

**IN THE HIGH COURT OF JURIDICATURE  
AT MIMOSA CITY,  
MIMOSA**

**2001-2001**

**Design-a-Flower Ltd.**

**VS**

**Floralmania Ltd.**

**WRITTEN SUBMISSION ON BEHALF OF  
FLORALMANIA LTD.**

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1. Convention on Biodiversity.
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5. Patent Cooperation Treaty.
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8. The Berne Convention.
9. The Vienna Convention.
10. World Intellectual Property Organization.
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## **BOOKS AND DOCUMENTS**

1. Atkins, Chemistry
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6. George Schwarzenberger, International Law
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11. John Maynard Smith, Evolutionary Genetics
12. Kelson & Marley, Stay Orders and Temporary Injunctions
13. Nelson's Law of Injunctions
14. P. Narayanan, Intellectual Property Law

15. Rebecca MM. Wallace, International Law
16. Richard A. Falk, Role of Domestic Court in The International Legal Order
17. Tenaire, Introduction to Microbiology
18. Stephanie Jones, The Biotechnologists
19. Sweet And Maxell, Patents and Commerce
20. Wadhera, The Law Relating to Patents, Trade Marks, Copyright, Designs and Geographical Indications
21. W R. Comish, Intellectual Property
22. George Halliwell, MNC's and Unethical Warfare.

### **Cases**

1. Harry Lighthouse vs. House of Lords
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4. Van Der Lely vs. Bamfords
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## **STATEMENT OF JURISDICTION**

The High Court of Mimosa city in the country of Mimosa has the jurisdiction to adjudicate this case through the powers of ordinary original jurisdiction conferred upon it by the laws of Mimosa to entertain, decide and adjudicate such suits.

## **STATEMENT OF FACTS**

1. The parties to the suit, The State of Mimosa and The State of Pollen are the members of the United Nations and are signatories to the WTO, and all other relevant treaties.
2. A new innovative technology called “molecular manipulative technology” is invented by Mr. Anther, a national of Pollen through which designer plants can be created.
3. Mr. Anther immediately applies for a patent both in Pollen as well as in other countries through the Patent Cooperation Treaty (PCT).
4. This technology which is referred to as Design-a-Flower gets tremendous international publicity and results in the setting up of a company known as Design-a-Flower Ltd. (DAF), by Mr. Anther.
5. This technology enables a customer to order a desired design on any flower such as a checked rose or a cartoon character on tulips and becomes the latest fashion statement which wins an international contest and redefines the whole concept of flower arrangement.
6. Under the laws of Mimosa, it takes four years for a patent application to be published and six years for a patent to be granted.
7. Stigma, a national of Mimosa discovers that though Anther’s patent has been applied in Mimosa, it is safe to copy the technology.
8. Using a series of designer plants, Stigma reverse engineers and announces a rival venture called Floralmania Ltd. (FLO).
9. FLO’s business in Mimosa picks up enormously.

## STATEMENT OF ISSUES

- A. Whether the suit filled by Design-a-Flower Ltd. against Floralmania Ltd. is maintainable in the Court of Law.
- B. Whether Floralmania Ltd's action does not violate any aspect of Municipal Law.
- C. Whether Design-a-Flower is liable to pay damages to Floralmania Ltd. for filing a frivolous suit.

## **SUMMARY OF ARGUMENTS**

### **A. Whether this Suit is maintainable in the Court of Law.**

- This Court has the jurisdiction through Art 1(1) of TRIPS.
- The Suit is Speculative in Nature.
- Contradictory to the Laws of Mimosa.
- Hence, Suit not maintainable in the Court of Law.

### **B. Whether FLO has not violated any aspect of Municipal Law.**

- DAF's invention not Patentable due to Publication and Commercialisation.
- Reverse Engineering a Separate process competent to be granted a patent.
- In the event of conflict between Municipal and International Laws, the Municipal Laws will Prevail.

### **C. Whether FLO can claim for compensation from DAF for filing a frivolous Suit.**

- Art 50(7) of TRIPS, FLO can claim for compensation from DAF for filing a false Suit of Infringement.
- Parties filing Speculative Suits not backed up by proper evidence are liable to pay compensation to the aggrieved party.
- DAF's Suit is a veiled attack on FLO to diminish, destroy and defame the battens successful Business.



## **A. Whether the Suit filed by DAF is maintainable in the Court Of Law**

In its broader sense the Jurisdiction of a state may refer to its lawful power to decide whether and if, so how to act in the hands of the state.<sup>1</sup>

The High Court of Mimosa certainly has the Jurisdiction to adjudicate the present Case on its merit, not only through the ordinary. Original Jurisdiction conferred to it but also through Art. 1 (1) of the TRIPS Agreement.<sup>2</sup>

There arise circumstances, when even though the Court has Jurisdiction to decide a particular case, it may decide to relieve itself of the Jurisdiction and decline to adjudicate<sup>3</sup> it as was evident from the case of *Harry Lighthouse Vs. The House of lords*<sup>3</sup>. Also the court did look into the possibility of changed economic scenario which rendered the current legislation toothless to adjudicate that case without injuring either party.

In *Mortinson V Peters*, the House of Lords went to the extent of squashing an appeal made under a domestic legislative provision which allegedly contravened Customary International Law.<sup>4</sup>

Hence inferred that the Honourable Court can either squash the Suit or decline Jurisdiction if and only if the basic conditions of Customary International Law regarding Jurisdiction are satisfied.<sup>5</sup>

The basic conditions that are to be fulfilled if the Court is to squash DAF's claims are:

1. It is a case of speculation.
2. It is contrary to the laws of the land.

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<sup>1</sup> Ian Brownlie, Principles of International Law

<sup>2</sup> **TRIPS Art 1 (1)**, "Members shall be free to determine the appropriate method of implementing the provisions of this agreement within their own legal system and practice.

<sup>3</sup> Fawcett, Declining Jurisdiction in Pvt. International Law, 2nd edition Oxford Univ. Press. **Harry Light House Vs. The Royal Patent Corp. Judge Chesterton**, "The Hon. Court on going through the merits of the Case understands the present legislation to be incompetent to resolve this dispute. Further the appellant has no proved beyond doubt his allegations and at the same time the Respondent has not proved it otherwise. Hence the court declines Jurisdiction"

<sup>4</sup> **Mortenson Vs Peters** (1906) 8f (Ct of Sess) 93.

<sup>5</sup> Salmonds, **Jurisprudence** 12th edition Swed & Maxwell.

### **A.I. The Suit Is Speculative**

It has been held in the Courts of India, United Kingdom and other Commonwealth countries apart from the famous case of *Celitech Inc. Vs. The State Of Alabama*, that no suit for infringement can be brought for any infringement of such patent committed before the date on which such Patent was granted.<sup>6</sup>

Patent has not yet been granted to the alleged invention of Mr. Anther, and an Infringement Suit cannot be brought before the Patent is granted.<sup>7</sup>

The question of enforcement of Patentee Rights arises only after the Rights have been given to a person and there has been an Infringement of such Rights. The Court, in the above mentioned case restrained an overzealous Patentee from threatening another by making unjustifiable threats of an action for Infringement.<sup>8</sup>

A suit for infringement can be instituted only after the Patent has been sealed, when a specification has been accepted and advertised and infringement occurs, before the sealing of the patent i.e. during the period when the opposition has been called and is being decided, the applicant cannot institute a suit for infringement, but damages sustained due to the infringement committed during the period between the date of advertising of acceptance of complete specification and the date of sealing, maybe claimed in another suit, a separate suit for damages but not a suit for infringement.<sup>9</sup>

This suit has been filed with an assumption that a patent shall be granted even though there exists a possibility of it being disallowed. Hence DAF's stand cannot be maintained in the Court of Law.

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<sup>6</sup> W.R. Cornish, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, 2<sup>nd</sup> edition.

<sup>7</sup> *Inferred from the facts of Case.*

<sup>8</sup> P. Naraynan, Patent Law, 3rd edition  
Kulkarni and Narman, **Crimes in Intellectual Property**, 1<sup>st</sup> edition, 2000

<sup>9</sup> *Van Der Lely Vs Bamfords* 1963 RPC

## **A.2. Contrary To The Laws Of The Land**

The laws of Mimosa clearly provide that a Patent application will be published and approved after four years and a Patent will be granted after six years.<sup>10</sup>

It has been cited earlier that a suit for infringement can be initiated only after the Patent has been approved/granted.

As far as the question over the applicability of Foreign Laws, International treaties and Conventions is concerned, the precedent throughout the world is that Municipal Law shall prevail;

(a) Most of the Latin American states are committed to the view that there are certain Laws of forum which are unconditionally applicable to all situations. Thus a Foreign Law opposed to these Internal Laws cannot be applied.<sup>11</sup>

(b) The prevailing view in Germany is that all rules of Foreign law which are contrary to moral basis, fundamental provisions of the legal system of the forum or to basic notions and principles of its social and economic life precluded from application.<sup>12</sup>

(c) The Soviet Union and some of the countries of East Europe, the broad principle is that all those rules of Foreign Law which are at variance with the basic values of the forum or are against the fundamental principles of its Law in society are precluded from application.<sup>13</sup>

(d) The countries belonging to common Law system and India take the view that Courts will not apply only rule of Foreign Law, nor will they recognize any Foreign Law or Judgement which is contrary to public policy.<sup>14</sup>

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<sup>10</sup> *inferred from the facts of the Case*, Pg 2 para 2

<sup>11</sup> *Schwazanberger, Latin America and International Law*, 12<sup>th</sup> edition 1979

<sup>12</sup> *J. G Starke*, Introduction to International Law, 10<sup>th</sup> edition 1989

<sup>13</sup> *ibid.*

<sup>14</sup> *supra*, pg-3

FLO by no action of its has violated the Customary Municipal Laws as has been proved in the following contention. Inferred from *Mortinsen Vs. Peters*<sup>15</sup>, that the laws of Mimosa will be upheld if there is inconsistency with Customary International Law. In fact, British courts have upheld that a Customary International Law contrary to a British statute will not be enforced in the Court of Law.<sup>16</sup>

The Rights of FLO which they enjoy in Mimosa under the Domestic Laws will be deprived if there is a sudden application of International Conventions and Treaties before the incorporation of legislative amendments in the Municipal Laws. Inferred that international law has no validity saving so far as it's principles are accepted and adopted by domestic law, as was held by Lord Atkin in *Chung Chi Cheung Vs. The King*.'<sup>17</sup>

Even monistic countries contend that though international ties are to be adhered to by a State, it should also make legislation and modifications as necessary to ensure the fulfillment of the same.<sup>18</sup>

Therefore, inferred that the Court is in no way bound just by treaty obligations. If it is also proved in the subsequent issue that FLO has not violated any aspect of Municipal Law, it satisfies the earlier conditions when the court can squash the case or decline Jurisdiction.

FLO also formally questions the locus standi of DAF and also reserves its opinion regarding the patentability of Mr. Anther's invention.

It is hereinafter prayed before this Honourable Court that

1. It not deprives FLO from its rights guaranteed by Mimosan Laws through application of International Law.

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<sup>15</sup> Supra pg 1

<sup>16</sup> Jacob Walksman, International Institutions

<sup>17</sup> *Chung Chi Cheung Vs The King* 1939 AC 160 Lord Atkin, " ... any International Law or Treaty or any other such records contradictory to the British Statute shall not be upheld in the country of United Kingdom."

<sup>18</sup> Cheshire & North, Private International Law, 11<sup>th</sup> edition 1987.

2. Immediately squash the case  
OR In the alternative
3. Decline jurisdiction.

## **B. Whether FLO's action violate any aspect of Municipal Law.**

### **B.1 The alleged invention is not patentable.**

Patent protection is a creation of a statute territorial in its extent, the Rights that are accrued by the patentee in a particular country is limited within the territorial extent of that country.

Thus if any inventor in one country desires protection for his invention, he must get it patented in that country.<sup>19</sup>

DAF to have protection for its invention in Mimosa must have a patent in the State of Mimosa. As a patent is yet to be granted to DAF in -Mimosa, a suit for infringement cannot be filed in the said country.<sup>20</sup>

In the case of Asahi Kasei Kagyo KKs Application<sup>21</sup>, the Court held that the copying of an invention in any country cannot be prevented unless it is patented in that country.

Hence even if DAF alleges FLO of copying its invention it still does not amount to FLO's action being violative of Municipal Laws.

This statement above is in context to DAF's allegations regarding the copying of their invention by FLO.

In fact FLO states on record that it does not agree to this charge of copying as has been proved by subsequent sub-contentions.

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<sup>19</sup> IBM Application 1983 RPC 283.

<sup>20</sup> Inferred from the facts, Proved earlier.

<sup>21</sup> Asahi Kasei Kaoyo KKS Applications, 1991 RPC 485 "...copying of a product is inevitable in a country where hat product has not been patented"

## **B.2 Whether the invention is patentable**

There are certain claims which invalidate the claim for a Patent by a party.

Two such grounds relevant to this present case are:

- Prior publication of information.
- Commercialization of technology.<sup>22</sup>

In clear and concise terms, publication means making a work available to the public by issue of copies or by communicating the work to the public.

Publications means “*Making publicly known*” and publish means “*make generally known*.”<sup>23</sup> *Genetech patent case*<sup>24</sup> the court declined to provide patent on the grounds that the information was made available to the public prior to the grant of the Patent.

*The Chiron Corporation Case*<sup>25</sup>, the Court went to the extent stating that if the public becomes possessed of an invention by any means, no subsequent Patent for it can be granted either to the first inventor or any other person.

DAF through entering an international contest showed its intention to publicize and to commercialize this product before the Patent had been granted.<sup>26</sup>

Finally *Celitech Inc. Patents*<sup>27</sup> application confirms the above arguments in which the Court held conclusively that a Patent cannot be granted to an invention which has been publicly used.

Hence proved that the application for Patent is invalidated.

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<sup>22</sup> Kerney & Watson, **Protection of Patents**, 2nd edition 1996.

<sup>23</sup> Oxford Dictionary, 1998

<sup>24</sup> John Maynard Smith, **Evolutionary Genetics**

<sup>25</sup> “... a patent cannot be granted for any product which has already been publicized.

<sup>26</sup> inferred from facts.

<sup>27</sup> Jeremy Ripkin, **The Biotech Century**.

### **B.3 Commercialization of technology**

Any invention that is commercialized before a Patent has been obtained renders invalid the claim for such a Patent.<sup>28</sup>

Minnosta patent Claims Case<sup>51</sup> clearly clarified that commercialization of product before a patent has been granted invalidates the application for such a Patent.

*Norpaint Vs. SPJ Labels*<sup>30</sup> validated this above judgment and went a step further by giving the reason for such invalidity stating that commercialization leads to communication and hence defeats the purpose of granting the patent.

The above argument sufficiently proves that the application for the Patent is invalid and hence, the invention unpatentable.

### **B.4 The Process Of Manufacture Of FLO Differs From That Of DAF.**

*Reverse engineering*<sup>31</sup>, according to *Schwartz and Mendelson* is the process of analysing an existing system to identify its components and their interrelationships and create representations of the system in another form or at a higher level of abstraction. Reverse engineering is usually undertaken in order to redesign the system for maintainability without access to the design from which it was originally produced.<sup>32</sup>

The case of *Genentech Vs. Wellcome Foundation*<sup>32</sup> it was held that reverse engineering if results in a more useful product, diverse in nature, will not amount to copying, but in fact be liable for a patent.

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28 Cornish, **Intellectual Property.**

29 Dustin & Halmer, **Genetics and Patents.**

30 Norpaint and SPJ Labels, “Commercialization leads to communication and is in its very existence contradictory to the granting of Patents.”

31 Reverse Engineering- “*Reverse Engineering can be defined as a scientific process to redesign a particular system without accessing the original technology.*”- Shwartz & Mendelson

32 Sir Edward Stanton, **Famous American Cases.**

The more recent case of *Cellotroma Vs. US Patent Office* <sup>33</sup> reaffirmed the above belief and maintained that reverse engineering is as Patentable as any other scientific process.

FLO by using DAF's product as a starting point through reverse engineering have reached a more diverse, more utilitarian product.<sup>34</sup>

International expert H.H. Davidson CEO Cellotron, in the "*United Nations Convention on Biomedicine*" <sup>35</sup> stated that reverse engineering was a process which deserved to be known as a patentable process and not a mere copy.

The draft on drugs, biomedicine and genetology currently being formulated by the United Nations has a clause which supports the above theory.<sup>36</sup>

Watson and Chek, Fathers of Genetics in their famous treatise "Genetics, Ethics and Future" <sup>37</sup> clearly state that reverse engineering is not a copy, but a new process which is altogether different from the previous process which it remodifies.

Hence the above arguments prove conclusively that reverse engineering is but a patentable process.

The product reached by FLO through reverse engineering resulted in a wider range of products than what DAF claimed to have produced.<sup>38</sup>

Even though the process is patentable, satisfying all aspects of intellectual Property Rights, including TRIPS, CBD, WIPO and all other relevant treaties, FLO has abstained from filing for a patent because of its commercial and public interest.

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<sup>33</sup> Cellotrama Vs US patent Office, 1999, " the process of reverse Engineering is as Patentable as any other invention..."

<sup>34</sup> inferred from the facts.

<sup>35</sup> Charles Wilkins, **Biotechnology: A Hope or A Threat.**

<sup>36</sup> **United Nations Year Book**

<sup>37</sup> Watson and Crick, **Gentics, Ethics and Future**

<sup>38</sup> inferred from facts of the case



### **B.5 FLO has not violated any Municipal Law**

- 1 . The laws of Mimosa clearly states that a patent application shall be published after four years and granted after six years.<sup>39</sup>
2. Proved in the earlier contention that the infringement suit is not maintainable in the court of law, if there does not exist a Patent grant.<sup>40</sup>
3. DAF's invention is not Patentable due to invalidity surrounding it.<sup>41</sup>
4. Proved that reverse engineering is a different process and is not a copy of the process applied by DAF.<sup>42</sup>
5. DAF's claim of copying by FLO is unsubstantiated.

This hereby amounts to a frivolous case.

It is therefore submitted before this Honorable Court that the two processes are different and FLO's actions do not amount to copying. Hence inferred that FLO has not violated any aspect of Municipal Law.

### **C. Whether Floralmania Ltd. can claim for damages from Design-a-Flower Ltd. for filing a frivolous Suit.**

Art 50(7), clearly states that the Court can order the party filing the suit to pay compensation to the other party, if it is proved that the suit for infringement was unwarranted. Proved earlier, that the suit for infringement is not maintainable in this Court of Law under the Mimosan Laws.

Also proved that the Suit is speculative in nature.

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39   inferred from the facts.

40   Supra, page- 2,3

41   as proved earlier

42   expert opinion

The case of *Globe Industries Ltd.*,<sup>43</sup> the Court held that, the party filing an infringement suit purely on speculation will be liable to pay damages to the aggrieved party if the speculation is not supported by concrete facts of Law.

FLO process is entirely different from the process of DAF, and this in no sense amounts to copying.<sup>44</sup>

FLO's sales have soared ahead since its inception and this suit may be a veiled attack by DAF to create a dent in its market share.

As held in *Coca Cola Inc. Vs Pepsi Co Foods Ltd.*<sup>45</sup>

" ... any suit of infringement filed by a party against its immediate competitor; if not proved substantially and concretely shall be deemed to be an attempt to defame, disrupt and destroy the competitor's business, good will and above all an act of Economic Warfare."

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<sup>42</sup> *expert opinion*

<sup>43</sup> *Globe Industries Corp. Patent 1977 RPC 563.*

<sup>44</sup> *Proved earlier.*

<sup>45</sup> *George HalliWell, MNC'S and Unethical Warfare.*

## **PRAYER**

It is hereinafter Prayed before this Honourable Court that in the light of issues raised, arguments advanced, authorities cited and expert opinion sought, this Honourable Court may declare that;

- A) DAF'S allegations are unsubstantiated and speculative and hence,
  - a) Dismiss the suit as one having no locus stands.
  - b) Or, Decline Jurisdiction.
- B) FLO has not violated any aspect of Municipal Law.
- C) DAF pay damages to FLO for filing a speculative, unsubstantiated and a frivolous Suit.

And any other order that this Honorable Court may deem fit and Proper in the interest of Justice, Equity and Good Conscience.