BEFORE THE
HIGH COURT OF STATE OF MIMOSA
ORIGINAL JURISDICTION

AUGUST 2000, O.P. :- ...../2000

IN THE MATTER OF	:	The case concerning the grant of Intellectual Property Rights Protection in the State of Mimosa for the designer Plants technology.

DAF **……Applicant**

Vs

FLO **……Respondent**

PETITION FIELD INVOKING THE ORIGINAL JURISDICTION OD THE HIGH COURT OF MIMOSA

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STATEMENT OF JURISDICTION

The petitioner humbly submits that the subject matter of the petition concerning the grant of Intellectual Property Rights is within the original jurisdiction of the Honourable High Court of Mimosa.

STATEMENT OF FACTS

Mr. Anther, a national of the island of Pollen and a scientist of the highest repute invents a molecular manipulative technology by which designer plants can be created. He sets up a company Designer-a-Flower Limited (hereinafter referred to as 'DAF') and immediately applies for a Patent, both in Pollen as well as other countries through the PCT (Patent Cooperation Treaty) route.

The technology which Mr. Anther refers to as 'design-a-flower' enables a customer to order a desired design on any flower, for example, a striped, spotted and checked rose or even cartoon arrangement took on a meaning altogether and Designer flowers became the latest fashion statement.

Stigma, a national of "Mimosa" discovers that though Anthers Patent has been applied in Mimosa, it is safe to copy the technology for a period of say three and a half years before it is published. Using a series of designer plants, stigma reverse engineers and announces rival venture called Floralmania Ltd. (hereinafter referred to as 'FLO') with a wider range of products including those that appealed to purient minds.

Within a few months, the rival company's business in the country Mimosa Picks up enormously for very obvious reasons and for justifiable reasons 'DAF' sues 'FLO'.

SUMMARY OF ARGUMENTS

Under the TRIPS agreement, any invention is patentable provided the basic requirements of novelty, utility and inventiveness of an invention are satisfied. The TRIPS agreement lays down the intention Patinally recognised minimum standards for patent protection. It is also binding on the state of Mimosa as the lather is signatory to the WTO. The patent in the instant case is being sought for a technology by which designer plants can be created. This technology satisfies all the requirements for patentability. The subject matter of the patents is also one that does not come within the ambit of categories exempted from patentability. The patent in the instant case, therefore, although not granted is inevitable.

The basic principle behind granting patent protection to an invention is to vest the inventor with a right to an exclusive monopoly to use the subject matter of the patent for commercial exploitation. 'FLO"s action in the instant case are depriving the inventor of this exclusive monopoly. Further, the technology is being put to wrongful use which destroys the value of the technology itself.

Competition is an essential feature if a market, It gives begitimocy to the market and the focus of competition laws is on competition reflecting the belief that vigorous competitions is frequently the best way to enhance economic efficiency. The existence of licensing provisions in the Competition law of several countries reflects that it is against the principles of unfair Competition for a Competitor to usurp the Commercial benefit of another's invention.

QUESTIONS PRESENTED

A. Whether the technology is such that, although the patent has not been granted, it is inevitable.

B. Whether a patent when granted will be redundant if ‘FLO’ is allowed to clearly copy the technology and shuts shops and whether the commercial worth and the value of the technology will itself get destroyed if put to a wrongful use.

C. Whether it is against the principles of unfair competition for a competition to usurp the commercial benefit of another’s invention.

WRITTEN SUBMISSION

A. THE TECHNOLOGY IS SUCH THAT, ALTHOUGH THE PATENT HAS NOT BEEN GRANTED IT IS INEVITABLE

The TRIPS agreement of the WTO provides that Patents shall be granted for any inventions, whether products or processes, in all fields of technology, provided they are new, involve an inventive step and are capable industrial application.[1] The State of Mimosa, being a signatory to the WTO and to the Vienna Convention on the Law of Treaties, is under an obligation to abide by the provisions of the TRIPS agreement in good faith[2]. The TRIPS agreement embodies the international required minimum standard for patentability.[3] A patent, may therefore, be taken in any area, irrespective of whether it is a process, method, machine, article or substance provided the basic requirements for patenting and other provisions of patent law are met. [4]

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1 . Art. 27 of the TRIPS agreement. See also Dennis camp bell and Susan cooter, International Intellectual Property law - New Developments (ed. 1995); Andrew Christico & Stephen Gaie, Blackstone's Statutes on Intellectual Property (2nd edn. 1995); George Cho, Trade, aid & global interdependence (1995), Walker, A.G., International Trade Procedures & Management (4th edn. 1995); Meyer, "Problems and Issues is Depositing Micro-organimes for patent purposes", 65 J. PAT.OFF. SOC, 455 (1983).

2. See Art. 26, 27 and 18 of The Vienna Convention on Law of Treaties.

3. See Patent Act of England 1977, American Patent legislation, European Commission Patent legislation, Patent Act of South Africa - 1978, Canadian Patent Act.

4. See cf. Fox, "Patents encroaching on Research Freedom", 224 SCIENCE 1080 (1984); Blumen that, Gluck, Louis, Stoto & Wise, Office of Technology Assessment, Commercial Biotechnology - An International analysis (1 984); Kitch, "The nature and function of the patent system", 20 J.1 & Econ. 265, 278 (1977); Note, "Micro organism and the patent office: To Deposit or not to Deposit, That is the question", 52 FORDHAM L. Rev 592, 596 (1984); Levy & Wendt, "Microbiology and a standard format for lnfra - Red Absorption Spectra in Antibiotic Patent Application", 37 J. PAT. OFF. S0c'y 855, 859 (1955)

The technology in the instant case is one by which designer plants may be created. The inventive nature of the break through is demonstrated by the tremendous international publicity which it received.[5] The Petitioner company has used this technology to provide customers with designer flowers. This demonstrates that the technology is capable of industrial application. The new technology, for which the patent is sought, therefore satisfies the basic requirements for patenting.[6]

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5. Refer Statement of Facts Pg. 2.

6. See Malcolm D. Evans, Black Stone's International Law Documents 4th edn. 1999): C.J. Miller and N.E. Paimer, Business Law (1st edn. 1992); Chisum, "Sources of Prior Art in Patent Law", 52 WASH. L. REV 1.(1976); Gordpm, "Fair use as Market failure: A structural and Economic Analysis of the Betamax case and its Predecessors", 82 COL. L. Rev 1600 (1982); Turner, "The Patent System and Competitive Policy", 44 N.Y.U.L. Rev 449, 455 (1969); Hantman, "Experimental use as an Exception to Patent Infringement", 67 J.PAT. OFF. SOC'Y 617 (1985).

Further, the technology is one by which designer plants may be created It is not a technology by which plant life may be protected or conserved [7]. Neither does it fall into any of the other categories which are exempted from being patented.[8]

The patent in the instant case is being sought for the technology invented and not just for the use that it is being put to. It is submitted that if the intention were to protect the designer flowers, copyright protection not patent protection would have been sought.[9]

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7. Notes, "Limiting the Anti competitive Prerogative of Patent Owners : Predatory standards in Patent licensing". 82 Y.L.J. 831, 852 (1983), W. Bowman, Patent and Antitrust Law: A Legal and economic Appraisal 7 (1973); W. Nicholson, Micro economic theory: Basic Principles and Extension 520 (2nd edn. 1978) ; Gilbert, Patents, sleeping Patents and Entry. Deterrence, in Strategy, Predation and Antitrust Analysis 205, 233 (S. Salop ed. 1981); F. Scherer, Industrial Market Structure and Economic Performance 440 (2nd edn. 1980)

8. See Generally Mcgee, "Patent Exploitation: Some Economic and Legal Problems", 9 J.L. & Ecom. 135, 144 (1966); Baxter, "Legal Restrictions on Exploitation on the Patent Monopoly: An Economic Analysis", 76 Y.L.J. 267, 274 (1966).

9. See Refer Facts Gary M. Ropski, Butter worths Patents litigation-Enforcing a Global Patent Portfolio 72 (Butterworths 1955) ; J. Robinson, The Economics of Imperfect Competition 188 (2nd edn. 1969); Gilbert & New bery, "Preemptive Patenting and the Persistance of Monopoly", 72 Am. Econ. Rev. 514 (1982).

Since intellectual property rights have been defined as information with a commercial value or a mix of ideas, invention and creative expressions on which there is a public willingness to bestow the status of property, protection for the technology[10] in the instant case may be sought under a 'product by - process' provision.[11] Since the technology in the instant case satisfies all the conditions laid down in the TRIPS agreement for patentability of an invention, it is submitted that although a patent has not yet been granted, it is inevitable.

B. A PATENT WHEN GRANTED WILL REDUNDANT IF 'FLO' IS ALLOWED TO CLEARLY COPY THE TECHNOLOGY AND SHUT SHOPS. THE COMMERCIAL WORTH AND VALUE OF THE TECHNOLOGY ITSELF WILL ALSO GET DESTROYED IF PUT TO A WRONGFUL USE.

As per Art-28 of the TRIPS agreement, a patent when granted confers on its owner the exclusive right to use, make, sell or import the subject matter of the patent which may be a product or a process.[12] It also prevents third parties from using this exclusive right of the patent owner without the owner's consent. The patent owner shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.[13] This essentially means that when a patent is granted, it vests with the inventor the right to an exclusive monopoly, albeit for a limited time period, to use the technology whether product or process for commercial exploitation and thereby for economic gains. This enables the owners to recoup their investments and secure their economic interests, thus creating an incentive for the production of knowledge. [14]

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10. Landes & Posner, "Market Power in Anti Trust Cases", 94 Harv.1.Rev. 937, 951 (1981); Comment, "Accomodating Patent and Antitrust Law: Monopolists Lawful Patenting Conduct and SCM Corp.v.Xerox Corp', 60 B.U.L.Rev. 78 (1980).

11. Refer statements of Facts. See also Axeeda & Turner, "Predatory pricing and Related Practices under Sec.2 of the Sherman Act", Harv.L.Rev. 697, 715 (1975); Cheung, "Property Rights in Trade secrets", 20 Econ. Inquiry 40 (1982)., F.Scherer, The Economic effects of compulsory patent licensing, 75 (1977).

12. Robin Jacob and Daniel Alexander, A Guidebook to Intellectual Property P. 84 (Sweet & Maxwell 4th edn. 1993) See also Cornish Intellectual Property (Sweet & Maxwell 2nd edn. 1989).

13. F. Scherer , The Economic effects of compulsory Patenting licencing, P. 66 (1977). Bailley & Fried Caender, "Market Structure and Mulli Product Industries", 20 J. Econlit. 1024 91982): Peter Pan manufacturing Co. v. Corsets Silhoustte Ltd. [1963] 3 All.E.R. 402: Neil R. Belmore, D. Doak Horne, A Kelly Gill, Canadian Patent Infringement Remedies P. 313 (Butterworths, 1995)

14. J.G. Starke, "Protection of Intellectual Property Rights under International Trade Law", 65 A.L.J. 417 91991); Gary M. Ropski, Butterworths Patent litigation enforcing a global patent portfolio p. 77 (Butterworths 1995); Reich man, "Legal Hybrids between the patent and copyright paradigms", 94 Col. L. Rev. 2432 (1994)

The protection by patent is needed not so much to promote inventions but to provide an incentive to engage in costly and developmental activities which turn inventions into innovations.[15] Such protection is all the more significant in the area of intellectual property law as property like entitlement in this area of law are instrumental and not natural rights.[16] By using the market to reward investors, society encourages the types of innovation that consumers value most, without making it necessary for the government to determine the social value of inventions.[17]

If 'FLO' is allowed to clearly copy the technology and shut shops, the right to an exclusive monopoly which will be vested ins the investor

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15 See Note, "The public use bar to Patentability: Two New Approaches to the Experimental Use Exception", 52 Minn. L. Rev. 851, 854 (1968); Silk & Urban, Pre - Test - Market Evaluation of New Packaged Govds: A model and measurement methodology", 15 J.Mktg. Research 171 (1978).

16. Jay David Schainhoiz, "The validity of patents after market testing: A new and improved experimental use Doctrine", 85 Col.L.Rev 371, 380 (1985); Grobstein "Biotechnology and open University Science", 10 Sci. Tech. & Hum. Values 55 (1985).

17. Note, "Patent and Trade Secret Protection in University - Industry Research Relationship in Biotechnology", 24 Harv. J. of Aegis. 191, 201 (1987); Blumental, Gluck, Louis Stoto & Wise, "University-Industry Research Relationship in Biotechnology: Implications for the University", 232 SCIENCE 1361 ,1986); Market & Robin "Biotechnology and the social Reconstruction of Molecular Biology", 10 Sci. Tech & Hum. Values 70 (1985)

when the patent is granted to him, will become useless as he will not be able to recoup : his investment or secure his economic interest.[18] The monopoly is being exercised by an infringer for his economic interest. This is a lost the Commercial value of the technology. Such as act will also lead to a loss of incentive for the production of knowledge as the commercial grains arising out of the commercial worth of the technology is not directed at the inventor. Society will be using the market to reward an unethical act and not the inventor[19] Such an act would therefore, be against the very essence of the purpose of a patent. Further, when the technology is being put to a wrongful use, it in effect destroys value of the technology.[20] It is submitted, therefore that if 'FLO' is permitted to carry on its illegal act, it will lead to a patent being redundant when granted.

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18. See generally W. Hamilton , Patents and Free Enterprise, P. 154. (1941); Dobkin, "Patent Policy in Government Research and Development Contracts, 53 Va. L.Rev. 7 564, 591 (1967); J. Gaston, Originality and Competition in Science (1973).

19. See Chiscm, "The Patentability of Algorithons", 47 U.PITT.L.Rev. 959 (1986); Kayton, 1. copyright in living genetically engineered Works", 50 GEO. WASH. L. REV. 191 (1982). See also Fraud in Biomedical research: Hearing before the subcommon Investigation and Oversight of the House common Science and Technology, 97th Cong. I st 19-24, 352-355 (1981).

20. See Generally Biggart , Patentability, disclosure, Requirements, Claiming and Infringement of Micro-organism-Related Invention in Genetically engineered Micro organisms & cells. The Law and the Business (1 st ed. 1981); 'Hearing Pouders Patentability of Genetically altered animals", 34 Pat. Trade Market & Copyright. J.835, 1.91 (1987); R. Saliwanchik, Legal Protection for Micro biological and Genetic Engineering Gaventions (1982).

C. IT IS AGAINST THE PRINCIPLES OF UNFAIR COMPETITION FOR A COMPETITOR TO USURP THE COMMERCIAL BENEFIT OF ANOTHER'S INVENTION.

The World Market is used by economists to concern the general conditions under which the buyers and sellers exchange goods and service and these conditions may be summarized by words such as perfect competition, monopoly, monopolistic competition etc. [21] Competition has been defined as the rivalry between two or more persons or groups for an object desired in common, usually resulting in a victor and a losse or losers but not necessarily involving the destruction of the latter. [22] The Competition in the instant case is the rivalry between the petitioner and respondent for gaining the commercial benefit of the petitioner's inventions in the Mimosan Market. [23]

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21. See Random House of Dictionary of English Language p. 878 (1966). See also The International Encyclopedia for the Social Science p. 575 (David sills ed. 1972)

22. Supra n. 1 p. at p. 300. See also Encyclopedia Britannica. (15th edn. 1974): Helsbury's Laws of England 4th edn. reprint 1997); Marsh and souls by Business Law p. 263 (5th edn. 1992)

23. Refer statement of facts.

Competition gives legitimacy to the market [24] and the focus of competition laws is on competition, reflecting the belief that vigorous competition is frequently the best way to enhance economic efficiency. [25] Competition policy is already on the agenda of the WTO as is reflected in the TRIPs agreements which allows governments to take measures to control anti-competitive practice in contractual licenses that adversely affect and may impede the transfer and trade dissemination of technology.[26]

A patent owner possesses a legal right of limited duration to exclude competitors from using process or manufacturing products that employ technology within the scope of his patent grant.[27]

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24. Public Prosecutor v. Chere Kutty A.I.R. 1925 Mad. 1095. See also Arivar's Judicial dictionary (11th edn); John Ellison, Jim Beduig field, Tom Harrison, Business Law (3rd edn., 1994).

25. Notes, "Limiting the Anti Competitive Prerogative of Patent Owners : Predatory standards in Patent Licensing", 92 Y.L.J. 830 (19830, See C.J. Miller and N.E. Paimer, Business Law (Ist edn. 1992); Malcolm D. Evaus, Blackstone's International Law Documents (4th edn. 1999).

26. See W. Bowman, Patent and Antitrust law , A Legal and Economic Appraisal (1973); Williamson, "Economics as on antitrust defense : The welfare Trade - offs", 58 Am. econ. Rev. 18 (1968); Nicholson, Micro economic theory : Basis Principles and extension p. 520 (2nd edn. 1978).

27. Hirshleifer, "The Private and Social Value of Information and the Reward to Inventive Activity", 61 Am. Econ. Rev. 561, 569 (1971); Gilibert, Strategy, Predation and anti trust Analysis 205, 233. (S. Salop ed. 1981); W. Nordhaus invention. growth & welfare 76 (1969); F. Scherer, Industrial Market structure and economic Performance 440 (2nd edn. 1980)

Therefore, the owner's discretion to grant contractual licenses for the use of the patented technology is an important aspect of his patent rights [28] as is his right to restrict the manner in which it is put to use. [29] This essentially underlines the principle that a competitor may not usurp the commercial benefit of another's invention without his permission. [30]

Several nations recognize this principle by providing rules in their legislation governing competition in their markets. [31]

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28. Supra n. 5 p. 831. See also Posner, "The Social Costs of Monopoly and Regulations", 83 J. Pol. econ. 807 815 (975): Posher. "The Chicago School of Antitrust analysis', 127 u. P.A.L. Rev. 935 (1979); McGee, "Patent exploitation : Same economic and legal Problems", 9 J.L. & Econ. 135 (1966) Baxter, "Legal restrictions on exploitation of the Patent monopoly: An Economic Analysis", 76 Y.L.J. 267, 274 (1966)

29. Priest, "Cartles and Patent License Arrangements", 20 J.C. & Econ. 309 91978). See also J. Robinson, The Economics of imperfect competition 188 (2nd edn. 1969); Gilbert & Newbery, "Preemptine Patenting and the persistence in monopoly", 72 Am. Econ. Rev. 514 (1982); Ewan Maclntyre, Business Law - A New Approach (1st edn. 1997).

30. See Baxter, "Legal restrictions on exploitation of the Patent Monopoly: An Economic Analysis, 76 Y.L.J. 267, 274 (1966) : J.Robinson. The Economics of imperfect competition 188 (2nd edn. 1969) ; Gilbert & Newbery, Pre-emptive Patenting and the persistence of Monopoly, 72 Am.econ.Rev. 514 (1982) ; O. Williamson, Market and Hierarchies : Analysis and Antitrust Implications 26 (1975) ; Laudes & Posner, "Market Power in Antitrust cases," 94 Harv.L.Rev. 937, 951 (1981).

31. See Art. 85 of Treaty of Rome ; Competition Act, 1980 of in England; Art. 5 of the Unfair Competition Act, 1991 in Spain; The Paris Convention 1971.

The Most recent British national legislation on competition, emphasizes on anti-competitive effect as opposed to form.[32] Similarly, the European Community extends restrictions on competition not only to restrictions causing a reduction in the flow of trade, but also to any restriction altering the pattern of trade that would otherwise exist.[33] This is particularly relevant under the circumstances of the present case as the respondent's action has resulted in altering the pattern of trade that would have existed otherwise. An analogy may also be drawn from the condemnation of attempts to extend the legal monopoly of a patent to unpatented products by tying arrangements.[34]

Further, even in the absence of an express covenant in restraint of trade, the general law may protect one party against unfair competition. [35]

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32. See Competition Act, 1 980.

33. See Butter worths, Competition Law. Handbook (4th edn. 1995); Paul Dobson, clive M. Schmitth off, Charles worth's Business Law P. 429 (15th edn. 1991); Christopher C. Joyner, The United Nations and International Law (lst edn. 1997); Dixit, "Recent Developments in Oligopoly Theory", 72 Am. Econ. Rev. Papers & Proc. 12 (1982); Spence, "The learning curve and competition", 12 Bell. J. Econ. 49 (1981).

34. Turner, "The Patent System and Competitive Policy", 44 N.Y. U.L. Rev. 450, 459 (1969); Areeda & Turner, "Predatory Pricing and Related Practices under the Sherman Act", 88 Harv. L. Rev. 697, 715 (1975); Williamson, "Predatory Pricing - A strategic and welfare Analysis", 87 Y.L.J 284, 297 (1977); Scherer, "Predatory Pricing and the Sherman Act: A comment", 89 Harv. L. Rev. 868, 890 (1976).

35. See Faccenda Chicken Ltd. v. Fowler, (1986) 1 All E.R. 617 ; cf. Foster & Sons v. Suggett, (1918) 35 TCR 87; John Richard Brady v. Chemicals Process Equipment Pte. Ltd. A.I.R. 1987 Delhi372 ; Wheat ley v. Bell, 1984 FSF 16, 22;

The protection granted to a trade secret which may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use [36], is also a reflection of the principle against usurpation [37] of the commercial benefit of another's invention. Such an act of usurpation is very clearly an act done by a seller to confuse or deceive the public with the intent to acquire a larger portion of the market. [38]

It is submitted therefore that such an act is against the principles of unfair competition.

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36. See Generally Bau mol, "Contestable Markets : An uprising in the Theory of Industry structure", 72 Am. Econ Rev. 1,3 (1982) Bailey & Fried Laender , "Market Structure and Multi product Industries", 20 J. Econ Lit. 1024, 1040 (1982)

37. 'Usurpation" is defined as an act of usurping ; wrongful or illegal encroachment, infringement or seizure-illegal seizure. See Random House Dictionary of English language. P. 1574 (1966). See also F. Scherer, The Economic effects of compulsory patent licensing 66 (1977)

38. Bernard Hoek man, Michel Kostecki, The Political Economy of the World Trading System. Front GATT TO WTO (Oxford University Press, Oxford 1995) ; Cheung "Property Rights in Trade secrets", 20 Econ. inquiry 40 (1982)

CONCLUSION AND PRAYER

In the light of the above said grounds and other grounds to be urged at the time of argument, the petitioner most humbly prays that this Honourable Court may adjudge and declare that:

(A) The technology is such that, although the patent has not been granted it is inevitable.

(B) A patent when granted will be redundant if ‘FLO is allowed to clearly copy the technology and shuts shops and that the commercial worth and the value of the technology will itself get destroyed if put to a wrongful use;

(C) It is against the principles of unfair competition for a competitor to usurp the commercial benefit of another’s invention.