

Enforcement, Infringement and Protection of Intellectual Property Rights in India

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Abstract: India has a strong judicial framework to safeguard people's rights, however it still has a lot of problems of infringement and enforcement of Intellectual Property Rights (IPR). IPR exists in every innovation, but if it gets infringed, can result into infinite business loss for the original creator considering the loss of revenue and human intellect. Hence, it is important for businesses to know and understand the value of IPR, manage them appropriately, protect them adequately to safeguard their investments and efforts and reap the deserved benefits for their own work. Though concern has always been expressed about losses and unfair practices, the recent years have witnessed the lax in protection of IPR. It is advised that by adopting right policies and strategies, IPR can be effectively protected with the help of law enforcement. Be it an individual organization, an industry or even as a nation, IPR as a strategic marketing tool has the potential to create the future where brand, technology, service, people everything can together and become a force for development and market leadership. The scope of IPR is expanding very fast and attempts are being made by original creators to seek protection for their intellectual work. It is also important to understand the enforcement measures available for protecting one's business or individual creations. This paper discusses the mode of acquisition, nature of rights, commercial exploitation, enforcement of those rights and protection available against infringement of IPR in India with relevant suggestions for organizations to implement and practice.

Keywords: Enforcement, Infringement, Protection, Intellectual Property Rights, India.

INTRODUCTION

As the term Intellectual Property relates to ownership of the creations of human intellect, the right to this ownership is called Intellectual Property Right. Intellectual Property is a basic property because human does not use any external resource to create it but therefore it is also the most precious property as human uses his/her mind to create it. Intellectual property is intangible in nature is an immovable property. Since it is so precious it is bound to get protection to safeguard it from being stolen, just like any other property. Intellectual Property Law governs the protection of all intellectual properties to prevent the un-authorized use of intellectual property by persons other than the original creator or owner. For this very reason the intellectual property right has been also called as a negative right because the owner has the right to prevent other from infringing his/her rights and similarly others have the corresponding duty to refrain from violating such rights [1, 2].

In the recent past media has reported several cases with IPR infringements that have happened either intentionally or unknowingly where-in lots of revenue loss was faced by businesses and individuals creations got diluted of its originality leading to un-calculative

loss of time and human effort. All these are mere effects of IPR infringements. To understand the seriousness of these, it becomes necessary to first understand what IPR is, what its types are, what all provisions of protection do the governing laws for those several types of IPR provide and how can they be enforced [2]. Hence for the same reason this paper discusses all that with a clear objective of discussing the enforcement, infringement and protection of Intellectual Property Rights in India

Definition

Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce – *World Intellectual Property Organization (WIPO)* [3].

Intellectual Property Rights (IPR) are the legal rights governing the use of creations of the human mind. It consists of a bundle of rights in relation to a certain material object created by the intellectual capabilities of the creator who only has the right to recreate it [4-9].

Intellectual Property can be classified into two broad categories:

- Industrial property: including Patents, Trademarks, Industrial Designs, and Geographic Indications of source;
- Copyright: including literary and artistic works such as fiction and non-fiction books, poems, plays, films, musical works, and artistic works such as drawings, paintings, photographs, and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs [4-6].

The innovations and creative expressions of indigenous and local communities as Traditional Knowledge are also intellectual properties, but because they are traditional they may not be fully protected by existing IP systems. Access to, and equitable benefit-sharing in, genetic resources also are matters of intellectual property rights.

- The most noticeable difference between intellectual property and any other form of property is that intellectual property is intangible, that is it cannot be defined or identified by physical parameters. It must be expressed in some discernible way to be protectable. Generally, it has four separate types of intangible properties; patents, trademarks, copyrights, and industrial designs, which collectively are referred to as “intellectual property.” However, the scope and definition of intellectual property is constantly evolving with the inclusion of newer forms under the identity of intellectual property. In recent times, geographical indications, biological diversity, protection of plant varieties, protection for semi-conductors and integrated circuits, and undisclosed information have been brought under the umbrella of intellectual property [4-9].

The Convention establishing the World Intellectual Property Organization –WIPO (1967) gives the

following list of the subject matter protected by intellectual property rights:

- Literary and scientific works;
- Performances of performing artists, phonograms, and broadcasts;
- Inventions and Scientific discoveries in all fields of human endeavor;
- Industrial designs;
- Trademarks, service marks, and commercial names and designations;
- Protection against unfair competition; and
- All other rights resulting from intellectual activity in industrial, scientific, literary, artistic fields

With the establishment of the world trade Organization (WTO), the importance and role of the intellectual property protection has been crystallized in the Trade-Related Intellectual Property Systems (TRIPS) Agreement. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994 [9, 10].

The TRIPS Agreement encompasses, in principle, all forms of intellectual property and aims at harmonizing and strengthening standards of protection and providing for effective enforcement at both national and international levels. It addresses applicability of general GATT principles as well as the provisions in international agreements on IP (Part I). It establishes standards for availability, scope, use (Part II), enforcement (Part III), acquisition and maintenance (Part IV) of Intellectual Property Rights. Furthermore, it addresses related dispute prevention and settlement mechanisms (Part V). Formal provisions are addressed in Part VI and VII of the Agreement, which cover transitional, and institutional arrangements, respectively. The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property [10, 11].

According to the TRIPS Agreement, the areas of intellectual property can be classified as:



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Different intellectual property rights vary in the protection they provide and similarly so in the legal system different Acts have been enacted to govern the individual intellectual property rights separately. In India, the Acts that provide protection to intellectual properties are:

- The Patents Act, 1970
- The Copyright Act, 1957
- The Trademarks Act, 1999
- The Designs Act, 2000
- The Semiconductor Integrated Circuits Layout Design Act, 2000
- The Geographical Indication of Goods (Registration and Protection) Act, 1999
- The Biological Diversity Act, 2002
- The Protection of Plant Varieties and Farmers' Rights Act, 2001

Since the above discussed properties are of human mental labour, there is obviously a definite need to protect these rights. The justification for the protection of intellectual property rights is that the property encourages a desirable behavior for the deserved protection of ones' hard labour. The Patent system is justified on the basis of the protection that it provides to an inventor with the incentive to disclose valuable technical information to public for their benefit, which would otherwise have remained a secret. The trademark system is justified because it encourages manufacturing of quality products and to be sold as brands. This also prohibits miscreants to copy the genuine brands. Copyrights justify author's natural rights over their intellectual labour.

It is advised that by adopting right policies and strategies, Intellectual Property can be effectively protected with the help of law enforcement authorities. Strategies and contracts are the most significant instruments for protection of IPR in India. For any IPR enforcement strategy or any case in Indian Courts, one must understand the Indian Judicial system and psychology of the Indian judiciary. While Indian Courts are active in granting equitable reliefs like injunctions, etc., it has been generally observed that they are reluctant in awarding punitive damages. It is important to note that Indian High Courts particularly Delhi High Court and Mumbai High Court are proactive in the protection and enforcement of Intellectual Property Rights in India.

PIRACY AND COUNTERFEITING IN INDIA

Needless to say that piracy and counterfeiting practice is rampant world over and India is no exception. A survey conducted by International Chamber of Commerce few years back put India as the third most unfavorable country for Intellectual Property environment. A report published by FICCI (Federation of Indian Chamber of Commerce and industry) on a National Initiative against Piracy and Counterfeiting

indicates the magnitude of the problem of Counterfeiting and Piracy in India, which is grave enough to cause alarm. More or less all industries are a victim of piracy and counterfeiting in India. Despite the fact that India has a very large drug manufacturing industry, fake medicines are estimated to occupy between 15 to 20% of the total Indian market. The entertainment industry is the most affected industry in India and is passing through a tough phase. An estimated 40% of music industry's production ends being copied and distributed illegally in India. Similarly, the automobile industry is no exception. As per the report in India, 1 in 3 automotive parts are copied. Spurious car parts take up an estimated 37% of the market in India. It has been reported that the impact of counterfeiting in FMCG sector is 8-10%, hampering quality of goods as well as raising concerns about health issues. 10% of the major soft drinks sold in India are fakes and 10-30 % of cosmetics, toiletries and packaged foods are counterfeited.

Counterfeit and smuggled products account for more than a fifth of the FMCG market. This is based on the FICCI-KPMG report's assessment that the FMCG counterfeit market at the end of 2014 stood at 65% of the total market of counterfeit products, which was worth Rs 1.05 lakh crore. The FMCG counterfeit market, as such, stood at Rs 68,000 crore at the end of 2014. At the end of 2014, the overall FMCG market in India was valued at Rs.3.2 lakh crore. This market hasn't dramatically changed this year, given the slowdown, notably in urban areas. The FICCI-KPMG report says the loss to the exchequer as a result of FMCG counterfeiting is to the tune of Rs. 27,500 crore. Apart from the lack of coordination between law enforcement authorities, which companies say is a challenge, experts also point to the lack of awareness among consumers. The report further raises serious concerns on the Intellectual Property protection regime in India by adversely reflecting on the Indian enforcement agencies, public awareness and lack of will for enforcement of Intellectual Property Rights. The report further states that a random search of registered Indian companies reveals that, there are sixty plus companies starting with the word 'Nike'; sixty plus companies starting with the word 'Rolex'; two-hundred plus companies starting with the word 'Intel'. This is not limited only to multinationals and there are about one hundred plus companies beginning with the word 'Tata', and four hundred plus companies beginning with the word 'Reliance'. If one seriously researches the market, can find many more of such examples. The above data is indicative of the poor situation of the IPR regime in India, requiring attention from all concerned. However, the proactive approach of various Indian High Courts and the Supreme Court of India for the protection of Intellectual Property Rights is a matter of some comfort [12-15].

There are several reasons behind the growth of counterfeit practice. The most important factors can be broadly identified as:

- Low cost for high technology which results in low investment for high profits;
- Globalization and smaller size trade barriers;
- Consumer complicity;
- Expansion of channels and markets;
- Powerful worldwide brands;
- Weak enforcement of IPR internationally
- High tariffs and taxes.

ENFORCEMENT OF IPR IN INDIA

Enforcement of Intellectual Property Rights is still not very serious in India as largely people are either unaware that a counterfeiting is illegal or aware that counterfeit is happening or there may be no way to trace the origin of counterfeit as it goes undetected many times unless it is the deed of a big organization which can be traced. The lax in enforcement is the result of the passive attitude on the part of right holders and may also be due to slackness on the part of the enforcement machinery at times. Most of the Indian states do not have any special cell for enforcement of Intellectual Property Rights in particular. The strength of the force and the enforcement infrastructure are also not adequate to tackle effectively the problems of India's population size, geographical expanse and complexity and therefore counterfeiting or infringement cases often do not receive the highest attention. Counterfeiting cases are many times not registered as much as any other crime. It is also because many times the counterfeiting goes undetected for a long time and gets the highlight only when takes a major shape in the form of revenue loss for the organization who is the real owner of the intellectual property. Many times the right holders are also to be blamed for their casual attitude towards counterfeiting practice. If, in some cases, counterfeiters are prosecuted, the clumsy and sluggish judicial system ensures that the culprits remain unpunished for long if not for ever. This demotivates the right holders from involving themselves actively in the battle against piracy. Many of them feel that it is better to tolerate the monetary losses due to piracy than to undergo the immense hardships involved in chasing the police and attending periodic court cases with no definite outcomes in the foreseeable future. The lack of infrastructural facilities in India also influences counterfeiting practice in some way or the other which is one of the possible reasons for India not emerging as an integrated market place. The markets in India have remained fragmented, thus giving enough scope to the local suppliers/sellers to manipulate the conditions in their favour. This provides an ideal environment for piracy/counterfeiting to grow. The counterfeiters in India are observed more to operate at the local levels, and such markets are captured by the unrecognized businesses who swing into action in the absence of concerted efforts from the legitimate producers [12-18].

INFRINGEMENT AND PROTECTION OF IPR IN INDIA

INFRINGEMENT OF TRADEMARK

Indian law recognizes both statutory rights of infringement as well as common law action of passing off of Trademarks. A trademark owner in India can bring a:

- Statutory action of infringement where the trademark is registered; and
- Common law action of passing off where the trademark is not registered.

In order to establish infringement with regard to a registered trademark, it is required to establish that the infringing mark is identical or deceptively similar to the registered mark. In the case of a passing off action, besides proving that the marks are identical or deceptively similar, it is also necessary to establish that the use of the mark is likely to deceive or cause confusion resulting in damage to the goodwill and reputation. However, proof of actual deception or confusion is not necessary. In India, both the passing off action and infringement action can be combined together. The registration cannot upstage a prior consistent user of trademark in India, for the rule followed is priority in adoption of trademark prevails over priority in registration of trademark. The concept of Well-known trademarks is recognized in India and a well-known trade mark is protected in India even if it is not registered in India. Trans-border or spill-over reputation can be relied upon even if a trademark has not been used in India.

REMEDIES FOR TRADEMARK INFRINGEMENT AND PASSING-OFF

In the case of misuse of a trademark, the law provides for both civil and criminal remedies. In a Civil action all of the above mentioned relief can be claimed. The (Indian) Trade Marks Act, 1999, also provides for criminal action against offences relating to a trademark, whether registered or unregistered. The offences under the (Indian) Trade Marks Act, 1999, are punishable with imprisonment up to 3 years and fine up to INR 2,00,000/- The minimum term of imprisonment shall not be less than 6 months. The selection of a civil or criminal remedy by an aggrieved party is dependent upon various circumstances and factors pertaining to each case. Generally, civil remedies should be preferred.

QUASI-JUDICIAL REMEDIES

- Opposition (Before the Registrar) – Opposition to the registration of a trademark can only be filed after publication of the trademark within a total period of 4 months from the date of publication in the Trademark Journal. During the course of the process of registration, public is given an opportunity to oppose the

registration of a trademark by filing an opposition petition on various grounds such as the registration is likely to create confusion or deception in the market, identical to the trademark of the opponent or violates any other right of the opponent etc.

- Cancellation (Before the Registrar as well as Intellectual Property Appellate Board) - In case a Trademark has been wrongly registered, the registration of the same can be cancelled on various grounds which may be similar to the grounds on which an opposition can be filed including the grounds of wrong and fraudulent registration and non-user etc [4, 6, 19, 21, 22].

INFRINGEMENT OF PATENT

Patent infringement proceedings can only be initiated after grant of patent in India but may include claim retrospectively from the date of publication of the application for grant of the patent. Infringement of a patent consists of the unauthorized making, importing, using, offering for sale or selling any patented invention within the India.

REMEDIES FOR INFRINGEMENT OF PATENT

Under the (Indian) Patents Act, 1970 only civil action can be initiated in a Court of Law and no penal action can be initiated. Further, a suit for infringement can be defended on various grounds including the grounds on which a patent cannot be granted in India and based on such defense revocation of Patent can also be claimed [4, 20, 21, 23].

INFRINGEMENT OF COPYRIGHT

Both civil as well as criminal remedies are available under the (Indian) Copyright Act, 1957, against the infringement of a copyright, and the remedies are similar to the remedies relating to the infringement of the Trademark. It is also important to note that a suit or criminal complaint can be filed by joining actions under the (Indian) Trade Marks Act, 1999 and the (Indian) Copyright Act, 1957 in appropriate cases where the trademark involves an artistic work. Offences relating to the infringement of Copyright under the (Indian) Copyright Act, 1957 are punishable with minimum sentence of imprisonment of 6 months which may extend up to 3 years and minimum fine of INR 50,000 which may extend up to INR 2,00,000.

In order to curtail piracy and protection of computer programs, special provisions have been made under the (Indian) Copyright Act, 1957. Any person who knowingly uses a pirated copy of a computer programs is also liable to be imprisoned for a term which shall not be less than seven days but which may extend to three years and with fine which shall not be

less than INR 50,000 but which may extend to INR 2,00,000.

Copyright infringement is a cognizable offence, which means that police on the complaint of a complainant can directly initiate criminal prosecution by lodging a First Information Report (FIR), investigate, search and seize the infringing goods from known and unknown offenders and arrest the offenders.

QUASI-JUDICIAL REMEDIES are also available, wherein an application, by the owner of copyright or by his duly authorized agent, can be made to the Registrar of Copyrights for banning the import of infringing copies into India and delivery of the confiscated copies [4, 5, 20, 21, 23].

INFRINGEMENT OF INDUSTRIAL DESIGN

An action for infringement of design can only be initiated after the registration of the design under the (Indian) Designs Act, 2000, which only provides for civil remedies as already mentioned above. In case a civil action has been initiated on the basis of a design which has been wrongly registered for any reason as provided under the (Indian) Designs Act, 2000, revocation or cancellation of the registered design may be set up as a defense [4, 5, 20, 21, 23].

INFRINGEMENT OF SEMICONDUCTOR INTEGRATED CIRCUITS LAYOUT DESIGN

A registered Layout-Design is infringed by a person who, not being the registered proprietor of the Layout-Design or a registered user thereof does any act of reproducing, importing, selling or otherwise distributing for commercial purposes a registered layout-design in its entirety or any part thereof. The Act does not provide for any civil remedy, however, we are of the opinion that preventive reliefs can be claimed by way of permanent injunction coupled with an interim injunction, which is as ordered by the Court during the pendency of litigation in the court of law, delivery up/destruction of infringing goods and damages. Under the (Indian) Semiconductor Integrated Circuits Layout Design Act, 2000, any person found to be infringing a registered layout design can be punished by way of imprisonment for a maximum of three years and/or a fine constituting a minimum of INR 50,000 and maximum of INR 10,00,000 [4, 20, 21, 23].

INFRINGEMENT OF PLANT VARIETIES AND FARMERS' RIGHTS

Any person, who produces, sells imports or exports any variety without the permission of the owner, infringes the rights of owner. Use of a denomination which is similar to a registered denomination and likely to confuse the general public also amounts to infringement. Infringement of any right under the Plant Varieties and Farmers' Rights attracts both Civil and Criminal action. A criminal action under

the Act entails punishment up to two years and fine of INR 50,000 [4, 20, 21, 24].

INFRINGEMENT OF GEOGRAPHICAL INDICATIONS

The remedies relating to the infringement of Geographical Indications are similar to the remedies relating to the infringement of Trademark. Similarly, under the (Indian) Geographical Indications of Goods (Registration and Protection) Act, 1999, falsification of a Geographical Indication will carry a penalty with imprisonment for a term which may not be less than six months but may extend to three years and with fine which may not be less than INR 50,000 but may extend to INR 2,00,000.

In a typical case for enforcement of Intellectual Property Rights pertaining to infringement of Trademark and passing off, infringement of Copyright, Patent, Design, Geographical Indication and Plant Variety, following reliefs can be claimed in a civil suit:

- Permanent Injunction;
- Interim Injunction;
- Damages;
- Accounts and handing over of profits;
- Anton Pillar Order (Appointment of Local Commissioner by the Court for custody/sealing of infringing material/accounts);
- Delivery of goods/packing material/dyes/plates for destruction.

In case of infringement of Trademark and passing off, infringement of Copyright, Geographical Indication, Plant Variety and Semiconductor Integrated Circuits Layout Design following Criminal action can be initiated:

- Registration of First Information Report (FIR); or
- Filing of a Criminal Complaint before a Competent Magisterial Court;
- Filing of application before the Court for issue of search and seizure warrants;
- Raid of the Premises of the accused by Police on registration of FIR or on the orders of the Court and seizure of the infringing material;
- Arrest and prosecution of the counterfeiters, in case involving cognizable offence.

In India, wherever provisions have been made for criminal prosecution for violation of Intellectual Property Rights, a criminal case can be filed against known as well as unknown persons. It is also important to note that both civil and criminal remedies, wherever applicable, can be availed simultaneously and both the remedies are coexistent [4, 20, 21, 24-27].

SUGGESTIONS FOR PROTECTION OF IPR IN INDIA

Some suggestions to business organizations for protection of their Intellectual Property Rights in India are:

- Organizations should make Intellectual Property protection a priority in the organization;
- Organizations should implement clear and effective IPR policies and strategies for creation and protection of intellectual properties
- Organizations should continuously monitor the need for IPR protection by regular evaluation of counterfeit products or infringement of any form in the market by conducting periodic due-diligence
- Organizations should know the legal and administrative rules for IPR protection and also should undertake early assessment of the value of each element of IPR
- Organizations should form a team particularly to evaluate the benefits to continue protection, and renew protection as appropriate thereby preventing losses that may happen due to lapse of rights
- Organizations should take the initiative of registering Intellectual Property Rights legally as it has been observed in several cases that a registration certificate may carry a greater value than the actual evidence of user of the IPR at the time of litigations arising out of infringement
- Organizations should evaluate the risks that their IPR faces and keep a watch over potential registrations from competitors, potential business risks and violations of rights, and take appropriate action to oppose any such registrations or violations
- Organizations should ideally publish a public notice/advertisement against any violation of the IPR through at least 2 newspapers of the national level, as such publications are treated as public knowledge
- Organizations should enter into elaborate assignments, licensing or user agreements, wherever required and should ideally avoid the policy of permissive user
- Organizations should mandatorily understand that the above suggestions can only work by having a serious approach towards IPR and by possibly having a IPR culture in the company by making serious efforts of understanding and protecting the valuable intellectual properties.

CONCLUSION

Intellectual Property Rights (IPRs) have never been more economically and politically important than they are today. It's a matter of pride and revenue earner for some nations / organizations whereas some nations / organizations have faced infringements heavily and still

could not control it. Patents, Copyrights, Trademarks, Industrial Designs, Integrated circuits and Geographical indications are frequently mentioned in discussions and debates on diverse topics as Sustainable development, public health system, food, education, industrial policy, traditional knowledge, biodiversity, Internet of things, etc. In a knowledge-based economy, there is no doubt that an understanding of IPRs is indispensable to informed policy making in all areas of human development. It is but natural that in this new scenario, Intellectual Property Rights should occupy the central stage in the economic development [28-30].

A renewed awakening of the role of intellectual property in the countries of the various regions of the world led to the adoption or revision of national legislation on Intellectual Property Rights as well as to the establishment or modernization of Government structures that administer such legislation. The changing legal regime of IPR has become one of the crucial issues in the contemporary relations among nations. Central to such a concern has been the level of protection sought or contested on the rights at international and transnational level. It is critical to realize that we have entered in the era of a knowledge driven society where businesses in the market are increasingly becoming knowledge based entities without enough attention to the impact of knowledge dynamics on strategic management.

A business invests a great deal of efforts in the form of money and human intellect to create brands and products having the complex amity of trademarks, patents, copyrights and designs. The technical innovation in the product, its shape, size, packaging, its trade name, label, colour and combinations thereof makes the product, the brand an unique one with capabilities of creating competitive advantage for the parent business. If the same gets infringed by some fraudster who simply copies the above and pirates it or passes-off his substandard product/brand as the original, it can result into business loss for the original creator to an infinite extent considering the loss of revenue and human intellect. Hence, it is important for businesses to know and understand the value of the intellectual properties, manage them appropriately and protect them adequately to safeguard their investments and efforts and also to reap the deserved benefits themselves for their own work. This paper has tried to simplify this challenge with the objective of involving both academia and industry in improvising upon the knowledge base of the subject matter of IPR, its importance in business and its due protection to earn the benefits of competitive advantage.

In general terms of business management, IPR is considered as a legal entity where it is managed and taken care by a team of legal counsels who come into function every time the brand or products of the

business is being infringed and the reputation being compromised. In India, apart from Pharmaceutical, Information Technology and Entertainment other industries have not given IPR its due importance in business. Therefore we should work hard towards creating a culture of managing IPR as a part of strategic marketing so as to businesses create competitive advantage in the marketplace for every organization irrespective of the business type and industry. Be it an individual organization, an industry or even as a nation, IPR as a strategic marketing tool has the potential to create the future where brand, technology, service, people everything can together become a force for development and leadership. The suggestions to businesses for protection of their Intellectual Property Rights in India have been very thoughtfully proposed from experience and industry analysis, which if implemented in organizations across industries will benefit immensely.

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