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FUNDAMENTALS OF INTELLECTUAL PROPERTY LAW BY AAHELI BHOWMIK & SUVAJYOTI SAHA [*]

Introduction

Intellectual property refers to creations of the mind; products born from our thoughts and intellect and encompasses most notable forms of assets envisaged by our minds, such as inventions, literary works, artistic works, songs and music, trademarks, designs and names and images purposed for industrial use. The concept of intellectual property arose from the imperative need to devise some form of mechanization to protect creations of the mind and thought. Artistic works and literature were squandered and their value depreciated and lost in the passage of time. Inventions were conceived and geniuses birthed concepts and devices which were set to change the world, but they could most easily be duplicated and the originality of the idea, lost. It was this need to protect such works and ideas that founded the concept of intellectual property and laws to manage their usage and applicability to further the works of others. Intellectual property laws confer an array of exclusive rights in relation to the particular form or manner in which perceptions or instructions are expressed or manifested and their products thereafter, though not in relation to the ideas or concepts themselves.

Intellectual property rights have become important in the face of changing trade environment which is characterized by the following features namely global competition, high innovation risks, short product cycle, need for rapid changes in technology, high investments in research and development (R&D), production and marketing and need for highly skilled human resources. Geographical barriers to trade among nations are collapsing due to globalization, a system of multilateral trade and a new emerging economic order. It is therefore quite obvious that the complexities of global trade would be on the increase as more and more variables are introduced leading to uncertainties. Many products and technologies are simultaneously marketed and utilized in many countries. With the opening up of trade in goods and services intellectual property rights have become more susceptible to infringement leading to

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inadequate return to the creators of knowledge. Developers of such products and technologies would like to ensure R&D costs and other costs associated with introduction of new products in the market are recovered and enough profits are generated for investing in R&D to keep up the R&D efforts. One expects that a large number of IP rights would be generated and protected all over the world including India in all areas of science and technology, software and business methods.[1]

IPR are largely territorial rights except copyright, which is global in nature in the sense that it is immediately available in all the members of the Berne Convention. These rights are awarded by the State and are monopoly rights implying that no one can use these rights without the consent of the right holder. It is important to know that these rights have to be renewed from time to time for keeping them in force except in case of copyright and trade secrets. IPR have fixed term except trademark and geographical indications, which can have indefinite life provided these are renewed after a stipulated time specified in the law by paying official fees. Trade secrets also have an infinite life but they don't have to be renewed. IPR can be assigned, gifted, sold and licensed like any other property. Unlike other moveable and immoveable properties, these rights can be simultaneously held in many countries at the same time. IPR can be held only by legal entities i.e., who have the right to sell and purchase property. In other words an institution, which is not autonomous may not in a position to own an intellectual property. These rights especially, patents, copyrights, industrial designs, IC layout design and trade secrets are associated with something new or original and therefore, what is known in public domain cannot be protected through the rights mentioned above. Improvements and modifications made over known things can be protected. It would however, be possible to utilize geographical indications for protecting some agriculture and traditional products.[2]

Patents

Patents are exclusive right granted by a country to the owner of an invention to make, use, manufacture and market the invention, provided the invention satisfies certain conditions stipulated in the law. Exclusive right implies that no one else can make, use, manufacture or market the invention without the consent of the patent holder. This right is available for a

[1] 'Management of IP Rights in India'; R Saha
[2] *Ibid*

limited period of time. In spite of the ownership of the rights, the use or exploitation of the rights by the owner of the patent may not be possible due to other laws of the country which has awarded the patent. These laws may relate to health, safety, food, security etc. Further, existing patents in similar area may also come in the way. A patent in the law is a property right and hence, can be gifted, inherited, assigned, sold or licensed. As the right is conferred by the State, it can be revoked by the State under very special circumstances even if the patent has been sold or licensed or manufactured or marketed in the meantime. The patent right is territorial in nature and inventors/their assignees will have to file separate patent applications in countries of their interest, along with necessary fees, for obtaining patents in those countries. A new chemical process or a drug molecule or an electronic circuit or a new surgical instrument or a vaccine is a patentable subject matter provided all the stipulations of the law are satisfied.

The first Indian patent laws were first promulgated in 1856. These were modified from time to time. New patent laws were made after the independence in the form of the Indian Patent Act 1970. The Act has now been radically amended to become fully compliant with the provisions of TRIPS. The most recent amendment was made in 2005 which were preceded by the amendments in 2000 and 2003. While the process of bringing out amendments was going on, India became a member of the Paris Convention, Patent Cooperation Treaty and Budapest Treaty.

Copyright

Copyright is a right, which is available for creating an original literary or dramatic or musical or artistic work. Cinematographic films including sound track and video films and recordings on discs, tapes, perforated roll or other devices are covered by copyrights. Computer programs and software are covered under literary works and are protected in India under copyrights. The Copyright Act, 1957 as amended in 1983, 1984, 1992, 1994 and 1999 governs the copyright protection in India. The total term of protection for literary work is the author's life plus sixty years. For cinematographic films, records, photographs, posthumous publications, anonymous publication, works of government and international agencies the term is 60 years from the beginning of the calendar year following the year in which the work was published. For broadcasting, the term is 25 years from the beginning of the calendar year following the year in which the broadcast was made.

Copyright gives protection for the expression of an idea and not for the idea itself. For example, many authors write textbooks on physics covering various aspects like mechanics, heat, optics etc. Even though these topics are covered in several books by different authors, each author will have a copyright on the book written by him / her, provided the book is not a copy of some other book published earlier. India is a member of the Berne Convention, an international treaty on copyright. Under this Convention, registration of copyright is not an essential requirement for protecting the right. It would, therefore, mean that the copyright on a work created in India would be automatically and simultaneously protected through copyright in all the member countries of the Berne Convention. The moment an original work is created, the creator starts enjoying the copyright. However, an undisputable record of the date on which a work was created must be kept. When a work is published with the authority of the copyright owner, a notice of copyright may be placed on publicly distributed copies. The use of copyright notice is optional for the protection of literary and artistic works. It is, however, a good idea to incorporate a copyright notice. As violation of copyright is a cognizable offence, the matter can be reported to a police station. It is advised that registration of copyright in India would help in establishing the ownership of the work. The registration can be done at the Office of the Registrar of Copyrights in New Delhi. It is also to be noted that the work is open for public inspection once the copyright is registered.

Computer program in the Copyright Act has been defined as a set of instructions expressed in words, codes, schemes or any other form, including a machine-readable medium, capable of causing a computer to perform a particular task or achieve a particular result. It is obvious that algorithms, source codes and object codes are covered in this definition. It is advisable to file a small extract of the computer program at the time of registration rather than the full program. It is important to know that the part of the program that is not being filed would remain a trade secret of the owner but would have to be kept well guarded by the owner. It may be noted that computer programs will become important in the area of medicines when one talks about codification of DNA and gene sequencing. Generally, all copyrightable expressions embodied in a computer program, including screen displays, are protectable. However, unlike a computer program, which is a literary work, screen display is considered an artistic work and therefore cannot be registered through the same application as that covering the computer program. A separate application giving graphical representation of all copyrightable elements of the screen display is essential. In the digital era, copyright is

assuming a new importance as many works transacted through networks such as databases, multi media work, music, information etc. are presently the subject matter of copyright.[3]

Trademarks

A trademark is a distinctive sign, which identifies certain goods or services as those produced or provided by a specific person or enterprise. Trademarks may be one or combination of words, letters, and numerals. They may also consist of drawings, symbols, three dimensional signs such as shape and packaging of goods, or colors used as distinguishing feature. Collective marks are owned by an association whose members use them to identify them with a level of quality. Certification marks are given for compliance with defined standards. (Example ISO 9000.). A trademark provides to the owner of the mark by ensuring the exclusive right to use it to identify goods or services, or to authorize others to use it in return for some consideration (payment).

Well-known trademark in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services. Associated Trademarks are, in commercial terms, marks that resemble each other and are owned by the same owner, but are applied to the same type of goods or services. For example, a company dealing in readymade garments may use associated marks for shirts, trousers etc. means trademarks deemed to be, or required to be, registered as associated trademarks under this Act.[4]

Trade Secrets

The protected subject matter is information lawfully within the control of a natural person or legal person that is secret that has commercial value because it is secret and that has been subject to reasonable steps by the person lawfully in control of the information, to keep it secret.

[3] *Ibid*
[4] *Ibid*

Secret is defined as secret in the sense that it is not, as a body or in the precise configuration and assembly of its components known among or readily accessible to persons within the circles that normally deal with the kind of information in question." Undisclosed information, generally known as trade secret / confidential information, includes formula, pattern, compilation, programme, device, method, technique or process. Protection of undisclosed information is least known to players of IPR and also least talked about, although it is perhaps the most important form of protection for industries, R&D institutions and other agencies dealing with IPRs.

Protection of undisclosed information / trade secret is not really new to humanity; at every stage of development people have evolved methods to keep important information secret, commonly by restricting the knowledge to their family members. Laws relating to all forms of IPR are at different stages of implementation in India, but there is no separate and exclusive law for protecting undisclosed information / trade secret or confidential information. The Contract Act of 1872 would however cover many aspects of trade secrets.

It is difficult to define the term in its entirety but, for an easy understanding, it may be said that a piece of undisclosed information or a trade secret can be as simple an item as a company's customer list or as complex as a formula for a product or a process. Broadly speaking, the term would encompass information, including a formula, pattern, compilation, program, device, method, technique or process that provides the owner with an advantage over his business competitors who do not know or use it and is of significance or importance to the business of the company holding the information. Expanding it further, it may include new product plans, product costing, best material to use, sources of materials, financial standing of the business, accounting information, employee records, credit rating of customers, production information, manufacturing methods and processes, business methods, blueprints, test data, research reports, professional pollsters, technical drawings and organisational structure, specifications, process manuals, written instructions for operating the process and analytical means to check and control the product and processes, details of workshop practice, technical training and personal visitation and inspection. On the software side it would include source code; the data file structure, the structure sequence and organisation of computer program. It may also include information relating to a patented invention not included in the patent specification, inventions capable of being patented but not patented, inventions incapable of being patented in a particular country because of the

subject matter being excluded in the patent law of that country, inventions incapable of being patented by reason of lack of inventiveness, industrial designs capable of being registered but not registered, industrial designs having functional characteristics and skills, experience and craftsmanship of technicians. The information can be intangible and invisible as well and can take myriad forms, and therefore, any attempt to define it in an exhaustive manner would be practically meaningless.

A trade secret is a valuable piece of information with the essential requirement that the information be treated as such, i.e. as a secret. The value of a trade secret resides in the fact that competitors or other interested parties do not have access to it. Therefore, a trade secret must be kept secret so that no one could, without the consent of the owner, acquire it. Trade secrecy is basically a do-it-yourself form of protection. You do not register with the government to secure your trade secrets. The only way to acquire it without the consent of the owner would be through devious or unlawful means. The owner has the exclusive right to use / exploit a trade secret as long as it remains a secret. As a result, theoretically speaking, the term of a trade secret could be indeterminate or infinite. It is said that the trade secret of Coca-Cola still has not entered the public domain despite the fact that the common ingredients of Coca-Cola are known. A chemical composition falling in this category needs to be protected through a trade secret rather than patent which is a publicly known document. It is usually said that the term of the trade secret relating to a machine tool is only as long as the company keeps it internal secret. The moment the product is in the market, many people will know how to copy the product and the moment the product is copied the trade secret associated with the copied aspects will no longer remain valid and secret, hence the protection will be lost and the term of the protection will be over. By and large this would be true for design features but trade secret can be maintained about say, composition of materials used and the process conditions adopted for manufacturing.[5]

Industrial Designs

An industrial design refers to the ornamental or aesthetic aspects of an article. A design may consist of three-dimensional features, such as the shape or surface of an article, or two-dimensional features, such as patterns, lines or color. Industrial designs are applied to a wide variety of industrial products and handicrafts: from technical and medical instruments to

[5] *Ibid*

watches, jewelry and other luxury items; from house wares and electrical appliances to vehicles and architectural structures; from textile designs to leisure goods. To be protected under most national laws, an industrial design must be new or original and nonfunctional.

This means that an industrial design is primarily of an aesthetic nature, and any technical features of the article to which it is applied are not protected by the design registration. However, those features could be protected by a patent. Industrial designs are what make an article attractive and appealing; hence, they add to the commercial value of a product and increase its marketability.

When an industrial design is protected, the owner – the person or entity that has registered the design – is assured an exclusive right and protection against unauthorized copying or imitation of the design by third parties. This helps to ensure a fair return on investment. An effective system of protection also benefits consumers and the public at large, by promoting fair competition and honest trade practices, encouraging creativity and promoting more aesthetically pleasing products.

Protecting industrial designs helps to promote economic development by encouraging creativity in the industrial and manufacturing sectors, as well as in traditional arts and crafts. Designs contribute to the expansion of commercial activity and the export of national products. Industrial designs can be relatively simple and inexpensive to develop and protect. They are reasonably accessible to small and medium-sized enterprises as well as to individual artists and craftsmakers, in both developed and developing countries. In most countries, an industrial design must be registered in order to be protected under industrial design law. As a rule, to be registered, the design must be "new" or "original". Countries have varying definitions of such terms, as well as variations in the registration process itself.

Generally, "new" means that no identical or very similar design is known to have previously existed. Once a design is registered, a registration certificate is issued. Following that, the term of protection granted is generally five years, with the possibility of further renewal, in most cases for a period of up to 15 years.[6]

[6] Intellectual Property Rights WIPO

World Intellectual Property Organization

Established in 1970, the World Intellectual Property Organization (WIPO) is an international organization dedicated to helping ensure that the rights of creators and owners of intellectual property are protected worldwide, and that inventors and authors are therefore recognized and rewarded for their ingenuity. This international protection acts as a spur to human creativity, pushing back the limits of science and technology and enriching the world of literature and the arts. By providing a stable environment for marketing products protected by intellectual property, it also oils the wheels of international trade.

WIPO works closely with its Member States and other constituents to ensure the intellectual property system remains a supple and adaptable tool for prosperity and well-being, crafted to help realize the full potential of created works for present and future generations. As part of the United Nations system of specialized agencies, WIPO serves as a forum for its Member States to establish and harmonize rules and practices for the protection of intellectual property rights. WIPO also services global registration systems for trademarks, industrial designs and appellations of origin, and a global filing system for patents. These systems are under regular review by WIPO's Member States and other stakeholders to determine how they can be improved to better serve the needs of users and potential users.

Many industrialized nations have intellectual property protection systems that are centuries old. Among newer or developing countries, however, many are in the process of building up their patent, trademark and copyright legal frameworks and intellectual property systems. With the increasing globalization of trade and rapid changes in technological innovation, WIPO plays a key role in helping these systems to evolve through treaty negotiation; legal and technical assistance; and training in various forms, including in the area of enforcement. WIPO works with its Member States to make available information on intellectual property and outreach tools for a range of audiences – from the grassroots level through to the business sector and policymakers – to ensure its benefits are well recognized, properly understood and accessible to all.[7]

[7] *Ibid*

Conclusion

Intellectual property rights are one of the most important aspects of the creative world and need to be honored by those who are part of that world, as well as those who aren't. It is obvious that management of IP and IPR is a multidimensional task and calls for many different actions and strategies which need to be aligned with national laws and international treaties and practices. It is no longer driven purely by a national perspective. IP and its associated rights are seriously influenced by the market needs, market response, cost involved in translating IP into commercial venture and so on. In other words, trade and commerce considerations are important in the management of IPR. Different forms of IPR demand different treatment, handling, planning, and strategies and engagement of persons with different domain knowledge such as science, engineering, medicines, law, finance, marketing, and economics. Each industry should evolve its own IP policies, management style, strategies, etc. depending on its area of specialty. Pharmaceutical industry currently has an evolving IP strategy. Since there is the increased possibility that some IPR are invalid, antitrust law, therefore, needs to step in to ensure that invalid rights are not being unlawfully asserted to establish and maintain illegitimate, albeit limited, monopolies within the pharmaceutical industry. Still many things remain to be resolved in this context. Some critics of intellectual property, such as those in the free culture movement, characterize it as intellectual protectionism or intellectual monopoly, and argue the public interest is harmed by protectionist legislation such as copyright extension, software patents and business method patents. Although the term is in wide use, some critics reject the term "intellectual property" altogether. Richard Stallman argues that it "systematically distorts and confuses these issues, and its use was and is promoted by those who gain from this confusion." He suggests the term "operates as a catch-all to lump together disparate laws which originated separately, evolved differently, cover different activities, have different rules, and raise different public policy issues." These critics advocate referring to copyrights, patents and trademarks in the singular, and warn against abstracting disparate laws into a collective term. The Intellectual Property Rights (IPR) will have wide range of socio, economic, technological and political impacts. Rapid technology obsolescence and fierce competitions lead one to protect the innovations using the tools of IPR such as patents, trademarks, service marks, industrial design registration, copy rights and trade secrets. The legal framework for IPR is in a stage of dynamic adjustments and changes to accommodate the challenges and new situations that result from convergence of technology. Natural rights to the fruits of one's labor are not by

themselves sufficient to justify copyrights, patents and trade secrets though they are relevant to the social decision to create and sustain intellectual property institutions. Thus, it is imperative that focusing on the problems of justifying intellectual property is important, not because these institutions lack any sort of justification but because they are not so obviously or easily justified as people may think. We must, hence, begin to openly and imaginatively speculate alternative choices available to us to stimulate and reward intellectual labor. [8]

[8] Intellectual Property Right: Critical Concepts in Law, Volume 1