

Intellectual property law in India: A historical perspective

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Abstract

To understand the concept of intellectual property (IP) it is important to understand the concept of property. For a layman, property means some material object belonging to a particular person. Ownership concept is critical to the concept of property. The term 'Ownership' means the right to possess, use and dispose of the property. For a civilized society recognition of ownership is must to embrace the concept of property. In the legal sense, property refers to the rights that the law confers on a person by virtue of the ownership and possession of an object.

Legislations and laws on intellectual property rights in India dates back to British times. The tradition of scholarship and intellectual creativity in India goes back to a few millennia. Yet the concept of Intellectual Property Rights in the modern sense is rather new and would appear to have no cultural moorings or sanction in our country. The history of intellectual property rights in India backed by enforceable legal provisions scarcely goes back to 150 years.

According to World Intellectual Property Organization (WIPO) "Intellectual property is a term that refers to creations of the mind, such as inventions; literary and artistic; designs; and symbols, names and images used in commerce". This paper analyzes and deals with the history of IP law regime in India and the protections provided in the current globalized scenario.

Keywords: ownership, legislations, entitlements, intellectual property, inventions, creation etc.

Introduction

Intellectual property is an intangible creation of the human mind, usually expressed or translated into a tangible form that is assigned certain rights of property. For eg.: a soft drink as it will have unique composition and mechanism for manufacturing which is exclusive to the owner of the company, a drug or medicine if we talk in general because now days we are seeing the case of generic drugs, a website with some particular operations or we may take a case of any author. These are the examples of Intellectual Property. Now IPR can be differentiated as the ones that stimulate inventive and creative activities (patents, utility models, industrial designs, copyright, plant breeders' rights and layout designs for integrated circuits) and the other that offer information to consumers (trademarks and geographical indications).

As the world moved towards knowledge and information technology era, intellectual capital has gained substantial importance. Therefore Intellectual Property (IP) and the rights attached to it have become important and are being protected at all costs. Recent years, especially the last decade, have witnessed an increase in volume of cross-border trade. Multinational companies are carrying on business in several countries and selling their goods and services in different parts of the world. Since intellectual property rights (IPRs) are specific to a region or country, it is crucial, in a globalized world economy, to ascertain and analyze the nature of protection that can be given to IPRs in each jurisdiction.

There are well-established statutory, administrative, and judicial frameworks for safeguarding IPRs in India. It becomes pertinent to mention here that India has complied with its obligations under the Agreement on Trade Related

Intellectual Property Rights (TRIPS) by enacting the necessary statutes and amending the existing statues. Well-known international trademarks have been given the required protection in India in the past by the Indian courts despite the fact that these trade marks were not registered in India. Computer databases and software programs are not protected under the copyright laws in India despite that software companies have successfully curtailed piracy through judicial intervention. Although trade secrets and know-how are not protected by any specific statutory law in India, they are protected under the common law. The courts, under the doctrine of breach of confidentiality, have granted protection to trade secrets.

History of Intellectual Property Legislation Patent Law

The first Indian legislation on patents was passed in 1856 which gave exclusive rights to inventors for 14 years. This law was again enforced by the Act of 1859 with some modifications. It granted rights to inventors of 'new manufacture' and exclusive rights to make, sell and use the invention in India and the right to authorize anyone. The scope of Act of 1859 was broadened to include designs, under 'the new manufacture' in the Patents and Designs Protection Act 1872. After this, Inventions and Designs Act of 1888, and later the Indian Patents and Designs Act 1911 which was based largely on the British Patents and Designs Act 1907. In 1947 after India's independence the Government felt the need for a more effective patent legislation. Two expert committees were formed to review the situation: one, headed by Justice Rajagopal Iyengar, and another headed by Bakshi Tek Chand.

The study suggested that MNCs owned around 90% of the patent and they misused it so that they can have a monopoly over the market which resulted in the suffering of the consumer as goods and services were not available at competitive prices. Supply of essential goods was also low. The Patents Bill was tabled in the parliament following the reports of these Committees and this was debated for a decade which led to the enactment of Indian Patents Act 1970. This law was highly praised at that time and United Nations Conference on Trade and Development (UNCTAD) termed it as a progressive patent law which would inspire other developing countries to pass similar legislation. It clearly codified inventions that could not be patented, permitted patenting of only process, not products, of manufacture in the fields of food, drugs and medicines and substances produced by chemical processes. The term of patent was in the case of process relating to food, medicines and drug, 5 years from the sealing of the patent or 7 year from the date of patent whichever was earlier; in case of other process patents, it was 14 years; it had provision for 'licences of right' and compulsory licensing in some circumstances; it provided for use of inventions for government purposes, acquisition of invention by Central Government and revocation of patents in public interest.

After India's membership of the WTO and her obligations under the TRIPS Agreement, the Indian Patents Act 1970, was amended by Patents Amendment Act, 1999 and Patents Amendment Act 2002, which came into force on May 2, 2003. The Provisions of the present Act are in accordance with the TRIPS Agreement.

Trademarks and Designs

There was no specific legislation on trademark before 1940. However, remedies for violation of trademark were available under the Indian Penal Code (IPC, 1860) and Specific Relief Act, 1877. The Trade Marks Act, 1940 was replaced by the Trade and Merchandise Marks Act, 1958, which has now been repealed and replaced by the Trade Marks Act, 1999. Designs continued to be governed by the provisions of the Indian Patents and Design Act, 1911, until the Designs Act, 2000 was passed.

Copyright

In the matters of Copyright the English Copyright Act, 1842 was applicable to India. But it was never exclusively stated. Copyright Act, 1911 of England was extended to India as a British dominion. The Indian Copyright Act, 1914 introduced criminal sanctions for infringement and continued till the copyright act of 1957 came into force in 1958. There was a necessity of the copyright act because of the changed status of India as an independent nation and also due to advancement of technology of reproduction and communication. Among several features; registration of copyright was voluntary; administrative machinery for registration of copyright was established; the government was empowered to protect copyright of citizens from other countries. Since then it has been amended in 1983, 1992, 1994. After, India ratified the TRIPS Agreement as a member of the WTO, copyright act was amended for the last time in 1999.

Besides these India has enacted the IP laws for geographical

indications of goods, protection of plant varieties and farmers' rights, semiconductor IC layout designs, information technology, and biodiversity. To grant and regulate protection of intellectual property the Indian law on IP has now been aligned to the requirements and provisions made under the TRIPS Agreement of the WTO.

The Indian Patent Law

The law on patents is laid down in the Indian Patents Act (1970) as amended by Patents (Amendment) Act, 1999 and Patents (Amendment) Act, 2002. This Act makes the Controller General of Patents, Designs and Trademarks who is appointed under the Trade Marks Act, 1999 as the controller of Patents having powers of a civil court.

Significant changes that have been introduced by these amendments in the original Act of 1970 are as follows:

1. There is no restriction on Indians applying for patents abroad.
2. The definition of term 'invention' is fully consistent with the TRIPS Agreement, and includes both products and processes in all fields of technology. Before amendment only methods or processes of manufacture relating to food, medicines and drugs were patentable.
3. The list of items that are not to count as inventions for grant of patents has been modified to include exclusions permitted by the TRIPS Agreement. Earlier an invention was not patentable if its primary or intended use would be 'contrary to law or morality or injurious to public health.' Now it will not be considered an invention if its 'primary or intended use or commercial exploitation' could be 'contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment. Also 'discovery of any living thing or non-living substance occurring in nature' is not regarded as an invention under the amended Act.
4. The rights of the patentee have been brought in line with the provisions of the TRIPS Agreement.
5. Reversal of burden of proof in case of any infringement will be on the defendant.
6. The term of patent is now uniform 20 years in alignment with the TRIPS agreement. Earlier, for a process patent, relating to an item of food, medicine or drug it was five years from the date of sealing of the patent or seven years from the date of application whichever period was shorter, and fourteen years from the date of patent in respect of any other invention.
7. The provision of licenses of right has been omitted and compulsory licensing brought in line with TRIPS.
8. Provisions for exclusive marketing rights have been included.
9. Provisions for parallel import of patented products have been included.
10. Protection of biodiversity and traditional knowledge, under 'inventions not patentable' category.

Indian Copyright Law

The Copyright Act, 1957 was amended in 1999 governs the copyright law in India. It came into existence on January 15, 2000. As per this law there shall be a copyright office, under the immediate control of the Registrar of Copyrights to

facilitate copyright registration. It has established a Copyright Board (CB) with Registrar of copyrights as its Secretary. The Copyright Board is meant to hear and settle disputes arising under the Act. The Act mentions various categories of works in which copyright subsists, provisions for determination of first ownership of copyright, the scope of rights conferred; assignment and licensing of copyright; licenses and the reasons to grant it; performing rights of societies; broadcasting rights; authors special rights; international copyrights. The Act explains the meaning and situations of infringement and remedies for any legal proceeding without any particular grounds. Like the patent law, the Indian copyright law is in conformity with the provisions of the TRIPS Agreement of the WTO. It is also in line with the provisions of the Berne Convention for the Protection of Literary and Artistic Works (Brussels Text, 1948), and the Universal Copyright Convention (1952); as India is a member of both conventions.

Indian Trade Mark Law

The Trade Marks Act, 1999 lays down the law governing trade marks in India. It extends the scope of protection by registration of trade marks to services, besides goods. It provides for a single register and simplifies the procedure for registration. It recognizes well known marks as a distinct category, and provides for registration of collective marks, owned by an association of persons. It discourages persons who try to exploit others good name in business through false means. The Controller-General of Patents, Designs and Trade Marks is the Registrar of Trade Marks. The act directs for the constitution of an appellate board with the same powers that are vested in a civil court and all the proceedings before the Board are deemed as judicial proceedings.

Several measures have been taken to simplify trade mark law and related procedures to enforce effective protection.

Indian Designs Law

The Designs Act, 2000 lays down provisions for protection of industrial designs in India. The Controller-General of Patents, Designs and Trade Marks is the Controller of Designs. Among other things the Indian Design act defines 'original' and enlarges the scope of definitions of 'article' and 'design'. It clearly states the type of designs that shall not be registered, brings in the internationally followed system of classification in place of the Indian system, provides for restoration of lapsed designs and maintaining the register of designs digitally.

The provision for two year period of secrecy for a registered design is revoked and any document for transfer of right in a registered design is required to be compulsorily registered. Additional grounds for cancellation of registration are explicitly stated. The cancellation proceedings are to be initiated before the Controller of Designs instead of a High Court. All kinds of infringement will attract heavier penalties than before.

Appeal Mechanism

Patents and industrial designs are required to be registered under the relevant Acts to claim any legal protection of IPRs. However, copyright and trademarks (in India) have no such requirement. Their registration is voluntary, but in case of

legal disputes, registration carries distinct advantages. As copying, counterfeiting and forgery have become easy and rampant and economic consequences of infringing a copyright or using a brand name (trademark) in an unfair way may be huge, it is advisable to get the copyright and trademark duly registered.

The provision of appeal against a decision/order of the highest controlling authority is only fair and necessary under a sound legal system. The appeal earlier used to lie with a High Court of appropriate jurisdiction. However, the domain of IP being highly specialised, which was often unfamiliar to a High Court judge, the need of a specialist member on the reviewing bench was always felt. Further the disposal of an appeal in a High Court was time-consuming and involved high cost of litigation.

Having regard to these considerations, the Trade Marks Act, 1999, established an Appellate Board (AB) having advocates who have been active in the field of Trade Marks for 10 years. A bench of the Appellate Board will consist of a Judicial Member and a Technical Member. The bench will sit at a place decided by the Central Government.

The Appellate Board for trademarks is also the appellate authority under the Patents Act, 1970, as amended by the Patents (Amendment) Act, 2002. It is also the Appellate Board for geographical indications. The Technical Member of the AB for patents cases is a person experienced in patent law to consider appeals against the decision of Controller. He is a person who has been Controller, or has exercised his functions, for 5 years, or he should be an Advocate practising law relating to patents and designs for 10 years. A bench of the Appellate Board consists of one judicial member and one technical member.

The Appellate Board sits in the following cities: Ahmedabad, Chennai, Delhi, Mumbai, Kolkata. The Board fixes its own procedure, place and time of sittings. Pursuing a case before a trade mark Appellate Board or the Copyright Board (which can also have sittings all over India) can be frustrating and difficult experience. The procedure for appeal in the case of copyright is different. The appeal against a decision of the Registrar of Copyrights lies with the Copyright Board. The Copyright Board, constituted by the Central Government, consists of a Chairman who is or has been or has the qualifications to be a judge of High Court, and two to fourteen members. The Registrar of Copyrights is the secretary of the Board. A further appeal against the decision of the Copyright Board lies with the High Court of appropriate jurisdiction.

Under the Designs Act, 2000, the appeal against a decision of the Controller of Designs lies with the High Court. The Semiconductor Integrated Circuits Lay-out Designs Act, 2000, provides for a Layout Design Appellate Board, and an appeal against its decision lies with the High Court. The appellate authority under the Protection of Plant Varieties and Farmers' Rights Act 2001, is the Plant Varieties Protection Appellate Tribunal. The Biological Diversity Act 2002 provides for a appeal against the orders of the national biodiversity authority or a state biodiversity board, to the High Court. The Information Technology Act provides for appeal to a cyber Appellate Tribunal against one order of the Controller of Certifying Authority or an adjudicating officer.

Thus, the situation in respect of appeal related to various kinds

of IPRs may do with some streamlining. The diversity of appellate authorities and procedures for different IPRs seems unnecessary. There could be a case to have only one Intellectual Property Appellate Tribunal to hear appeals cases of all category of IPRs. The Tribunal and its benches.

The IP and Constitution

The Constitution of India makes no specific mention of intellectual property. Property in the Constitution generally means tangible property. However, IP as a form of property can be put under Article 300A which deals with property and be entitled to a legal right. Experts have spotted possibilities of a conflict between the IP, specially the copyright, and the constitutionally guaranteed freedom of speech and expression. The Courts have zealously upheld this fundamental freedom. In a case of any restriction on speech and expression, the perspective of the rights of viewers and listeners, is likely to get precedence over the perspective of the rights of broadcasters. Any monopoly that undermine the right to freedom of speech and expression may face a challenge in court of law.

IP issues in Developing Countries

Intellectual property rights are being synchronised and harmonized worldwide. According to TRIPS Agreement, developing countries are implementing national systems of intellectual property rights following an agreed set of minimum standards like 20 years of patent protection etc. Without proper advice on creating national legislation that aligns with what TRIPS allows, many developing countries under pressure have enacted legislations which have proved to be a disadvantage for economic growth. TRIPS is an agreement on a legal frame work and its implications will be decided by resolving disputes. The battle today is between those which are not equal economically and institutionally. Since the power of the parties involved plays a crucial role, developing countries are at a disadvantage. Depending on the countries' economic and technological development, the impact of TRIPS will vary. Middle income countries like Brazil and Malaysia always get benefited from the local innovation. India and China, with large intellectual infrastructure will gain in the long term by strong IPR protection. Least developing countries are likely to face higher costs without getting the benefits. TRIPS has important provisions for a fair play in technology transfer from which the developing world should benefit. It also recognizes that appropriate measures may be needed to prevent the abuse of intellectual property rights by right holders or their resorting to practices which unreasonably restrain trade or adversely affect the international transfer of technology. According to Article 7 of TRIPS Agreement, the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge in a manner conducive to social and economic welfare, and to a balance of rights and obligations. The access to technologies required by the developing countries needs to be facilitated to accelerate their economic and social developments.

Conclusion

India's rank has improved in the international intellectual property index this year with the introduction of national IPR policy adding to its systemic efficiency. India languished near the bottom in the index last year, ranking 43rd out of 45 global economies. This year, the index will map the performance of 50 countries against 40 indicators.

India has repealed the following IP Acts:

1. The Patents Act, 1970, as amended by the Patents (Amendment) Act, 1999, and the Patents (Amendment) Act, 2002
2. The Copyright Act, 1957 as amended in 1999
3. The Trade marks Act, 1999
4. The Designs Act, 2000
5. The Geographical Indications of Goods (Registration and Protection) Act, 1999
6. The Protection of Plant Varieties and Farmers Rights Act, 2001
7. Integrated Circuit Layout Designs Act, 2000
8. The Biological Diversity Act, 2002

While most contracts lay down clearly and in detail the rights and obligations of contracting parties, any disputes that arise in connection with the contract can be resolved on the basis of provisions in the contract itself. What is different with IPR is the fact that it is aimed at excluding others from doing certain things as regards the IP even without the existence of a formal contract between them and the owner of the right. The effectiveness of IPRs is clearly dependent on how speedily they can be enforced with reasonable cost.

As requirement of space for storage of information and means and cost of copying tumble down with the advance of information and communication technologies, the scale and incidence of copying/reproduction have greatly increased. Piracy and counterfeiting are the scourge of the world trade. In books, films, music, computer programmes, pharmaceuticals and consumer goods, infringement of IPR on commercial scale is rampant.

While national laws provide legal remedies for violations of IPRs, the TRIPS Agreement lays down the provisions which must be included in the national IP laws and regulations of all member countries of the WTO to enable effective enforcement of IPRs. The remedies are meant to deter incidence of future infringement without harming legitimate trade, while safeguarding against the abuse of IPRs.

India, though a relatively late comer in the IP game, has strong IP Laws and effective enforcement of IPRs. All the Acts dealing with IP in its various forms are aligned to the TRIPS Agreement making appropriate use of flexibilities available under the TRIPS. They are fully alive to the role of IPRs in growth and development consistent with societal and environmental concerns.

All the IP Laws provide for (i) a fully empowered administrative machinery to grant and register claims for IPRs in a fair and transparent manner, (ii) a mechanism for appeal against administrative decisions if necessary, and (iii) a procedure for legal enforcement of IPRs.

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