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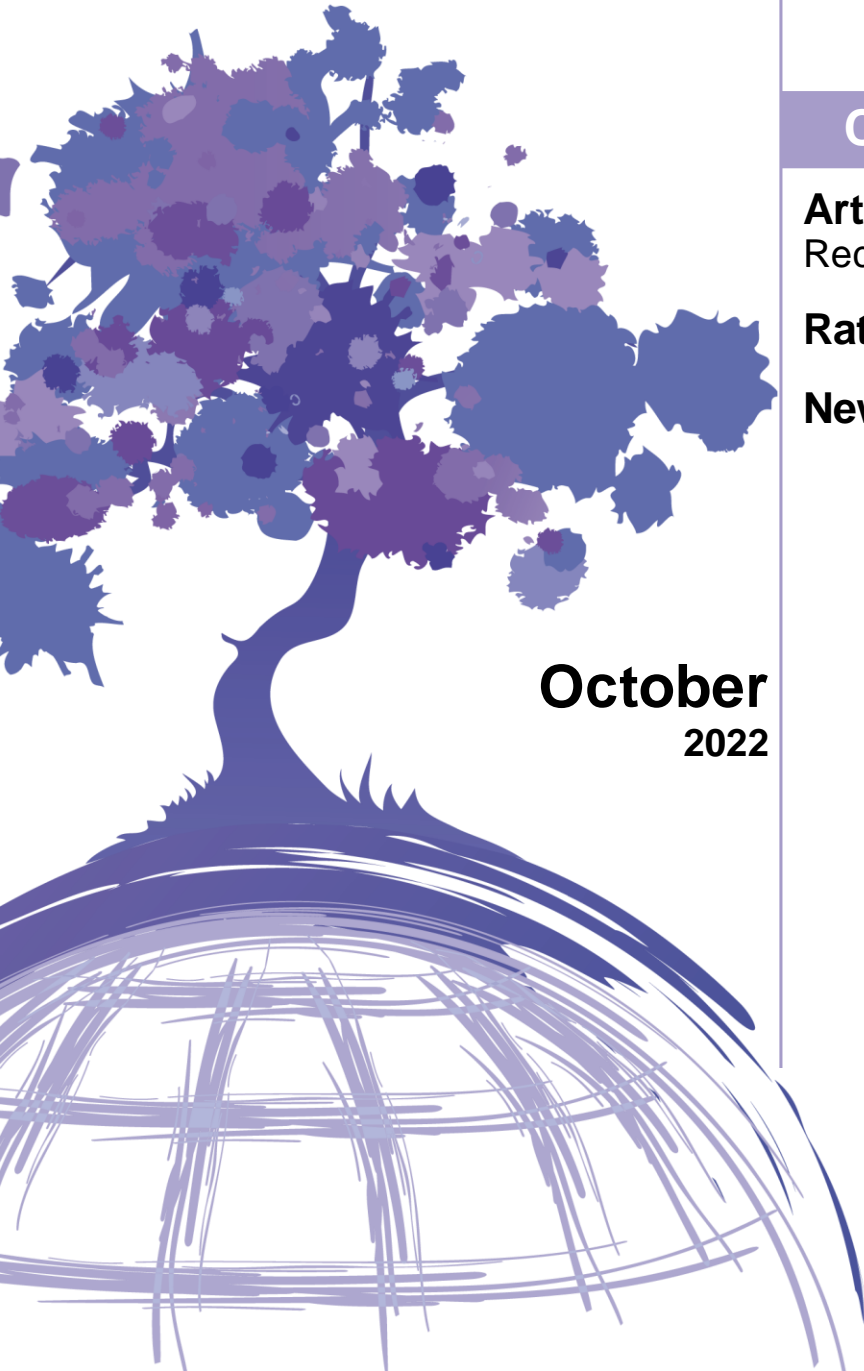
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**October**  
2022





## Article

### Recycle with care

By Pulkit Doger and Niharika Tiwari

Section 29(1) of the Trade Marks Act, 1999 ('Act') provides the manner in which a registered trademark may be infringed by a person not being a registered proprietor or an authorized user of the registered trademark. It states that such a person may infringe a registered trademark if, in the course of trade, the person uses an identical or deceptively similar trademark in relation to the goods and services for which such trademark is registered, in a manner to render such use as likely to be taken as the use of the particular registered trademark. However, the current matter relates to a peculiar situation where a trademark of one proprietor is found to be infringed by another, by use of recycled bottles or containers of that proprietor for sale of goods or products in those recycled containers. This article navigates and analyses the issue and applicability of the statutory provisions in such a case when recycled beer bottles of one proprietor were used by another by re-labelling them when the proprietor's trademark was embossed on such bottles. In the recent case of *Anheuser-Busch LLC v. Mr. Surjeet Lal and Anr.* decided on 14 March 2022, the Delhi High Court has analyzed the aspects to be considered while granting the relief of permanent injunction for trademark infringement and passing off in such situations.

Originally, the Plaintiff, in this case, Anheuser-Busch LLC, filed a suit, that was initially listed before the Delhi High Court seeking permanent injunction for restraining the Defendants (Mr. Surjeet Lal & M/s Som

Distilleries and Breweries Ltd.), from infringing their trademark '*BUDWEISER*' by using any recycled glass bottles with the embossed word '*BUDWEISER*'. The Defendants were the manufacturers and sellers of beers under the trademarks '*BLACK FORT*' and '*POWER COOL*'. The bottles manufactured by the Plaintiff, also originally used for selling beer, with the embossed word '*BUDWEISER*' were being used by the Defendants by re-labeling them as '*BLACK FORT*' and '*POWER COOL*'. The Plaintiffs alleged infringement, passing off, unfair competition, dilution, and tarnishing of goodwill and reputation of the Plaintiff. Additionally, the Plaintiffs also sought the relief of damages, rendition of accounts of profit, delivery up and order for costs of the proceedings.

The Defendants put forth an explanation before the High Court that the bottles had come into their system through *kabadiwalas* (junk or scrap dealer) and had entered their manufacturing line. Since the Defendants used recycled bottles for their business, and a large volume of such bottles were cleaned, filled, and bottled, the Defendants claimed that it is possible that there may have been stray bottles of '*BUDWEISER*', which may have been accidentally put to use. The Defendants were willing to give an undertaking as to the effect that the bottles of the Plaintiff bearing their trademark '*BUDWEISER*' shall not be used by them for the manufacture and sale of their own beer.

In view of such submissions, the Court *vide* an interim order, passed an order in favor of the

Plaintiff restraining the Defendants, till the next date as the Court deemed fit, from using any bottles with the trade mark 'BUDWEISER' appearing on them for beer or any other alcoholic drink of its manufacture or sale. Furthermore, the Defendants were directed to place an affidavit on record as to the manner in which they intended to implement the aforesaid injunction so as to ensure that there was no violation in the future. Through the affidavit, the Defendants were also to ensure that the *kabadiwalas* were directed and informed not to supply or deliver any bottles bearing the mark 'BUDWEISER' to them and also deploy a mechanism for weeding out such bottles at the feeder line itself.

Pursuant to the above order, the Defendants filed the affidavit giving an undertaking to not use any bottles of the Plaintiff and take measures to ensure that bottles of the Plaintiff are weeded out before it enters the Defendant's feeder line.

During the final hearing in the matter, the Court found that the use of the Plaintiff's beer bottles bearing their trademark 'BUDWEISER' by the Defendant for the purpose of sale of the Defendant's own products was likely to cause confusion as to its source among the consumers, resulting in the Defendant's products likely to be confused as that of the Plaintiff's. The Court relied on the decision of the Bombay High Court in *Som Distilleries and Breweries Ltd. v. SABMiller India Ltd.* [2013 (56) PTC 237 (Bom)], wherein the ingredients to prove trademark infringement as per Section 29 of the Act were reiterated as the following:

1. There must be in existence a registered trademark.
2. There has to be a use by a person who is not a registered proprietor or a person using by way of a permitted use.
3. The use must be in the course of trade.

4. The use must be of a mark which is identical with or deceptively similar to the trademark.
5. The use must be in relation to goods and services in respect of which the trademark is registered.
6. The use must be in such a manner as to render the use of the mark likely to be taken as being used as a trademark.

The Court held that all the above-mentioned ingredients were fulfilled in the present case. Plaintiff's registered trademark 'BUDWEISER' was being used by the Defendants who were not its registered proprietor and were also not entitled to permissive use in relation to their own beer. Such use would cause irreparable loss to the Plaintiff and dilution of its goodwill and reputation. Therefore, the Court held that the use of recycled 'BUDWEISER' beer bottles by the Defendants for selling their products under the trademarks 'BLACK FORT' and 'POWER COOL' clearly constituted '*use in the course of trade*'. The Court was of the view that "*the fact that the same are recycled bottles would not make a difference in so far as the question of infringement or passing off is concerned*".

Consequent to the final hearing, it was held that such sale resulted in infringement and passing off and the Court granted a permanent injunction in favour of the Plaintiff. The Defendant was, henceforth, restrained from using, manufacturing or selling their products under the mark 'BUDWEISER', even in recycled bottles, or in any manner whatsoever, in respect of beer manufactured and sold by the Defendants. The Court directed the Defendant to take a greater degree of care to ensure that the recycled 'BUDWEISER' bottles are not used for the beer, manufactured and sold by them, under the marks 'BLACK FORT' and 'POWER COOL', or under any other mark. The Court also directed the

Defendant to exercise a greater degree of supervision at their manufacturing plant and conduct random checks and inspections to ensure that the bottles used in its manufacturing plant do not, in any manner, bear the mark 'BUDWEISER'. Though, in view of the undertaking given by the Defendants, the Plaintiff agreed not to press relief of damages, rendition of accounts of profit and delivery up, the Court directed that in future if any 'BUDWEISER' bottles were found at the Defendant's factory, the Plaintiff would be entitled to avail of its remedies, in accordance with law, including the claim of damages.

It is a common practice amongst beer manufacturers and bottlers to use recycled generic bottles for their businesses. In the recent years, quite a few cases have come up before the Courts where bottles bearing one party's trademark have been used by the other and the Courts have taken a strict view that bottles bearing trademark of one party (embossed/labelled) cannot be re-purposed by re-labelling them for the sale of products of some other party. It is clear from judicial precedents that such acts would constitute as an act of infringement as there is a likelihood of confusion as to the source of the product amongst the consumers. Therefore, in the case of recycled bottles, if the trademark of the registered proprietor cannot be removed or blocked and the bottle can be identified as that of the registered proprietor, it can still be used as a commercial logo to identify the source of goods. Particularly, if the Plaintiff's trademark has garnered reputation and distinctiveness amongst the consumers, the consumers could be led to believe that the Plaintiff has some kind of relationship with the Defendant in relation to the goods being sold by the Defendant.

In the case of *Ruston & Hornby Ltd. v. Zaminadara Engineering Co.*, AIR 1970 SC 1649,

the Supreme Court held, "it very often happens that although the Defendant is not using the trademark of the Plaintiff, the get up of the Defendant's goods may be so much like the Plaintiff's that a clear case of passing off would be proved. Nevertheless, in an action on the trademark, that is to say, in an infringement action, an injunction would issue as soon as it is proved that the: Defendant is improperly using the Plaintiff's mark". Therefore, the party may not be using someone else's trademark on the recycled bottles as it may re-label it, but the shape and design of the bottle still might cause confusion among the consumers as to its source and a case for passing off can still be made out.

In *Som Distilleries case (supra)* the Court also discussed a few factors relevant to such fact situations where the Defendant's improper use of the Plaintiff's trademark can be proved and an action for infringement can be brought about. These factors are as follows:

- Similarity in the businesses of the parties which they are engaged in.
- Similarity in the height and characteristics of the bottles in which the respective parties sell their products (in case different bottles with similar designs or characteristics are used)
- The trademark being used has a valid registration under the Act.

While the Courts have taken a lenient view in cases where the bottles supplied by the *kabadiwalas* (junk or scrap dealers) have been mistakenly taken among the bulk of other bottles for recycling and re-labelling by the Defendants on account of human error, the Court has not been hesitant in granting the relief of damages and costs in favor of the Plaintiffs even if the usage of such bottles was due to a *bona fide* error. Thus, users of recycled products must apply a higher degree of caution while using

recycled products to ensure that they do not even might inadvertently infringe the trademark of some other party.

In *Allied Blenders & Distilleries Pvt. Ltd. v. Rangar Breweries Ltd.*, CS (COMM) 1213/2018, the Defendant was using the Plaintiff's *beer bottles* with their trademark embossed on them for selling *whisky* under their brand name. The Court, in the present case, decreed that "*Under these circumstances, permanent injunction as prayed would be liable to be granted against the Defendant. The Defendant's arguments that the bottles are counterfeit bottles of the Defendant, depends on the outcome of the complaint, which is pending investigation and unless and until some other party is found to be indulging in the counterfeiting, the Defendant cannot escape liability.*"

Thus, through these judgements, the Courts have attempted to strike a balance between the rights associated with the trademark of one party and promoting use of recycled materials for the business of another. From the trend of the cases, it can be concluded that generic recycled containers after being relabelled can be used by the other proprietors for the manufacture and sale of their goods, so long as the trademark of another proprietor is not present on the recycled container. However, if the trademark of a proprietor remains on such container and is used by another, it could amount to an act of infringement and the rights associated with the trademark bestowed upon the party under the Act shall not be compromised.

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## Ratio decidendi

### Patents – Amendment to claims on directions of Controller – Filing of Form 13 and notice to opponent not required

In a case where the patent claims were amended from 1-27 to 1-25 and then again to 1-19, last time without informing the petitioner (who had filed for pre-grant opposition) or filing Form-13, the Delhi High Court has held that the same is not fatal. The Court noted that the Controller himself had asked the respondent (patentee) to

amend its claims so as to restrict its scope and no additional claims was ever made with only re-adjustment of claim nos.1-25 was done and were brought down to claims no.1 to 19. Observing that some claims independently made were added/joined in earlier claims thus making the list concise, the Court held that there was no violation of natural justice and no prejudice was caused to the petitioner.

The High Court also observed that there was no requirement to submit Form-13 as amendment

was made pursuant to the directions of the Controller in exercise of his power and discretion under Section 15 of the Patents Act, 1970 read with Rule 55(5) of the Patents Rules, 2003. The Court also held that procedure required in case of voluntary amendment, as prescribed in the provisions, does not apply to the amendment made in the specification to comply with the direction of the Controller issued before the grant of Patent. [*Haryana Pesticides Manufactures Association v. Willowood Chemicals Private Limited* – Decision dated 12 September 2022 in W.P.(C)- IPD 15/2021, Delhi High Court]

### **Patents – Bar of patentability under Section 3(d) – Non-identification of ‘known substance’ is fatal**

The Delhi High Court has held that for an objection of non-patentability under Section 3(d) of the Patents Act, 1970 to be raised, the basic pre-condition would be the identification of the ‘a known substance’. Section 3(d) bars patentability of a ‘new form’ of ‘a known substance’, without establishing enhanced therapeutic efficacy. The High Court was of the view that it cannot be left to the Applicant to deduce as to what is the known substance and thereafter give efficacy data *qua* that known substance, based on the said deduction.

Observing that the compound which constituted the ‘known substance’ was not identified in the hearing notice, the Court stated that one specific known substance is to be identified and the manner in which the claimed compounds are ‘new forms’ ought to be mentioned by the Patent Office, even if not in detail but at least in a brief manner.

Holding the impugned order, rejecting the patent application, as not sustainable, the Court observed that Appellant did not have adequate opportunity to deal with the objection under Section 3(d) in as much as apart from merely

specifying the said objection for the first time in the hearing notice, the manner in which the said objection was attracted was completely absent. It noted that the objection was crystallized only in the impugned order. [*DS Biopharma Limited v. Controller of Patents and Designs* – Decision dated 30 August 2022 in C.A. (COMM.IPD-PAT) 6/2021, Delhi High Court]

### **Trademark – Use of mark ‘Tata’ – Targeting in India by foreign company’s website**

In a case involving accessibility of the Defendant’s website in India, allegedly using the mark of the Plaintiff, the Delhi High Court has held that even if a website is not directed at customers in a particular country, the fact that they are not restricted by the website to have access to it, is enough to characterise it as targeting. It was of the view that mere looming presence of a website in a geography and ability of the customers therein to access the website is sufficient, in a given case. The High Court for this purpose relied upon a decision by the England and Wales Court of Appeals in the case of *Lifestyle Equities CV v. Amazon UK Services Ltd.*

The Defendant, registered in the United Kingdom and the USA was using the mark ‘TATA’ of the Plaintiff-appellant for doing online trading in cryptocurrency through their websites [www.tatabonus.com](http://www.tatabonus.com) and [www.hakunamatata.finance](http://www.hakunamatata.finance). The respondent was also found to be selling, through its website, merchandise, such as t-shirts, shorts, caps, facemasks etc, under the name ‘TATA’. The Single Judge Bench had not agreed with the appellant that Courts in Delhi could have jurisdiction over the respondents who were registered and located overseas, and had dismissed the application for ad-interim injunction on the said sole ground.

Setting aside the order impugned before it, the Division Bench of the High Court observed that it was reasonable to infer that the objective of respondent could be to target unsuspecting Indian origin public by doing trade in the name of 'TATA' which is embedded in the sub-consciousness of public in India.

However, the Court *prima facie* rejected the plea of infringement by use of the domain name 'Hakunamatata'. It observed that there was only partial phonetic overlap with the word 'TATA' in 'Hakunamatata' and that the appellant cannot prevent adoption by others of names that naturally have alphabets 'TATA' embedded in them. [*Tata Sons Private Limited v. Hakunamatata Tata Founders* – Judgement dated 19 September 2022 in FAO(OS) (COMM) 62/2022, Delhi High Court]

### **Process patent – Use of different reagent with different sequence of reaction is significant enough to fall out of rigours of Doctrine of Equivalents**

The Delhi High Court has held that the Defendant's process for manufacturing Chlorantraniliprole ('CTPR') did not infringe the Plaintiffs' patented process for manufacturing CTPR, under the 'Doctrine of Equivalents'. The Court noted that Sulphonyl Chloride was an essential element of suit patent and the use of Thionyl Chloride as a reagent coupled with a different sequence of the reaction, cannot be termed as insignificant or trivial or insubstantial variation in the Defendant's process and thus the process *prima facie* did not come under the rigours of Doctrine of Equivalents.

The Doctrine of Equivalents is applied to examine if the substituted element(s) in the infringing product does the same work, in substantially the same way, to accomplish the same result. According to it a person is guilty of infringement if



he makes what is in substance the equivalent of the patented article.

The High Court clarified that in a process claim, the monopoly is restricted to the method by which the product is manufactured and if the same product is manufactured through a different process/method, the patentee cannot extend its monopoly to the different process.

The Court conducted a *prima facie* comparison of the two processes and observed that the settled law for determining the question of infringement is that only non-essential or trifling variations in the allegedly infringing process would not be germane. Referring to the reports of Scientific Advisors, the Court noted that (1) Sulfonyl Chloride was an essential element of the suit patent and (2) Thionyl Chloride used as a reagent in the Defendant's process, differed from Sulfonyl Chloride in its physical and chemical properties.

Holding that the suit patent process and the Defendant's process as distinct and different, the High Court dismissed the application seeking injunction and permitted the Defendant to launch its product, CTPR, with a caveat that the process claimed in the suit patent shall not be used. [*FMC Corporation v. Natco Pharma Limited* – Judgment dated 19 September 2022 in CS(COMM) 349/2022, Delhi High Court]

### **Trademarks – Device marks – Phonetic identity is not enough**

The Delhi High Court declined to grant a prohibitory interim injunction in the case involving alleged infringement and passing of the mark  by use of the mark  by the Defendant. Noting that the case involved device marks and the Plaintiff did not have any registration of the word 'Vasundhra', the Court held that the fact that 'Vasundhra' is a common name in India would be an important consideration to be kept in view while deciding

the claim of exclusivity made by the Plaintiff. The Court noted that when compared as a whole, though phonetically the two marks were identical, visually they were different as the Plaintiff's mark had a symbol 'V' alongwith the word 'Vasundhra', while the Defendant had a picture of a leaf along with word 'Vasundhra Fashion'.

The High Court in this regard also noted that that the Plaintiff had only one store at Delhi, while the Defendant had two manufacturing units, four warehouses, and seven offline stores. Its goods are available also online at Flipkart and Meesho, where the Plaintiff was not present. The Court also noted that the goods of the Defendant were aimed at persons belonging to lower strata while

the goods of the Plaintiff (designer jewellery) aimed at persons belonging to the higher strata of the society. It noted that the goods of the Defendant were in Classes 24 and 25, in which the Plaintiff did not have any registration. The Court in this regard also observed that merely because the Plaintiff dealt in jewellery items, which by themselves are more costly thereby resulting in a higher turnover for the Plaintiff, will not give a better right to the Plaintiff over an otherwise a common name in India. [*Vasundhra Jewellers Pvt. Ltd. v. Kirat Vinodbhai Jadvani* – Decision dated 21 September 2022 in CS(COMM) 363/2022, Delhi High Court]



## News Nuggets

### Not providing reasons for rejecting application for grant of patent is fatal

The Calcutta High Court has set aside the decision of the Controller of Patents and Designs where the impugned order did not provide any reasons for rejecting the application for grant of patent. The High Court observed that the impugned order mechanically reproduced the submissions and the notes of submissions filed on behalf of the parties without any application of mind. Further, the Court in *Dahon Technologies Ltd. v. Controller* [Decision dated 5 September 2022] noted that the Controller failed to provide for re-examination in terms of Section 13(3) of the Patents Act, 1970. The patent sought was for pump for supplying air to the bicycle tyres.

### Trademark disparagement – Not open for advertiser to send a message that quality of goods of his competitor is bad

The Delhi High Court has reiterated that in a comparative advertisement, while it is open for an advertiser to say that his goods are of a good quality, it is not open for an advertiser to send a message that the quality of the goods of his competitor is bad. In an appeal against rejection of the plea for interim measures, the Court made the order passed by the Court earlier, granting interim injunction in respect of airing of the television commercial of the respondent, as absolute, and held that the Respondent's TV commercial in respect of its product 'Domex' was *prima facie* disparaging the product 'Harpic' of the petitioner-appellant.



On the facts of the case, the Court in *Reckitt Benckiser (India) Pvt. Ltd. v. Hindustan Unilever Limited* [Judgement dated 26 September 2022] noted that the TV commercial not only projects a message that Domex fights odour for a longer period of time, it also sends a clear message that Harpic does not address the problem of foul smell that emanates from toilets. It observed that the manner in which the impugned commercial was structured, it, sends a message that Harpic only cleans without addressing the problem of bad odour and thereafter sends the message that whoever chooses Harpic would have to live with their toilets smelling foul.

### **Trademarks ‘Steelbird’ and ‘Seabird’ are phonetically similar**

The Delhi High Court has held that the trademarks ‘STEELBIRD’ and ‘SEABIRD’ are phonetically similar and are likely to cause deception in the minds of the common public purchasing the goods. The Court observed that the Plaintiff being a prior and a continuous user, using the mark ‘Steelbird’, has attained goodwill and reputation in the said trademark. In this case of *Steelbird Hi-Tech India Ltd. v. Tazeen Farooqui* [Decision dated 13 September 2022], where both the marks (of the Plaintiff and the Defendant) were registered, the Court held that Plaintiff’s common law rights are required to be protected and the Plaintiff was entitled to interim injunction.

### **Trademarks ‘Carlsberg’ and ‘Tensberg’ are deceptively similar**

The Delhi High Court has stated that the mark of the Plaintiff (Carlsberg) and the Defendants (Tensberg), both used for same product, appear to be deceptively similar. The Court in this regard noted that *prima facie*, the shape of the bottle and the Can adopted by the

Defendants appears to be deceptively similar to that of the Plaintiff; with the same colour green for the bottle, and green/white for the Can. The Court in *Carlsberg Breweries v. Tensberg Breweries Industries Pvt. Ltd.* [Decision dated 16 September 2022] observed that the placement of the marks, the appearance of the deceptively similar crown, also *prima facie* reflects the intention of the Defendants to come as close to the Plaintiff’s mark as possible. It hence held that applying the test of an unwary consumer with imperfect recollection, the two marks and their trade dress, *prima facie* appear to be deceptively similar and likely to deceive and confuse such consumer. It, in this regard, also stated that Beer Bottles and Cans are not bought with minute scrutiny but in a more casual manner.

### **Trademarks ‘ZIPOD’ and ‘ZOYPOD’ are deceptively similar – Dissimilarity in packing is not relevant**

Observing that the marks ZIPOD of the Plaintiff and ZOYPOD of the Defendant were phonetically and deceptively similar, the Delhi High Court has held that the dissimilarity in the packing of the two products is not relevant. The Court in this regard also rejected the plea of the Defendant that the mark ‘ZOYPOD’ was derived from the molecular name i.e., Cefpodoxime. Similarly, it also rejected the plea that as the medicinal preparations in question were Schedule ‘H’ drugs and are only available on a prescription, therefore, no confusion is possible. The High Court in the case *FDC Limited v. Nilrise Pharmaceuticals Pvt. Ltd.* [Decision dated 23 September 2022] was also of the view that merely because the Defendant used the prefix ‘ZOY’ for its other medicinal preparations, it cannot be allowed to use the impugned mark.

## Trademark infringement by passing of old and used goods of Plaintiff as new products of Defendant, after tampering with labels

In a case involving passing of old and used hard-disk drives of the Plaintiff as new products of the Defendant, by tampering with the PCB and the labels of the hard-disk drives, the Delhi High Court has held that the case was clearly of infringement of the trademark of the Plaintiff as also passing off goods of the Plaintiff as new and un-used. The Court was of

the view that this would lead to deception, loss and injury to an unwary consumer as also dilution of the trademarks of the Plaintiff by the unfair trade practices adopted by the Defendant. The High Court in *Western Digital Technologies Inc. v. Raaj Computer* [Decision dated 21 September 2022] also stated that the Defendant was also not entitled to seek protection under Section 30(3) of the Trade Marks Act, 1999 as it had tampered with the goods of the Plaintiff and its labelling.

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