

INTELLECTUAL PROPERTY LAW IN MODERN ERA

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INTRODUCTION

Intellectual property rights are like any other property rights. They allow creators, or owners, of patents from their own work or investment in a creation. It also refers to the creations of the mind which includes inventions, literary work, names and images. With the advent of the knowledge and information technology era, intellectual capital has gained capital substantial importance. Intellectual property law ensures that trade secrets, utility models and patents of the industry are protected and are not violated or hampered.¹ IPR includes trademark, patent, copyright, geographical indications etc. Importance of intellectual property was first recognized in Paris convention for the protection of industrial property (1883) and the Berne convention for the protection of literary and artistic works. Indian legislature has made efforts to implement better IP rights enforcement and protection.² Formally, the Intellectual Property is defined under Article 2(viii) of the World Property Organization, 1967 to include rights relating to: (1) literary, artistic and scientific works, (2) performance of performing artists, phonograms and broadcasts, (3) inventions in all fields of human endeavor, (4) scientific discoveries, (5) industrial designs, (6) trademarks, service Marks, commercial names and designations, (7) protection against unfair competition and all other rights resulting from the intellectual activity in the industrial, scientific, literary or artistic fields.

Copyright Act 1999

For the purposes of this Act,³ "copyright" means the exclusive right. Subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely:- (a) in the case of a literary, dramatic or musical work, not being a computer programme, - (i) to reproduce the work in any material form including the

¹ SHIV SAHAI SINGH, THE LAW OF INTELLECTUAL PROPERTY RIGHTS: INTRODUCTORY, WTO, PATENT LAWS (2005)

² L BENTLY & B. SHERMAN, INTELLECTUAL PROPERTY LAW (4th ed. 2014)

³ JATINDRA KUMAR DAS, LAW OF COPYRIGHT (1st ed. 2015)

storing of it in any medium by electronic means; (ii) to issue copies of the work to the public not being copies already in circulation; (iii) to perform the work in public, or communicate it to the public; (iv) to make any cinematograph film or sound recording in respect of the work; (v) to make any translation of the work; (vi) to make any adaptation of the work; (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi); (b) in the case of a computer programme,- (i) to do any of the acts specified in clause (a); 51A “(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme: Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.” (c) in the case of an artistic work,- (i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work; (ii) to communicate the work to the public; (iii) to issue copies of the work to the public not being copies already in circulation; (iv) to include the work in any cinematograph film;(v) to make any adaptation of the work; (vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv); (d) In the case of cinematograph film, - (i) to make a copy of the film, including a photograph of any image forming part thereof; (ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions; (iii) to communicate the film to the public; (e) In the case of sound recording, -(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions; (iii) to communicate the sound recording to the public.

Cases: In the case *University London Press vs. Universal Tutorial Press*⁴ and in *C.Cunnian & Co vs. Balraj & Co*⁵., it was reiterated that work must not be copied from another’s work; the manner of expression must be the original point in originating the thought.

In *Jagdish Prasad vs. Parmeshwar Prasad*⁶, the court had the view that no original thought or original research is required in order that literary work may be deemed to be original.

⁴ (1916) 2 CH 609

⁵ AIR 1961 MAD 111

⁶ AIR 1966 Pat 33

In *Govindan Vs. Gopalakrishna*⁷, the opinion that was formed that in the modern complex society provisions have to be made protecting every man's copyright whether big or small, whether involving high degree of originality as in a new poem or pictures or only originality at the vanishing point as in a law report.

TRADEMARKS ACT 1999

A ⁸trademark is a name, phrase, sound used in association with services or products in trade which often connects a brand with a level of quality on which companies build their reputation. It is not mandatory in India to register a trademark. If a company creates a symbol or a name it wishes to use exclusively, it can simply attach the TM symbol, signifying an unregistered trademark. As per the law a trademark is a visual symbol in the form of a word, a device or a label applied to articles of commerce, with a view to indicating that they are manufactured or otherwise dealt in by a particular person or a particular organization as distinguished from similar goods manufactured or dealt in by others.

The TM act which was approved by Parliament in 1999 came into effect on September 15, 2003. As per the preamble it was an act to amend and consolidate the law relating to trade marks, to provide for registration and better protection of trade marks for goods and services and for the prevention of the fraudulent trademarks.

Importance of registration of trademarks

It is sought to be important because:

1. It is the link between user and the manufacturing company.
2. It is an instrument of publicity.
3. It is the symbol of goodwill.
4. It is considered to be a property.

CASES

*Durga Dutt Sharma v Navaratna Pharmacy Laboratories*⁹

⁷ AIR 1955 Mad 391

⁸ PALLE KRISHNA RAO, WORLD TRADE ORGANIZATION TEXT AND CASES (1st ed. 2005)

⁹ AIR 1965 SC 980

The court held that the onus to prove infringement is on the plaintiff. The resemblance between marks may be phonetic or visual, or in the basic idea represented by the plaintiff's mark, and establishing resemblance is a question of fact.

Colgate Palmolive Company v Anchor Health and Beauty Care Pvt Ltd ¹⁰The court stopped the defendant from using red and white in its packaging and trading as the plaintiff had proprietary rights over the combination when used for toothpastes.

The Supreme Court's most recent foray into trademark infringement doctrine, KP PERMANENT MAKE UP, Inc. v LASTING IMPRESSIONS I, Inc.¹¹, provides a useful context in which to explore ideas. KP PERMANENT concerned trademark fair use, a defense to trademark infringement that applies when a party makes descriptive use of another's trademark. While the court held that a defendant did not bear the burden of showing that no likelihood of confusion would follow from its descriptive use, it reasoned nevertheless that the degree of likely confusion may be relevant to whether the defendant's action were fair, and thus protected by defense. The court's approach to fair use tolerates some consumer confusion where the defendant has used the mark fairly to describe its products or services, but it also risks valorizing consumer confusion in a context in which it should be downplayed; moreover, the court's holding risks constraining the analytical space available in trademark law for expression and development of policy concerns other than those that underline trademark infringement's straightforward story.

GEOGRAPHICAL INDICATIONS:

According to the article 22 and 23 as per the TRIPs agreement geographical indications aim at informing the consumer about the geographical origin of the good that it has the "quality, reputation or other characteristic essentially attributed to the geographical origin"¹². Thus the agreement provides that the countries should not register trademarks containing misleading information of the origin of the good. Thus we cannot call goods produced in other country by the same trademark as that is produced in its origin country as in case of "champagne" which

¹⁰ 2003 (27) PTC 478 (Del)

¹¹ 543 U.S. 111 (2004)

¹² BERNARD O' CONNOR, LAW OF GEOGRAPHICAL INDICATIONS (1st ed. 2005)

is registered to be called so if produced only in the selected region of France though other country producing it can produce quality similar to it.

INTERNATIONAL PROTECTION OF GEOGRAPHICAL INTENTION¹³

Paris convention for the protection of industrial property, 1883

The first multilateral agreement, which included indications of source or appellations of origin as objects for protection by national industrial property law, was the Paris convention. Under article 10(1), provision is made for seizure upon importation of goods bearing false indications of the source of goods or the identity of the producer.

Under article 10(2), any

Producer, manufacturer, or merchant whether a natural person or a legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of the source is used, shall in case be deemed an interested party.

MADRID AGREEMENT FOR THE REPRESSION OF FALSE OR DECEPTIVE INDICATIONS OF SOURCE OF GOODS, 1891.

The original form of Paris convention prohibited the use of false geographical indications. A number of signatory nations proposed a more comprehensive form of regulation for what was considered to be a significant intellectual property abuse. The 1891 Madrid agreement concerning the protection of geographical indications was their response¹⁴. Article 1 provided that all goods bearing false or misleading indications to a signatory country or to a place in that country shall be seized on importation. However this agreement failed to attract the accession of significant trading nations such as the USA, Germany and Italy. A threshold problem with this agreement and with subsequent revisions was the inability of nations to exempt geographical indications which had become generic within their borders.

TRIPS AGREEMENT

¹³ Ibid.

¹⁴ DEV GANGJEE, RELOCATING THE LAWS OF GEOGRAPHICAL INDICATIONS (1st ed. 2012)

The agreement on trade-Related Aspects of Intellectual Property Rights (generally known as the TRIPS agreement) is one of the most important agreement concluded within the framework of the GATT Uruguay Round of multilateral trade negotiations¹⁵.

The TRIPS agreement is the most far reaching and comprehensive legal regime ever concluded as the multilateral level in the area of intellectual property rights (IPRs). It supplements and modifies the elderly conventions governing intellectual property rights, the most important of which (i.e. The Paris convention for the protection of industrial property and the Berne convention for the protection of literary and artistic works) were first elaborated at the end of 19th century. The TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus agreement. The TRIPS Agreement makes disputes about the respect of the obligations under the Agreement subject to the WTO's dispute settlement procedures (Article 64).

General provisions in TRIPS agreement.

The general goals of the TRIPS Agreement are contained in the Preamble of the Agreement, which reproduces the basic Uruguay Round negotiating objectives established in the TRIPS area by the 1986 Punta del Este Declaration and the 1988/89 Mid-Term Review. These objectives include the reduction of distortions and impediments to international trade, promotion of effective and adequate protection of intellectual property rights, and ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. These objectives should be read in conjunction with Article 7, entitled “Objectives”, according to which 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 and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Article 8, entitled “Principles”, recognizes the rights of Members to adopt measures for public health and other public interest reasons and to prevent

¹⁵ A HANDBOOK ON THE WTO TRIPS AGREEMENT, ANTONY TAUBMAN (EDITOR) (2d ed. 2013)

the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.

PATENT LAW

Patent, is a legal document granted by the government giving an inventor the exclusive right to make, use, and sell an invention for a specified number of years. Patents are also available for significant improvements on previously invented items¹⁶.

The Patents Act 1970, along with the Patents Rules 1972, came into force on 20th April 1972, replacing the Indian Patents and Designs Act 1911. The Patents Act was largely based on the recommendations of the Ayyangar Committee Report headed by Justice N. Rajagopala Ayyangar. One of the recommendations was the allowance of only process patents with regard to inventions relating to drugs, medicines, food and chemicals. Patent laws are one of the most important and decisive laws that most of the developed countries such as US and European Union has always recommended to be have made stricter and are most concerned of.

The Patents Act 1970 had a very limited scope of protection wherein the essential elements of invention were new, useful and manner of manufacture. Even though manufacture was not defined in the old Act, the Patent Office established the practice of interpreting manufacture as process resulting in a tangible product. The landmark decision of Calcutta High Court on the process of production of Bursitis virus containing vaccine (Dimminaco AG vs. Controller of Patents, 2002¹⁷) changed the practice and now the definition of invention is interpreted keeping in mind the term 'industrial application' as under section 2(1)(j).

The object of patent law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the production patented for a limited period¹⁸, stimulates new inventions of commercial utility. The price of the grant of the monopoly is the disclosure of the invention at the patent office, which after the expiry of the fixed period of the monopoly, passes into the public domain.

What is Invention?

¹⁶ M.B. RAO & MANJULA GURU , PATENT LAW IN INDIA (1st ed. 2010)

¹⁷ IPLR 2002 July. 255

¹⁸ P. NARAYANAN, Patent Law, (4th Edn.)

Section 2(1) (j) of the Patent Act, 2005, defines the "invention" as a new product or as process involving an inventive step and capable of industrial application.

Under the Act "New invention" is defined under section 2(1)(l) of the Patents Act

"New invention"¹⁹ means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art.

Thus, according to this definition of new invention, Act talks of absolute novelty, i.e. the invention should have neither been used anywhere in the world nor published in any part of the world. However, the later sections of the act for the purpose of anticipation and opposition proceedings deal with the relative novelty i.e. not used in India and not published in any part of the world. Further, entire Act refers to the word invention and not new invention. Therefore, for all purposes relative novelty is the criterion.

In case of *Reckendorfer v. Faber*²⁰, the court struck down a patent claiming the combination of a pencil with an attached rubber eraser on the ground that an instrument or manufacture which is the result of mechanical skill is merely not patentable.

The patent of any type is governed by three factors that are: Novelty, Utility and Nonobviousness.

Novelty: It implies that the work should be novel that is new not just original, there is a big difference between Novelty and Originality. The novelty could be in any type may be design, idea, product or the process so as the patents obtained on them could be categories as product patents, idea patents or process patents. Original could be based on inspiration taken by some other persons work and presenting it in your style, well if that is the case you are eligible for copyright but not patent provided if the patent holder doesn't brings the injunction on you.

Utility: Utility means that the invention should be useful for some industrial application those that are not cannot be granted for the patent.

¹⁹ AJIT PARULEKAR, Indian Patents Law

²⁰ 92 U.S. 347 (1875)

Nonobviousness: It means that the work or the inspiration should not have been derived from some other that is one invention should not lead to the development of the other invention rather it could provide the basis for further research.

TERM OF PATENT:

The term of every patent granted under the Act is twenty years from the date of filing.

The patents in force on 20th May 2003 stood extended for the term of 20 years²¹.

The term of patent in case of International applications filed under the PCT, designating India, is twenty years from the international filing date accorded under the PCT.

Renewal fee is required to be paid annually to keep the patent in force. Restoration of patents is possible if applied within 18 months from the date of lapse.

EXPIRY OF A PATENT

A patent can be expired in following ways

1. The patent has lived its full term.
2. The patentee has failed to pay the renewal fee.
3. The validity of the patent has been successfully challenged by an opponent by filing an opposition either with the patent office or with the courts.
4. As soon as the patent expires, it pass to the general public domain and now anybody Can use without the permission of the original inventor.

How to obtain a patent?

- Fill an application for patent
 - With one of the patent offices based on territorial jurisdiction of the place of office or residence of applicant/agent.
 - Pay the required fee
- Information concerning application form and details of fee available.
- Guidelines for applicants also available.

²¹ AJIT PARULEKAR AND SARITA D'SOUZA, Indian Patents Law.

What can get your Patent application rejected?

If the applied product loses any of the three qualities the application gets rejected or

Can be cancelled at the later stage. The top priority goes to the Novelty. It is the most basic step that can get your application rejected or get your patent cancelled.

Novelty, can be destroyed if the product, design, idea or process have been published

Before filing up of the application for the patent. Published or publication here doesn't mean that it should be published in the paper but rather even if it is brought to the noticed of the general public even one person that is not liable to keep it as a secret could result to the loss of novelty, while utility and obviousness could be the other cause.

Once the patent is granted on the particular thing, the patentee enjoys the exclusive right on it for the term the patent has been protected. The basic idea behind patent is to protect and prevail rather from prevent and pertain. If someone found guilty of going against the concept of patent then a suitable action can be taken by the concern government by interfering and by issuing the compulsory license on the product.

CONCLUSION

This is very clear that anything that is the talent of human mind and is exclusive to the developer is protected Intellectual Property Rights. Its breach, misuse and unauthorized excess or development leads to violation of intellectual property rights. WTO and other governing authorities should take into the consideration both developed and developing nations as well as steps to protect the intellectual property, every law that is made should be same for both developed and developing countries unlike that, the developing countries cannot get their inventions patented that are based on traditional knowledge.