore, when the approval was already

granted twice and there is no subsequent change in the facts and circumstances then the refusal by the DIT [E] for renewal was not based on any legal in forces.

On perusal of the said judgment it has once again been proved that the Indian Courts would not allow the Department to take away the rights, without any substantial cause, from the organizations to whom once they themselves have provided these rights on their full satisfaction that they should be provide.

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# OPEN SOURCE SOFTWARE VS. PROPRIETARY SOFTWARE: A SHIFT FROM PROPRIETARY SOFTWARE TO OPEN SOURCE SOFTWARE

*By: Kailash Choudhary, Sadhvi Saraf and Neha Das<sup>1</sup>*

## AN INTRODUCTION TO THE CONCEPTS OF OPEN SOURCE SOFTWARE AND PROPRIETARY SOFTWARE

In the recent times we have seen a considerable development in the Open Source Software, it has transformed from oddity to a major business model.<sup>2</sup> It has become a major interest for the software industry as well as economic theory. It has been often considered as the producer of higher quality services as compared to the proprietary development, wherein major players prefer open source strategy and where they publish the sources of the programs instead of keeping it for themselves as opposed to the case in a proprietary model.<sup>3</sup>

A software program usually consists of two main codes - 'Source Code' and 'Object Code'. Source code is written in computer programming language such as BASIC, FORTRAN etc. that can be read and understood by only trained personnel in computer programming. In order to use the software code in a computer the source code needs to be converted to object code which consists of bits, and such conversion is done by way of a software program called "Compiler". In order to upgrade or modify the software, changes have to be made to the source code and not object code. Therefore, access to source code is an important issue in drafting of software licenses. Thus, accessibility to the source code is a major difference between open source software and proprietary software.

In 1984 Richard Stallman developed the 'free software'- software which could be copied by others and made changes too as they pleased. 'Open source software

can be defined as software distributed under a licensing agreement which allows the source code (computer code) to be shared, viewed and modified by other users and organizations.<sup>4</sup> The open source software contains certain criteria such as:

- a) Free Distribution Rights
- b) Access to Source Code
- c) Permission to modify
- d) Distribute Modifications
- e) Forbidding Modifications against persons, groups, fields of endeavor.<sup>5</sup>

Proprietary software on the other hand in its mass distribution reserves all rights to the author except a license to run the software on the purchaser's computer<sup>6</sup>. Herein, the software developers attempt to prevent outsiders from gaining access to their source code, this in order to protect the sole right of the proprietor to add features or correct defects. The licensor issues licenses to the users who are willing to use the proprietary software in order to prohibit the users from modifying, copying or redistributing the software to other users. This strategy creates a 'lock in' effect where the user is forced to purchase the upgrades solely from the proprietor or abandon the product entirely.

The major goal of the OSS is to support a process of the community or shared development and evolution of software. This enables the higher quality of software quickly and encourages participation in the community in the software environment<sup>7</sup>. The open source computer programs have become increasingly

1. *Sadhvi Saraf and Neha Das are Interns and V year students of School of Law, Christ University, Bangalore*
2. *Ronald J.Mann, Electronic Commerce (4th edn, Aspen Publishers, 2011) 637.*
3. *Jean Michelle Dalle & Nicolas Jullien, "Open Source vs. Proprietary Software".*

4. *Sam Saltis, "Open Source vs. Closed Source (Proprietary) Software" (Copyright Core DNA 2009) 2.*
5. *Mark A Lemley, Robert P. Merges, Peter S. Menell, Intellectual Property in the New Technological Age (4th edn Apen Publishers 2006) 1037.*
6. *Mann (n 2) 638.*
7. *Raymond T. Nimmer, Licensing of Intellectual Property and other Information Assets (Lexis Nexis 2004) 828.*

common and widely used even at companies such as IBM, Hewlett Packard that are known for distributing proprietary software. One of the most widely known open source projects is the UNIX kernel work alike commonly known as GNU/LINUX<sup>8</sup>.

## TECHNICAL AND DEVELOPMENTAL DIFFERENCES BETWEEN OPEN SOURCE SOFTWARE AND PROPRIETARY SOFTWARE

Releasing the object code without the source code is one of the major characteristics of proprietary software as compared to the OSS. This is one of the major technical differences between the two. Much number of arrangements can be made between the vendor and customer in dealing with proprietary software, for example the user might be permitted to see the source code and make changes but not to distribute those changes to others, thereby reserving the right of the proprietor. In response to the OSS movement the proprietary software makers have attempted to allow users to some extent of adapting the proprietary software to their own uses by accessing and altering the software's source code for example Microsoft's 'Shared Source Initiative' (SSI)<sup>9</sup>.

Whereas OSS on the other hand propagates the releasing of the source code in the public domain in order to work upon it and make the changes available to others thereby removing any sort of restrictions upon its usage. As defined by Richard Stallman that Free Software is not free until the source code is not included with the object code<sup>10</sup>. He further stated that one can charge for particular software as long as the source code is provided along with a specific bundle of rights with the software such as redistribution of the changes and further right to copy it.

Furthermore, the usability of OSS is often criticized as it is not usually reviewed by the experts and therefore does not cater to the majority of users. Due to the lack of technical expertise the ability to fix errors become

comparatively lesser as compared to the Proprietary software<sup>11</sup>. There even exists a lack of documentation as seen with respect to proprietary software wherein inhibit learning is more prominent, therefore, the OSS users end up learning and gaining inputs from the alternatives such as online communities or so and basically relying on the documents. This forms another critical difference between the two.

The developments made in the software in case of OSS are made by the users themselves, they are the innovators as well as the users therefore, and question of ill target is completely removed. Whereas on the other hand in case of proprietary software, the developers are not users and therefore are not aware of which functionality is required to be improved first and therefore is usually ill-targeted. Therefore, developments added to open-source software are considerably more efficient for a given level of adoption than for proprietary software<sup>12</sup>.

Under OSS the improved versions are delivered regularly as contrary to the proprietary software. Herein the successive versions are released at regular intervals along with minor improvements and correct bugs. But under the proprietary model the improved versions are released only from time to time so that the users are obliged to buy the newer versions in regular intervals in order to use the software, as the free bugs are very rare as the producers prefer to wait for the improvements to be sufficient and then release it for a price<sup>13</sup>.

Furthermore, the open source development tends to attract various skilled workers due to its open organizational structure whereby more developers contribute to a piece of OSS than that of proprietary software. The proprietary technology mainly depends on research and development (R&D) investments which are often not up to the mark as it diminishes the efforts for a monopolist<sup>14</sup>. Therefore, as a consequence the OSS is more efficient as compared to the proprietary software. OSS enables innovation by providing users with freedom and flexibility to adapt the software suit without any restriction<sup>15</sup>, but

8. *Mark A Lemley, Peter S. Menell, Rober P. Merges, Pamela Samuelson, Brian W. Carver, Software And Internet Law (4th Edn Walters Kluwer 2011) 299.*

9. *Mann (n 2) 638.*

10. *ibid 639.*

11. *Saltis (n 4) 3.*

12. *Dalle, Jullien (n 3) 5.*

13. *ibid 5.*

14. *ibid 5.*

15. *Saltis (n 4) 3.*

however, the innovation may or may not be available to other users as many may not wish to share it in the community which again becomes a major deterrent to the innovation of the software.

Another major difference between OSS and proprietary software is with respect to security. Proprietary software as is targeted towards majority users is developed and processed in a controlled environment by a specific team having common objective. The source is edited and viewed by the specific team itself and is further heavily audited. Therefore, the risk of the software being infiltrated by bugs and viruses are less likely. Whereas, on the other hand OSS is often viewed as unsecure because not all such software have been developed in a controlled environment. The development process in the OSS often lack continuity and common object as there are numerous individuals along with other big players making changes to the software without any communication between the developers. It is also not reviewed or validated prior use, therefore, having high risks of being infested with bugs and viruses such as Trojans etc.

Therefore, open source software and proprietary software are highly different from each other on various grounds such as technical, developmental, security, cost, innovation etc. The difference in the two also lies in the form of licenses and not only source code<sup>16</sup>.

## **CONCLUSION: SHIFT FROM PROPRIETARY SOFTWARE TO OPEN SOURCE SOFTWARE**

Recent years have seen a striking success of OSS as it allows the software developers to use shared source codes and correct errors as well as further redistribute such source codes. One of the most famous and successful open source software projects is Linux, which has been able to command a part of the market share within the server operating system market, the market share is likely to increase further in future. Amazon reported that adopting open source software has reduced 25 percent of its technology expenses thereby making it more viable as compared to that of the usage of proprietary software<sup>17</sup>. Open source software with the given advantages has a high possibility of having future dominance over proprietary software.

It has often been contended by the critics that a open source software is more efficient in nature as compared to a proprietary software. Herein the developers are users who make changes and reforms to the software on regular intervals and make such versions and updates available to all as compared to that of the proprietary software.

When it comes to innovation, it is higher in the OSS as compared to proprietary software. In OSS many individuals are working side by side in the further innovation and development of the software as compared to the proprietary software. With the going and increasing development in technology it is highly important to be at par with the changing scenario and therefore, considering the innovation factor is more in OSS it is likely to be seen that in future there will be a shift from the conventional proprietary software to that of the open source software.

It is already seen that many firms and companies such as IBM, Hewlett Packard are already dealing with the open source software at the present and it is likely to spread to other firms as well. Therefore, the day is not far enough wherein the software industry will see a major change in its application of free software in major as compared to that of the proprietary software.

In our opinion the fact that there exists an option of source codes being open to the users has the ability to overcome the standards set by the proprietary software and builds its own niche in the software environment. Thus, concluding by saying there has been a shift from the Proprietary Software model to the open source software model and it is here to stay but one major question which arises now is –whether the proprietary software producers will be able to cope up with the challenges poised against them by the OSS and will they be able to compete with the OSS?

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16. *Nimmer (n 8) 828.*

17. *ibid 2.*

## CONTRIBUTION OF IP IN GROWTH OF FDI'S IN INDIA

*By: Himanshu sharma*

India has become one of the sought after destinations for the investment in recent years due to the growing economy. As per reports, the Indian GDP is still growing at a rate of 6.5 percent in 2011-12 even after the recent slump in the economic growth. Being one of the biggest consumer markets in the world, it is always on the radar of investors and one of the sought after investment hub.

A new and growing brand is always looking for the market wherein its product has demand and India being a consumer market is always the best place to promote a new product. Many brands have established themselves in Indian market and are gaining out of it. Even with all these advantages, Indian markets also have certain challenges in terms of intellectual property rights which are required to be taken care of before entering the market.

### **STRONG IP REGIME HELPS THE GROWTH OF FDI IN INDIA:**

A strong Intellectual Property rights regime would certainly lead to good market conditions for inviting FDI in India. The report 'India: International Outlier on IP' by the US chamber of Commerce said if India strengthens its intellectual property regime and increases its score on GIPC (Global Intellectual Property Centre) IP Index by 14.9 per cent, it can reach the level of FDI similar to Brazil, Russia and China. It has also been observed in the report that "India has been less able to attract FDI than its BRIC (Brazil, Russia, China) peers since the 1980s. Also in regards to FDI, India is noticeably weaker than other emerging economies, which started off at similarly low levels of investment and had similar IP rights environments to India's in the 1980s,"

A strong IP regime would certainly include realistic protection to intellectual property rights together with a mechanism for the enforcement of rights in case of misuse of the same. IP assets account for more than one-third of the net value of corporations in the United States and Europe, making protection of valuable IP critical for many would-be investing companies. In India the intellectual property like patents, trademark, copyright, design, geographical indication, plant variety, semiconductor and integrated circuits layout

design have protection. Indian does not provide specific protection to trade secrets and also do not have a proper law for the data protection. These two are governed by the trademark law and information technology law and hence there is a requirement of specific law for these two as well in order to create a healthy environment wherein a creator of intellectual property right would feel comfortable to invest further. The current legislation on the IP laws should also be kept similar to the international standards in order to compete with other economies.

### **CHALLENGES REGARDING INTELLECTUAL PROPERTY RIGHTS:**

#### **TRADEMARK INFRINGEMENT/PASSING-OFF:**

In this electronic age, the brands have acquired altogether a different meaning. Now a brand famous in one country can easily be recognizable in a country wherein the products of the brand have not yet marketed. This feature of modern market has led to the problem of infringement and passing-off of the brands which are known across the world but have not entered a particular market. Local merchant for taking advantages of the established reputation of the international brand, start manufacturing their own products under the same brand. Hence in order to curb this problem international brands can take action against the local merchants under the provision of trademark law wherein trans-border reputation has been recognized as one of the ingredients for taking action against infringement and passing-off.

#### **INDIAN COLLABORATOR TREATING THE BRAND AS ITS OWN:**

One of the most common problems faced by the foreign collaborators in India is regarding the misuse of the brands by the Indian counterpart in the collaborations. More often than not in case of collaboration between a foreign corporation and an Indian corporation is regarding the dispute related to brand use. After a period of time Indian party to the collaboration starts claiming the brand of the foreign collaborator as their own even though it is clearly mentioned in the Act that the use made by the licensee of a trademark would always be counted as use of the

licensor. Hence it is required by the foreign investor to always be aware of the misuse of its brand and should take timely action against any misuse by collaborator or any third party.

### **COMPULSORY LICENSING:**

The recent grant of compulsory licensing to the generic pharmaceutical Natco Pharma has created a lot of wrong publicity to Indian IP environment even though Indian Patent Office had its own reasons to provide the same. As Patent is provided for a limited period of time of 20 years and out of these 20 years only few years are fruitful years for a patent to make money. An environment wherein the investor has the fear of losing its patent due to compulsory licensing would certainly not improve the FDI in India.

There are certain other challenges which an investor would face in India like counterfeiting, piracy, and data theft etc for which there is a need for a strong IP regime. A strong IP regime would help in gaining the confidence of foreign investors for inviting the FDI's.

### **THE RELATIONSHIP BETWEEN FDI AND ECONOMIC GROWTH:**

The FDI influx is an influential factor for economic growth. With the recent move by the Indian Government to relax the norm FDI norms will help the revival of the economy which was growing at the positive rate during the period of 2005-2010.

FDI involves not only the purchase of capital assets, including mergers and acquisitions, joint ventures, buying property, and investing in plants and equipment, but, perhaps more important to developing countries, FDI can include the transfer of managerial expertise, technological skills, and access to the investing company's global network<sup>1</sup>. Technology transfers from developed to developing nations are one of the most important forces behind economic development<sup>2</sup>. Experts argue that FDI is "the most important channel through which advanced technology is transferred to developing countries<sup>3</sup>."

In a communication to the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD) noted:

1. *Mikhaelle Schiappacasse, Intellectual Property Rights in China: Technology Transfers and Economic Development, note 14, at 174.*
2. *Schiappacasse, supra note 14, at 167.*

*Direct investment by MNEs [multinational enterprises] has the potential rapidly to restructure industries at a regional or global level and to transform host economies into prodigious exporters of manufactured goods or services to the world market. In so doing, FDI can serve to integrate national markets into the world economy far more effectively than could have been achieved by traditional trade flows alone. As with private sector investment more generally, the benefits from FDI are enhanced in an environment characterized by an open trade and investment regime, an active competition policy, macroeconomic stability and privatization and deregulation. In this environment, FDI can play a key role in improving the capacity of the host country to respond to the opportunities offered by global economic integration, a goal increasingly recognized as one of the key aims of any development strategy<sup>4</sup>.*

The move to allow 100% FDI in telecommunication sector and changes in the preposition of FDI in other sectors is a positive step for inviting the investors to invest in India although for the same, the policies regarding the grant and safeguard of intellectual property rights should also need to be parallel with international standards.

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3. *Press Release, WTO, Trade and Foreign Direct Investment (Oct. 9, 1996), available at [http://www.wto.org/english/news\\_e/pres96\\_e/pr057\\_e.htm](http://www.wto.org/english/news_e/pres96_e/pr057_e.htm).*
4. *WTO Working Group on the Relationship Between Trade and Investment, Foreign Direct Investment and Economic Development, WT/WGTI/W/26, at 4 (Mar. 23, 1998).*

## PFRDA ACT, 2013

*By: Yogesh Malhan & Ankit Sukhija*

### ABOUT PFRDA

Pension Fund Regulatory and Development Authority was established by the Government of India on 23rd August, 2003 to promote old age income security by establishing, developing and regulating pension funds, to protect the interests of subscribers to schemes of pension funds and for matters connected therewith or incidental thereto.

### BACKGROUND & ORIGIN

During the last decade, a shift in pension policy in India was witnessed which resulted in the introduction of a new pension system. A High level Expert Group (HLEG) and the Old Age Social and Income Security (OASIS) Project commissioned by the Government were the two initial milestones on the road to pension reforms for the Government employees and the unorganized sector respectively.

During the Budget 2003-04 a new pension system was announced by Government of India which was based on defined contribution, to be shared equally in the case of Government employees between the Government and the employees. Under such scheme there will be no contribution from the Government in respect of individuals who are not Government employees. The Ministry of Finance was empowered to oversee and supervise the Pension Funds through a new and independent Pension Fund Regulatory and Development Authority (PFRDA). On 23rd August 2003 the Government approved the proposal to implement the budget announcement of 2003-04 relating to introduction of a new restructured defined contribution pension system and accordingly an Interim PFRDA was introduced vide Government Resolution dated 10th October, 2003 and 14th November, 2008 respectively.

To bring the new pension system within a statutory regulatory jurisdiction, an ordinance was promulgated on 29th December, 2004 for setting up a statutory

Pension Fund Regulatory and Development Authority. Subsequently PFRDA Bill also known as Pension Bill was first time introduced into the parliament in the year 2005 to replace the ordinance, but could not be passed in the Lok Sabha. The PFRDA Bill, 2011 was reintroduced in Lok Sabha on 24th March, 2011, under the bill the legislation in addition to the setting up of PFRDA also seeks to empower the same to regulate the New Pension System (NPS). The said Bill was referred to the Standing Committee on Finance on 29th March, 2011 for examination and report thereon. The Standing Committee on Finance gave its Report on 30th August, 2011. Based on the recommendations of the Standing Committee, official amendments were incorporated in the Bill and the same was approved by the Union Cabinet in its meeting held on 4th October, 2012. Some of the key amendments incorporated in the Bill based on the recommendations of the Standing Committee on Finance are as follows:

- a) That the subscriber seeking minimum assured returns shall be allowed to opt for investing his funds in such scheme providing minimum assured returns as may be notified by the Authority;
- b) Withdrawals will be permitted from the individual pension account subject to the conditions, such as, purpose, frequency and limits, as may be specified by the regulations;
- c) The foreign investment in the pension sector at 26% or such percentage as may be approved for the Insurance Sector, whichever is higher;
- d) At least one of the pension fund managers shall be from the public sector;
- e) To establish a vibrant Pension Advisory Committee with representation from all major stakeholders to advise PFRDA on important matters of framing of regulations under the PFRDA Act.

In the year 2013 both the houses of parliament i.e. Lok Sabha and Rajya Sabha on 04th September, 2013 and 06th September, 2013 respectively have passed the PFRDA Bill, 2013. The said bill has also received the

<http://pfrda.org.in>

*PFRDA Act, 2013*

*Press Information Bureau*

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assent of the President on the 18th September, 2013 and became 'The Pension Fund Regulatory and Development Authority Act, 2013'. The act conferred the statutory status to the Interim PFRDA to develop and regulate National Pension System (NPS) earlier known as New Pension Scheme.

### **NATIONAL PENSION SYSTEM-AN OVERVIEW**

The National Pension System reflects Government's effort to find sustainable solutions to the problem of providing adequate retirement income. As a first step towards instituting pensionary reforms, Government of India moved from a defined benefit pension to a defined contribution based pension system by making it mandatory for its new recruits (except armed forces) with effect from 1st January, 2004. Since 1st April, 2008, the pension contributions of Central Government employees covered by the National Pension System (NPS) are being invested by professional Pension Fund Managers (PFM's) in line with investment guidelines of Government applicable to non-Government Provident Funds.

NPS has been made available to every citizen from 1st May, 2009 on a voluntary basis. The NPS architecture is transparent and will be web-enabled. It allows a subscriber to monitor his/her investments and returns under NPS, the choice of Pension Fund Manager (PFM) and the investment option would also rest with the subscriber. The design also allows the subscriber to switch his/her investment options as well as pension funds. The facility for seamless portability and switch between PFMs is designed to enable subscribers to maintain a single pension account throughout their saving period.

The National Pension System has been designed to enable the subscriber to make optimum decisions regarding his/her future and provide for his/her old-age through systemic savings from the day he/she starts his/her employment. It seeks to inculcate the habit of saving for retirement amongst the citizens.

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<http://pfrda.org.in>

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### **CONCLUSION**

In the light of the above, it can be concluded that in order to effectively invest and manage huge funds belonging to a large number of subscribers and to ensure the integrity of NPS, establishment of a statutory PFRDA with well defined powers, duties and responsibilities would benefit all the subscribers of the NPS.

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# SEBI (REAL ESTATE INVESTMENT TRUSTS) REGULATIONS, 2013

By: Megha Kapoor

## INTRODUCTION

Real Estate Investment Trusts [REITs] refers to a security that sells like a stock on the major exchanges and invests in real estate directly, either through properties or mortgages. REITs receive special tax considerations and typically offer investors high yields, as well as a highly liquid method of investing in real estate.<sup>1</sup>

The concept of REITs is not new in countries like US, UK, Australia, Singapore etc. REIT is one of the preferred investment vehicle since it is being managed by professionals having diverse skill bases in property development, acquisitions, leasing etc. Also, it provides opportunity to retail investors to invest in properties. It is also a popular investment option for long term pools of capital viz pension funds and insurance companies.

In view of the significant role it plays, the draft SEBI (Real Estate Investment Trusts) Regulations, 2013 (hereinafter referred to as "draft regulations") has been proposed for introducing REITs in India. In this article an endeavor is made to discuss the various aspects of REIT as per the draft Regulations.

## IMPORTANT DEFINITIONS

- a. "Parties to the REIT" shall include the sponsor, re-designated sponsor, manager, trustee and the principal valuer
- b. "Related parties of the REIT" shall include:
  - i. Parties to the REIT
  - ii. Any unit holder holding, directly or indirectly, more than 20% of the units of the REIT;
  - iii. Any associates of the persons mentioned at (i) and (ii) above;
  - iv. Any promoter or director of the persons included at (i), (ii) and (iii) above;
  - v. Any associates of the persons included in point (iv) above;
- c. "Real Estate" or "property" means land and any permanently attached improvements to it, whether leasehold or freehold and includes buildings, sheds, garages, fences, fittings, fixtures, warehouses, carparks, etc. and any other assets incidental to the ownership of real estate and does Development Rights;
- d. "Real Estate assets" means properties held by REIT whether directly or through a Special Purpose Vehicle;
- e. "sponsor" means any person and its associates, if any, who set(s) up the REIT and assigned as such at the time of application made to SEBI and who hold(s) not less than 25% of the units of the REIT at the time of making application to SEBI for registration;
- f. "Re-designated sponsor" means any person and its associates, if any, who has/have assumed the responsibility of the sponsor from the person as designated under clause (q) of sub-regulation (1) above or any re-designated sponsor thereafter;
- g. "Manager" means a company which manages assets and investments of the REIT;
- h. "Trustee" means a person who holds the REIT assets in trust for the benefit of the unit holders, in accordance with these regulations;
- i. "Principal Valuer" means any person who is a "registered valuer" under Section 247 of the Companies Act, 2013 and assigned as such and who has been appointed by the manager to undertake valuation of the real estate assets;
- j. "Value of the REIT" means value of the REIT as assessed by the valuer excluding any debt/liabilities thereof;
- k. "Right-of-first-Refusal" or "ROFR" of a REIT means the right given to the REIT by a person to enter into a transaction with it before the person is entitled to enter that transaction with any other party;

1. <http://www.investopedia.com/terms/r/reit.asp>

## REGISTRATION AND STRUCTURE OF REIT

The draft regulations require the registration of REIT with the Securities and Exchange Board of India (SEBI) before carrying out any activity. The REIT shall be set up as a Trust as per the provisions of the Indian Trust Act, 1882 and shall trustee, sponsor, manager and principal valuer as its parties. For the purpose of registration, application in Form A alongwith requisite non refundable fee shall be made. If satisfied, SEBI shall grant the certificate of registration to REIT. Further, SEBI shall have the power to appoint any person to take charge of records and documents of the applicant.

## RAISING OF FUNDS AND LISTING OF SECURITIES OF REIT

As per the draft regulations, the REIT shall be required to initially raise funds through initial offer. Further, it is mandatory for all REITs to list all its units on the exchanges and shall continue its units to be listed on the exchange unless delisted under the Regulations.

The minimum initial offer size and minimum public float of Rs. 250 crore and of 25% respectively has been specified by the regulations in order to ensure adequate public participation and float in the units.

The funds may be raised by REIT from resident or foreign investor. However, the draft regulations proposed that till the time the market develops, REITs may be offered only to HNIs/ Institutions. Further, minimum subscription size shall be Rs. 2 lakhs and unit size shall be Rs. 1 lakh.

## INVESTMENT CONDITIONS AND DIVIDEND POLICY

Taking into consideration the nature of REIT to invest primarily in completed revenue generating properties, the draft regulations has imposed the following conditions:

- ❖ At least 90 % of the value of the REIT assets shall be in completed revenue generating properties.
- ❖ To distribute atleast 90% of the net distributable income after tax of the REIT to the investors.
- ❖ REIT shall invest only in assets based in India.
- ❖ Investment shall not be allowed to be made by REIT in vacant land or agricultural land or mortgages other than mortgage backed securities.
- ❖ Investment upto 100% of the corpus of the REIT has been permitted in one project subject to the

condition that minimum size of such asset is not less than Rs. 1000 crore.

## ELIGIBILITY CRITERIA

- ❖ Applicant: Applicant must be a Trust and the Trust deed must be duly registered in India under the provisions of the Registration Act, 1908 containing the main objective as undertaking activity of REIT in accordance with the set Regulations.
- ❖ Sponsor(s): It shall have net worth of atleast Rs. 20 Crore on a consolidated basis and not less than 5 year experience in the real estate industry on an individual basis.
- ❖ Manager: It must have net worth of not less than Rs. 5 crore; not less than 5 years of experience in fund management/ advisory services/ property management in the real estate industry or in development of real estate; and not less than 2 key personnel in its Investment Committee<sup>2</sup> having not less than 5 years of experience in fund management/ advisory services/ property management in the real estate industry or in development of real estate.
- ❖ Trustee: It should be registered with SEBI under SEBI(Debtenture Trustees) Regulations, 1993; not an associate of the sponsor/ manager/ principal valuer and not less than 50% of its directors are independent and are not related parties to the REIT.
- ❖ Principal valuer: It shall be appointed in the annual meeting of the unit holders and shall be changed not less than every 2 years and new principal valuer<sup>3</sup> shall be appointed. Principal valuer shall not be an associate of the sponsor/ manager/ trustee and has not less than 5 years of experience in valuation of real estate

## AUDIT OF REIT

The accounts of the REIT shall be required to be audited by an auditor and draft audit report shall be examined

2. *Not less than half of members of Investment Committee are independent and are not related parties to REIT*
3. *It shall not be an associate of the earlier principal valuer*

by the auditor. The auditors shall have access to the books of accounts and vouchers relating to activities of the REIT.

## **BORROWINGS AND DEFERRED PAYMENTS**

The draft guidelines prescribes that the aggregate consolidated borrowings and deferred payments of the REIT shall never exceed 50% of the value of the REIT assets. If the aggregate consolidated borrowings and deferred payments of the REIT exceed 25% of the value of the REIT assets, for any further borrowing:

- a. Credit rating shall be obtained from a credit rating agency registered with SEBI; and
- b. Approval of unit holders shall be obtained

## **VALUATION OF ASSETS**

The valuation shall be done by the principal valuer of all the assets including physical inspection of every property. A full valuation shall be conducted by the principal valuer not less than once every year followed by a full valuation report provided to the unit holders.

In addition to the yearly report, a half yearly valuation of the real estate assets shall be conducted by the principal valuer not less than once every six months for incorporating any key changes in the past six months. The half yearly valuation report shall be submitted to the exchange within not more than one month from the date of end of the every half calendar year.

## **CONCLUSION**

The step taken up by SEBI by introducing REITs will be helpful in organizing, operating and managing real estate collective investments and will attract small investors as well in the real estate sector. Further, since REITs offer a less risky option for investing in under-construction properties, it will serve as a regular income mode for the investors. As per the research conducted by the Asia Pacific Real Estate Association (APREA), India's share of the global investable real estate market is 1.3% at present. REITs shall definitely become a positive move in upbrining the investment in real estate market and will also aim at reducing individual speculations in real estate assets.

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# PRIVACY ISSUES IN CLOUD COMPUTING WITH REFERENCE TO INDIA

By: **KASTURIKA SEN AND NEHA DAS'**

## MEANING

Cloud Computing is a new paradigm in the evolution of Information Technology, as its one of the biggest revolution in the field of information technology to have taken place in the recent times<sup>2</sup>. The underlying notion of cloud computing was in existence way back in the 60's wherein computing was done by large mainframe computers wherein a single machine served many users, however, it was in 2000 when after the dot com bubble Amazon played a key role in the development of Cloud Computing by modernizing the existing data centers and increasing its usage capacity. Then lately the idea was seen in the IBM Smart Cloud framework to support Smarter Planet in 2011 wherein cloud computing is a one of the underlying concepts. Therefore, cloud computing with the advancement of technology has become more profound and gained depth.

Cloud Computing is a computing service which involves a galaxy of computers and other gadgets which stores, forwards, processes and transmits the data into a computer and which may further be processed in another and retained in another system by sharing resources such as software storage services in a cloud that maybe connected through internet despite being separated by vast geographical distance. It is similar to LAN (Local Area Network wherein a computer network interconnects computers in a limited area) but has a wide coverage which enables users to access systems using a web browser irrespective of their physical location.

## ADVANTAGES AND DISADVANTAGES

One of the major advantages of cloud computing is that it can be customized according to one's necessity and so any back-up information can be arranged easily as most cloud service providers use open sourced API software that is interoperable and where portability is

1. 5th Year student of School of Law, Christ University.
2. Ishan Rastogi, *International Journal of Advanced Research in Computer Science* (Vol 4 No. 4 March – April 2013) <http://www.academia.edu/3893183>

not an issue. This method is highly cost effective as it reduces the budget which is usually spent on security and infrastructure, thereby, facilitating any complex transaction in a cost effective manner.

Even though cloud computing is a very effective and technologically advanced mode there are certain risks and disadvantages attached to it. Due to the presence of huge computing resources and humongous amount of data which is being shared has made cloud environment a lucrative target for hacker. It has major security issues involved as the data or information is usually saved on the internet which may attract unwanted misuse of the information which is saved<sup>3</sup>.

Furthermore, the cloud computing environment has raised various privacy concerns as well because consumers believe that they have lost control on the data which they have stored in the cloud<sup>4</sup> The major privacy issues in cloud computing are:

- Trust
- Uncertainty
- Compliance

In the current cloud services usually the data is exposed on a machine which is owned and operated by an organization which is different from the data owner himself in an unencrypted form which raises the chances of such private data being misused<sup>5</sup>. Thus, establishing the lack of user control in cloud computing which leads to the unauthorized use of the information saved. Therefore, there is a need for strong regulatory regime to combat these privacy issues.

## CURRENT STATUS IN INDIA

In India as there is no separate legislation which exclusively deals with cloud computing or the legal issues attached to it, which establishes the lack of a strong regulatory regime in India with respect to cloud

3. <http://sbinfocanada.about.com/od/itmanagement/a/Cloud-Computing-Disadvantages.htm>
4. RASTOGI, *supra* note 1.
5. RASTOGI, *supra* note 1.

computing<sup>6</sup>. And moreover, the global and distributed nature of the cloud computing environment has made it more complex and difficult to ensure that all laws and regulations are applicable to a given case and complied with<sup>7</sup>. Therefore, it can be seen that laws relating to cloud computing is very limited in its applicability due to its very nature of the environment. However, inferences can be made from the existing legislations and be applied to the given circumstances.

## PROVISIONS UNDER INFORMATION TECHNOLOGY ACT, 2000

In India it is the Information Technology Act, 2000 which remotely deals with the issue of privacy in cloud computing. Section 72 of the Information Technology Act, 2000 lays down the penalty for breach of confidentiality and privacy. This section is one of the few provisions which are applicable in mitigating the breach of privacy with an imprisonment up to 2 years and fine up to Rupees 1 lakh. This provision safeguards the privacy interests which if breached is awarded with punitive damage thereby, is a deterrent in nature. Apart from Section 72 we have Section 80 of the IT Act, 2000 which deals with the search and seizure of computer data on connected systems if there is reasonable justification to do so. Recently, the concept of due diligence requirements has been prescribed by the Information Technology (Intermediaries Guidelines) Rules 2011. The cyber law due diligence requirements are for all the companies and intermediaries wherein they have an obligation to ensure that privacy is maintained and respected in the cloud. There should be proper measures taken by the intermediaries to maintain and safeguard all that is stored in the cloud from unauthorized access to such information. In particular they need to put more emphasis on the cloud services which deals with monetary transactions. And if the cloud service providers fail to provide or observe due diligence then they will be vulnerable to legal actions.

## RIGHT TO INFORMATION VERSUS RIGHT TO PRIVACY

Another major issue with respect to privacy in general is the authority of the government to intercept and monitor any person and his whereabouts, which is

6. <http://www.electroniccourts.in/blog/?p=617>

7. RASTOGI, *supra* note 1.

contrary to the right mentioned under Article 21 of the constitution. Similarly, under section 69 of the Information Technology Act, 2000, the Government has the authority to monitor as well as decrypt any information shared through a computer resource in the cloud. Therefore, the government may tend to infringe upon the right to privacy as specified under Article 21. However, in order to alleviate the possible effects on fundamental rights additional safeguards and conditions have to be followed in order to safeguard the privacy interests. In this respect the Court in *Secretary General, Supreme Court vs. Subhash Chandra Agarwal*<sup>8</sup> noted that as regards to right to information vis-à-vis right to protect privacy, fine balancing requirements are required between the government entities and individuals. Thus, in my opinion there is a need for careful consideration of issues of privacy, data chain authentication and security procedures needs to be looked into and modified in accordance with the changes required as per the specific circumstance.

## CONCLUSION

It can be seen that the laws regarding cloud computing and privacy issues attached to it are still evolving as there has not been much exposure to these situations in India as compared to other developed nations. Many countries have managed to ensure that the data in the cloud is protected by implementing certain geographical restrictions which disallows cross border data interchange<sup>9</sup>. This has helped in putting a check on the data which is being saved in the cloud from unwarranted access and usage. Thus, in light of the existing regulations around the world to protect privacy it is seen that there is serious lack of regulation and the government herein is ought to take steps in future to mitigate such threats. Therefore, in India a separate cloud computing law is needed to govern the cyberspace and bring in homogeneity in its administration.

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8. *Secretary General, Supreme Court v. Subhash Chandra Agarwal* AIR 2010 Del 159.

9. [judiciary.house.gov/hearings/.../Castro%2007252012.pdf](http://judiciary.house.gov/hearings/.../Castro%2007252012.pdf)

# CLAIM OF NON-RESIDENTS TO AVAIL REDUCED RATE OF CAPITAL GAINS FROM SALE OF SHARES ESTABLISHED

By: Smeeksha Bhola

## INTRODUCTION:

The recent ruling of the Hon'ble High Court of Delhi in the case of Carin U.K. Holdings Limited Vs. Director of Income- Tax<sup>1</sup> has been highly welcomed and appreciated. Through this judgment, the Hon'ble High Court has provided benefit of reduced rate of capital gains tax on transfer of shares of an Indian listed company to non-resident shareholder. In the present case, Carin U.K Holdings Limited transferred equity shares of Carin India Limited to Petronas International Corporation Limited through an of-market transaction, which resulted in long term capital gains in the hands of Carin U.K Holdings Limited [taxpayer in present case]. The taxpayer had originally requested a ruling from the Authority of Advance Ruling (AAR) on the applicability of reduced rate. The AAR held that, to benefit from the concessional rate as provided under the Income-tax Act, 1961 (ITA), the taxpayer has to be eligible to adjust the original acquisition costs of the shares using cost inflation index . The taxpayer filed a Special Leave Petition before the Supreme Court (SC). The SC, by its order dated 30 July 2012, directed the Taxpayer to first approach the appropriate High Courts.

## ISSUE BEFORE THE HIGH COURT:

The main issue before the High Court was whether the benefit of the 10% concessional tax rate on long-term capital gains is available to a non-resident where listed equity shares are transferred in an off- market transaction.

## OBSERVATION AND DECISION:

1. Section 48 and section 112 of the Income Tax Act were discussed at length.
2. Section 48 provides for mode of computation of capital gains. As per the said section, *The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:*

1. [Writ Petition (Civil) No. 6752/2012]

- (i) *expenditure incurred wholly and exclusively in connection with such transfer;*
- (ii) *the cost of acquisition of the asset and the cost of any improvement thereto:*

*1 Provided that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company:*

*Provided further that where long-term capital gains arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted:*

The first proviso to section 48 is applicable when a non-resident had purchased an asset being a share or debenture with foreign currency, converted into Indian rupee. It stipulates that on transfer of the said share or debenture the consideration received in Indian rupee should be reconverted into the same foreign currency. Therefore the first proviso

to section 48 of the ITA enables a non-resident to neutralize an exchange rate fluctuation when computing long term capital gains. Both provisos operate independently and have a different purpose and objective.

The second proviso to section 48 is applicable to all others including non-residents, who are not covered by the first proviso and they are entitled to benefit of cost of indexation which neutralize inflation and therefore second proviso enables both residents and non-residents (not governed by the first proviso to section 48) to neutralize the effect of inflation by deducting the indexed costs of acquisition of the shares in computing long-term capital gains. Both these provisos have a distinct area of operation and have different purpose and objective.

3. Further, clause (c) sub-section (iii) section 112 of the Income tax Act provides as follows:  
*The amount of income tax on long term capital gains arising from the transfer of a capital asset, being unlisted securities, calculated at the rate of 10 % on the capital gains in respect of such asset as computed without giving effect to the first and second proviso to section 48.*

*Explanation to section 112 provides that where the tax payable in respect of any income arising from the transfer of a long-term capital asset, [being listed securities or unit] [or zero coupon bond], exceeds 10% of the amount of capital gains before giving effect to the provisions of the second proviso to section 48, then, such excess shall be ignored for the purpose of computing the tax payable by the assessee. The above proviso gives a beneficial option to taxpayers on transfer of long-term capital asset being listed securities, units or zero per cent coupon bonds. They are liable to pay tax @ 10% on the amount of capital gains before giving effect to the second proviso of section 48, i.e., the assessee have the option to pay tax @10% without benefit of inflation indexation.*

4. As per the Hon'ble High Court of Delhi, the Income Tax Act, 1961 did not categorically provide that a taxpayer avails the benefits of first proviso to section 48 is not entitled to benefit of 10% tax rate. The intention of the legislature is to tax long-term

capital gains on listed shares at 10% rate, without the benefit of indexation under the second proviso to section 48 of the Act

### **CONCLUSION:**

The High Court decision has given a positive direction to the controversies on the provision of concessional rate on transfer of listed securities in an off-market transaction by a non-resident.

Domain of provisos (1) and (2) to section 48 are different, one provides for setting off inflation rate fluctuations and the second provides for lower rate of tax (without availing the benefit of indexation).

Section 112 provides respite in form of lower tax rate of 10% in respect of listed securities, without the benefit of indexation under second proviso to section 48 and the said section is equally applicable for resident as well non-resident taxpayers. Whereas first proviso provides relief from inflation on long term capital gains from currency fluctuations, therefore court has rightly interpreted that both provisos to section 48 are exclusive and independent of each other.

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# ICANN'S UDRP AS A DOMAIN NAME DISPUTE REDRESSAL MECHANISM

*By: Vaibhavi Pandey*

The rapid growth of the internet in the past ten years has witnessed a huge range of evolution in technological developments, from windows 98 to windows 8, from ugly html personal pages to colorful blogs, from e-mails to social networking sites to mention a few. But one thing has remained the same, the way from which the websites and web pages are accessed -THE DOMAIN NAMES.

## DOMAIN NAMES IN GENERAL:

Domain names can be defined simply as an address of the internet, for e.g. www.google.com , www.yahoo.com etc. It helps to locate a particular web page, send emails etc. Domain names are usually very closely related with the particular service or product for which it is used.

Domain names are divided into hierarchies. The top level in hierarchy of a domain name is the one which appears after the last dot (.) For e.g. in www.google.com, the top level domain name (TLDs) is "COM"."COM" is the most common and widely used domain name which indicates that the domain name is owned by a commercial enterprise. Other TLDs may include "org" for non-profit organizations, "net" for network and Internet related organizations, "gov" for government organizations etc. these TLDs are called generic top level domain names(gTLDs). Prior to 2000, there were only three gTLDs which were available for registrants i.e. ".com", ".net" and ".org". In November 2000, after a long and complex discussion, ICANN approved the much awaited creation of seven new gTLDs. However, any registry which wants to use these new gTLDs has to take approval of the United States Department of Commerce, which is at present the authoritative body regarding the allotment of new gTLDs.

Apart from this, there are several unique top level domain names as well which are used by particular countries for e.g. "fr" for France and "in" for India etc and are called Country Top level Domain Names (CTLDs).

The area where the disputes usually arise regarding a domain name is the second level domain name. A second level domain name is the one which is placed

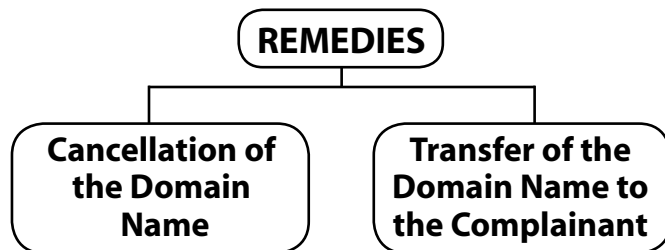
to the exact left of the top level domain name for e.g. in www.google.com "goggle" is the second domain name. Such disputes arise as no two identical second level domain names can exist under a same top level domain name. Anyone, who wants to register a particular domain name in his or her name, shall apply for registration in the office of a ICANN-approved domain name registry. At present, the disputes related to domain names are addressed under the provisions of a UDRP (Unique Dispute Resolution Policy) of ICANN (Internet Corporation for Assigned Names and Numbers). ICANN is a private body and the authority which is responsible for implementation and enactment of internet related parameters and the allotment of unique identities to users. The domain name registering bodies operating in particular countries are registered with ICANN. ".IN" registry which acts as a registering body in India is an example of this.

## ICANN'S UDRP

UDRP of ICANN is acting as a role model policy in resolving disputes related to e-commerce. The UDRP was approved and implemented by the ICANN on 24th October, 1999. This action of the ICANN was based mainly on the report of "Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy". The policy deals with the disputes between Registrars (or any other registration authority in case of country-top-level- domain names) and the domain name holders or registrants. Therefore, the whole policy uses the terms "you/your" and "we/our" for the registrants and themselves respectively. The main purpose behind this policy is to provide the domain name holders an alternate remedy apart from the courts for settlement of disputes related to cyber squatting and illegal transgressing etc. More than 7000 cases have been dealt with since the adaption of this policy. As per ICANN'S policy it is a mandatory requirement for all the Registrars to keep a separate provision in all their registration agreements which makes all the registrants contractually bound to submit to the UDRP, all their disputes and consequences. Also, they are bound to submit to the UDRP in case any aggrieved third party calls upon for that.

## TYPES OF REMEDIES AVAILABLE-

There are two types of remedies which are available to a complainant under the UDRP<sup>1</sup>.



However, there is only one remedy that has been practically availed in most of the cases i.e. Transfer of the domain name to the Complainant. If we look at the records till the year 2001, cancellation has been ordered in less than even 0.008 % cases. This is because once a domain name is cancelled, it is again available for registration by any other person, and the respondent himself can after associating with someone else get the same domain name registered in his name. This is the primary benefit of the remedy of getting the domain name transferred, another advantage which the complainant gets is that once the domain name is taken away from the respondent, he can no longer operate on the Internet with the same name. Consequently, it also ends up in hampering the business of a rival. Therefore, it is always suggestible to get the domain name transferred in the name of the complainant rather than getting it cancelled.

## UNIQUE FEATURES-

The features that make the UDRP unique are its specific descriptions of prohibited conducts<sup>2</sup>. According to the policy, a bad faith registration and use of a domain name is a prohibited conduct, where the domain name owner does not has any rights or a legitimate interest<sup>3</sup>, or where the domain name is identically or deceptively similar to the trademark or service mark of another person<sup>4</sup>. The UDRP specifies non-exclusive circumstances which are determinative of a right or legitimate interest in the domain name<sup>5</sup>, and of bad

faith registration and use of the domain name<sup>6</sup>. The persons entitled to seek a remedy are the ones who have a legitimate interest in registered or unregistered trademark, service mark or domain name.<sup>7</sup>

## CONCLUSION

It is often said that "a code is a law"<sup>8</sup>. The UDRP has tried to bring and address all the internet related disputes through a same platform. Apart from this, it also acts as a model law to the individual states so that they can also enact legislations based on this in their own countries. In the United States the disputes related to registration of domain names are dealt by the provisions of the Anti-Cybersquatting Consumer Protection Act ("ACPA") and the Indian policy of IN Domain Name Dispute Resolution Policy (INDRP) are the best examples of UDRP based policies adapted by individual states.

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1. UDRP, Para. 4 (i)

2. UDRP, para.4(a) (iii).

3. UDRP, para.4(a) (ii).

4. UDRP, para.4(a) (i).

5. UDRP, para.4(c).

6. UDRP, para.4(b).

7. UDRP, para. 4 (a) (i)

8. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

## NEWSBYTE

### FOREIGN DIRECT INVESTMENT IN FINANCIAL SECTOR – TRANSFER OF SHARES

Reserve Bank of India vide RBI/2013-14/366 A. P. (DIR Series) Circular No.72 dated November 11, 2013 has reviewed the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 and decided to waive off the requirement of obtaining No Objection Certificate which was earlier required to be obtained from the respective financial sector regulator/regulators of the investee company as well as transferor and transferee entities in the cases of transfer of shares from Residents to Non-Residents where the investee company is in the financial services sector. Accordingly, no such NoC(s) will be needed to be filed along with form FC-TRS.

The circular however clarified that any 'fit and proper/ due diligence' requirement as regards the non-resident investor as stipulated by the respective financial sector regulator shall have to be complied with.

### LODGING OF FIR- MANDATORY FOR POLICE OFFICERS

The Hon'ble Apex Court of India has recently in the case of Lalita Kumari Vs Govt. of U.P reported in (*W.P.(Crl)No. 68/2008*) has made it mandatory for a police officer to register the First Information Report (FIR) in all the cognizable offences. In case the concerned police officer fails to do so then an action will be taken against him.

Before the said judgment was passed, there was a dilemma on the issue as to whether a police officer has to conduct some preliminary enquiry before registering the FIR or is he bound to register a First Information Report (FIR) in case of cognizable offences. Settling down the issue, the Hon'ble Supreme Court has categorically held that under Section 154 of the Criminal procedure Code, the registration of FIR is mandatory except in some type of cases like matrimonial disputes, etc.

### MINISTRY OF HEALTH AND FAMILY WELFARE PLANS TO MAKE POST-MARKETING SURVEILLANCE MANDATORY FOR 6 YEARS

The Health Ministry is planning to make the post-marketing surveillance of drugs mandatory for six years,

instead of the current practice of four years, under Schedule Y provisions of the Drugs and Cosmetic (D&C) Rules. The move comes in accordance with the recommendations by the Prof Ranjit Roy Chaudhury expert committee.

Among several recommendations to streamline the clinical trials sector, the panel had suggested creation of a detailed protocol to monitor and record the side-effects and efficacy of the drugs. The focus of a PMS study should be to monitor hitherto-identified risks, potential risks and missing information, the panel said.

The PMS should include spontaneous/voluntary reporting including reporting from scientific literature, publications or meetings, voluntary or required reporting from observational studies and randomized clinical trials, drug-induced injury, detection of events not seen in clinical trials such as new, previously unknown adverse events or new drug interactions, and any observed increase either in quantity or severity of a known adverse event, according to the panel.

The expert panel report had mentioned that observations on adverse effects, serious adverse effects and benefits seen by the clinician or health personnel during or after treatment with a new drug or biological after marketing of the drug and thereafter for a period of five or six years are carefully recorded as per protocol by the treating clinician. These observations can also be reported by the patient or community to the treating clinician, who would then record and report the same directly to the DCGI and pharmaceutical company in case of AEs and SAEs. The pharmaceutical company will be required to make detailed records of the patient and report to the DCGI as per the laid-down protocol. Special attention would be required to pay towards recording of expected SAEs and occurrence of unexpected SAEs not listed on the package insert such as death, disability or any events or signs and symptoms which could possibly lead to death or disability or hospitalisation for treatment. Such events should be immediately reported to the ethics committee, DCGI and the pharmaceutical company.

### GOVERNMENT APPROVES PHARMA PURCHASE POLICY

The Government recently approved a policy for procuring medicines produced by Central PSUs, a move which aims at optimum utilisation of such units while ensuring

availability of medicines at lower prices. The policy will be applicable to 103 medicines for five years and will be consumed by central government departments, Public Sector Undertakings and autonomous bodies.

The release mentioned that the renewal of the policy is aimed at ensuring optimum utilisation of the installed capacity of the pharma CPSEs. It would not only provide necessary fillip in reviving these CPSEs, which are ailing but also ensure availability of quality medicines at low prices to the masses. The policy will also be applicable to purchase of medicines by state governments under health programmes funded by the government such as the National Rural Health Mission.

### **TRADEMARK REGISTRY ACCUSED OF "CIRCUMVENTING" THE LAW IN SONY CASE**

The IPAB (Intellectual Property Appellate Board) through its Technical member S. Ravi overturned the order of the Deputy Registrar in the Sony Corporation (label) case. The story begins where the deputy Registrar M.C. Gupta refused to uphold the opposition filed by Sony Corporation. The reasons behind his decision were simple and straight as Sony was not able to produce any evidence in support of its usage in class 25. But on an appeal the Appellate Board not only set aside this order but also criticized the Deputy Registrar in very harsh and strong words.

In the words of the IPAB "We are amazed at how far and to what extent the learned Deputy Registrar laboured with his analytical rigour to justify his decision to extend statutory protection in favour of the respondent but the devastating negative impact such rulings send a wrong signal to the international business community and give a needless opportunity for elements inimical to the country's IPR interest to finger point the absurdity of such decision. We need to make a few pointed observations how the Deputy Registrar cleverly and with phony reasoning circumvented the law." however, it is very surprising to see that the IPAB's words are so harsh despite of the fact that the registrar's decision was based on precedents and principles. Also, the IPAB fails to address the authority case laws mentioned by the Deputy Registrar in its decision.

### **RANBAXY FINALLY GETS APPROVAL FOR SYNRIAM BY DRUG CONTROLLER OF INDIA**

Drug Controller General of India (DCGI) has finally given marketing approval to Ranbaxy for its new drug

Synriam which is having anti-malarial property. Synriam is a Fixed Dose Combination (FDC) of "arterolane maleate (150 mg) and piperazine phosphate (750 mg). Arterolane was invented by the researchers from University of Nebraska (USA), Monash University (Australia), the Swiss Tropical Institute & Hoffman La Roche. The initial research was funded and co-ordination by the non-profit Medicines for Malaria Venture (MMV), which also have its Indian patent for the drug – IN 245779. The Phase III clinical trials were conducted successful and reportedly last year and Ranbaxy had announced the launch of the drug on April 25, 2012 – World Malaria Day.

### **INDIAN HERITAGE SOCIETY V. MEHER MALHOTRA [CS(OS) 2717/2011]- COPYRIGHT INFRINGEMENT CASE**

In a very interesting case, the Delhi High Court has discussed the rule of Diplomatic Immunity. The facts were that an Annual Day event was organised by the plaintiffs and the second defendant- daughter of the Ambassador of Ecuador recommended the second defendant to be hired as a photographer to take photographs of the event which included different Yoga-asans, props for tackling health issues etc. As per the terms of agreement all the activities of the defendants were supposed to be under the guidance of the first defendant and the photographs were to be delivered to the plaintiffs. But the photos were delivered directly to the second defendants who refused to hand over them to the plaintiffs.

The Delhi High Court held that as per the provisions of Section 17 of The Copyrights Act, the person on whose instance the photographs are taken is the real owner of those photographs. It was argued that the defendant could not be held liable because it enjoyed Diplomatic Immunity. But the Court said that although as per the provisions of Vienna Convention on Diplomatic Relations, 1961 the family members of the Diplomat enjoyed immunity, it is also subject to some exceptions and professional activity is one such exception. Consequently, the second defendant was restrained through an injunction as this was a clear infringement of the Plaintiff's copyright.

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