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Dated: 09/11/2021

No. Can/057/2015-267949

To,

1. Shri S.K. Bansal, Advocate
M/s. United Overseas Trademark Co.,
52, Sukhdev Vihar, Mathura Road,
New Delhi – 110 015. – For petitioner

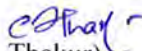
✓ 2. Amita Arora,
Anand and Anand, Advocates,
B-41, Nizamuddin East,
New Delhi – 110 013.—For Registered proprietor

**Sub: Application for cancellation of registration of Registered Design No. 267949
under class 28-03 in the name of Presto Industries filed by M/s. Tristar
Products Pvt. Ltd.**

Sir/Madam,

With reference to above subject , I am to forward herewith a decision dated
27/10/2021 (19 Pages).

Enclo. As stated above


(M. Thakur)

Dy. Controller of Patents & Designs



THE PATENT OFFICE, KOLKATA

The Designs Act, 2000

Section-19

In the matter of registered design no. 267949

registered in the name of Presto Industries

And

In the matter of petition for cancellation of the

registered Design No. 267949 under Section 19

of the Designs Act 2000, filed by M/s Tristar

Products Pvt. Ltd.

M/s Tristar Products Pvt. Ltd..... Petitioner/ Applicant for Cancellation

-Versus-

Presto Industries

..... Registered Proprietor/ Respondent

Present:

1. ~~Mr. Pankaj~~ Kumar, Mr. S.K.Bansal Counsels for Petitioner/applicant
2. Ms Amrita Arora Counsel for Respondent / Registered proprietor

DECISION

This order shall dispose a petition for cancellation of registered design No. 267949 presented by M/s Tristar Products Pvt. Ltd., of B-43, Sector 80, Phase-II, Noida- 201305 , under Section 19 of the Designs Act , 2000 . The said design was registered in the name of Presto Industries, an Indian company of 217/218 Vasani Udyog Bhavan Off S.B. Marg, Opp. Phoenix Mill, Lower Parel, Mumbai-400013. The design was registered as of 05.12.2014 in class 28-03 in respect of application of the design to 'Comb' .

The grounds opted in the said petition for cancellation under Section 19 of the Act were:

- (a) That the design has been previously registered in India,
- (b) That the design was published in any country prior to the date of registration
- (c) That the design is not new or original;
- (d) That the design is not registrable under the Designs Act, 2000.

It is the case of the petitioner that the Petitioner is engaged in the business of manufacturing and marketing of Cosmetics, Beauty, Hygiene and Healthcare products, viz: Nail Cutters, Nail Sharpeners, Filers, Trimmers, Buffs, Manicure Sets, Pedicure Sets, all being Nail Cater Preparations, Mehndi Brushes, Henna Brushes, Bleach Brushes, Dye Brushes, Make-up Sponges, all type of Combs, Hair Brush, Cleaning Brush, Bath Brushes, Scrubbing Brushes, Sponges, Pedicure tools & Sets, all being Mehndi Brushes, Henna Brushes, Bleach Brushes, Dye Brushes, Make-up sponges, Electrical products viz: Hair Straightener, Hair Dryer, beard trimmer, Shaver and all other beauty Care products for Household Purposes, included in class 03, allied and cognate goods etc. The Petitioner through its predecessor has been carrying on its said goods and businesses under its trademark VEGA since the year 1997. That ever since its inception in the year 1997, the Petitioner has been honestly, bonafidely, continuously, commercially, openly and exclusively using its trademark VEGA in relation to its said goods and businesses, which includes combs and hairbrushes. That the Petitioner has filed several Trademark Applications and also obtained Registrations thereof for its Trademark VEGA under various classes of goods and services under the Trademarks Act, 1999, including in Class 21, which is the relevant classification for the description of goods as Combs and Hair brushes. Moreover, the Petitioner has also been using its trademark "VEGA Easy to Clean Hair Brushes" since the year 2007 in connection with its

said goods and businesses, by virtue of which the Petitioner has established enviable goodwill and reputation in the course of trade for the said goods and businesses. (Exhibit I). It has done so by way of local market sales across different states and regions in India, exports to different other countries and by way of advertisements, promotion and sales over the e-commerce platforms through its websites www.vegabasics.com and www.vega.co.in (Exhibit II).

It has come to the knowledge of the Petitioner from Patent Office Journal dated 15th May, 2015 where the impugned design bearing no. 267949 in class 28-03 titled as COMB was published in the name of the Respondent. It was stated that the Petitioner is aggrieved by registration of the impugned design. The Respondent is carrying on its goods and businesses under the impugned design which are similar to those of the Petitioner. It was stated that the Petitioner is the prior user of the impugned design which has been copied by the Respondent. The Petitioner has adopted and has been using the impugned design in relation to said goods and businesses at least since the year 1997. Petitioner submitted extracted details of prior publication of the Petitioner's use of the design same/similar to the impugned design from the Internet Archive Software "Wayback Machine" and submitted that the Petitioner's aforementioned designs were published in the year 2007, which is much prior to the Respondent's registration of the impugned design.

It was also submitted by the petitioner that the impugned design of the Respondent is not new or original in any manner as the impugned design lacks any new features, shapes, configuration of patterns, ornamentation which are distinguishable from the designs of the Petitioner. It was further submitted that the Petitioner's combs and hair brushes, which have been in the market since the year 1997, have same or similar neck, handle and teeth, which constitutes a comb, as those of the Respondent's impugned design and therefore

neither the neck, handle or teeth have any distinctive eye appeal from the prior published and used design of the Petitioner, nor is there any distinct addition to such design. The addition, if any, is functional and therefore there is no novelty. It was stated therefore that the Respondent's impugned design could be considered as a trade variant devoid of novel features and liable to be cancelled in view of prior use, prior publication and lack in novelty. Petitioner's documents in support of the grounds consists of following:

- (a) Exhibit I : List of trademarks of the petitioner under the name VEGA along with registration certificates (pages 20-34)
- (b) Exhibit II – Extracts from the website of the Petitioner www.vega.co.in and www.vega.in. (Pages 35-38)
- (b) Exhibit III : Copy of the Designs Journal dated 15th May, 2015 depicting the impugned design of the respondent (Page 39)
- (c) Exhibit IV : Archive extracts of the petitioner's website as obtained from the Internet Archive software “ Wayback Machine” establishing prior publication.

The Registered Proprietor stated that it was established in the year 1961 and is a pioneer in premium hair grooming products. Over the years, it has grown its product portfolio from combs and brushes to personal grooming accessories for men, women and kids. The Registered Proprietor's company stated to have established its own identity, reputation and goodwill in the market. The Registered Proprietor has their own established Trademarks with which their products are associated to, by the general public. It was submitted that the Exhibits submitted by the petitioner are electronic downloads and are unverified and undated documents .

Generally denying the statements and averments of the petitioner parawise, it was submitted by the registered proprietor that petitioner's trademark rights has no relevance to the impugned design in the present design proceeding and petitioner has failed to establish the they are the prior user of the concerned design. It was submitted that the petitioner has pasted two designs of the combs used by them since 2007. Such general statements without proper corroboration do not hold any legal sanctity and further the designs of said two combs is completely different from present design 267949. It was stated that petitioner's designs extracted from the Internet Archive Software "Way back Machine" is an unverified and undated document, which cannot be relied upon. These designs have been included in Exhibit IV by the petitioner. However, without prejudice, and in view of Exhibit IV of petitioner, the present design 267949 is new and original. The present design is stated to have a distinct ocular impression and is easily distinguishable from the designs of the Petitioner. It was stated that the petitioner has failed to show any prior publication or prior use the present design. It was also submitted that the impugned design does qualify as a 'Design' within the meaning of Section 2(d) of the Designs Act, 2000. Registered proprietor further submitted that that none of the designs shown in Exhibit II and IV of the petitioner is closer to the impugned design and the impugned design is significantly distinguishable from the cited designs and therefore is new & original.

Evidence in reply under Rule 29(4) of the Designs Rules was submitted by Mr. Sandeep Jain, a Director of petitioner's concern. It was stated that the petitioner sought for extension of time for placing additional evidence on record on the ground that petitioner laid its hands on additional documents relating to prior arts which were not available with it at the time of filing the cancellation petition. It was stated that some of the prior arts were reproduced at Exhibit -A. These prior arts were stated to be extracted from prior publications of similar

designs from 'Internet Archive Software- Wayback Machine' and traced up to 2007. Denying the statements of registered proprietor in the counter statement and evidence, it was further stated that it was incorrect to suggest that the screenshots of combs extracted from Internet Archive Software " wayback Machine" are unverified or undated as the dates on which screen shots were obtained clearly appeared on the screen. It was stated that Hon'ble High Court of Delhi in the matter of Apple Inc Vs Rohit Singh & ANR [FAO (OS) COMM 11/2016] accepted evidence obtained from the from Internet Archive Software " wayback Machine" [Exhibit B]. It was also denied that the electronic downloads of the petitioner's comb designs from its website are unverified or cannot be relied upon. The date of downloads and other relevant details are stated to be manifestly contained in the downloaded documents and relevant dates are clearly reflected in the documents. Petitioner also submitted an affidavit under Section 65B of the Evidence Act in regards to the documents submitted from downloads.

The matter was called for hearing through video conferencing on 11.06.2021 and 30.06.2021. Learned counsels of petitioner and respondent kindly appeared the hearings followed by written submissions on 09/07/2021 and 06/08/2021 by petitioner and Registered proprietor respectively.

Learned Counsel of petitioner, during the hearing as well as written submission followed thereafter, reiterated the submissions of the petition for cancellation and stated that the respondent has fraudulently obtained the registration and the impugned design is pre published and prior in use by various parties prior to the date of impugned registration. It was stated that the petitioner has filed extracts from Internet Archive software (Way Back Machine) evidencing prior use of similar design as referred in Exhibit A along with reply evidence and also supported by affidavit under Section 65B of the India Evidence Act. It was

also stated that extracts of way back machine has been relied upon in several judgements of Hon'ble High Court of Delhi, viz Apple Inc. Vs Rohit Singh & Anr [2016(66)PTC277(DEL.)] and Crocs Inc. USA Vs Bata India Limited & Ors [FAO(OS)Comm.78 of 2018]. It was submitted that the petitioner has been using similar/same design prior to the respondent and the design is neither novel nor original. It was pleaded that the impugned design is not significantly distinguishable from prior used and prior published designs of other parties and the petitioner. Learned counsel of petitioner has also relied on judgements 1986 (6) PTC 50(Del.) Ravinder Kumar Gupta Vs Ravi Raj Gupta, 2020(84)PTC 492(del.) R.B.Health US LLC Vs Dabur India Ltd. And 2020(81)PTC 32(Kol.) Nellkamal Limited Vs. Holiday Chair.

Learned Counsel of respondent pleaded that the Petitioner has not filed any valid evidence as required under Rule 29 (1), Section 37 read with Rule 42 to discharge their burden of proof in the present case and relied on the judgement of Hon'ble IPAB in M.P. No. 37/2009 in ORA/44/2009/PT/CH & ORA/44/2009/PT/CH (The Travancore Mats & Matting Co. Vs. Controller of Patents). It was stated that in the absence of any valid evidence by way of affidavit to prove the material facts contained in the pleadings (statement of case), it may be concluded that the Petitioner has not discharged their burden of proof. It is submitted that the Petitioner in their entire statement of case while have referred to the exhibits, have failed to plead material facts based on which they make out their case and petitioner had referred to exhibits without actually pleading or stating the relevance of said exhibits, which is a clear violation of Order 6 Rule 2 of CPC. It was submitted that any documentary evidence, which is an electronic download, cannot be considered as being documentary evidence unless, it is proved in accordance with the procedure prescribed under Section 65(B) of the Evidence Act. Exhibits I, II, IV, A, filed by the Petitioners are all electronic downloads and in the absence

of said electronic downloads being accompanied with affidavits in accordance with Section 65(B) of the Evidence Act, the same cannot be taken on record. The Petitioner filed an Affidavit deposed by Ananya Singh along with reply evidence. It was stated that the same was filed only after the objection raised by the Registered Proprietor in their counter statement. Further, said Affidavit by Ananya Singh cannot be acceptable, as there is no proof that under what authority she has deposed said affidavit.

It is submitted that Exhibits II, IV, A are an unverified, undated, illegible and tampered documents. It was submitted that the present design imparts a new look to a comb, the article on which the said design is applied. Some of features of the design, are – Its unique and novel handle, Entire comb being curvaceous, Entire contours of the comb are having tapered and curvy sides and Slightly curvy teeth profile. It was submitted that Exhibit II is an unverified and undated document and there is no whisper of the date of publication in the said documents. Exhibit IV includes archive extracts of the Petitioner's website as obtained from the Internet Archive software "way back machine". It was pleaded that an exact date of publication cannot be established from Exhibit IV and the date, if any, on exhibit IV is not clear and it has not been proven beyond doubt that it is any sort of date of publication of the designs. Moreover, on top most left corner on page 40 of Exhibit IV, the date given is 19/09/2015, which is after the date of the present application. Further it was pleaded that, Exhibit IV on Page 40 of written statement, mentions 9 captures 20 Jan 12 – 15 Mar 15. Firstly, this does not establish the date of publication of said document. Secondly, the date is a range, with the upper limit of date being 15 March 2015, which is after the date of filing the present application, i.e. 5th December 2014. It was also submitted that none of the designs shown in Exhibits II and IV is closer to the design of the present registered design 267949. Regarding Exhibit A of the reply evidence, it was pleaded that page 1 of exhibit A states – 15

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- captures 12 Feb 2006 – 17 Dec 2007. The placement of said date kind of makes it appear as if
- it is being scrolled. There is no authentic date as to prove the veracity of the date of
- publication of said document. Further, Pages 2 and 3 of the Exhibit A mentions a date of 13
May 2016, which is after the date of filing of the present application. It is submitted that the petitioner has filed two separate cancellation petitions against two different designs 267949 and 267950, of the Registered Proprietor. Evidently, the two comb designs are different and completely distinct from each other. However, in both the cancellation petitions, the petitioner has relied upon the same documents. It was stated that no material facts have been pleaded as to how the present registered designs are anticipated.

Upon consideration of the statement of case of the petitioner, counter statements and evidences from both the sides and the submissions made in the hearing by both the sides followed by written note of arguments, following issues are considered to be decided:

- (a) Whether the petitioner is a person interested?
- (b) Whether the registered design no. 267949 is previously registered in India?
- (c) Whether the registered Design no. 267949 has been published in India or elsewhere prior to its date of registration?
- (d) Whether the registered design no. 267949 is new or original?
- (e) Whether the said design is not registrable under the Designs Act, 2000?

Regarding the first issue whether the petitioner for cancellation is an interested person or not, it is observed that both the petitioner and registered proprietor are engaged in similar business. Considering the facts of the case as presented by both the sides, it is opined that the petitioner is an interested person in this proceeding being engaged in similar line of activity.

Design of an article consists features of shape, configuration, pattern, ornament or composition of lines or colours applied to the article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, which in the finished article appeal to and are judged solely by the eye. A design is not registrable if it is previously registered in India and is not new or original and if it has been published in tangible form prior to its date of publication. In order to be registrable, a design should also be significantly distinguishable from known design or combination of known designs. As per provisions of Section 4 (b) – a design shall not be registered if it has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of the application for registration. ‘Publication’ per se is not defined in the Design Act, 2000. In the matter of Gopal Glass Works Limited Vs. Asst. Controller of Patents & Designs. [2006 (33) PTC –434 (Calcutta)], it was stated that:

Para 41: To constitute prior disclosure by publication to destroy novelty of a registered design, the publication would have to be, in tangible form, of the design applied to the same article. Prior publication of a Trade catalogue, brochure, book, journal, magazine or newspaper containing photographs or explicit picture illustrations that clearly depict the application of the design on the same article with the same visual effect would be sufficient.

Para 42: When the novelty of an article is tested against a prior published document, the main factor required to be adjudged is the visual effect and the appeal of the picture illustration.

Para 43: If the visual effect of the pattern, the shape or the combination of the pattern, shape, dimension, color scheme, if any, are not clear from the picture illustration, the

novelty cannot be said to have been destroyed by prior publication, unless there are clear and unmistakable directions to make an article which is the same or similar enough to the impugned design.

During the hearing as well as in the written notes of arguments, petitioner did not give any reference to any design previously registered in India similar to the impugned design and thereby could not substantiate that the impugned design has been previously registered in India. For the remaining grounds, it is pertinent to view the registered design and the design features of the article bearing that design. The registered design no. 267949 dated 05/12/2014 is registered in class 28-03 in respect of application of the design to Comb. The representations accompanying the certificate consists of three sheets depicting front view in the first sheet, right side view in the second sheet and top of the article in the third sheet. Novelty of the design is claimed to be residing in the shape and configuration of the comb as illustrated. Disclaimers were provided in respect of mechanical action or other action of the mechanism whatever in respect of any mode or principle of construction of the article, trademarks, logos, exclusive use of words, letters, numerals, appearing in the design as well as regarding exclusive use of colour or colour combination appearing in the design.

Ocular impression is the main yardstick in deciding distinctiveness of a design. Features of shape and configuration in a design in the perspective of newness and originality have been discussed in the matter of *Khaitan (I) Limited Vs. Metropolitan Appliances* [1994(14) PTC 170(Cal)], where it was held that:

“Para 13 : The primary point is, that in comparing design, the visual impact of the two competing designs is all important. It is upon the eye that the judge in these matters must principally rely and the impression that the mind receives through the visual sensation.

Para 14 : How the two designs are to be looked at, for similarity, is suggested in a case reported in 50 LTR 420 (Grafton V Watson)Mr. Justice Chitty said there as follows-

| The test is no merely to look at the two designs side by side, though no doubt that is one element of comparison in coming to a conclusion, but it is not the whole test. I think , the designs should be looks together, but then consideration should be given to what would be the effect supposing they were seen, at different times , or supposing they were looked at a little distance off |

Para 15: In my opinion, one need not always necessarily compare in all ways suggested above, but having in mind a person knowledgeable in the trade , or a buyer interested in design, one or all the above different ways of comparison might be found to be helpful in the facts and circumstances of a particular case.

Para 24: To my mind, it is important to understand that the same novel design might carry with it novelty not only with regard to shape or configuration, or pattern, or combination but might combine any two or even more of these elements. A particular design which is novel in shape can at the same time be novel as to ornamentation also. It is more helpful, therefore, to understand the basic concepts of shape, configuration, pattern and ornamentation rather than to try and define these, for such simple concepts are notoriously elusive of exact definition.

Para 25: We understand by shape the spherical nature of a sphere. It is easier to understand the meaning of the word | shape| by an example like this, then to try to get an exact definition of it. Similarly, if a sphere is placed on top of a cone and both are placed on top of a cube, we have a configuration of three shapes. The same three shapes can be arranged in a different configuration is, say, the cone is inverted and placed at the bottom and then the cube and the

sphere are side by side placed on top of it. In deciding the novelty of a configuration, the way of arrangement is more important than what is arranged.”

It was also stated in the matter of Hello Mineral Water Pvt. Ltd. Versus Thermoking California Pure [2000 (20) PTC 177] that :

“Para 9 : It also appears that insofar as the cylindrical shape is concerned , there is no novelty for the novelty does not lie in just shape of this kind or another , it is something much more. Novelty as defined in Blacks Law Dictionary reads as under:

“ In order that there may be ‘novelty’ so as to sustain a patent, the thing must not have been known to any one before, mere novelty of form being in-sufficient”

Para 10: Accordingly, mere novelty of form or shape is insufficient. Novelty involves the presence of some element or new position of an old element in combination, different from anything found in any prior structure. Secondly, in even cylindrical shape , there may be different shapes. The test is to consider and look at the design in question with an instructed eye and say whether there was or not such a difference between the which has been published previously, and the registered design so as to entitle the proprietor . However , the colour combination, the location of the cup holder and brand labels may give an impression that it may or may not be copy of the design of the plaintiff. ”

Now, traversing each of the documents and exhibits submitted by the petitioner in support of prior publication and in support of the grounds opted for cancellation, it is seen that:

(a) Exhibit I : List of trademarks of the petitioner under the name VEGA along with registration certificates (pages 20-34)

These documents show the trademarks registered in favour of the petitioner in

Class 3 and 21 of relevant classification of goods under trademark rules. Petitioner has also trademark registered in Class 5, 35, 41 and 42. In all cases the relevant trademark is 'VEGA'. None of the marks are showing any shape of any article under the respective class.

- (b) Exhibit II– Extracts from the website of the Petitioner www.vega.co.in and www.vega.in. (Pages 35-38)

It was stated that these are extracts from the petitioner's website www.vega.co.in and www.vegabasics.com . These web print pages were retrieved on 17/10/2015 which is later than the date of registration of the impugned design. As per visual impression, the various designs of depicted in those pages are different from the impugned one. Few combs depicted in the petitioner website show design feature of teeth at one end and handle of the comb on the other end, however the curvature and visual impressions of these designs are different from the impugned one. On the other hand, several such designs with variations in curvatures in handle and toothed end suggests various designs with variations. These print outs also do not suggest any date of publication of the displayed designs.

- (c) Exhibit III: Copy of the Designs Journal dated 15th May, 2015 depicting the impugned design of the respondent (Page 39)

This shows the publication of the impugned design in the Patent Office Journal dated 15/05/2015.

- (d) Exhibit IV (Pages 40 to 42 of petition for cancellation) and Exhibit A (pages 1-3 of reply evidence of the petitioner) along with Exhibit C of reply evidence as affidavit under Section 65B of the Indian Evidence Act, 1872:

These are Archive extracts of the petitioner's website as obtained from the Internet Archive software "Wayback Machine" to establish prior publication (Pages 40 to 42 of petition for cancellation) and third parties website (pages 1-3 of reply evidence of the petitioner), which are discussed in detail below:

(i) Exhibit IV (Pages 40 to 42 of petition for cancellation): This print out from

Internet Archive software "Wayback Machine" states about nine captures from the date range 20 January, 2012 to 15 March, 2015 where also the date Jan 20, 2012 is shown with previous arrow sign of December 2011 and forward arrow sign of April 2013. Altogether ten combs are shown in the first page (Page 40 of petition for cancellation) where none of them are similar with the impugned design. The designs show varieties of combs having teeth at one end and handle at the other end. Similarly, the second page (Page 41 of petition for cancellation) and third page (Page 42 of petition for cancellation) depicts four and two designs of combs respectively, none of which is similar to the impugned design either alone or in combination.

(ii) Exhibit A (pages 1-3 of reply evidence of the petitioner):

This print out from Internet Archive software "Wayback Machine" states about 15 captures from the date range 12 February, 2016 to 17 December, 2007 where also the date Jan 27, 2007 is shown with previous arrow sign of December 2006 and forward arrow sign of May, 2008. None of the combs shown in the pages 1 to 3 are similar with the impugned design. The designs show varieties of combs some of which are having teeth at

one end and handle at the other end none of which is similar to the impugned design either alone or in combination.

(c) Exhibit B and C of Reply evidence:

Exhibit B is the copy of judgment in the matter Apple Inc Vs Rohit Sing & Anr (Manu/DE/0825/2016). It was stated by the petitioner that Hon'ble High Court in that matter accepted evidence obtained from Internet Service Software "Way Back machine".

Petitioner also submitted Affidavit under Section 65B of the Evidence Act under Exhibit C in order to support and rely upon the downloaded content.

The Internet Archive (<https://archive.org/>) is a digital library of Internet sites and other cultural artifacts in digital form. The Archive collects web pages that are publicly available. The web archive can be searched using the Wayback Machine. In that website, regarding "Using The Wayback Machine" (<https://help.archive.org/hc/en-us/articles/360004651732-Using-The-Wayback-Machine>), it is also described that using the Internet Archive Wayback Machine, it is possible to search for the names of sites contained in the Archive (URLs) and to specify date ranges for the search. Anyone can access the collections through website archive.org for web pages that are publicly available.

However, it is also stated that some sites may not be included because the automated crawlers were unaware of their existence at the time of the crawl. It's also possible that some sites were not archived because they were password protected, blocked by robots.txt, or otherwise inaccessible to our automated systems. Site owners might have also requested that their sites be excluded from the Wayback Machine.

In that website of Internet Archive, It is further stated that not every date for every site archived is 100% complete. When anyone is surfing an incomplete archived site the Wayback Machine will grab the closest available date to the one is in for the links that are missing. In the event that the archive do not have the link archived at all, the Wayback Machine will look for the link on the live web and grab it if available.

In that website of Internet Archive, it is also stated that there is procedure for getting pages authenticated from the way back machine and to use the pages in court. It was stated that while the Wayback Machine tool was not expressly designed with legal use in mind, it receive regular requests for certified records for use in legal proceedings. There is a specific affidavit request procedure is available. Upon request ,the Internet Archive provides printed pages and a standard declaration or affidavit of authenticity.

However, in answer to a question “Does the Internet Archive's affidavit mean that the printout was actually the page posted on the Web at the recorded time?” in the concerned web page [<https://archive.org/legal/faq.php>], it is stated that the Internet Archive's affidavit only affirms that the printed document is a true and correct copy of their records.

Most importantly, it is also stated that [<https://archive.org/legal/faq.php>], the date assigned by the Internet Archive applies to the HTML file but not to image files linked therein. Thus images that appear on the printed page may not have been archived on the same date as the HTML file.

Without prejudice to the preceding discussions , the documents submitted by the petitioner from the Internet Archive “ Way Back machine” are revisited for careful scrutiny . It was pleaded by the petitioner that the impugned design is pre published and prior used. It was also pleaded that the extracts taken from Internet Archive Way Back Machine evidences

use of same/similar design prior to the date of impugned design. The cited pages of Exhibit IV (Pages 40 to 42 of petition for cancellation) and Exhibit A (pages 1-3 of reply evidence of the petitioner) show various designs of combs. None of the combs depicted therein are similar to the impugned design. It was pleaded by the petitioner that the impugned design is not sufficiently distinguishable from the evidenced designs or combination of known designs. It was stated that impugned design is neither novel nor original and mere infinitesimal insignificant variation does not qualify the impugned registered design from prior published designs. However, on the basis of visual impression, it was seen that none of the cited design is similar to the impugned design either alone or in combination.

It was also stated by the petitioner that petitioner is the prior user of the impugned design which has been copied by the respondent. It was stated that the petitioner has adopted and has been using the impugned design in relation to said goods and businesses at least since the year 1997. However, this statement is not supported by the documents as discussed above.

In view of discussion in preceding paragraphs in respect of evidences and exhibits as submitted by the petitioner, it cannot be said that the design suggested by the registered design no. 267949 has been published before the date of registration. Referring to the exhibits and particularly towards what has been disclosed in the alleged prior publication of Exhibits, learned counsel of petitioner's submission was that the design of comb of impugned design has been pre published and prior used. It is seen that through out the exhibits various combs have been depicted which differs in visual appeal owing to changes in height, dimension, curvature etc. On the basis of visual appeal, it is construed that the impugned registration cannot be considered to be devoid of newness because of the cited designs. It was not substantiated that the design features of the impugned design are significantly

indistinguishable from features of known designs or combination of known designs. As per Section 2(g) of the Designs Act 2000, ' "Original", in relation to a design, means originating from the author of such design and includes the cases which though old in themselves yet are new in their application'. It was not also substantiated that the design is not originating from the author of such design or it is not a new design. Thus, it is construed that that the impugned design is not devoid of newness and originality and registrability.

In view of preceding analysis, the present application filed by M/s Tristar Products Pvt. Ltd for cancellation of registered design 267949 dated 05/12/2014 under Class 28-03 is dismissed.

There is no order as to costs.


(Madhurjya Thakur)

Date: 27.10.2021

Deputy Controller of Patents & Designs

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All Concerned