

PROTECTION OF INTELLECTUAL PROPERTY RIGHT IN INDIAN LAWS

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Abstract:

Intellectual property law deals with the rules for securing and enforcing legal rights to inventions, designs, and artistic works. Just as the law protects ownership of personal property and real estate, so too does it protect the exclusive control of intangible assets. The purpose of these laws is to give an incentive for people to develop creative works that benefit society, by ensuring they can profit from their works without fear of misappropriation. Intellectual property is also recognized as one of the most important assets that can be held by a corporation or an individual. Today, the threat of intellectual property infringement is increasing with each passing day as infringers find it easier and faster to take advantage of the IP. Intellectual Property Right is protection for inventions, literary and artistic works, symbols, names, and images created by the mind. Intellectual property rights are important because they can:

- set your business apart from competitors
- be sold or licensed, providing an important revenue stream
- offer customers something new and different

IP can be anything from a particular manufacturing process to plans for a product launch, a trade secret like a chemical formula, or a list of the countries in which your patents are registered. It may help to think of it as intangible proprietary information. Their many cases are also involved in the infringement of IPR law like the **Clinique Laboratories case and Coca-Cola Company and many others which are related to the infringement of IPR law**, so protection of IPR is very important for the ideas and innovations of the person.

It is hoped this study will inform the reader and scholar about the protection and infringement of intellectual property law and it will help us to stop taking the advantages of other invention on the name of our self.

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History:

The roots of the laws and administrative procedures of IPR have been first seen in Europe. The trends of awarding patents began during 14th century. The first known copyrights were seen in Italy, while Venice pioneered the laws the of IP system as most legal thinking and rest followed it. In India patents laws were much recently observed, in 1856 the first act was established based on British patent systems.

IPR:

According to WIPO (World Intellectual Property Organization) Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.

Intellectual property rights (IPR) refers to the legal rights given to the inventor or creator to protect his invention or creation for a certain period of time. IP is nothing but legal rights which confer an exclusive right to the inventor/creator to fully utilize his invention/creation for a given period of time (Chandra Nath Saha & Sanjib Bhattacharya 2011).

It is now a known fact that IP plays a vital role in the modern economy. IPR is a strong tool which protects investments, time, money, effort which were invested by the creator of an idea/product, as IPR grants the creator an exclusive right for a certain period to fully utilize the creation. This results in the economic development by promoting a healthy environment towards new ideas and creations. (Chandra Nath Saha & Sanjib Bhattacharya 2011).

IP is divided into 2 categories

- 1) Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indication of sources and
- 2) Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances.

INTELLECTUAL PROPERTY LAW INTRODUCTION

INTELLECTUAL PROPERTY LAW Comprises of the following Laws: -

- The Laws relating to Trade Marks / Brands (Trade Marks Act, 1999), Property Marks
- The Laws relating to Copyright (Copyright Act, 1957) Artistic Work, Literary Work, Audio Video Records and Software
- The Laws relating to Industrial Designs (Designs Act, 2000)
- The Laws relating to Patents (The Patent Act, 1970)
- The Laws relating to Geographical Indications. The geographical Indications of (Registration and Protection) Act, 1999
- The Laws relating to Internet (Information Technology Act, 2000)

IMPORTANCE OF INTELLECTUAL PROPERTY RIGHTS-

Imagine that one day you came to know that someone has already protected the similar idea or product, on which you are working that you have painstakingly developed by investing the huge money/intelligence “In order to promote domestic market and the manufacturers, the Government of India had launched the "Make in India" campaign wherein various subsidies, benefits are introduced to the startups to facilitate and promote a feasible environment for the growth of entrepreneurial instinct of people. As the manufacturing involves creativity it is definite to pave ways for creation of Intellectual Property (IP) and hence it is crucial that proper protection should be sought in this regard before moving ahead with an idea in a market. By owning an IP, a startup could transform into a million-dollar entity and could create a niche for itself in market. IP can be a unique selling proposition (USP) of the product or service, and it could help to create a sustainable and defensible differentiator for an entity. There are various forms of IP namely as Patents, Trademarks, Designs, Copyright, Trade secret etc. under which a start-up can protect their idea or concept/ product/ process/ associated symbols, logos, brand name. They were essentially recognized for the acceptations of these rights are: -

- Provides incentive to the individual for new creations.
- Providing due recognition to the creators and inventors.

- Ensuring the material reward for intellectual property.
- Ensuring the availability of the original products.
- For economic growth and advancement in technology sector protection of Intellectual property protection is important.
- They are benefited for the growth of the business in the field of technology.

IPR RECOGNITION

The purpose of recognizing IPR is that one should respect the creative and innovative work of the creator and inventor. Specific recognition of IPR will grant the absolute ownership right to creator or inventor and exclusively restrict others from using the IPR for their own benefit. The biggest asset of biggest companies in the world is their IPR as they derive maximum economic benefit out of proprietary technology.

Role of Intellectual Property in Innovation and New Product Development

Innovation. -‘innovation’ is developing a new idea *and* putting it into practice. this is focused on the competitive strategy of a private enterprise in a market-driven business environment, the term ‘innovation’ is used here to refer to the process of bringing valuable new products (goods and services) to market i.e., from the idea/concept formulation stage to the successful launching of a new or improved product in the marketplace², or the result of that process, so as to meet the explicit or implied needs of current or potential customers. In other words, through innovation an enterprise seeks to deliver unique new value to its customers.

Role of IP in Innovation

IP plays an important role in facilitating the process of taking innovative technology to the market place. At the same time, IP plays a major role in enhancing competitiveness of

²This can basically be called a Schumpeterian approach to innovation. See Cantwell, J. “Innovation, Profits and Growth: Schumpeter and Penrose”

technology-based enterprises, whether such enterprises are commercializing new or improved products or providing service on the basis of a new or improved technology.

***Perception of Innovative Ideas**

Whether an enterprise's decision to innovate has been influenced by the overall business strategy (e.g. growth through innovation) or a reaction to developments in the market-place, it is imperative that an innovative idea must be treated as a secret if an enterprise wishes to appropriate potential commercial benefits from the idea (i.e. the information surrounding the creation of the idea must be protected carefully as a *trade secret*). It should be noted that not all commercially viable ideas can be or will be patented³, hence the importance of treating ideas as trade secret, in particular at the inception stage.

***Research and Development Stage**

The IP tools used during the "conception of an innovative idea" stage continues to be relevant also during this stage. Thus, trade secret continues to be relevant, especially if the enterprise is yet to decide on whether to file a patent application.⁴ Keeping trade secrets continues to be relevant during the entire R&D phase, as one would not want the competitors to ever have access to vital information. If used by such competitors it would result in the erosion of a competitive advantage, derived from the final product.

IP as Life-line While Passing Through the "Valley of Death" of Innovation

The protection of such ideas by IP rights ensures that these are not "lost" while taking advantage of external technical resources and facilities owned by innovation centers, technology parks, universities, research institutes, and other (big) companies. Furthermore, in the future development of an invention/design and taking it to the market through partnerships (such as,

³ Mark Rogers, 1998, The Definition and Measurement of Innovation,

⁴ See example of Australian camera man Jim Frazier who signed a confidentiality agreement with Panavision, regarded as the best lens manufacturer in the world

joint ventures, strategic alliances, licensing agreements, merger or acquisition) the ownership of IP provides a strong negotiating position in the process of getting into such a partnership. Both parties would also avoid potential future conflicts if ownership of IP issues were resolved initially with clarity.

Inventors, be they independent or employed, are not necessarily skillful marketers or manufacturers; furthermore, even the best products need the best marketing skills to succeed in the marketplace.⁵In most cases, taking a product to market has proven to be a big challenge to inventors, entrepreneurs, and enterprises, especially SMEs; hence the existence of the concept of “valley of death” in innovation (the “valley of death” normally starts from the period an invention has been made to the launching of a new product/process). This is the period where most inventions collapse due to the absence of external support or are found to be not commercially viable.

IP rights can also facilitate the establishment of joint ventures. SMEs facing serious financial constraints but rich with IP assets may find this form of partnership strategically useful. Ownership of patent and trade secrets may play a crucial role in attracting potential partners. Sometimes, an enterprise with patented product and/or valuable trade secrets may find it strategically beneficial to enter into a joint venture arrangement with an enterprise with a strong trademark so as to secure more s

Intellectual Property Regime – Indian Scenario

A knowledge-based product requires protection so that the investments made by companies in Research and Development may be justified. It has been seen that developing countries, including India, provide a very weak intellectual property protection. India acknowledged in principle the case for strict IPR protection, but in India, this could be done only in phases suited by its own ground reality. The reality - absence of international IPR protection for some decades had spawned employment for millions, so an overnight clampdown on IPR violators would foment social unrest. This has made the scene grim for companies investing / willing to invest in research and development efforts. India has lagged behind in formulating relevant laws, making it difficult to protect the country’s biodiversity. We

⁵ Fisher Philip. A. Common Stocks and Uncommon Profits

have a wealth of traditional knowledge and product's lying in the public domain that needs to be adequately protected. The Basmati controversy clearly underlines the need to have stringent IP laws. Had the Geographical Indication Law been there, Ricetec could not have branded its rice 'basmati rice lines and grains', as the law would have protected basmati on the basis of geographical indication, like France and Scotland did for Champagne and Scotch many years ago. As globalization deepens further, it also increasingly encompasses the sharing, utilization and enjoyment of IP products like inventions, designs, books, etc. India is fast developing into a technology producing country, particularly in biotechnology, information technology and pharmaceuticals sector. Therefore, development of stringent and staunch IPR system is an urgent need. Keeping in view, this emergency the Indian corporates are responding positively to TRIPS by gearing itself to increasing the R&D outlays. And as far as the government and legislation is concerned, the following work has been done in this direction, in order to provide a strong Intellectual Property protection system.

INFRINGEMENT OF PATENT AND REMEDIS

The patent grant to the owner of patent, the right to prevent third parties from making, using offering for sale, selling or important the product in India without the consent of the patent holder. Any violation of the right of patentee will constitute infringement of patent.

***What leads to infringement: -**

- 1- The colourable imitation of an invention
- 2- Immaterial variation the inventions
- 3- Taking essential feature o invention

Doctrine of pith and marrow: -

The pith and marrow of the invention the essence of the invention which if taken and reproduced in the infringed article even by incorporating a colourable variation of it with the invention, it can be presented that infringement has taken place. Court apply the doctrine of pith and marrow which means that the court is not to detect an absolute similarity between the two but is to see

whether the pith and marrow of the invention has been taken place and if it has been so done, there is an infringement.

CASE LAW- **Dunlop Pneumatic Tyre Co Ltd V/S Neal**⁶

Held – that the purchases of a patented article can carry out repair to it. But he cannot manufacture a new article and claim that he has not infringed the patent claim based on reverse engineering.

Doctrine of equivalent and Doctrine of colourable variation

Patent infringement generally falls into 4 categories: -

- 1- Literal infringement- so it means that each and every element recited in a claim has identical correspondence in the allegedly infringing device or process.
- 2- Doctrine of equivalent- A Doctrine of equivalent is an equitable doctrine which effectively expands the scope of the claim beyond their literal language to the true scope of the inventor's contribution to the art. However, there are limits on the scope of equivalent to which the patent owner is entitled.
- 3- Doctrine of colourable imitation- A colourable variation or immaterial variation amounting to infringement is where an infringer makes slight modification in the process or product but in fact takes in substance the essential feature of the patentee's invention.
- 4- Infringement by mechanical equivalent- it would occur when he uses mere substitutes for those features so as to get the same result for those features so as to get the same result for the same purpose as obtained by the patent.

REMEDIES UNDER IPR

Remedies in private civil actions:

The remedies available to a successful claimant in a private civil infringement action include:

- an injunction

⁶ 1899

- an award of costs
- damages or an account of profits
- delivery up/destruction of infringing items and items used to make them
- tracing orders

The injunction⁷-

IPRs are essentially negative in character: they all confer on their owners the right to stop others doing certain things, without the rights owner's consent. The practical manifestation of this ability to stop infringers is the prohibitory injunction. A prohibitory injunction is an order, made by a court, requiring a named individual or individuals to refrain from doing certain defined acts, which are the exclusive preserve of the IPR owner. In most IPR infringement cases the prohibitory injunction is by far and away the most important remedy in practice

Costs-

In IPR cases, there are often two issues in dispute: infringement of the claimant's IPRs and their validity. In patent actions, English courts retain the freedom to apportion the costs between these two issues so that where the patent in issue was held to be invalid but infringed or alternatively valid but not infringed, the winner of each issue can have his entitlement to the costs of such issue offset against his liability to pay his opponent's costs on the issues on which he himself lost (and for which he himself therefore cannot recover⁸).

Damages or an account of profits-

An IPR owner cannot claim both an account of profits and damages: he must choose one or the other. In practice after the trial on liability has concluded, the successful IP owner is given a short period within which to make his election. Often this is done after there has been some disclosure by the unsuccessful infringer of basic financial information relating to the

⁷The High Court's power to grant injunctions is conferred by the Supreme Court Act 1981, s 37 (SCA 1981, s 37).

⁸Monsanto Technology LLC v Cargill International SA and another [2007] All ER (D) 118 (Oct)

infringement, which is intended to enable the IP owner to make a more informed decision. Additional statutory damages can be awarded for copyright infringement which is flagrant⁹.

Delivery up or destruction-

There is no automatic entitlement to delivery up or destruction but once infringement is shown, orders requiring either or both these things will usually be made. UK courts are now required to take into account the need for proportionality between the seriousness of the infringement and the remedy ordered and the interests of third parties, under Council Directive (EC) 2004/48 (IP Enforcement Directive). Where the infringing item is a small part of a larger item, the effect of the IP Enforcement Directive may be that no order for delivery up will be made¹⁰.

Tracing remedies-

An infringer can be ordered to provide details of where he got his supplies of infringing goods. Failure to provide the information sought in the face of such an order can amount to a contempt of court.

REMEDIES IN CRIMINAL ACTION

Section 63 of the Copyright Act, 1957 deals with ‘Offences of Infringement of copyright or other rights conferred by the act’. It mentions about imprisonment for a term not less than 6 months which may extend up to 3 years and fine not less than 50,000 rupees which may extend up to 2 lakh rupees, as punishment if found guilty in a copyright infringement case. This term and fine can be increased according to the provisions of Section 63A of the Copyright Act, 1957.

Chapter XII of the Trademarks Act, 1999 deals with offences, penalties and procedures pertaining to trademark infringement. Here on account of trademark infringement, the punishment can go as high as imprisonment up to 3 years with or without fine. The fine ranges

⁹General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd [1975] 2 All ER 173

¹⁰: Council Regulation (EC) 1383/2003 Goods Infringing Intellectual Property Rights (Customs) Regulations 2004, SI 2004/1473

from 50,000 to 2 lakh rupees. This term and fine can be increased as per the provisions of the Section 105 of the Trademarks Act, 1999.

Indian Patent Act, 1970 also considers falsification of entries in register, claiming patent rights in an unauthorized way etc. to be punishable criminal offences. Such penalties are mentioned under Chapter XX of the Indian Patents Act, 197

Conclusion

Today possession of land, labor and capital are just not enough for a country to succeed. Creativity and innovation are the new drivers of the world economy. The policies adopted by a country shall determine the nations well-being. Development of a country's intellectual Capital is the most important task in these regards. An effective intellectual property rights system lies at the core of the countries development strategies. Within knowledge based, innovation driven economies, the intellectual property system is a dynamic tool for wealth creation, providing an incentive for enterprises and individuals to create and innovate a fertile setting for the development of, and trade in, intellectual assets, and a stable environment for domestic and foreign investments. Although India has complied with the obligations of TRIPS by amending the IP laws, certain issues are still needed to be taken care of. And there is a need for a constant thinking over the core issue of IP protection, in order to respond to situations arising out of global complete.

