



INTELLECTUAL PROPERTY RIGHTS: INDIAN SCENARIO

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Abstract

Global competitiveness has redefined business strategies worldwide and the focus has certainly shifted to examining how our knowledge resources can reposition our stand in the world market. It means that process of wealth creation is changing from resource based to knowledge based i.e. it now depends on brainpower and our ability to create, to sell, to explain and to solve problems. As a result, in future the wealth would more and more come out of our brains and less and less will it come out of the ground. And the goods and services being created by our brainpower would be marketed in the global village. Now a basic issue to be addressed is that how can this property of knowledge be protected? And prior to this we need to think that how the knowledge can be converted into property? Since knowledge is abstract and is not like a car or a house which can be locked and secured against theft. If anyone gains knowledge it does not reduce that available to others. There are two ways of turning knowledge into property. One way is secrecy, which is used to protect three types of information, namely trade secrets, know – how and rituals. Another way is Intellectual Property Laws, including Copyright, Patent, Registered Industrial Design and Trademark, legislation and conventions.

Intellectual Property Rights: Indian Scenario

Intellectual Property Rights – Defined

Intellectual property rights are provided as a protection and incentive to the creators, whose creativity could otherwise be freely used by others. The society expects the creators to make their work available in the market where this work can be bought and sold. But while the society wishes to encourage creativity, it does not want to help the grooming of harmful market power. And for this reason, certain limits are built in the rights granted to the creator, in terms of time and space, by the state. Rights are granted for fixed period of time and protect only the fixation of creativity in material form.

Intellectual Property Rights – Looking Back

Prior to General Agreement on Tariffs and Trade (GATT), intellectual property rights were not subject to formal international trade negotiations. Rather, intellectual properties were subject only to international conventions like Berne and Rome conventions concerning Copyrights. These conventions required 'national treatment', i.e. treat foreigners the same as nationals. As a result if the member nation opted to provide limited protection to the creators, then no greater protection was available to foreigners.

Intellectual Property Rights – The Days Ahead

Following the emergence of strong global and national intellectual property regimes the subject of intellectual property rights and their protection has become a central issue in economic development, scientific and technological development, protection of traditional knowledge and scientific and economic co – operation between industrialized and developing countries. IPR as an issue has become important because of the emergence of corporates' as dominant institutions. Today's world is a 'World of Opportunities and Threats' (WTO); wherein the knowledge dimension has acquired a new role in wealth creation. In this era of contemporary knowledge, the corporates' wish to establish their rights on this resource to ensure a proper 'Return on Investments / Invention / Innovation'. Where on one side these corporates' play a dominant role in discovering new knowledge, on the other side, these coporates' try to appropriate the knowledge of nations and communities. With the advent of globalization and a borderless world, nations have been weakened and corporates' have emerged as states in themselves. This has made attempts of piracy of people's knowledge easier. "How are we going to ensure that our Intellectual property is protected at an offshore location?" is a question often asked in board meetings of companies that are planning their offshore initiatives in India. The importance of IP exponentially increases in companies that are planning to execute some of their core projects offshore and in companies that need to provide access to classified company data to the offshore location for BPO/Call center initiatives. It is important for companies to understand IP rights in India and the best practices that can be followed to protect the IP.

Intellectual Property will no longer be seen as distinct or self contained domain, but rather as an important and effective policy instrument that would be relevant to a wider range of socio – economic, technological and political concerns. Moreover, as technological advancements have become a requirement for sustained growth in the future, a new emphasis is emerging on research and development. It is for this reason that intellectual property and its protection have gained greater importance. Intellectual Property has now been recognized as an important tool for technical, industrial and economic development.

Intellectual Property – Components

Intellectual Property essentially includes the products or creations of mind. Traditionally intellectual property was divided into two groups:

- 1. Industrial Property.** Industrial property includes Inventions (Process, Products and Apparatus); Industrial Designs (Shapes and Ornamentation) and Marks and Trade Names to distinguish goods.
- 2. Copyrights.** Copyrights broadly include Literary Work, Musical Works, including any accompanying Words; Dramatic Works, including any accompanying Music; Pantomimes and Choreographic Works; Pictorial, Graphic and Sculptural Works; Motion Picture and other Audiovisual Works; Sound Recordings and Architectural Works.

The convention establishing the World Intellectual Property Organization (WIPO) concluded in Stockholm on July 14, 1967 (Article 2 (viii)) provides that “Intellectual Property” shall include rights relating to:

1. Literary, Artistic and Scientific Works,
2. Performances of performing artists, Phonograms and Broadcasts,
3. Inventions in all fields of human endeavor,
4. Scientific discoveries,
5. Industrial Designs,
6. Trademarks, Service Marks and Commercial Names and Designations,
7. Protection against unfair competition and all other rights resulting Intellectual activity in the industrial, scientific, literary or artistic fields.

Significance of TRIPS Agreement

The Trade Related Intellectual Property Rights System (TRIPS) agreement is the most important development in international intellectual property law because it was made as an annex to the WTO agreement bringing intellectual property under the rubric of the trade for the first time. TRIPS has subsumed, the International Intellectual Property Regime created in the 1880's based on the judicial enforcement of IPR's and border control of trade infringements. This development was regarded necessary because of the perceived toothlessness of the Paris and Berne conventions and the inability of WIPO to modify the Paris Convention. The preamble to TRIPS heralded the demise of WIPO as the leading intellectual property agency by stating the desire of WTO members “to reduce distortions and impediments to international trade and taking into account the need to promote effective and adequate protection of intellectual property rights and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”

Intellectual Property Regime – Indian Scenario

A knowledge-based product requires protection so that the investments made by companies in Research and Development may be justified. It has been seen that developing countries, including India, provide a very weak intellectual property protection. India acknowledged in principle the case for strict IPR protection, but in India, this could be done only in phases suited by its own ground reality. The reality - absence of international IPR protection for some decades had spawned employment for millions, so an overnight clampdown on IPR violators would foment social unrest.

This has made the scene grim for companies investing / willing to invest in research and development efforts. India has lagged behind in formulating relevant laws, making it difficult to protect the country's biodiversity. We have a wealth of traditional knowledge and product's lying in the public domain that needs to be adequately protected. The Basmati controversy clearly underlines the need to have stringent IP laws. Had the Geographical Indication Law been there, Ricetec could not have branded its rice 'basmati rice lines and grains', as the law would have protected basmati on the basis of geographical indication, like France and Scotland did for Champagne and Scotch many years ago.

As globalization deepens further, it also increasingly encompasses the sharing, utilization and enjoyment of IP products like inventions, designs, books, etc. India is fast developing into a technology producing country, particularly in biotechnology, information technology and pharmaceuticals sector. Therefore, development of stringent and staunch IPR system is an urgent need. Keeping in view, this emergency the Indian corporates' are responding positively to TRIPS by gearing itself to increasing the R&D outlays. And as far as the government and legislation is concerned, the following work has been done in this direction, in order to provide a strong Intellectual Property protection system.

Amendments / Introduction of New Legislation

- 1. Copyrights.** India's Copyrights Act, 1957 as amended by Copyright (Amendment) Act, 1999, fully reflects Berne Convention on copyrights. Additionally, India is party to the Geneva Convention for the protection of rights and procedures of Phonograms and to the Universal Copyright Convention. India is also an active member of World Intellectual Property Organization (WIPO) and UNESCO. The copyright act has been amended periodically to keep pace with changing requirements. The recent amendment has brought the copyrights law in line with development in Satellite broadcasting, Computer software and Digital technology. The amended law has made provisions for the first time to protect performer's rights as envisaged in the Rome Convention. On the other hand, on the implementation front, several measures have been adopted to strengthen and streamline the enforcement of copyrights. These measures comprise setting up of a Copyrights Enforcement Advisory Council, training programs for enforcement officers and setting up special policy cells to deal with cases relating to infringement of copyrights.
- 2. Trademarks.** With regards to Trademarks, the TRIPS agreement provides that the initial registration of trademarks, and each renewal of registration shall be for a term of not less than 7 years. The registration shall be renewable for an indefinite period. Compulsory licensing of trademarks is not permitted. Keeping in view the requirement of TRIPS agreement, changes in trade and commercial practices, globalization of trade, need for simplification and harmonization of trade marks registration systems, a comprehensive review of the Trade and Merchandise Marks Act, 1958 was made and a Bill to repeal and replace the act has since been passed by the parliament and notified in the gazette on 30-12-99. This amendment not only makes the Trademarks law compatible to the TRIPS agreement, but also harmonizes it with international systems and practices.

- 3. Geographical Indications.** The TRIPS agreement contains a general obligation that parties (countries) shall provide the legal means for interested parties (countries), to prevent the use of any means in the designation or presentation of good that indicates or suggests, that the good in question originates in a geographical area, other than the true place of origin, in a manner which misleads the public, as to the geographical origin of the good. There is no obligation under the agreement to protect geographical indications which are not protected in their country of origin or which have fallen into disuse in that country. A new law for the protection of geographical indications, viz. The Geographical Indications of Goods (Registration and Protection) Act 1999 has also been passed by the parliament and notified on 30-12-99.
- 4. Industrial Designs.** Obligations envisages, in the TRIPS agreement, in respect of industrial designs are that independently created designs that are new or original shall be protected. Individual governments have been given the option to exclude from protection, designs dictated by technical or functional considerations, as against aesthetic consideration, which constitutes the coverage of industrial designs. The right accruing to the right holder is the right to prevent third parties not having his consent from making, selling or importing articles or embodying a design, which is a copy or substantially a copy of the protected design, when such acts are undertaken for commercial purposes. The duration of protection is to be not less than 10 years. A new law repealing replacing The Designs Act, 1911 has been passed by parliament in the budget session, 2000. This act has been brought into force from 11-05-01.
- 5. Patents.** The basic obligation in the area of patents is that, invention in all branches of technology whether products or processes shall be patent able if they meet the three test of being new, involving an inventive step and being capable of industrial application. In addition to the general security exemption which applied to the entire TRIPS agreement, specific exclusions are permissible from the scope of patent ability of inventions, the prevention of whose commercial exploitation is necessary to protect public order or morality, human, animal, plant life or health or to avoid serious prejudice to the environment. Further, members may also exclude from patent ability of diagnostic, therapeutic and surgical methods of the treatment of human, animals and plants, other than microorganisms and essentially biological processes for the production of plant and animals. The TRIPS agreement provides for a minimum term of protection of 20 years counted from the date of filing. India has already implemented its obligations under Articles 70.8 and 70.9 of TRIPS agreement. A comprehensive review of the Patents Act, 1970 was also made and a bill to amend the same was introduced in parliament on 20th December, 1999 and notified on 25-06-02 to make the patent law TRIPS compatible.

Modernization of Intellectual Property Administration

The Government, in a series of strategic responses to economic liberalization and globalization, has put on priority the modernization of IP Administration. Following steps have been taken:

1. Modernization of patent offices, located at Mumbai, Delhi, Chennai and Kolkata (Head Office), sanctioned at a cost of Rs. 75.79 crores in December, 1998. The components of

project included, human resource development, computerization and re-engineering of work practices, clearance of backlog of pending applications and operational and financial autonomy.

2. Effective steps have been taken in terms of acquisition of additional accommodation for Delhi, Kolkata and Chennai offices and its renovation, computerization of operations, provision of additional staff, improvement of library facilities and novelty search facilities, etc.
3. Efforts have been made to improve the working of the patent offices within the resources available and that the problem of backlog is also being attacked through 50% higher monthly target for disposal of patent applications per examiner.
4. A steering committee, comprising representatives of Patent Offices, NIC, NID, NPC, Finance Wing, etc., regularly monitors the progress of implementation.
5. Website of Patent Office (<http://patentoffice.nic.in>) was launched. Work manual of the office is put in use. Information brochures on different aspects of intellectual property, including patents, have been released. On-line search facilities have also been established.

Measures to Strengthen the Enforcement of IP Laws

Number of measures to strengthen the enforcement of copyright law has been taken by the Government of India. The summary of the same is as follows:

1. The Government has brought out A Handbook of Copyright Law to create awareness of copyright laws amongst the stakeholders, enforcement agencies, professional users like the scientific and academic communities and members of the public. Copies of the Handbook have been circulated free-of-cost to the state and central government officials, police personnel and to participants in various seminars and workshops on IPR.
2. National Police Academy, Hyderabad and National Academy of Customs, Excise and Narcotics conducted several training programs on copyright laws for the police and customs officers. Modules on copyright infringement have been included in their regular training programs.
3. The Department of Education, Ministry of Human Resource Development, Government of India has initiated several measures in the past for strengthening the enforcement of copyrights that include constitution of a Copyright enforcement Advisory Council (CEAC), creation of separate cells in state police headquarters, encouraging setting up of collective administration societies and organization of seminars and workshops to create greater awareness of copyright laws among the enforcement personnel and the general public.
4. Special cells for copyright enforcement have so far been set up in 23 States and Union Territories, i.e. Andhra Pradesh, Assam, Andaman & Nicobar Islands, Chandigarh, Dadra

& Nagar Haveli, Daman & Diu, Delhi, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Meghalaya, Orissa, Pondicherry, Punjab, Sikkim, Tamil Nadu, Tripura and West Bengal.

5. The Government also initiates a number of seminars/workshops on copyright issues. The participants in these seminars include enforcement personnel as well as representatives of industry organizations. As a consequence of the number of measures initiated by the government, there has been more activity in the enforcement of copyright laws in the country. Over the last few years, the number of cases registered has gone up consistently.

IPR Protection – Some More Issues

India has enacted fully TRIPS compliant Patents Act, Trademarks Act, Copyright Act, Designs Registration Act and such other acts related to fields of IPR. However, though most acts have been TRIPS compliant, in the Patents Act there are areas where substantive or procedural amendments could be considered for complying with the TRIPS. Business methods/ models or computer programmes comprising only mathematical or scientific principles are not patentable under the present act. Thus protection could be provided, under the Patents Act, for business methods qualifying as technology. Another important issue is that computer programmes qualify as expressions and can be protected under the Copyrights law. However, in certain sectors the need is being felt for getting a patent protection for certain software in addition to the copyrights. Copyright protects the coded expressions of software, while patent protection can protect the qualifying features of the software, such as its sequence, structure and organization or its functional elements.

Conclusion

Today possession of land, labor and capital are just not enough for a country to succeed. Creativity and innovation are the new drivers of the world economy. The policies adopted by a country shall determine the nations well being. Development of a country's intellectual Capital is the most important task in these regards. An effective intellectual property rights system lies at the core of the countries development strategies. Within knowledge based, innovation driven economies, the intellectual property system is a dynamic tool for wealth creation, providing an incentive for enterprises and individuals to create and innovate a fertile setting for the development of , and trade in, intellectual assets, and a stable environment for domestic and foreign investments. Although India has complied with the obligations of TRIPS by amending the IP laws, certain issues are still needed to be taken care of. And there is a need for a constant thinking over the core issue of IP protection, in order to respond to situations arising out of global competition.

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