

**\* IN THE HIGH COURT OF DELHI AT NEW DELHI**

**+ CS(OS) 2508/2007**

**WEIDER PUBLICATIONS, LLC & ANR. .... Plaintiffs**  
**Through: Mr.S.C.Ladi, Sr.Advocate with**  
**Ms.Deeksha Kakar, Advocate.**

**versus**

**SHRI PUSHPENDRA SRIVASTAV & ANR. .... Defendants**  
**Through: Defendants are *ex parte*.**

**% Date of Decision : January 07, 2013**

**CORAM:**  
**HON'BLE MS. JUSTICE REVA KHETRAPAL**

## **J U D G M E N T**

**: REVA KHETRAPAL, J.**

**1.** The Plaintiffs being the publisher of the **MUSCLE & FITNESS** magazine have instituted the present suit against the Defendants engaged in publishing, selling and marketing of **MUSCLES & FITNESS** magazine seeking permanent injunction restraining the Defendants from printing, publishing, selling or offering for sale, advertising, directly or indirectly dealing in any publication and/or sale of magazines having the get-up, layout,

content, printed matter, arrangement of articles/features, photographs and/or drawings identical to or substantially copied from the Plaintiffs' magazine **MUSCLE & FITNESS**. The Plaintiffs have also sought a permanent injunction against the Defendants on the ground of passing off by the Defendants in respect of the Plaintiffs' magazine **MUSCLE & FITNESS**. The ancillary reliefs of damages, delivery up etc. have also been claimed.

2. The Plaintiff Nos. 1 and 2 are both companies incorporated under the laws of United States of America (USA) and are publishing companies offering celebrity journalism, and health and fitness magazines and publications, including their magazine **MUSCLE & FITNESS** in the USA and numerous other countries around the world. Plaintiff No. 1 was acquired by Plaintiff No. 2 in 2003, and currently is a wholly owned subsidiary of Plaintiff No. 2.

3. The Plaintiffs assert that when in the month of May/June, 2006, the Plaintiffs decided to launch an Indian edition of their magazine **MUSCLE & FITNESS** wherein the content would be aimed and created entirely for the Indian market. The Plaintiffs approached the Registrar of Newspapers in India (in short "RNI") to initiate registration of their title **MUSCLE & FITNESS** as required by the Press and Registration of Books Act, 1867 (in short "the PRB Act") for title verification and registration of their publication title **MUSCLE & FITNESS**, as required by the PRB Act.

4. The Plaintiffs' said application for title verification was rejected by the RNI on account of a prior title registration of **MUSCLES & FITNESS** in

favour of the Defendant No.1. On learning of this fraudulent registration, the Plaintiffs through their licensee in India, namely, “**Health is Wealth Pvt. Ltd.**” filed an appeal before the Press & Registration Appellate Board (in short “PRAB”), Lodhi Road, New Delhi against letter dated 27.11.2006 of RNI rejecting Plaintiffs’ application for registration of **MUSCLE & FITNESS** in respect of its said magazine. The said appeal was rejected by the PRAB, *inter alia*, holding that:

*"The action complained of is covered by neither of the two. It, therefore, does not fall within the ambit of Section 8(c) of the Press and Registration of Books Act, 1867. The grievance of the Appellant being primarily governed by copyright and trademark laws needs to be agitated before the appropriate forum. The board directs dropping of the Appeal accordingly."*

5. The Plaintiffs allege that upon reading the Defendants’ magazine, the Plaintiffs discovered that not only had the Defendants lifted the Plaintiffs’ trademark **MUSCLE & FITNESS** in its entirety and applied the said mark as **MUSCLES & FITNESS** to their magazine, but also the get-up, layout, content, printed matter, arrangement of articles and features, photographs and drawings were identical to the Plaintiffs’ magazine. In the circumstances, the Plaintiffs instituted the present suit against the Defendants on 17.12.2007. The prima-facie rights of the Plaintiffs were confirmed by this Court by way of an *ex-parte ad interim* injunction order granted to the Plaintiffs on 19.12.2007 wherein the Defendants were restrained from publishing, marketing or in any manner circulating their magazine under the title **MUSCLES & FITNESS** or from copying any of the articles of the Plaintiffs in their magazine. The said injunction continues to

remain in force till date. The effect of the aforesaid injunction order was that the Defendants ceased publication of their magazine **MUSCLES & FITNESS** and instead started the publication, sale and marketing of a magazine titled **FITNESS TRAINER**, wherein they continued to plagiarize and entirely copy the content from the Plaintiffs' international magazine **MUSCLE & FITNESS**, as was previously done by them under the name **MUSCLES & FITNESS**. Due to this continued plagiarism of the Plaintiffs' copyrighted works and content by the Defendants in their magazine, now titled **FITNESS TRAINER**, on 20.09.2008 the Plaintiffs filed an application under Order XXXIX Rule 2A of the Code of Civil Procedure, 1908 being IA No.11817/08 for non-compliance by the Defendants of the interim injunction passed by this Court. On 13.02.2009, the aforesaid application was heard and the Defendants' counsel accepted notice of the same and sought time to file a reply. On 26.10.2009, the Defendants were asked by this Court to furnish an undertaking not to infringe the Plaintiffs' marks and copyright works in the future but on the adjourned date, that is, 10.12.2009, none appeared on behalf of the Defendants and no undertaking as aforesaid was furnished. On 12.05.2010, the interim injunction order granted on 09.12.2007 was confirmed by this Court in view of the statement made by the counsel for the Defendants, inasmuch as he stated that the Defendants would not publish the magazine under the impugned mark till final decision in the case. The Plaintiffs' application under Order XXXIX Rules 1 & 2 being IA No. 14716/2007 and under Order XXXIX Rule 2A of the Code of Civil Procedure being IA No. 11817/2008 stood disposed of in terms thereof and the matter was listed for framing of issues. On 12.07.2010, issues were struck

and the case adjourned for the parties to lead evidence. On 20<sup>th</sup> July, 2011, the Plaintiffs' witness, Mr. Rajeev Makhija, PW1 was present but none appeared on behalf of the Defendants for cross-examination of the said witness. On 29.08.2011 once again there was no appearance on behalf of the Defendants and consequently the Defendants were proceeded *ex-parte*.

6. As already set out hereinabove, the suit has been filed by the Plaintiffs for the infringement by the Defendants of the Plaintiffs' copyright and the passing off of the Plaintiffs' magazine title and the RNI registration of the infringing title **MUSCLES & FITNESS** by the Defendants, which acts of the Defendants are stated to be causing irreparable loss to the Plaintiffs. The Plaintiffs have sought reliefs in the suit on the following grounds:

- a. The Defendants have infringed the copyright of the Plaintiffs by blatantly copying the content of the Plaintiffs internationally acclaimed magazine, and reproducing the same for the Defendants' Indian magazine "**Muscles & Fitness**".
- b. The Defendants are passing off the Plaintiffs' magazine's name, title and mark, and are currently infringing the registered trademark of the Plaintiff inasmuch as the registered name of their magazine sold in India ("**Muscles & Fitness**") is deceptively similar to the name and registered trademark of the Plaintiffs' magazine "**Muscle & Fitness**" sold worldwide, and is likely to cause confusion to the consumer.

7. The Defendants apart from generally denying the contents of the plaint have claimed their right to publish the magazine on the strength of the clearance of magazine title by the RNI under the PRB Act vide letter dated 27.11.2006. The Defendants claim that the only

requirement for publishing a magazine in India is the registration of the magazine title with the RNI, and that no trademark or copyright registration is required for the publication of a magazine in India. As such the suit filed by the Plaintiffs in spite of the copyright infringement and passing of is not maintainable. Defendant No.1 is the registered owner of the magazine **Muscles & Fitness** in India in both languages, that is, English and Hindi and is a rightful user thereof since 2003 and 2004 in English and Hindi respectively and has been publishing the same since the date of registration till date. The Plaintiffs are the owners of the copyright in U.S.A. but have miserably failed to produce or show any document showing the existence of copyright in their favour in India.

8. At the time of the institution of the suit, the Plaintiff No. 1 was the registered owner of the trademark **MUSCLE & FITNESS** in several countries of the world including Australia, Canada, France, Germany, Russia, United Kingdom and United States of America. In India, Plaintiff No.1 had filed trademark application No.1480753 in Class 16 dated 22.08.2006 with the Trade Mark Registry, Delhi for registration of the trademark **MUSCLE & FITNESS** for its said magazine. During the pendency of the present suit, Certificate of Registration of the said trademark was issued by the Trade Mark Registry on 19.03.2010 in favour of the Plaintiffs effective from 22.08.2006 and the Plaintiffs filed IA No.2985/2011 for bringing the same on record, which application was allowed by this Court on 14.03.2011.

9. The Plaintiffs by way of evidence have filed the affidavit of

PW-1, Shri Rajeev Makhija to depose the following facts:-

(i) The authors of the articles published in the Plaintiff's magazine MUSCLE & FITNESS are duly remunerated by the Plaintiffs for the publication of their articles in the said magazine. Similarly, the photographer of the photographs and the artists of the depictions published in the Plaintiffs' magazine MUSCLE & FITNESS are duly remunerated by the Plaintiffs. The Plaintiffs are thus the owner of the copyright in the magazine MUSCLE & FITNESS.

(ii) The Plaintiffs magazine MUSCLE & FITNESS are "works" that have been first published in the USA and are also registered in the USA. Under the US copyright law, US Code Title 17, Section 201(b) the copyright in a work created by an employee or an author who has been remunerated, belongs to the employer. The articles published in the magazine MUSCLE & FITNESS are "original literary work" within the meaning of Section 2(y)(i) and the photographs and drawings are "artistic work" within the meaning of Section 2(c)(i) of the Copyright Act, 1957 and copyright subsists in favour of the Plaintiffs in their magazine MUSCLE & FITNESS within the meaning of Section 13(1)(a) of the Copyright Act, 1957" (hereinafter "the Act"). The Plaintiffs are the exclusive owner of the copyright in the magazine MUSCLE & FITNESS since it was published in 1980 in the USA under the name MUSCLE & FITNESS.

(iii) The rights of authors of member countries of the Berne and Universal Copyright Conventions are protected under Indian copyright law. India and USA are signatories to both the Universal Copyright Convention as well as the Berne Convention. The Plaintiffs' works are

created by authors of member countries and originate from and are first published in the said member countries. The Plaintiffs' works are, thus, protected in India under Section 40 of the Copyright Act, 1957 read with the International Copyright Order, 1999.

(iv) The Plaintiff No. I is the owner of the copyright in its magazine **MUSCLE & FITNESS** being a literary work within the meaning of Section 17 of the Act and is entitled to all the exclusive rights flowing from such ownership as set out in Section 14 of the Act inter alia being the right (a) to reproduce the work in any material form, including storing in any medium by electronic means; (b) to issue copies of the work; (c) to make an adaptation or translation of the work and (d) to authorise the doing of any of the aforesaid acts.

(v) The Defendants have lifted the Plaintiffs' trademark **MUSCLE & FITNESS** in its entirety and applied the said mark as **MUSCLES & FITNESS** to their magazine. This is clear from a comparison of the rival trademarks as they appear on their respective magazines depicted as follows:-

**THE PLAINTIFF NO.1'S TRADEMARK**



THE DEFENDANTS' TRADE MARK

# **MUSCLES** *December 2003* **& FITNESS**

(vi) The Defendants are intentionally plagiarizing the Plaintiffs' **MUSCLE & FITNESS** magazine, and this can be demonstrated from the chart set out in paragraph 24 of the plaint, which shows some of the identical content of the two magazines, *inter alia*, being

- *Pictures of man weight-lifting have been scanned from Plaintiff's magazine and published in Defendant's magazine including printed matter — "Explosive Growth", "High Pull", "Jump Shrug", etc.*
- *Photograph of Ronnie Coleman being felicitated with raised hands have been plagiarized from the Plaintiff's magazine and published in Defendant's magazine.*
- *Pictures of man weight-lifting have been scanned from Plaintiff's magazine and published in Defendant's magazine including verbatim Hindi translation of Plaintiff's English text.*
- *Depiction of muscular development during bench press has been plagiarized from the Plaintiff's magazine and published in the Defendant's magazine.*
- *Advertisement of different brands of sunglasses including*

*printed matter in Hindi text has been scanned from the Plaintiff's magazine and published in the Defendant's magazine.*

- *Drawings of man exercising depicting muscular development of biceps have been scanned from Plaintiffs' magazine and printed in Defendants' magazine including printed matter.*

10. PW-1, Shri Rajeev Makhija also proved on record the infringing materials of the Defendants alongwith the original magazine editions of the Plaintiffs wherefrom the works, articles and photographs were copied by the Defendants. He also proved on record his Power of Attorney dated 27.11.2007 (Exhibit PW1/1); the original printouts of opening pages of Plaintiffs' various websites as Exhibit PW-1/2 (Colly.); the original printouts of opening pages of Internet Search Engines, namely, Google, Yahoo and Alta Vista in respect of Plaintiffs' magazine **MUSCLE & FITNESS** as Exhibit PW-1/3 (Colly.) and Exhibit PW-1/4 (Colly.) respectively; copy of letter dated 18.09.2007 issued by Amcorp Ltd., U.S to India Book Distributors (IBD) alongwith copies of invoices to IBD and copy of sale invoices dated 15.01.2007 issued by IBD to various book stores in India as Exhibit PW-1/5 (Colly.) and Exhibit PW-1/6 (Colly.); the printouts of articles authored by Mr. Arnold Schwarzenegger, Editor-in-Chief of the Plaintiffs' magazine **MUSCLE & FITNESS** as Exhibit PW-1/7 (Colly.); copy of the application made by the Plaintiffs to the DCP (Licensing) for publication of the Plaintiffs' magazine as Exhibit PW-1/8; the License Agreement dated 13.06.2006 and the letter issued by Plaintiff No.1 in favour of **Health is**

**Wealth Pvt. Ltd.** as Exhibit PW-1/9 (Colly.) and Exhibit PW-1/10 (Colly.) respectively; the letter dated 25.09.2006 issued by the RNI to the DCP (Licensing) intimating that the name of the Plaintiffs' magazine **MUSCLE & FITNESS** was not available under the PRB Act as Exhibit PW-1/11; the letter dated 17.10.2006 issued by the Plaintiffs' licensee **Health is Wealth Pvt. Ltd.** to the DCP (Licensing) requesting for cancellation of the Defendants' title **MUSCLES & FITNESS** in India as Exhibit PW-1/12; letter dated 19.10.2006 from Plaintiffs' licensee **Health is Wealth Pvt. Ltd.** to the RNI requesting for the registration of the Plaintiffs' magazine **MUSCLE & FITNESS** as Exhibit PW-1/13; letter dated 04.06.2007 addressed by Plaintiffs' licensee in India, **Health is Wealth Pvt. Ltd.** to PRAB as Exhibit PW-1/14; the order dated 07.09.2007 issued by PRAB rejecting Plaintiffs' application for registration of the title **MUSCLE & FITNESS** in India as Exhibit PW-1/15; the original issues of January, February, April, June, July 2005 and June 2006 of Plaintiffs' magazine **MUSCLES & FITNESS** and the original issues of May, December, September, October 2005, October 2003 and February 2006 of the Defendants' magazine as Exhibit PW-1/16 (Colly.) and Exhibit PW1/17 (Colly.) respectively.

11. This Court has heard the learned senior counsel for the Plaintiffs, Mr. S.C. Ladi and scrutinized the pleadings of the parties and the evidence on record. It is submitted on behalf of the Plaintiffs by Mr. Ladi that the Defendants' use and publication of the magazine under the mark **MUSCLES & FITNESS** is an infringement on the trademark rights of the name and title of the Plaintiffs' internationally renowned magazine **MUSCLE &**

**FITNESS.** The Defendants' mark is almost identical to the Plaintiffs' mark, making it deceptively similar to the consumer. It is further submitted that the Defendants' use of the name and mark to pass off their magazine as that of the Plaintiffs', is damaging and detrimental to the goodwill and reputation of the Plaintiffs' title and brand, a reputation that has been painstakingly and tediously built over nearly 30 years, when the Plaintiffs first began using the name **MUSCLE & FITNESS**. As regards the protection agreed to internationally renowned trademark and names, learned counsel relied upon the judgment of this Court rendered in the case of *Playboy Enterprises Inc. Vs. Bharat Malik and Anr. 91 (2001) DLT 321* wherein the Court upheld the right of the Plaintiffs to protect its trademark **PLAYBOY** from infringement as well as from passing off. The relevant extract of the judgment reads as under:-

*"71. Undoubtedly, the Plaintiffs trade name PLAYBOY has all over the years become strong and powerful mark as it has gained tremendous popularity all over the world initially through the medium of magazine and subsequently through the medium of the entertainment channel. The 'PLAYBOY' magazine has a total monthly world-wide circulation of nearly 5 million copies. Millions of Dollars are spent every year on publicity of its mark. The name is registered in large number of countries. the trade mark 'PLAYBOY' has entered in the list of a major trade marks.*

*72. The contents of the Defendant's magazine are on the same lines as that of the Plaintiffs magazine in so far as concepts and ideas are concerned. Mere a (sic.) glance reveals that it is slavish copy and cheap imitation. It is also aimed to target the same market of consumers with a likely effect to create confusion as to its source and conscious association with the*

*Plaintiff's widely known name. There is not a scintilla of doubt that the Defendants have adopted the word "PLAY" with sole object to exploit and trade on its goodwill and widespread reputation. There is no credible explanation as to why the word "PLAY" was chosen.*

*73. In nutshell the following conclusions emerge:*

*(1) Though the Plaintiff has secured registration of the trademark Playboy in respect of the magazine and several other goods which is more than seven years old and has demonstrated its strength due to the degree of distinctiveness, fame and reputation of the trademark Playboy yet being a title of the magazine it qualifies to be a valid trademark even if it is not registered because of its long and continuous use.*

*(2) The trademark Playboy falls in the category of arbitrary or fanciful trademark as it does not bring to mind the product to which it is applied and as such deserves the highest degree of protection. The trademark Playboy has acquired its world-wide circulation and publication in as many as 16 foreign countries and huge amounts spent on its publicity and promotion of this mark project its widespread fame and reputation culminating in its synonymity with the Plaintiff company.*

*(3) The Defendant's adoption of the trademark 'Playway' not only amounts to infringement of the Plaintiff company's statutory right because of its being deceptively similar as to its ideas, contents, themes, concepts and photographs resulting in confusion and deception as to its source but also amounts to passing off as it tends to thrive upon the strength of its reputation and goodwill.*

*(4) Temporary legal ban or import restrictions in a particular country particularly of an insertional trade*

*name or brand do not confer right on any person to adopt either the same name or deceptively similar name or its distinctive features verging on passing off action as the goodwill or reputation has indelible influence over the mind of the people and is all-pervading.*

*(5) Ban may not totally wipe out the circulation as the tourists, travellers, embassies still remain the active channels.*

*74. Out of all this, what emanates is that the Plaintiff has the right to protect its trade name PLAYBOY from infringement as well as from passing off.”*

**12.** In the context of the defence of the Defendants, noted hereinabove, that the Plaintiffs’ magazine is not registered under the PRB Act and that on merely obtaining the trademark right, the Plaintiffs do not become entitled to question the legitimately registered name of the Defendants under the PRB Act, my attention was drawn to the following observations made in the case of ***Playboy Enterprises Inc. vs. Bharat Malik (supra)***:-

*“The registration of name of magazine, calendar or any printed publication under the provisions of PRB Act is an independent action and has no relevance or effect either over-riding or over-stepping the provisions of TMM Act. The preamble of the PRB Act itself demonstrates that this Act was not made for the purpose of governing disputes relating to names, titles and trade marks. Trade mark or mark registered under the TMM Act or its prior, long and known existence particularly the mark of arbitrary nature makes it so strong, the infringement of which entitles the user to obtain injunction against the infringer.*

*The nature of enquiry under the PRB Act is for the purpose of approval of the name of a magazine or publication and as such it cannot have precedence over the provisions of the TMM Act which is a special enactment and was made for the purpose of governing disputes relating to names, titles or trade marks. This conclusion emanates from the comparison of the object of the aforesaid two Acts. The preamble of PRB Act shows that it was made for regulating printing presses and newspapers, for preservation of copies of every book and registration of such books and newspapers. Thus the main concern of the Legislature was to enact a law which would help in preservation of the copies of the books and newspapers.*

*The TMM Act was enacted to provide for the registration and better protection of trade marks and for the prevention of the use of fraudulent marks on merchandise. The Fourth Schedule of the TMM Act has adopted the international classification of goods including the kinds of the goods in question. Magazines, periodicals are included in Class.*

*Had the PRB Act which too is a special Act a precedence over the TMM Act, the inclusion of magazines, periodicals and other literature in Class 16 would have been omitted as the registration of the name of the periodicals and printed publication is compulsorily registrable under the PRB Act. Thus the two Legislations should not be confounded and confused. So far as the valuation or infringement of the trademark or mark is concerned this is to be regulated by the provisions of TMM Act and provisions of the PRB Act are of no relevance.”*

- 13.** Learned counsel for the Plaintiffs also submits that the position that the Defendants have no right or authority to publish the copyright

protected works of the Plaintiffs' and that in such circumstances the Plaintiffs are entitled to a decree of permanent injunction, as prayed for in the plaint, has been confirmed by this Court in its subsequent judgment rendered in the case of *Playboy Enterprises International Inc. Vs. Mr. Chaitanya Prabhu & Ors.* in *CS(OS) No. 1670/2006 decided on 21.04.2009*. In its said decision, the Court went so far as to hold that even if the Defendants had acquired for consideration the photographs in which the Plaintiff had a copyright, this did not entitle the Defendants to infringe the copyright of the Plaintiff.

**14.** In view of the aforesaid discussion and also keeping in mind the similarity between the two marks, the degree of similarity between the two products/magazines including colour, scheme, get-up, display, photographs etc., the purpose of the Defendants in adopting this mark, the area of circulation and the resulting confusion amongst consumers, which is likely to be caused by two near identical magazines, this Court has no hesitation in arriving at the conclusion that the mark **MUSCLE & FITNESS** of the Plaintiffs stood infringed by the use of the mark **MUSCLES & FITNESS** by the Defendants on account of being deceptively similar and creating confusion in the minds of consumers as to the origin of the product, that is, the magazine. The only difference between the two marks is the addition of syllable (S) after the word **MUSCLE** in the Defendants' magazine, and this addition is, in my opinion, too insignificant to be noticed by the average consumer. The inference of deceit on the part of the Defendants in adopting an identical

trademark, thus, to my mind, is the only inference, which can be drawn in the circumstances. The degree of similarity in the content of the two magazines including photographs, advertisements, articles etc. also assumes importance in view of the fact that the Plaintiffs' indubitably must have expended considerable funds and resources over the years for the creation of these copyright works. The Defendants seek to derive material benefits by riding on coat-tails of the Plaintiffs without expending material resources and merely by getting the name of the magazine registered under the PRB Act, knowing fully well about the magazine of the Plaintiffs, which by then had attained international acclaim. The Plaintiffs, on the other hand, claim to have suffered losses since the year 2006 due to their inability to launch and publish their magazine in India, which the Plaintiffs allege are directly attributable to the aforesaid infringing acts of the Defendants for which the Plaintiffs have claimed damages under various heads including compensatory/actual damage, damages to goodwill and reputation, and exemplary/punitive damages, in all, Rs.21,00,000/- (Rupees twenty one lakhs only).

**15.** The issue of punitive damages has been addressed by this Court time and again. In the case of *Time Incorporated Vs. Lokesh Srivastava & Anr., 2005 (30) PTC 3 (Del)*, this Court observed that punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also

who are not party to the lis but suffer on account of the breach such as the consumers.

**16.** In the case of *Hero Honda Motors Ltd. Vs. Shree Assuramji Scooters, 2006 (32) PTC CS(OS) No. 255/2005 page117 (Delhi)*, a learned single Judge of this Court (Hon'ble Mr. Justice Sanjay Kishan Kaul) highlighted yet another aspect of the matter and made the following apposite observations:-

*“That in such case punitive damages need to be awarded, since otherwise the Defendant, who appears in the Court and submits its account books would be liable for damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books.”*

**17.** In *Microsoft Corporation v. Deepak Raval MIPR 2007 (1) 72* while dealing with the growing menace of piracy and in the context of granting damages in cases where the Defendant chooses to remain absent, the Court observed as under:-

*“That in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of Defendant, the exact figures of sale made by them under the infringing copyright and/or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the Plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.”*

18. In *Larsen and Toubro Limited v. Chagan Bhai Patel MIPR 2009 (1) 194*, this Court was again seized of a case where the Defendant chose to remain away from the proceedings. The Court expressing its disapproval made the following pertinent observations with regard to award of punitive damages in such cases:-

*“that it would be encouraging the violators of intellectual property, if the Defendants notwithstanding having not contested the suit are not burdened with punitive damages. Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the trademark and copyright of others and try to encash upon the goodwill and reputation of other brands by passing off their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, in the case of a trademark use the well-reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity or in the case of a software use the pirated software thereby depriving the copyright owner of the revenue to which he is entitled by sale of license to use that software and then avoid payment of damages by remaining absent from the Court, thereby depriving the Plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark/pirated software, which, if he is using the infringing mark/pirated software for business purposes, can be computed only on the basis of his account books. This would, therefore, amount to putting premium on*

*dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court.”*

**19.** From the aforesaid, it is clear that the Courts have repeatedly emphasized the fact that in cases of violation of intellectual property, the Court ought not to countenance such violation without award of punitive damages even in cases where the Defendant absents himself from the proceedings, thereby depriving the Plaintiff of an opportunity to establish the actual loss of revenue to him but must visit such a Defendant with the penal consequences of his infringing activities by awarding punitive damages. If the infringer is allowed to get away scott free merely on account of the fact that he does not appear to contest his case, those who do appear before the Court and have a *bona fide* defence to make will undoubtedly be placed at a serious disadvantage *qua* such an infringer. The necessary corollary would be that those who divert the owners of intellectual property of their property would score over their more scrupulous brethren against whom false charges of infringement have been brought.

**20.** For the reasons set out in the preceding paragraphs, the Plaintiffs are held entitled to the reliefs prayed for by them against the Defendants. The suit is accordingly decreed by passing a decree for permanent injunction in terms of paragraph 34 (a) to (c) of the plaint in favour of the Plaintiffs and against the Defendants. In the facts and circumstances of the case, punitive damages are also awarded to the tune of Rs.5,00,000/- (Rupees five lakhs). The Plaintiffs shall also be

entitled to costs as determined by the Registry of this Court. The decree-sheet be drawn-up accordingly.

**21.** CS(OS) No.2508/2007 stands disposed of in the above terms.

**REVA KHETRAPAL  
(JUDGE)**

**January 07, 2013  
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