

IN THE
HIGH COURT OF MIMOSA CITY

APPLICANT : DESIGN-A-FLOWER

RESPONDENT : FLORALMANIA LTD.

IN THE MATTER OF: DAF SUES FLO FOR THE INFRINGEMENT OF
ITS INTELLECTUAL PROPERTY RIGHTS AND
VIOLATION OF THE PRINCIPLES OF UNFAIR
COMPETITION

MEMORIAL FOR THE APPLICANT

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1. Intellectual Property in Global Markets – Gutterman and Anderson
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10. Noonan, W. (1990). Ownership of Biological Tissues. *Journal of the Patent & Trademark Society Office*.
11. Biodiversity: Promoting Efficiency in Conservation and Equity in Utilization – M.S. Swaminathan.
12. Cooper, I.P. (1992). *Biotechnology Law*. Clark Boardman Callaghan, New York Revision
13. Phillips, J. and Firth, A. (1990), *Introduction to Intellectual Property Law*. Butterworths, London.
14. Farrington, J. and Greenly, M. (1989). The issues. In: *Agriculture Biotechnology: Prospects of the Third World*, Overseas Development Institute, London
15. International Legal Materials Vol. 31, 33 & 36
16. California Law Review (1996) Vol. 84 No. 5
17. Harvard Law Review (1974)
18. Australian Law Review (1978)

JURISDICTION OF THE COURT

This Court has ordinary original Jurisdiction to entertain and decide all the questions presented in the suit.

STATEMENT OF FACTS

The Island of pollen was known not just for the exotic flowers that grew in abundance but also the most divine climate that nurtured many a budding relationships.

Mr. Anther, a National of the Island and a scientist of the highest repute invents a molecular manipulative technology by which designer plants can be created.

The technology has enormous potential and he immediately applies for a patent, both in pollen as well as other countries through the PCT route.

The breakthrough gets tremendous International publicity. Anther sets up a company known as Design-a-Flower Limited (DAF).

The technology, which he 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 characters on tulips etc.

Needless to say, the whole concept of flower arrangement took on a new meaning altogether, with the latest winning entry in an international contest being titled “Space Age Flowers”.

Soon enough the natural flowers that were once cherished were now ignored. Designer flowers became the latest fashion statement.

Stigma, a national of “Mimosa” discovers that under the laws of the said country, it takes four years for a patent application to be published and six years on an average for the patent to be granted. The laws of Mimosa do not enable the filing of an infringement action before the patent is granted: however damages can be claimed retrospectively from the date of publishing the contents of the specifications in the official gazette for opposite purposes.

Therefore, Stigma discovers that although 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 a rival venture called Floralmania Ltd. (FLO), with a wider range of products including those that appeal to prurient minds.

Within a few months, the rival company’s business in the country Mimosa picks up enormously (for obvious reasons).

DAF sues FLO on the grounds of unfair competition and claims inevitability of the patent, FLO defends on grounds, no patent no remedy and uncertainty of grant of patent.

STATEMENT OF ISSUES

1. Whether the Design-a-Flower (DAF) technology is patentable?
2. Whether Floralmania Ltd. (FLO)'s act amounts to a violation of DAF's Intellectual Property Rights?
3. Whether FLO's "copying" of the DAF technology will result in a colossal loss to DAF?
4. Whether FLO's acts are against the Principles of Unfair Competition?

SUMMARY OF ARGUMENTS

1. The DAF technology is patentable because it fulfills all the criteria of a patent which are novelty, utility, non-obviousness and stability. Also it is not a “product of nature but is a result of a substantial intervention by man”, which is a pre-requisite of patents for biotechnological innovations.
2. FLO’s acts have violated the Intellectual Property Rights of DAF, because though the patent is not yet granted, the information contained in the patent application is protected, initially by Art. 30 of the PCT as a “confidential information” and after publication by a legal regime, which has evolved, out of State Practice, a source of Customary International Law.
3. FLO’s “copying” of the DAF technology will result in undue commercial advantage to FLO and thereby inflicting colossal loss of revenue to DAF. Moreover a socially upright scientist Mr. Anther’s name will come to disrepute because FLO is using the technology for manufacturing flowers that appeal to prurient minds.
4. FLO by adopting dubious means of infringing the trade secret of DAF for the manufacture of flowers and further creating confusion in the minds of the consumers as to the true owner of the technology is clearly treading the path of unfair competition.

ARGUMENTS ADVANCED

I. WHETHER THE DESIGN-A-FLOWER (DAF) TECHNOLOGY IS PATENTABLE?

It is the applicant's humble submission that the Design-a-Flower (DAF) technology is patentable.

As the technology has all the requisites of a patent, and there is no valid reason as to why the technology may not be granted a patent. The technology is such that a patent is inevitable.

Patents are major types of intellectual property, which are used to protect new inventions. A patent is a legal right issued by the National Government, which allows the holder to exclude others from making, using or selling the patented subject matter¹. A patent is granted for new and useful products or process for the manufacture of new or existing products².

As long as the criteria of 'novelty, utility, non-obviousness and stability'⁴ are fulfilled a patent will be granted so long as the intended purpose of the patent is neither against *public order nor morality*⁴. If all the requisites are present there is no reason why a patent should not be granted. Though granting a patent is the discretion of the State, failing to do so in the presence of all the requisites will result in a failure to comply with the International obligation.

In the instant case the DAF technology has all the requisites of a patent. It has "novelty" which could be defined as when an average observer perceives the new design to be different rather than just a modification of an existing design⁵. It could be equated to "involving an inventive step"⁶, in the instant case Anther's invention is a process which has never been made by anyone else, and it involves an inventive step, as in a molecular manipulative process.

The 2nd essential requisite of a patent is "utility" it could also be called as *Industrial applicability or commercial potential*⁷ of the patent, in the instant case it is very clear from the facts that, the DAF technology has enormous commercial value, thereby fulfilling this criteria.

¹ Defn. of Patents: Cases and Materials on Intellectual Property Rights - W.R. Cornish

² 35 U.S.C.S.101

³ Pg. 115 Intellectual Property - W.R. Cornish

⁴ Art. 27(2), of the TRIPS

⁵ Cases and Materials on Intellectual Property Rights - W.R. Cornish

⁶ Art. 27(1) of the TRIPS

⁷ Intellectual Property in Global Markets - Gutterman & Anderson

The 3rd requisite is “non-obviousness”; this can be defined, as, the subject matter of the patent is not obvious to a person having ordinary skill in the art to which the said subject matter belongs.⁸ Here the DAF technology is not something that anyone with ordinary skill in the technology would easily invent; therefore this technology is “non-obvious”. In *Graham V. John Deere Co.*⁹ and *Specialty Composites V. Cabot Corp.*¹⁰, the U.S. Supreme Court stated that the commercial success of the subject invention, long felt but unsolved needs, failure of others and evidence of copying of the claimed invention are all objects indicia of non-obviousness.

In biotechnology one of the most essential criteria’s for a patent is the “stability of the product/process” for which the patent is sought. In the instant case, the DAF technology has proven to be stable in every use. Thus all the requisites of a patent are present in the DAF technology thereby making the granting of a patent inevitable.

In biotechnology, the other criterion on which a grant of a patent depends is whether the subject matter for which the patent is sought is a “product of nature” or “obtained by substantial human intervention”¹¹, the base material for all biotechnological inventions is some kind of cellular matter provided by nature, but if by substantial human intervention the base material can be worked to get a new product or a process then that is patentable as it is not a product of nature but is a result of human intervention¹².

In the instant case, Mr. Anther’s technology is a certain kind of molecular manipulative technology, which means that there is certain kind of a genetic engineering done to available cellular base matter which resulted in the invention of the DAF technology. Thus there has been a substantial human intervention and the DAF technology cannot by any stretch of imagination be construed as the product of nature.

In *Diamond V. Chakraborty*,¹³ the U.S. Court in its decision said that, “the patentee has produced a new bacterium with markedly different characteristics than any found in nature...His discovery is not nature’s handiwork, but his own; accordingly it is patentable subject matter under patent law.” As the quote makes clear, the key element in granting of the patent is need for human action upon genetic material. The U.S. Court in the *Onco-Mouse Case*¹⁴ reached a similar decision, therefore it can now be safely concluded that the DAF technology is patentable since it fulfills this criterion too.

⁸ 35 U.S.C.S.103

⁹ 383 U.S. 1, 86 S.Ct 684, 15 L.Ed.2d 545 (1966)

¹⁰ 845 F.2d 981, 991 (Fed. Cir. 1988)

¹¹ Noonam, W. (1990). Ownership of Biological Tissues *Journal of the Patent & Trademark Society Office*, 72 (no.2): 109-13

¹² Biodiversity: Promoting Efficiency in Conservation and Equity in Utilization-M.S. Swaminathan

¹³ 447 U.S. 303, 314-15 (1980)

¹⁴ U.S.A (1988)

II. WHETHER FLORALMANIA LTD. (FLO)'s ACT AMOUNTS TO A VIOLATION OF DAF'S INTELLECTUAL PROPERTY RIGHTS?

It is the humble submission of the applicant that FLO's acts amount to a violation of DAF's Intellectual Property Rights, and also rights under various Conventions and treaties.

The Patent though yet not granted carries some legal regime along with it, i.e. The patent information contained in the application will be protected as a valuable information, an intellectual property in itself. Art. 30 of the PCT describes the confidential nature of the International application and forbids any access by 3rd party to the contents of an application and also binds the officers of the International and National patent bureaus by their office of employment to not to disclose any information to 3rd parties by word or deed, until the International Publication takes place. Thereby giving the information contained in the application a status of "Confidential Information", which is in itself an intellectual Property.

In the instant case, the patent application of Mr. Anther for the DAF technology has reached the National Entry Phase which means that the International Publication has already taken place. The Publication of the application however does not result in the loss of the protectability of the information. Rule 48 (2)(b)(iii) of the PCT regulations expressly states that only the "abstract"¹⁵ is published, so as to protect the information in the application.

The information so published is also protected in Common Law, as an Intellectual property of the author, therefore any unauthorized copying or use of such an information, to make commercial benefit out of it, will amount to an infringement of Intellectual Property Rights.¹⁶

In Biotechnology Industry, this kind of protection is relied on in a number of circumstances:-

- 1.) To protect information prior to an application for a patent
- 2.) To protect peripheral undisclosed know-how related to the patent and
- 3.) To protect information that is patentable on which the patent law regime has not yet been confirmed¹⁷.

Therefore the Information in the application will fall in the 3rd category. Since the existing patent laws in the country of Mimosa do not provide adequate protection to the information contained in the application.

The 1st step in any action alleging a breach of a protected information is for the Court to decide if the information involved can be categorized as protected information.

¹⁵ A summary; abridgment - Chambers Dictionary

¹⁶ Intellectual Property in Global Markets - Gutterman & Anderson

¹⁷ Cooper, I.P. (1992). Biotechnology Law. Clark Boardman Callaghan, New York, revision.

In Australia, the Courts have shown themselves willing to view “plant genetic material” as having the appropriate qualities of ‘protected information’¹⁸. In *Franklin V. Giddins*¹⁹ the defendant stole cuttings from the plaintiff’s genetically unique nectarine trees. An action was taken for the improper acquisition of “Confidential Information” embodied within the genetic code of the tree. The Judge accepted this position declaring that: - “The parent tree may be likened to a safe within which there are locked up a number of copies of a formula for making a nectarine tree with special characteristics.....When a twig of budwood is taken from the tree, it is as though a copy of the formula is taken out of the safe.”

In the instant case, Mr. Stigma “reverse engineer’s” “the designer plant made by DAF, which is in effect means that he steals the secret information as to how the product is made. Drawing an analogy from *the Franklin V. Giddins Case*, it would not be wrong to construe that Mr. Stigma’s FLO has in effect stolen the Intellectual property which belongs to Mr. Anther. It is the secret know how of DAF that gives Mr. Anther a commercial advantage over other competitors. Such secrecy does not have to be absolute; rather it is a question of objective fact.²⁰

This kind of protection is being increasingly used in the field of Biotechnology Industry, because of the difficulties in obtaining patents and uncertainties regarding the scope and effectiveness of patent protection for e.g. Patents will be virtually unenforceable in many least developed countries (LCD’s).²¹

In Mexico a patent is granted by the Institute of Industrial Property. After the application is submitted to the Institute, it is then published for opposition purpose, but such a publication is only a publication of the summary of the invention, this is so as to insure the “Confidentiality” of the application and its attachments.²²

Similarly other states have provision for the protection of the information contained in the patent application for e.g. Brazil has a “guarantee of priority certificate”²³, Argentina has a “provisional patent”²⁴, Chile makes public only the “summary of invention”²⁵, in the European Union, Art. 63 (1) of the EPC provides for the protection through the issuance of a “supplementary protection certificate” or in countries like Belgium, France and Germany the application is made public only after a grant of patent, the same procedure is adopted in the Federation of Russia and Eastern Europe. However in Japan an application for a patent may also initiate an action for infringement. Once the application is submitted and published, any applicant may make a formal

¹⁸ Intellectual Property Rights and Biodiversity Conservation - Timothy M. Swanson

¹⁹ Australian Law Review (1978)

²⁰ Phillips, J. and Firth, A. (1990). *Introduction to Intellectual Property Law*. Butterworths, London.

²¹ Farrington, J. and Greenly, M. (1989). The issues. In: *Agriculture Biotechnology: Prospects of the Third World*. Overseas Development Institute, London

²² Law of Industrial Property S. 52 - Mexico

²³ Code of Industrial Property S. 17 - Brazil

²⁴ Law no. 24,481 at Art. 4 - Argentina

²⁵ Law N.Q. 19, 039 Art. 46 - Chile

demand for damages from any party that is making use of the invention for which a patent is sought. In the people's Republic of China a "certificate of administrative protection"²⁶ is given prior to the publication of the application. In India and Pakistan, "injunctive relief" is awarded as a Common Law remedy, where the patent is still pending and an action for infringement is sought.

The promulgation of these rules was seen as necessary because of the threat that inventions would be "worked" by a person other than the inventor following publication of the application. Therefore it is to be noted that a legal regime has been evolved as a result of State Practice a source of Customary International Law which is pursuant to the objectives of the PCT, TRIPS and the Paris Convention also the Art. 27 of the Universal Declaration of Human Rights as Intellectual Property Rights essentially stem from Human Rights.

The information in the patent application has not been given the clear status of a "trade secret" but it is protected in the same manner as an intellectual property of the author. Thus a patent application is protected against those who use the same technology as is revealed in the application. Therefore in the instant case, though the DAF technology has yet not been granted a patent, it still is an Intellectual property of Mr. Anther, as such any unauthorized copying of the technology or its use will result in the infringement of the rights of Mr. Anther. FLO has clearly violated the rights of Mr. Anther and DAF and thereby DAF is justified in filing a suit of infringement, and is also entitled to an injunctive relief.

Rights Conferred by Law

Since the fact of the case are silent as regards to the Constitution of Mimosa and certain municipal laws, the applicant has to take the help of International Conventions and treaties to which Mimosa is a signatory. Art. 26 of the Vienna Convention on Law of Treaties binds State parties to fulfill their International obligation in good faith. The means to do so however are by promulgation of new municipal laws incorporating the provisions of the treaties²⁷. The State of Mimosa is the member of the United Nations and signatory to other relevant documents.

Keeping this in mind, two situations may arise, they being: -

1. Mimosa complying with its International Obligation has incorporated the provision of the relevant treaties into their internal laws. Or
2. Mimosa has failed to comply with its International Obligation by not incorporating the relevant provision of the treaties into their internal laws.

²⁶ Patent Law, Art. 13 - People's Republic of China

²⁷ Municipal Laws and the Fulfillment of International Obligation; Pg. 82-3, Oppenheim's International law.

However the second presumption cannot be relied on for the lack of evidence in the statement of facts, therefore it becomes imminent that we take the 1st presumption. However this presumption will also give rise to two different situations they are:

a. that Mimosa has promulgated Municipal laws in conformity with it's international obligations

OR

b. though it fully accepts it's International obligation, it has still not been able to promulgate laws, which are in conformity with such Obligations.

Presuming that situation “a” exists, then Mimosa has laws which comply with the following provisions of the various Conventions and treaties that is laws complying with the objectives of the Trade Related Intellectual Property Rights (TRIPS), enshrined in Art. 7 of the same, which talks about the protection and enforcement of intellectual property rights, the rights of DAF under Art.1(3), Art 3, Art 27(3)(b) of the TRIPS, besides other rights conferred by Art. ²⁸, Art 31, and Art. 34 which states that the presumption of law would be in favour of the Plaintiff and the burden of proof lies on the defendant in addition to the objectives laid down by the Patent Cooperation Treaty (PCT) and The Paris Convention, the acts of FLO are also in contravention to Art. 27(2) of the Universal Declaration of Human Rights (UDHR) as Intellectual Property Rights are rights which have essentially stemmed from this article of the UDHR, they are basic human rights, which every State is Obligated to protect. Therefore the acts of FLO are in contravention to Mimosas own laws, thereby enabling Mimosa to give effective remedy to DAF for the violation of it's rights and the injury caused to them by FLO.

However presuming that the situation “b” exists, than it is the rule of International law, that International obligation must be fulfilled by the State through it's organs²⁸, the organs of the state which are capable of fulfilling these obligations is either the “Parliament or the Courts”²⁹. Assuming the absence of legislation to fulfill these obligations, the legislature has failed to promulgate laws, therefore it now becomes the duty of the court as an organ of the state to fulfill these obligations.³⁰

It is therefore the applicant's humble submission, that this Honorable Court harmoniously construct the various provisions of the relevant treaties with existing Laws of the country.

²⁸ Municipal Laws and the Fulfillment of International Obligation; Pg. 82-3, Oppenheim's International law

²⁹ Municipal Laws and the Fulfillment of International Obligation; Pg. 82-3, Oppenheim's International law

³⁰ Principles of Public International Law - Ian Brownlie

III. WHETHER FLO's "COPYING" OF THE DAF TECHNOLOGY WILL RESULT IN A COLOSSAL LOSS TO DAF?

It is the humble submission of the applicant before this honourable court that FLO's copying of the DAF technology not only will but has resulted in colossal loss to DAF.

The facts of the case state that 'Stigma discovers that although Anther's patent has been applied in Mimosa it is safe to copy the technology for a period of three and a half years before it is published'³¹. Stigma's using designer flowers reverse engineers and starts a rival venture FLO. When FLO is started, DAF has already been getting enormous profits, which can be seen from the facts of the case where it is stated that 'designer flowers became the latest fashion statement'.³² Now when Stigma is allowed to copy the technology through reverse engineering the damage done to DAF is very colossal. DAF has applied for a patent for the technology. The purpose of the patent is to get exclusive rights over the technology as it has extreme commercial value. When FLO copies this technology, the value of the technology is lost. When the patent is granted there would be no value for the patent as the technology would have lost all its commercial worth to protect which patent is being asked for. The patent would be redundant. Fashion is a changing concept so is biotechnology. If FLO is allowed to copy the technology for three and a half years, then something new and better would have been discovered or invented and this technology would be obsolete. Thus causing irreparable damage to DAF and Mr. Anther.

DAF has created a reputation for itself. It is the sole producer of designer flowers. This can be substantiated from the facts of the case where it is stated that the break through gets tremendous international publicity; latest winning entry in an international flower contest being titled space age flowers.

When FLO starts making the same kind of designer flowers, the reputation of DAF will be at stake. Mr. Anther is a scientist of a highest repute (facts of the case). When he starts DAF his name is attached to the company and when Stigma steals the technology, serious doubts would arise as to who is the inventor of the technology thus causing damage to the reputation of Mr. Anther.

Also it is stated in the facts of the case that FLO brings out a wide range of products including those that appeal to prurient minds. 'Prurient' means morbid intentions or encouraging unhealthy sexual curiosity.³³ The flowers which appeal to people with prurient minds means that the flowers have something obscene on them, so that it could appeal to such minded people. This could be construed to be a form of pornography. When such flowers are made and distributed in the open market it can be said that FLO has committed unethical acts. Such an unethical conduct on FLO's part would cause damage to the reputation of Mr. Anther who is the inventor of this technology.

³¹ Paragraph 8 of facts of case

³² Paragraph 7 Facts of case

³³ Oxford Dictionary

The technology thus loses its commercial value and damage is caused to the goodwill earned by the technology thus causing extreme injury to DAF.

Thus it can clearly said that if FLO is allowed to copy the technology, the patent when granted, would be redundant. Not only would the loss be colossal, the commercial worth of the technology and the value of the technology would itself get destroyed particularly when put to a wrongful use.

IV. WHETHER FLO's ACTS ARE AGAINST THE PRINCIPLES OF UNFAIR COMPETITION?

It is the humble submission of the applicant that the acts of FLO are against the principles of Unfair competition.

The law of unfair competition is primarily comprised of torts that cause economic injury to a business through a deceptive or wrongful business practice. Unfair competition can be broken into two categories. First, the term 'Unfair Competition' is used to refer to those torts that are meant to confuse consumers and the other category 'Unfair trade practices' comprise of all other forms of unfair competition. A common form of unfair competition is 'misappropriation'. Other practices that fall under unfair trade practices are use of confidential information or theft of trade secrets.³⁴

In the instant case, FLO using the designer flowers made by DAF reverse engineers and starts a rival venture. By doing so has copied the technology which is also clearly stated in the facts of the case. This amounts to stealing of confidential information. The confidential information here is the technology and the method used by FLO to get the technology will amount to misappropriation as they copy it by reverse engineering. ***When considering genetic material it is their representation as information, which provides the economic value, not the physical manifestation.*** In *Franklin v. Giddens* (1978) the defendant stole cuttings from the plaintiff's genetically unique nectarine trees. An action was taken for the improper acquisition of confidential information embodied within the genetic code of the trees. The court accepted this position and held it to be a theft of confidential information.³⁵ It held that "such secrecy does not have to be absolute, rather it is a question of objective fact". Drawing inference from the case it can be said that FLO has indulged in unfair competition. Nothing in the Patent Law requires that State refrain from action to prevent Industrial Espionage. In addition to the increased costs for protection from burglary, wire trapping, bribery and other means used to misappropriate Trade Secrets there is inevitable cost to the basic decency of the society when one firm steals from another. A most fundamental Human Right that of privacy is threatened when

³⁴ Unfair Competition - An overview, www.findlaw.com

³⁵ Intellectual Property Rights And Biodiversity Conservation-Timothy Swanson, Pg-188-189

industrial Espionage is condoned or made profitable.³⁶ The maintenance of Standards of commercial ethics and the encouragement of invention are broadly stated policies behind trade secret law.” The necessity of good faith and honest fair dealing is the very life and spirit of the commercial World”³⁷

Unfair competition would also occur when a person or company would sell goods in the market similar to the goods already existing which would have likelihood of causing confusion among the users. This confusion would occur when the competitor has full knowledge that the existing producer in the market has a monopoly and his production of the goods that are very similar to the goods existing in the market would cause confusion. The confusion in the instant case occurs when FLO make the same kind of designer flowers that DAF had been making. DAF had a monopoly the market production of such designer flowers. This was known to the whole world. When FLO makes similar flowers and sells them in the open market it is most likely to cause confusion among the consumers as to the origin of the product i.e. The designer flowers. This can be clearly proven from the facts of the case. In the case it is mentioned that the rival company’s business picks up enormously (obvious reasons)³⁸ here this obvious reason being ‘confusion among customers’ as DAF has already got immense popularity. The concurrent sale of two products in the market is likely to cause confusion and confusion has actually occurred in the instant case³⁹.

FLO as is clearly stated in the facts of the case discovers that it is safe to ‘copy’ the technology. Now as it has already proven, the technology is sure to be granted a patent as it fulfills all the requisites that a patentable subject matter needs and if not it is an intellectual property all the same.

The intention of FLO to ‘copy’ the technology is clearly seen to be dishonest. When there is such a dishonest intention it is unfair competition. In *Franklin v Giddens* (1978) the defendant stole the plaintiff’s genetically unique nectarine tree. An action was taken for the improper acquisition of the property. The case was held in favour of plaintiff. Drawing an analogy from the case to the instant case, it is clear that FLO has stolen some property and this is a clear indication that they have involved in unfair competition methods.

When FLO copy’s the technology and creates designer flowers similar to those made by DAF that have already got tremendous publicity, it could now be safely concluded that FLO has attempted to pass off its product. Passing off is generally done with the assistance of deceptive or confusing similar trade tactics. Here in the instant case DAF is known to the world only because of its designer flowers, which have become the latest fashion statements so when FLO creates similar flowers the customer who knows that only DAF makes such flowers assume that the flowers made by FLO are those made by DAF technology which amounts to passing off tactics.

³⁶ Patent Preemption of Trademark Protection of Inventions meeting judicial Standards of Patentability Harv. L. Rev 807, 828 (1974)

³⁷ National Tube Co. V. Easter Tube Co. 3CCR (n.s) 462

³⁸ Paragraph 11, Facts of the case

³⁹ Pg. 8-23 Trademarks, Trade Identity and Unfair Trade Practices - Pattishall and Hilliard

In the instant case, it is clearly seen from the facts of the case that FLO had dishonest intentions. They found that it is safe to copy the technology for a period of three and half years and then shut shops as till then the patent will not be published so no one can file a suit against them. This shows that they have tried to usurp the customers of DAF by unfair means and this amounts to unfair trade practices.

FLO in the instant case announces a rival venture. The whole reason why Mr. Anther applies for a patent and in the market for designer flowers. So when FLO starts a rival venture the whole purpose for which Mr. Anther had applied for the patent is lost. The whole cause for granting of a patent is lost and when the cause for a patent i.e. Exclusive rights is lost any trade practice affecting that cause will amount to unfair trade practice. So in the present instance FLO has conducted itself in a manner which will amount to unfair trade practice. The major Intellectual Property Rights are Patents, Plant Breeding Rights, Trade secrets, trademark and copyrights. The general principle behind IPR protection is that the right holder is given so form of monopoly control over the economic exploitation of the material concerned. The overriding economic justification behind such protection is as a reward an incentive for the efforts of those involved in the creation of the property as well as to prevent Unfair Competition from others⁴⁰

The basic principle behind any trade practice to be called as unfair is ‘deceptiveness’ and ‘unfairness’⁴¹. ‘Deceptiveness’ means to deceive the people i.e. To make them think that something that is not theirs belongs to them. ‘Unfairness’ is when some method followed is immoral, unethical, or causes substantial injury to competition and consumers. While applying these two principles of unfair competition to the instant case it can be seen that FLO has indulged in unfair competition. When FLO copy’s the technology it is an immoral and unethical procedure followed by it, which hurts not only the competitor but also the consumer.

Thus in the instant case, FLO is likely to cause damage to DAF in three ways,

- a) Diverting the trade from DAF to FLO.
- b) By injuring the reputation of Mr. Anther, who is a scientist of a highest repute.
- c) Injury caused due to confusion among the consumers.

All these damages caused are only due to the unfair trade practices that FLO have indulged in.

⁴⁰ Pg. 181-2, Intellectual Property Rights and Biodiversity Conservation - Timothy M. Swanson

⁴¹ Pg. 8-47 Trademarks, Trade Identity and Unfair Trade Practices - Pattishall & Hilliard

PRAYER

The applicant humbly prays to the Honorable Court to declare that the patent is inevitable and FLO's acts would result in colossal loss to DAF as they have violated the principles of unfair competition by usurping commercial benefit out of the DAF technology and thereby grant an injunction ordering FLO to shut shops immediately.