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SURVEYING THE DAMAGE: A STUDY OF DAMAGES PAYOUTS BY THE DELHI HIGH COURT IN TRADEMARK INFRINGEMENT CASES (2005-2014)

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ABSTRACT

A comprehensive ten year study of damages awarded by the Delhi High Court in trademark infringement cases reveals the remarkable extent to which the quantum of damages can be correlated to the presence of certain factual criteria. It brings into sharp focus exactly how far the reasoning behind awarding and quantifying damages – often the biggest takeaway and most powerful deterrent in trademark infringement cases – has been rendered an afterthought. Commencing with a critical commentary on the headline damages payouts by the Delhi High Court in 1, I break down the significant statistical outcomes of damages awarded based on key criteria, including aggravating and mitigating factors considered and litigant profile, in 2. I then employ these findings in 3 as the basis for a proposed basic minimum checklist for quantifying damages in such cases going forward – an area where judicial reasoning has been strikingly and disappointingly thin in the past decade.

1 THE HEADLINE DAMAGES PAYOUTS IN TRADEMARK INFRINGEMENT CASES BY THE DELHI HIGH COURT

The early history of damages in trademark infringement cases was marked more by the range of justifications offered for sustaining a damages payout rather than the adherence to any one individual reason. Most notably, infringement by

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defendants amounting to fraud on the public,[1] calculated to increase the likelihood of deception,[2] the presence or absence of *bona fide* use[3] or other *bona fide* conduct by the defendants[4] were all employed by the Delhi High Court in the early decades as markers for attracting damages.

These markers quickly expanded over the first few years of this century to incorporate most aspects of infringing defendants' conduct, even though the explicit correlation of these factors to damages payouts was largely non-existent.

1.1 Time Inc

Despite the prevalence of several fairly well-reasoned contemporaneous alternatives,[5] *Time Inc*[6] has become the equivalent of the Big Bang in the modern Indian law on damages in trademark infringement cases – the agreed-upon starting point to which practically all significant damages awards over the last decade have traced their antecedents. This ubiquitous nature of *Time Inc* over the following decade makes it a convenient and accurate starting point for the present paper. The cases considered in this paper are limited to final judgements by the Delhi High Court – another largely straightforward qualification, given this Court's virtual stranglehold on cases discussing and awarding damages for trademark infringement following *Time Inc*[7] and the lack of reliable public information on out-of-court settlement amounts in such cases. The ten year time period is long enough to provide substantial case coverage while still maintaining comparability in terms of preserving the money value[8] of damages awarded by Courts at the beginning and the end of this time period.

1 *Wearwell* 5 (1969) DLT 469.

2 *Prina Chemical Works* (1974) ILR 1 Del 545; *Century Traders* AIR 1978 Del 250.

3 *Amar Soap* 1985 (5) PTC 85 (Del); *Hindustan Pencils* AIR 1990 Del 19; *Ciba-Geigy* 1998 (18) PTC 545 (Del).

4 *Walter Bushnell* 1999 (19) PTC 667 (Del).

5 See *Adidas-Salomon* 2005 (30) PTC 308 (Del), *NASSCOM* 2005 (30) PTC 437 (Del), *Microsoft* 2005 (30) PTC 245 (Del), *Cartier* CS(OS) 1208/2003 (22.07.2005), *Scotch Whisky Association* 2006 (32) PTC 656 (Del), all of which resulted in hefty damages payouts against infringing defendants.

6 2005 (30) PTC 3 (Del).

7 Honourable mention must, however, be made of a clutch of recent Bombay judgements by Justice Kathawalla, awarding damages after returning findings on deceptive similarity. See *Arviva* 2013 (54) PTC 199 (Bom), *Asian Paints* 2013 (54) PTC 433 (Bom), *Lupin* 2014 (2) ABR 325, 2014 (2) ABR 326 and *Biochem* 2014 (3) ABR 54.

8 All numerical references to damages payouts hereinafter are in INR (Lakhs/100,000), denoted by 'L'. The US Dollar exchange rate at the time of final judgement in *Time Inc* was around US$1:INR 43.5, which has since shifted to around US$1:INR 63.5, as of December 2014, which is the time period of the most recent judgement considered in this paper.

A reasonably straightforward deceptive similarity finding crystallized by a 5L[9] damages award, *Time Inc* stands out primarily for its exploration of the theories behind awarding damages. Discussing compensatory and punitive damages in detail, the judgement attracts little argument insofar as it identifies the essentially restitutive nature of the former and the essentially penal/deterrent intention behind the latter, openly targeting the financial viability of trademark defendants for the first time.[10]

Bizarrely, though, Justice Chopra relied heavily on the 2003 US Court of Appeals decision in *Mathias*. *Mathias* affirmed a jury award of punitive damages against an American motel company in a civil negligence claim based on the motel's failure to prevent them from being bitten by bedbugs in US$100+ per-night rooms. The decision is conspicuous by its rather left-field inclusion in an Indian trademark case and the passage relied upon in *Time Inc* is worth quoting in full (italics mine):

> "When punitive damages are sought for billion-dollar oil spills and other huge economic injuries, the considerations that we have just canvassed fade. As the Court emphasized in *Campbell*, the fact that the plaintiffs in that case had been awarded very substantial compensatory damages — $1 million for a dispute over insurance coverage — greatly reduced the need for giving them a huge award of punitive damages ($145 million) as well in order to provide an effective remedy. Our case is closer to the spitting case. The defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional. And the defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms. Refunds were frequent but may have cost less than the cost of closing the hotel for a thorough fumigation. The hotel's attempt to pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhealthful, may have postponed the instituting of litigation to rectify the hotel's misconduct. *The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping*

9 INR Five Lakhs or 500,000; see note 4, *supra*.

10 *Supra* note 6, at 7, 8.

> *detection and (private) prosecution. If a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.*"[11]

To use this passage as authority for the view that a trademark defendant should be punished "twice as heavily in order to make up for the times he gets away"[12] because "it is very difficult for a plaintiff to give proof of actual damages suffered…as the defendants who indulge in such activities never maintain proper accounts of their transactions [which] they know…are objectionable and unlawful"[13] is as ingenious as it is reductive. It offers an extremely thin trademark-specific justification for punitive damages – indeed, it suggests that the role of punitive damages is to plug gaps that compensatory damages cannot by, in a sense, overcompensating plaintiffs with punitive largesse that is merited on account of financially disorganized defendants. Further, it cripplingly and unfairly caricatures all defendants in trademark infringement suits as unprofessional small traders who knowingly violate trademark law and, equally harmfully, offers plaintiffs no basis to claim proportionally higher damages against bigger defendants based on their scale of business.

The Court's gung ho affirmation that its punitive damages award was restricted to "only" 5L because the Plaintiff limited itself to such amount made headlines while the pegging of punitive damages to the flagrancy of the infringement – perhaps the only trademark-exclusive metric in the entire judgement – slipped almost furtively into precedent.

1.2 Hero Honda

Time Inc was revisited eleven months later in *Hero Honda*.[14] With non-contesting defendants becoming the rule rather than the exception, Justice Kaul tempered the vigilantism of *Time Inc* with a bit of common sense regarding the harm that damages awards sought to fortify plaintiffs from. As with *Mathias*, this passage has also been subsequently misapplied and is worth reproducing in full (italics mine):

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11 *Mathias* 347 F 672 (7th Cir, 2003), at 13.

12 *Supra* note 6, at 8.

13 *Supra* note 6, at 8.

14 *Hero Honda* 2006 (32) PTC 117 (Del).

> "I am in agreement with the [submission] that damages in such cases must be awarded and a defendant, who chooses to stay away from the proceedings of the Court, should not be permitted to enjoy the benefits of evasion of court proceedings. Any view to the contrary would result in a situation where the defendant who appears in court and submits its account books would be liable for damages, while a party which chooses to stay away from court proceedings would escape the liability on account of failure of the availability of account books. A party who chooses to not participate in court proceedings and stay away must, thus, suffer the consequences of damages as stated and set out by the plaintiff. *Of course, this would not imply that the plaintiff would be entitled to any figure quoted by it, which may be astronomical. The figure of Rs. 5 lakhs as damages can hardly be said to be astronomical keeping in mind the nature of deception alleged by the plaintiff which not only causes direct loss to the plaintiff, but also affects the reputation of the plaintiff by selling sub-standard goods in the market where the public may be deceived in buying the goods thinking the same to be that of the plaintiff.* There is a larger public purpose involved to discourage such parties from indulging in such acts of deception and, thus, even if the same has a punitive element, it must be granted. [Justice Chopra] has very succinctly set out in [*Time Inc*] that punitive damages are founded on the philosophy of corrective justice. *That was the case where the publishers of* Time Magazine *had come to court and one of the factors which weighed while awarding punitive damages was that the readers had been sufferers of the infringement of the mark of the plaintiff. The only difference is that in the present case it is the consumer of the products of the plaintiff, who have suffered as a consequence of the infringement of the mark and logo of the plaintiff by the defendant.*"[15]

The logic for punishing non-contesting defendants, while understandable from a rudimentary equity perspective, is itchily contradictory, given the problem identified. Surely it stands to reason that punishing contesting but infringing defendants ought to be a bigger priority than imposing damages on non-contesting

15 *Ibid*, at 18.

and frequently untraceable fly-by-night infringers for whom such damages are no more than symbolic. Nevertheless, *Hero Honda* stands out for laying down a veritable stream of relevant factors to aid in the damages inquiry – quantifiable losses to plaintiffs, effects on plaintiffs' reputation, the similarity of the marks and the likelihood of confusion and overall effects on consumers primary among them.

The *Hero Honda* passage has been quoted increasingly frequently to support damages awards as defendant absenteeism continues to grow. Shockingly, though, the italicized parts, where Justice Kaul's real contribution shines through, have been progressively sawed off,[16] gifting plaintiffs nothing less than a hunting license for plaintiffs to line up *ex parte* defendants with damages awards in their pockets. *Microsoft*,[17] *The Polo/Lauren Co*,[18] *KeePharma*,[19] *Cadila Healthcare*,[20] *Pfizer*,[21] *Jockey*,[22] *Pepsi*,[23] *Disney*,[24]*Atlantic Industries*[25] and *Nestlé* [26] have all benefited from this alarming revisionism in recent years.

1.3 The Big Payout Trilogy: Microsoft, Lachhman Das and Reckitt Benckiser

By July 2007, Delhi's judicial patience with non-contesting defendants had reached a breaking point. The release came in the form of Justice Sistani's hard-hitting 20L damages award in *Microsoft*.[27]Three things stand out about the judgement. First, it demonstrated that non-contesting defendants were not just anomalies who could be made examples of *a laTime Inc*– it was clearly becoming "a trend"[28] to the point

16 A process ironically commenced by Justice Kaul himself in *The Heels* CS(OS) 1385/2005 (29.03.2006) and recognised recently by Justice Singh while imposing a 5.2L award against small-time counterfeiters in *Cisco* 2014 (59) PTC 356 (Del), at 23.3, 24.

17 *Microsoft* 2007 (35) PTC 415 (Del).

18 *The Polo/Lauren Co* CS(OS) 163/2005 (19.12.2011).

19 *Kee Pharma* 2012 (50) PTC 501 (Del).

20 *Cadila Healthcare* 2014 (58) PTC 650 (Del).

21 *Pfizer* 2014 (59) PTC 537 (Del).

22 *Jockey* 2014 (59) PTC 437 (Del).

23 *Pepsi* 2014 (59) PTC 275 (Del).

24 *Disney* 2014 (59) PTC 217 (Del).

25 *Atlantic Industries* MIPR 2014 (2) 344.

26 *Nestle* AIR 2014 Del 156.

27 *Microsoft* 2008 (36) PTC 697 (Del).

28 *Ibid*, at 22.

that it was becoming "a systematic attempt to jettison the relief sought by the plaintiff",[29] something that the judiciary was getting extremely worried about. Second, it painted punitive damages as the judicial equivalent of breaking the emergency glass while deftly burying the act of avoidance of judicial proceedings by defendants under an avalanche of contemptuous language, imputing everything from flagrancy of conduct to reckless shenanigans.[30] Third, it marked a significant improvement on *Time Inc* in terms of relying on international precedent supporting punitive damages awards in intellectual property cases, though even this remained more an *ersatz* list of cases[31] with corresponding damages awards than engagement with substantive legal standards of any description.

However, the eventual calculation of damages was a simple estimate of the total revenue generated by the defendants, arrived at by a crude 'number of infringing units sold multiplied by price per unit' formula. This resulted in a gross estimate of 127.8L, which had to be capped at 20L, since that was the extent of the plaintiff's claim.

September 2007's *Lachhman Das*[32] did little to contribute to trademark jurisprudence on damages but returned an award two-and-a-half times higher – 50L plus costs, payable at 9% interest – but based on a calculation that was no more sophisticated than *Microsoft*. Justice Ahmed drew a straight line between a drop in sales of the plaintiff and the amount of damages they were entitled to, reasoning that "it may well be that had the activities of the defendants [doing business under a trademark identical to the plaintiff's] not taken place, the increase in the sales [of the plaintiff] might have been more but there is no conclusive evidence as to the exact quantum of the loss that has been caused to the plaintiff. There is ample evidence however of the fact that loss had been caused to the plaintiff by the defendants."[33]

Even setting aside the difficulties involved in projecting plaintiff's business revenue independent of its competitors, it is surely fallacious in the extreme to impute *all*

29 *Supra* note 27, at 22.

30 *Supra* note 27, at 22.

31 This, of course, included the now-obligatory reference to *Mathias*, continuing judges' inexplicable fascination with the passage quoted at 1.1 above.

32 *Lachhman Das* 2007 (35) PTC 693 (Del).

33 *Ibid*, at 5.

losses suffered by the plaintiff to the defendant's activities, especially given the admitted lack of evidence led by the plaintiff on losses it suffered. The final figure of 50L (split into 25L each for compensatory and punitive damages) – a compromise between the plaintiff's supposedly demonstrated losses of 100L and its suit claim of 20L – is equally mystifying, based possibly on the recognition that the plaintiff was entitled to more than its original claim of 20L but not to the extent that it later claimed on affidavit.[34] No reasons whatsoever were forthcoming on why the damages award was not capped by the plaintiff's claim of 20L nor was there any explanation for why punitive damages were deemed appropriate.

The January 2014 decision in *Hindustan Unilever*[35] revisited some of these issues, though in the context of product disparagement. The conclusion of the Division Bench, enhancing to 25.7L a 5L damages award challenged in appeal for product disparagement through an advertisement by a competitor, was based primarily on the deliberate nature of the defendant's actions. The decision involves some excellent discussion of factors such as the effects of repeated infringement *via* publication/ airing and the defendant's overall conduct but transfers disappointingly little into an actual calculation of damages.

1.4 Ardath Tobacco and Philip Morris

Standing somewhat forlornly against this line of big payouts is *Ardath Tobacco*.[36] It articulates a succinct set of factual circumstances – the small scale of the defendants' roadside vending business, the absence of any accounting records or storage space where infringing material could be stored, miniscule sales (and thus, presumably, correspondingly minor actual losses caused) when compared with the plaintiffs – to support the conclusion that not only was a heavy damages award not merited but it would also have been meaningless in an enforcement sense given the inability of the defendants to pay such amounts. Two similarly small payoffs to Philip Morris in March 2014[37] raise hopes that this approach to small infringers could prevail in the long term.

34 *Supra* note 32, at 6.

35 *Hindustan Unilever* 2014 (57) PTC 495 (Del).

36 *Ardath Tobacco* 2009 (39) PTC 208 (Del).

37 *Philip Morris* 2014 (58) PTC 317 (Del), 209 (2014) DLT 1.

2. Key Statistical Takeaways from Damages Payouts by the Delhi High Court

2.1 Average Damages Awarded and Other Remedies

The overall average payout in all trademark infringement cases proceeding to full judgement where damages have been awarded in the time period in question is about 5.9L. However, it is notable that in 6% of all cases, despite showing an inclination to do so, courts have awarded no damages whatsoever on account of plaintiffs' failure to demonstrate a basis for the claim for damages. Taking into account these cases where plaintiffs have failed to make the threshold for claiming damages, the overall average dips to 5.6L.

To be sure, the three slightly *outré* awards discussed in 1.3 above deserve to be red-flagged here – as such, they are highly unlikely to feature in such calculations going forward and ought to be disentangled from the vast majority of cases included in the study. Eliminating these three awards, the average corrects to a much more representative 5.2L (and further to 5.08L, taking into account the 6% of empty awards).

Moving to allied awards, costs of the proceedings have been awarded to successful plaintiffs in 51% of such cases overall. However, in only one-fifth of these cases have costs been quantified in the judgement itself, while almost none of these judgements seek to explain the thinking behind the quantum of costs awarded. A further 7.2% of cases have explicitly made the damages award payable within a specified time period and/or with penal interest and a small fraction of cases (3.8%) have even separately quantified awarded legal fees.

2.2 Ex Parte Awards

Another striking feature is that an overwhelming 88% of these cases were decided entirely *ex parte*, with the damages payout to plaintiffs in fully contested proceedings shrinking to 1.7L. This adds statistical ammunition to questioning the logic that non-contesting defendants should be punished more severely, since it is evidently a dangerous evasion of priorities if it has the consequence of not punishing those defendants who do put in appearances.

This reticence in punishing contesting defendants could be possibly be partly explained by lingering doubts over the get-out clause provided by Section 135(3) of the Trade Marks Act, 1999. Sections 135(3)(b) and 135(3)(c), in trademark infringement and passing off cases respectively, provide a safe harbour for a contesting defendant, contingent on the defendant demonstrating that that it was unaware or had no reasonable ground to believe that the plaintiff was the proprietor or authorised user of a trademark/registered trademark[38] and that it ceased its own use of the trademark on becoming aware of the plaintiff's rights in the same.[39]

In such cases, a minimum expectation would be that the employment or contemplation of Section 135(3) be backed by some kind of evaluation of whether the defendant fulfilled the conditions to trigger its applicability. Unfortunately, this has simply not been the case and instances of judges employing and explaining Section 135(3) as a mitigating factor in the damages award are extremely rare.[40]

2.3 Aggravating, Mitigating and Neutral Factors in Damages Awards

The standout finding in this specific sub-section is that cases involving infringement findings on deceptively similar marks (as opposed to identical marks), which account for about one-fourth of all damages awards, result in an average payout of only 2.8L, which is a hugely significant 44% lower than the overall average.

Other, more foreseeable aggravating factors include contempt by defendants of *ex parte* injunction orders (where the average award spikes to 7.2L, +41% above the overall average), using infringing trademarks on counterfeit products (6.6L, +30%) and copying of well-known acronyms in the same class of products (6.7L, +33%).[41]

Conversely, several mitigating factors also stand out. These include use of the same or similar trademark in relation to a different class of products (where the

38 S. 135(3)(c)(i), and S. 135(3)(b)(i), Trade Marks Act, 1999.

39 S. 135(3)(c)(ii) and S. 135(3)(b)(ii), Trade Marks Act, 1999.

40 *Nestlé* 2009 (39) PTC 129 (Del); *J&P Coats*2014 (59) PTC 175 (Del).

41 Another aggravating factor recently recognised by Courts, though not yet conclusively correlatable with damages payouts, has been the defendant's priors in terms of trademark squatting, filing trademarks with false use claims and other *mala fide* acts. See Justice Sistani's 5L award in *Forme Communications* 2014 (59) PTC 518 (Del), at 34, Justice Singh's 8.5L award in *Rolex* 2014 (60) PTC 131 (Del), at 47.

average award reduces to 3.03L, -40% below the overall average),[42] copying of numerals (2.8L, -43%) and domain name infringement cases (3.5L, -31%).

Surprisingly, there is no significant difference in the damages awards based either on the extent of preliminary engagement by infringing defendants with the judicial process after injunction orders. Indeed, suits partially contested at various preliminary stages (initial appearance, cooperating with investigations/court-appointed Local Commissions, filing a written statement) account for no more than a 5% swing in the overall average damages payout. Equally remarkably, there appears to be no discernible difference in the judicial treatment of potentially public interest-facing disputes such as pharmaceutical products cases, where average damages awarded are merely +2% off the overall average.

2.4 Litigant Profiles

About one-half of cases proceeding to final judgement and a damages award in the time period in question have been instituted by Indian plaintiffs and it is telling that the damages awarded to them on average are a touch under 3.3L per award, which is a full 35% lower than the damages awarded on an average to foreign plaintiffs. Further, on most occasions where a foreign plaintiff has been awarded damages below the overall average, there appears to have been a mitigating factor close at hand. Thus, judges have inevitably reduced payouts where damages have not been properly articulated[43] or pressed[44] or supported by proof[45] by plaintiffs, where the marks have been deceptively similar and not identical,[46] where some

42 The reasoning in this sub-classification of cases is often shaky, as demonstrated by Justice Singh's 2L punitive damages award despite the admittedly plaintiff proving actual damages in *Sasken Communication* 2009 (41) PTC 523 (Del), at 21.

43 *General Electric* 2009 (39) PTC 541 (Del); *Pfizer* 2011 (46) PTC 401 (Del).

44 *Toyota* 2011 (45) PTC 465 (Del).

45 *Glaxo* 2007 (34) PTC 109 (Del).

46 *Intel* 2006 (33) PTC 345 (Del); *P&G* 2011 (45) PTC 541 (Del); *Novartis* 2011 (47) PTC 349 (Del); *Nestlé* 2011 (48) PTC 152 (Del); *Smithkline and French* CS(OS) 1775/2008 (24.11.2011); *Siemens* CS(OS) 1986/2013 (10.11.2014).

47 *Jane Norman* MIPR 2014 (2) 363.

48 *L&T* 2011 (46) PTC 385 (Del).

contesting defendants have admitted liability or settled,[47] have been out of the reach of the court[48] or operating on such a small scale that losses have been minor.[49]

This begs the thorny question of whether this considerably lighter trigger in cases involving foreign plaintiffs is deliberate. It is a question with no clear-cut answer, and a classic instance of the judiciary being caught between the proverbial legal rock and policy hard place. Nevertheless, it bears mention that the odd judgement on the subject has not been shy in openly siding with foreign plaintiffs. Justice Jain's March 2011 opinion in *Tata* (*en route* to awarding an Indian plaintiff 2L plus costs in damages)is a case in point:

"Our country is now almost in the league of advanced countries. More and more foreign companies are entering our markets, with latest products. They would be discouraged to enter our country to introduce newer products and make substantial investments here, if the Courts do not grant adequate protection to their intellectual property rights. [...] Most of the products sold by these companies are branded products, the marks on them having trans-border reputation and enjoying tremendous brand equity. It is, therefore, becoming increasingly necessary to curb such trade mark piracies (*sic*), lest they drive away the huge foreign investment our country is attracting."[50]

3 Towards a Judicial Checklist for Quantifying Damages in Trademark Infringement Cases

The various approaches followed by the Delhi High Court in the last ten years in awarding damages have occasionally complicated the task of picking a minimum

49 *Philip Morris* 2014 (58) PTC 317, 209 (2014) DLT 1.

50 *Tata* 2011 (46) PTC 244 (Del), 28.

51 Most recently, *Disney* CS(OS) 3466/2012 (20.02.2014).

52 In the same vein, courts may also look to incorporate, wherever appropriate, the user principle and the possibility of defendants doing business in non-infringing alternatives. The yardsticks for these factors were fruitfully explored in *Force India* [2012] EWHC 616 (Ch) and fine-tuned in *32Red* [2013] EWHC 815 (Ch) to include an assessment of the strengths and weaknesses of the parties' positions in arriving at a fair damages award. See Bonita Trimmer, "A Guide to Damages Calculations for Trade Mark Infringement", http://www.managingip.com/Article/3358604/A-guide-to-damages-calculations-for-trade-mark-infringement.html (last accessed December 29, 2014) and Walker Morris, "Assessment of Damages in IP Infringement Cases", http://www.walkermorris.co.uk/assessment-damages-ip-infringement-cases (last accessed December 29, 2014).

consensus path in arriving at such awards but have, in aggregate, covered most factual considerations that ought to be relevant.

These factors could be usefully refashioned in the form of a basic three question post-infringement inquiry.

(1) **Where does the infringement fall to be located on the deceptive similarity continuum?**

This could conceivably be worked on a percentage or point scale to judge how adjacent the rival marks are and how likely they are to cause consumer confusion.

(2) **What is the estimated annual capacity of the infringer's business and how long has the infringer has been in business?**

Pressure points in this specific inquiry could be addressed by considering reliable evidence of adoption and use (ideally, from a legal document such as a trademark application). In cases where evidence is not forthcoming on these factors on account of non-contesting defendants, courts should still require plaintiffs to fulfill minimum evidentiary thresholds by furnishing market intelligence or expert affidavits on infringers' business.

(3) **Speaking primarily to the punitive element, is the infringement of a flagrant or brazen nature?**

While a cynical view would suggest that the insistence on the *absence* of a flagrant and brazen infringing act means little when the positive standard is so ambiguously defined, there is precedent[51] to suggest that there is enough meat to this standard to at least merit inclusion in a *pot pourri* of factors to be considered in arriving at a damages award.

A percentage value of (1) multiplied by a realistic financial estimate of (2) compounded by the punitive element embodied by (3) should, at the very least, offer a useful baseline around which other aggravating and mitigating factors can be arranged. Potential factors that could populate such an inquiry have, as evident

53 *Ellora Industries* 1981 PTC 67.

from 2.3 above, already form a part of the judicial calculus on the quantum of damages.[52]

To this, however, it would be remiss not to incorporate – within the punitive damages assessment at the very least – some consideration of the infringers' business profile. More specifically, the centrality of the infringing mark to the infringer's overall business and, especially in a counterfeit context, the commercial environment of the infringer's business are evidently extremely germane factors.

The potential pitfalls of relying on a plaintiff-driven estimate of losses caused as a consequence of infringement are evident post-*Lachhman Das*. Sidestepping a theoretically taxing but ultimately ancillary debate on the rule of law, it may fairly be asserted that deterrence is likely to work only where potential infringers are confronted with a gradient of consequences and to fall back, as so many judgements have, on the mythical default position that all infringers are deterred by the law would merely be judicial bluster. Lastly, all such calculations should, of course, add costs of the suit where plaintiffs claim them through evidence but overall awards should always be capped by the amount claimed.

This sort of inquiry could possibly be dovetailed with another encouraging, if slightly antiquated, Delhi High Court practice – using inherent powers to customize relief to the needs of the case. This could include evolving factors to determine when defendants are required to submit accounts of profits,[53] requiring litigants to furnish security amounts against injunctive relief[54] and setting standards for whether and to what extent defendants consenting to injunctions should mitigate relief.[55]

The possibilities are endless and it is vital to mould these numerous considerations into a consensus judicial checklist to ensure that the damage done to trademark-dependent businesses on both sides of the litigation divide is fairly, accurately and swiftly accounted for.

54 *Mehboob Productions* 10 (1974) DLT 299; *S Karam Singh* 1981 PTC 260.

55 *Rai Toys Industries* 1982 PTC 85.