

The Rise of Intellectual property and the new IPR brigade in India

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Abstract:

This article is based on the emergence of the Intellectual Property Rights and its faster pace in rendering protection at different aspects. The paper tries to put emphasis on the legal protection system which acts as an IPR brigade to extinguish unfair trade practises that prevailed before the emergence of IPR law. Since about a decade ,IP practice was very less seen in full service law firms .But with advancement of economy starting from 1990's ,there was a change in the landscape with the entries of the foreign firms in India.IPR is a global practise. Indian client cannot alone generate revenue to manage law firms-says a managing partner of a firm. As global firms rushed in, the business of IP boomed –as did IP litigation. The sudden growth left the IP Indian practitioners in conflicting emotions between socialism and technological insperlism.As our culture is tuned to the gurukul system where knowledge holder is duty bound to disseminate whereas according to western approach the holder will leverage it.There are various opinion's for IPR,some are of view that it is anti-public, many are of opinion that India never had IPR as well cited by Anuradha Salhotra-managing partner of Lalu Lahiri & Salhotra.The debate of IPR is still continuing as IP is moral right or a econometrical right. This concept came into existence when India became signatory of WTO and there was a change in situation after TRIPS (TRADE-related aspects of intellectual property rights) came into force in 1995. It slowly showed its effects in 1998 with patent co-operation liberty. The IPR practice was seen all over in India and in every sector in the country with full-fledged successful steps people came to know the real value of their products and the rights of their own creation. The steps of IPR were broader rather than narrower. It captured the global sphere for safeguarding their brand name and logo. The introduction of patents, trademarks and copyright tried to stop the illegal activities to some extent in the countries.IPR is a brigadier to extinguish the fire of corruption to an extent. The rise of IP is well seen in prominent cases dealing with the product dealing will rice, television, medicines etc.The medicines companies are such-Cipla Norvartis,Remfry etc. This paper is purely based on the rise of IPR dealing with prominent case in recent times. It is also based on the study of particular firms and companies dealing with the own products and safeguarding their logo brand name and other things relating to the companies. It covers the judicial awareness in India, data protection paranoia with 180 years of IPR and super specialization of IPR law firms basing on different aspects of copy right, trademarks, patents within different sectors.

Keywords:

IPR, copyright, trademark, patent, brigade, TRIPS, Biotechnology.

Introduction:

As there are different brigades of IPR in India, The intellectual tally shows the IPR filing has grown twice over past five years. One of the most prominent brigades to be discussed in this is patent and its steps in biotechnological invention. IPR holds importance in almost every walks of life-well said by S.P Satakar in his book IPR and Copyright trace back to law and practices on patent in UK. The Indian patent Act 1970 was modelled on British Patent Act of 1949 as amended. The difference between the two is –in Indian Patent Act 1970 has granted product patent for food, medicines and chemicals. Patent law centres are based on concept of novelty and non-obvious inventions. The invention must be legally useful. The imitators and all independent devisors are prevented from using the invention for the duration of patent. Law on petty patent is similar to patent law but usually has a shorter term (often 7-10 years) with less rigorous patentability needs. This law allows the companies to protect inventions as a separate entity. The cost to register and maintain a petty patent is much cheaper.

The origination of patent is from a Latin term “literal patentees” (letter patent) which mean open letters has been defined u/s 2(m) of Indian Patent Act of 1970. It confers on patent owner or patentee negative right to exclude others from working and operating the invention for a limited period of time and hence grant the patentee exclusive monopoly right over his patented invention.

According to Indian Patent Act (2005) the patent period of 20 years after which the invention falls into public domain and anybody can use of the inventions. It is an exclusive right granted to a person who has invented a new and useful article or an improvement of existing article or a new process of making an article. The law grants patent to investors to encourage technological invention. Patent law requires an invention to be new non-Obvious/inventive steps and capable of industrial application for attracting the protection under it. In Biswanath Prasad Radhy vs. Hindustan Metal Industries, The Supreme Court of India held that grant of exclusive privileged for own use or sell the method or the product patented for a limited period, stimulates new invention of commercial utility. The price for the grant of monopoly is the disclosure of information regarding invention at the patent office, which after the expiry of the fixed period of monopoly passes into public domain.

The issues surrounding the top most IPR brigade i.e. patents in relation to biotechnological invention can be grouped into number of categories which are partly inter-related. Biotechnology means and include any technique that uses the living organisms or part of organism to make or modify products to improve plants or animals or to develop micro-organism for specific uses is well cited in report given by united states office of technology assessment (1989). This definition is rather broad and would embrace what some experts refer

to first, second and third generations of biotechnologies. The first generation includes traditional technology like beer brewing and bread making. The second generation begins with microbiological application developed by Louis Pasteur culminating in mass the production of fermentation of antibiotics. Tissue culture of modern plant and animal breeding also fall within this generation. The third generation include recombinant DNA (gene splicing), Hybridoma technology and genomics. The advancement in the field of law led to Patent Amendments Act 2005 which covers an area on:-

1. Product patents in all fields of technology.
2. Barring incremental invention and minor modification around drug molecules u/s 3(d).
3. Repealed the controversial sec 5(1) of patents act 1970 which highlighted on process patent and also removed the definition of food.
4. The original provision prohibiting the patentability of invention where computer programmes per se do not come within the purview of patent protection, as software the inherent part of machine or a device and is patentable.
5. The facility relating to exclusive marketing rights.
6. Checks on granting patent of new invention found u/s 2(1)(l).
7. The definition inventive steps involves technical advance as compared to the existing knowledge.
8. The new definition of pharmaceuticals is stated u/s 2(1)(ta).
9. Allowed both pre-grant and post-grant opposition within three months of publication, a person can file opposition but before expiry of one year from the date of publication of grant of patent, person can oppose a patent u/s 25(1) and 25(2).
10. The burden of proof in the case of infringement of patent is on the alleged infringer whereas the 1970's Patent Act was based on plaintiff to show there has been a violation of patent.
11. A Patent holder in respect of patent granted is prohibited from instituting an infringement suit.
12. Compulsory license for export of patented pharmaceuticals products inserted u/s 92(A)(l).
13. A provision requesting early publication.
14. Request for examination of application-it counts from the date publication within thirty six months from the priority date.
15. The time frame for putting an application is shortened to six months extendable by three months.

16. Provision relating to first selling in India has been reintroduced.

Patents of Biotechnology:

A patent is grant of exclusive rights for a limited time in respect of new and useful invention. The main motive for the grant of patent, the scope of protection it provides and its duration differs depending on national legislation. Generally invention must be patentable subject matter, new inventive of industrial application and sufficient disclosure. Patent no doubt provide a wide range of legal rights including the right to possess, use, transfer by sale or gift and to exclude others from similar rights. These rights are generally restricted to territorial jurisdiction of the country granting the patents and thus inventor wishing to protect his/her invention in a number of countries will need to seek separate patents in each of those countries. While the majority of countries provide some form of patent protection only a few provide patent protection for biotechnology (these include Australia, Bulgaria etc) the reason for this may differ but generally it has been because biotechnology has been thought inappropriate for patent protection, the reason is the system which was originally designed for mechanical or technical invention or practical reasons. In all National patent offices where the patents are granted for biotechnology there is a considerable backlog of pending applications. In every national system there is a considerable change in the type and extent of patent protection.

Moving our eyes from nook and corner it has been found that USA has provided a new ground in providing the possibility of patent protection. Patent has been granted for plants since 1930 in USA under the Plant Patent Act. However prior to 1980, the US Patent Office would not grant utility patents separate from the living matters because it deemed products of nature not to be within the terms of utility patent statute.

Elsewhere, the treatment of application for patents of living matter is far from certain. While patents are granted in many countries for plants and micro-organisms, it has been issue of patents for animals which has been most controversial. While it is not possible to summarise the position in the rest of the world; it is possible to describe the present approach of those countries which are the party to the European Patent Cooperation. This EPC dealt with the common system for patent protection with support with 14 European countries. It is also important to note that there is currently from European Parliament of European community for a council of directives for harmonization of legal protection provided for biotechnology in EC. This does not amend the EPC, but the present draft proposals would make even more opportunities available for patenting biotechnology and thus makes EC more attractive in terms of investment in biotechnological research.

There are three IPR international treaties which are of particular importance for the protection of biotechnology .They are

-The Paris Convention for the protection of industrial property which was signed in 1883 with support of 11 countries.

-The Budapest treaty on international recognition of the deposit of the micro-organism for the purpose of patent procedure or it is otherwise called a depository treaty.

-And the Patent Corporation Treaty (PCT) simplifies the process of filing the patent applications simultaneously in number of countries.

Unfortunately the eventful outcome is not the “world patent” and there is no harmonization patent law under PCT apart from the procedural aspects. The union for the protection of new plant varieties (UPOV) model cannot accepted in India, if India want to join UPOV, the first approach should be a change in the farmers Right Law, where UPOV doesn't recognise farmers right but cites importance to breeders entries neither to give protection nor food security.

In Oct 2002, gene campaign filed a PIL petition in Delhi High Court saying the government should not take any step that would mean dilution of farmers right he case is still in court and yet to be decided. The government cannot join with UPOV as it was in law that the developing countries which were enormously pressured to join UPOV. At this point India came out with alternative method but unfortunately our own people were undermining that. So to say we do not have a biotechnology policy and the former secretary of the biotechnology department Dr.Manju Sharma has gone on record as saying that India does not need a biotechnology policy .This is the way we are working .It is really dangerous. We do not think that India is the centre of origin of many crops. Why do we need to research? Whom to sell it? All these issues are to given much priority. Why we need a policy. That is the one set of concerns.

The other matters of concern are if we do not have a transparency and if there be no accountability. According to GEAC (Genetics Engineering Approval Crops) committee which is the highest decision body on every technical subject comprising five chairpersons? Can a mature and responsible scientific establishment function like this? The answer is No.

Judicial Awareness:

Even as new firms continue to mushroom in the countries, big IP centres (Chennai, Mumbai and Bangalore) and law tries to play catch up with growing complexity of business. The question that everyone is asking is: - Is our judiciary up to it? In the lower courts for instance the understanding of copyrights, trademarks and patents is elementary and the cases often get decided on social empathy, rather than on principles of infringement and business propriety. For instances ,it tool over 11 years of litigation to arrive a judgement that using a Mercedes –Benz logo for selling of Benz underwear was an act of infringement.

The Delhi, Bombay High courts are very IP savvy but there are smaller towns where judges are quiet ignorant and can seldom distinguish between different brigades IPR says Dodd.Anand however says” Judiciary cannot be blamed. FOR example the software where damages were granted and the average damage was Rs 14 lacs a case”, who has fought various landmark cases in Indian IPR. The solution is based on offer which is specialised in IP courts on the line of federal circuits in the US. The starting point is to get specialized courts to handle the deluge of patent litigation. It is time we gave IP a sense of priority says Raja opal.

The prominent cases relating of patents are as such:-

1. CSIR vs.RICETEC (K&s PARTNERS) Where Texas based rice tech were denied patent for texamati rice similar to basmati.
2. Norvatis vs. IPAB (Remfry & Sagar) Novartis denied product patent gets price patent for drugs.
3. Buyers vs.Cipla (Remfry & Sagar) court rejects the buyer plea to link patent status with generics regulatory approval.

Conclusion:

Time for Super Specilisation: Globally super specialisation among IPR law firms is mostly based on three prominent brigades Of IPR.India being a developing market, super specialization is not the order of the day. With client such as Qualcomm, erricsion, IBM and Pepsi, patents account for 60% revenue. Similarly IP Guru Poja Dodd says that her firm to be super specialist in anti-counterfeiting work.

But despite the aura the corporate legal fraternity has created some things don't change one of them is the image of lawyers, journalist and small businessman as habitual defaulters.

As patents has become a big chunk of IPR business, firms need experts such as biotechnologist or engineers. But Advocate Act 1961 forbids non lawyers to be partners of law firms.

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