

Is the Indian Judiciary Ready To Face The IP World?

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Abstract

World around us is moving in great hustle. From ancient method of waiting for tabloid at daybreak we have progressed up to e-newspapers. To simply, a lot of things around us are getting technology oriented.

New ideas are developed very often making life easier and comfortable though a bit stylish. But these new creations make life of the intellectual property businessmen complex.

First a good lump of their life is spent giving a physical shape and expression to their thoughts/ideas. When it comes to availing themselves of accruals for the same, sometimes they are left uncared by the society, law and justice delivery system. All shows indifference, unpredictable time in prosecution and litigation for the recognition of their work and no effective mechanism for security of the benefits for them are the real constrains. Many a times, years are spent by benefit reapers knocking the doors of several courts for getting their intellectual property identified and justified before the court. Even after entering into litigation and court they are not sure to get justice. This scenario is true for civil, criminal and all other cases. But my work will be confined to issues related to IPR litigation. Whether the above scenario is not enough to instigate our think tank for a relook around this centrally targeting justice delivery system.

It is high time for us, the Indians, to realize that our real asset includes not only our land, fixed deposits and goods, but creativity, innovation, inventions and de-novo are also our real asset. It is simply amazing to take note of how much value Intellectual Property can generate?

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Is The Indian Judiciary Ready To Face The IP World?

Introduction

Under Intellectual Property regulation, proprietor is allowed definite private rights for his intangible belongings which may comprise of music, literature, creative works, designs, novelty and discoveries. These possessions have to be preserved. In order to preserve our ideas we must learn to recognize it as a property. And this recognition of property needs to be done purely in the structure of internationally established norms which are known as Intellectual Property (IP) law.

India is the one of the major countries known for having exceptional pool of intelligent minds and therefore there is a depth potential of Intellectual Property. In the past 50 years creativeness has been universally acknowledged as an separate property which can be relished, developed and shifted like any other property to the prohibition of others for the creation of those ideas by the person crafting those or by the person financing.

Initial bond of trade in Intellectual Property arose in the year 1983, after the Uruguay session which led the establishment of General Agreement on Tariffs & Trade (GATT) and in 1995 came Trade Related Intellectual Property Rights (TRIPS). The purpose of TRIPS agreement was mentioned in Article 7 of the agreement states as under:

‘the protection and enforcement of IPR should contribute to promotion of technological innovation and to transfer and dissemination of technology, to the mutual advantage of producers and uses of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations.’²

Development of Intellectual Property is in the hands of the society. But again Intellectual Property is not a portable or permanent property whose control can be actually or materialistically conveyed. Ownership of land can be communicated by fencing land. The owner of the car can express intention by possessing its keys. But what about the ownership of this paper? (*Animus possidendi - corpus possidendi*). If inventions are not spread, the world will be the eventual loser and will be deprived of advanced goods and beliefs. Thus such an incompetent physical control over this property but carrying ideals worth billions and zillions

² TRIPS AGREEMENT (1995), art. 7.

must be conserved. Intellectual Property is an incorporeal property whose control cannot be demanded by fencing it or possessing key. A different machinery is required either to recognise Intellectual property or to reserve it for individual or social resolve. For protection of this property which is earned by knowledge; we have developed several laws.

Background

The effective safeguard of the Intellectual Property can be carried out by judiciary, with understanding of laws, statues and judgments (foreign and municipal). These analyses and verdicts form a definite type of law. But it is very essential that later on the same adjudication must be reliably followed.

As fittingly said by a prominent international jurist Archibald Cox in his book the *Court and the Constitution* “*The court Decision often shape the course of our nation’s life.*”³

In India, the legislations such as Copyright Act, 1957, The Patent Act, 1970, The Trade Mark Act, 1999, The Design Act 2000 were passed to safeguard the Intellectual Property of the owner. But, an activist for intellectual property right cannot restrict himself to aforementioned limited laws rather general laws concerning to cases under Code of Civil Procedure, grievances for wrongdoings under the Indian Penal Code, 1860, the Criminal Procedure Code, 1872, the Contract law, 1872 and laws related to civil and criminal negligible, land practice thereof cannot be alienated and ignored. Intellectual property must be given due recognition for its impact on GDP of the country and its violation must be prevented. Any breach of intellectual property right may cause huge personal or national loss which might not be easily calculable and may be veiled and not even apparent.

Indian scenario

The Intellectual property law system of our country is over 150 years old. After studying the the results, we come to a conclusion that our law-making body is quick towards intellectual property law. In India, patent law was existing from 1856. With time, the fresh legislatures kept coming in the year 1859, then in 1872 followed by 1911. Later amendment to the 1911 Act took place in 1950. Then finally came the laws of patent which we are still followed “The Patent Act of 1970”.

³ ARCHIBALD COX, THE COURT AND THE CONSTITUTION, (Houghton Mifflin Harcourt Publishing Company, 1987)

The twenty-first century is controlled by power of knowledge. Possibly today we are in an intellectual gen century. In the contemporary situation our personal intellect is really a creative power and property at our discrete command.

Every person is the unchallenged owner and source of his distinct intelligence. He is accountable for its use. To possess intellectual property is to own the profits as well as the dangers arising out of that property. By shielding breach of intellectual property financial inducement can be availed by inventor and this economic incentive will initiate one for advance researches. At the same time distinct proprietorship of an intellectual property will help the people to peg the accountability and recognise the source if this intellectual property is found to be a contaminant. Thus, a tough intellectual property law will draw new investments and encourage progress of new know-how with due safety measure.

The courts ought to march hand-in-hand with law makers. The courts in India are authorised under the municipal laws to grant aids against abuse of Intellectual Property rights, and the restrictions are echoed in Part III of the TRIPS Agreement which are now adopted enabling the courts to safeguard these reserved rights⁴.

Georgia-Pacific Crop v. U.S. Plywood champion Paper⁵ laid down rules by determining royalty based upon procedures by determining royalty based upon assumed arbitration.

Francis Bacon has said "The works of creators of States, law-givers, despot destroyers and heroes cover but constricted spaces, and tolerate but for little time, while the work of the creator though of less splendour is felt everywhere and lasts forever."⁶

Our judiciary is also functioning hard to identify and give status to intellectual property. Court of law has tried to construe 'property' time and again. Property does not only comprise concrete property. Property is pool of rights. In Writ Petition (Civil) 12598 Of 1985 in the case of Shri Krishna Gyanoday Sugar Ltd. & Anr. Vs. State Of Bihar⁷, the Supreme Court discussed to R.C.Cooper's Case⁸ in the following words:

In its normal meaning "property" means "highest right a man can have to anything, being that right which depend on another's courtesy: It includes ownership, estates and interests in

⁴ Justice R.K. Abichandani, Role of Judiciary In The Effective Protection of Intellectual Property Right

⁵ Georgia-Pacific crop v. U.S. Plywood champion Paper, 446 F.2d 295.

⁶ Quoted in Mainly on Patents, Felix Liebesny, Ed. (1972) at p. 1

⁷ Shri Krishna Gyanoday Sugar Ltd. & Anr.v. State of Bihar , (2003) 132 (Manu).

⁸ R.C.Cooper's Case v. Union of India, (1970) 564 (AIR).

corporeal things, and also rights such as trade-marks, copyrights, patents and even *rights in personam* capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value.” (Date of Judgment: 18th February, 2003). Even article 300-A of the Constitution of India ensures that no citizen is deprived of his or her property rights.

Intellectual Property Right litigation system in India

India has established judiciary with Supreme Court with highest power under Article 142 to mark any order for widespread justice in any cause or matter. These are subordinate courts also accessible in addition to Supreme Court and High Courts. Cases relating to violation of Intellectual property right cannot be filed in any court lower than District Court. Breach of intellectual property is tortuous attack on property. In dealing with intellectual property, judiciary has an important role in adjudicating claims of different party. It is also expected to compensate for the complaints and to discourage such wrongs because intellectual property rights can be easily invaded devoid of touching or coming in knowledge of the owner.

Hierarchy of Indian judiciary to deal with IPR infringement matters

In India, only High Courts have the power to deal with matter of both breach and irrationality instantaneously.⁹ A specific medium, i.e., Intellectual Property Appellate Board (IPAB) has now been formed¹⁰. Provisions associated with IPAB were incorporated into the Act in 2002 and are enforced now.¹¹ Also, all unresolved appeals from Indian High Courts under the Patents Act were to be moved to the IPAB since April 2, 2007. The IPAB has its head office at Chennai and ensures sittings at Chennai, Mumbai, Delhi, Kolkata and Ahmedabad. The IPAB also has special jurisdiction on problems related to cancellation of patent and modification of register.

Intellectual Property in US

Due to globalization, easy availability of info, know-how, expansion of advanced models of commerce and decrease of trade restrictions by establishment of clusters and associations of states like EU, SAARC, NAFTA, G-8 etc. intellectual property has developed into a transnational concept; and also resulting it to become increasingly susceptible to

⁹IPPRO Services (India), *Patent Infringement & Litigation in India*, (2009)

¹⁰ Intellectual Property Appellate Board (IPAB) has been constituted by a Gazette notification of the Central Government in the Ministry of Commerce and Industry on 15th September 2003

¹¹ Official Website of IPAB; (www.ipab.tn.nic.in)

infringement¹². The United States placed India along with 10 other nations on its 'priority watch list' for not providing satisfactory intensities of protection or administration of Intellectual Property Rights¹³. In its annual report on competence and efficiency of US trading partners' protection of Intellectual Property Rights (IPR), the US Trade Representative (USTR) Ron Kirk advised India to increase its IPR regime by providing tougher safeguard for patents.¹⁴ This lackadaisical attitude to IPR has also had an adverse effect on the way India protects its own patents.¹⁵ The country hold-ups far behind other countries when it comes to registration of its products on a national and international scale.¹⁶ Just over 1,000 patents were recorded with WIPO in 2004, paralleled to over 44,000 by US residents and 13,531 by Japanese aspirants¹⁷.

In India the need for a distinct organisation for Intellectual Property was realized late and IPAB started working from September 15, 2003. Primarily it had limited authority related to Geographical Indication Act, 1999 and Trademark. After, 2007 it can now adjudicate claims on patent as well. In contrast, in US Federal Circuit Court for IPR problems was established in 1982.¹⁸ Although proceedings time of US court is very less compared to India but proceedings cost is too high. Due to high proceedings cost most of cases are settled outside court. Experimental scholarship suggests that only 1% of patents are ever prosecuted.¹⁹ This is due to high cost involved in litigation²⁰.

In India, the whole process of litigation is very slow and tardy. For example, it took over 11 years to reach on a verdict that using the Mercedes-Benz logo for selling Benz underwear was an act of violation²¹. And still high-value suits are not affected by this (suits with monetary value of Rs 25 lakh and above go straight to the HC), cases where monetary value is indescribable often bear the effect on lower courts²².

¹² Ranjan Kumar Misra, *From Legal Information to Knowledge IPR-Enforcement Law in India*.(Blog.law.cornell.edu), August 30, 2013.

¹³ *India on US watch list for inadequate IPR protection*, The Deccan Herald, May 1, 2012, p.3.

¹⁴ Ibid.

¹⁵ Terry Adams, *Crunching on Patent Data*, New Legal Review, (2012).

¹⁶ Ibid

¹⁷ Ibid.

¹⁸ Federal Judicial Center page on the Federal Courts Improvement Act, P.L 97164 §165, 96 Stat.50, (1982)

¹⁹ Mark A. Lemley, *Rational Ignorance at Patent Office*, 95 Nw.L.1995 ,1501 (2001).

²⁰ Ibid

²¹ Daimler Benz Aktiengesellschaft ...v. Hybo Hindustan, (1994) AIR 23 (Del.).

²² Ibid.

Thus to defend the nation-wide creativeness and to enable the development of pioneering ideas, a tough, structured, organised and above all learned expert is essential. This will also lessen litigation period.

In *Bilski v. Kappos*²³ a case decided on November 9, 2009 by the United States Supreme Court over 60 *amicus curiae* briefs were filed. This helps court to decide correctly. When it comes to our country, having 60 *amicus curies* for cases related to Intellectual Property Rights to help the court. The technical consultants play a significant role of helping the courts, in any case for breach or in any proceeding before the court of law, whenever called by the court. Hence, the patent office must release a list of technical advisors.

As the law is changing, and legal theories are being reinterpreted, the ease of access and openness in the field must be protected though intellectual property contracts. Yet, growth of effective tactics requires understanding in the intellectual property law, something which is often missing in the academic world. Actions need to be taken to cut the knowledge gap so that scholars will be able to make up to date decisions with respect to these issues.

Major Challenges

Rights of intellectual property is an area of growing argument. Let Indian judiciary grow with the developing challenges in the current situation of out of court settlements -

- Recognising intellectual property with precision
- Nailing down intellectual property
- Fixing intellectual property with its real proprietor
- Safeguarding of intellectual property
- Protection of right of the proprietor of the property

With these type of challenges are encountered in field of intellectual property there is a need for a trained, specialized and tactful judiciary. In the context, judiciary refers to both, the judges as well as the bar.

Creation, duplication and placing old wine in new bottle is not intellectual property. This has to be filtered rather re-filtered. There is a different role for judiciary i.e. determining the ratio and proportion of the corresponding rights. The worth of Intellectual Property is not at all

²³ *Bilski v. Kappos*, (2010) 130 S. Ct. 3218.

times result of person's effort. It doesn't every time come in a short span of time and hence the judiciary has to measure and decide individual proportional input subject to the quality or quantity of time, effort and resources put in by the individual.

The judiciary must be able to comprehend intellectual property, identify intellectual property and predict the utility of the same. It is vital that the quantum of damage fixed in encroachment of intellectual property ought to be such that it not only protect the holder but also prevent any subsequent infringement.

Judiciary needs reformation

Our judiciary requires upgradation while dealing on intellectual property. It seems that our learned judges are not knowledgeable enough of the intellectual property concepts and its several dimensions and complications. As a result of which some absurd rulings have come in this arena which we believe to be set right soon. About 600 Intellectual Property cases are pending decision in several courts, according to industry estimations, primarily due to the lack of special courts and trained judges.

The Novartis case

On 1 April 2013, The Indian Supreme Court, in *Novartis v UOI*²⁴ has generated a great degree of backlash from the patent regime in the world. The decision has the India under US black list due to concerns 'raised by the innovation climate in India' [that] 'risks hindering the country's progress towards an innovation-focused economy'.²⁵ On the other hand, Médecins Sans Frontières called the litigation and attack on the pharmacy of the developing world 'inappropriate revocation' of patents on several life-saving drugs. There was a need for proper interpretation of S 3(d), which is essential the terms of the TRIPS obligations are complied with. Unfortunately the SC's have damaged the functionality in S 3(d) to provide a robust basis for the rejection of trivial patents on secondary pharmaceutical innovation by ignoring the role of the person skilled in the art in S 3(d).

The decision in *Novartis v UOI* heralds a post-TRIPS coming of age for many jurisdictions like India, including Thailand, Brazil, Malaysia and Indonesia. There is an urgent need to build up legitimate legal standards, tests and principles around domestic patent legislation that do not replicate the predicament around patentability standards that several jurisdictions

²⁴ *Novartis v. Union of India*, (2013) AIR 2706 (S.C.).

²⁵ Office of United States Trade Representatives, *Special USTR Report* 301.(2013).

(www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf)

face.²⁶ Legal strategies must include transparency that facilitates scrutiny²⁷ and a body of carefully analysed precedents from own and other jurisdictions.²⁸ In this respect *Novartis* showcases much needed legal pluralism for which the Indian legal system deserves respect irrespective of the missed opportunity that lies at the heart of the decision.

Placing *Novartis v UOI* against a backdrop of patent law in the UK and in Europe highlights the international legal significance of this decision. The UK experience of patent protection and enforcement has largely been positive for pharmaceutical companies who appear to consider this forum as fair and even friendly. Although there are many aspects of Indian patent law that are directly resonant of UK patent law, higher appellate courts in India, rather confusingly, rely on material from a wide array of jurisdictions.

In cases involving patents and trademarks it has been realised in lower courts that cases are decided more on public understanding rather than regulation and statutes and economical characteristic for the same. This is for the reason that there is an inadequate understanding of intellectual property law in lower courts. Judges should have real knowledge of jump, jerk and jolt of R & D. They must be qualified to recognise the nuances of practical ideas, technical researches, engineering and design finesse and particulars associated with that. Due to lack of information intellectual property cases particularly related to patents remain undecided for decades. Madan Lokur, once an acting chief justice of the Delhi high court, said at an occasion to mark World Intellectual Property Day said some courts had shown capability by disposing cases quickly. But nearly 85% of the decisions are appealed again, which would add to the number of cases related to intellectual property in higher courts, he said.²⁹

The study³⁰ of 54 judges of Mumbai High Court in the year 2012 shows that only 15 out of 54 are BSC LLB. Rest all are from pure arts education and none have any practical background. Therefore excluding these 27% judges rest does not even have simple science education and go on deciding cases which comprises of lot of understanding of knowledge and nuances of technology. In such a case can the decisions be very effective?

²⁶ *Actavis v. Merck*, (2008) 444 EWCA Civ.

²⁷ *Schering v. Geneva* 348 F 3d 992.

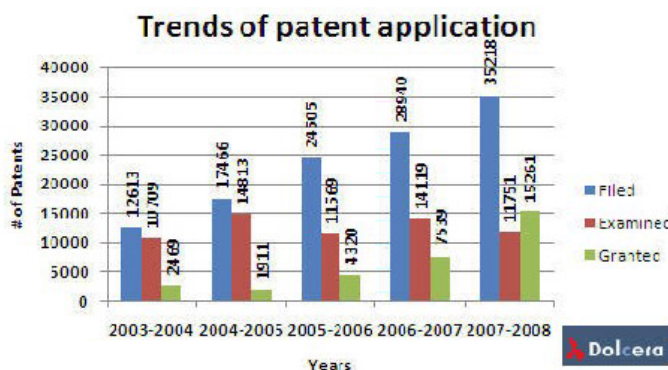
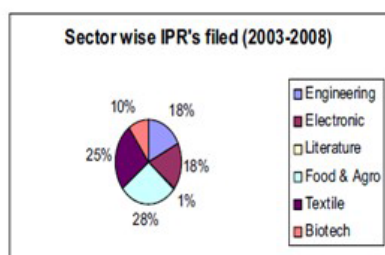
²⁸ Such as the UKIPO patent examination guidelines – a stellar and invaluable body of research that maps legal tests and standards as well as gaps and ambiguities in case law going back several decades. The guide relating to chemical inventions is available at <www.ipo.gov.uk/chemicalguide.pdf>

²⁹ *Ibid.*

³⁰ Confederation of Indian Industry, *Annual Report*, (2009).

If there were judges and lawyers of B.Tech, environmental Science or biological background in the judgement of Bhopal Gas Tragedy then there is a chance that the compensation given would have been decided otherwise. These criterion does not go for judges only. Bar should also have practical knowledge. This will make way for a better quality of litigation and justice will move faster to truth.

As person handling the cases of IPR, he should have varied and sufficient if not thorough knowledge of various fields. Here below is imitated the flow of intellectual property right claim applications in India between 2002-2008 graphics. This shows the several fields in which intellectual property rights have been claimed. This pie-chart is not the end. Cases are pending concerning various technologies, stretching from computers to biotechnology to biomedical policies, x-ray structures, cable television technology, polymer plastics and numerous electro-mechanical and machine-driven devices. New areas of inventions and design always keep coming. Thus person dealing in intellectual property matters should not only have know-how in his domain but must not be untouched and ignorant of other existing domains rather should have secure grip over other areas as well.



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Graph is showing predictable demand of intellectual property rights justice and supply of the same at current level and necessary level. In order to preserve our knowledge as asset, our judges needs to be trained on IP laws. Even in Indian judiciary, program such as 'pilot program' are compulsory. This was a program launched to teach district judges of US to improve expertise in patent cases³². Such education will increase level of proficiency and better proceedings and more expert verdict can come from the chair. There is no intent to hurt anyone, but it is silly to suppose judges to oversee patent suit of a product of which they have

³¹ Supra 10.

³² Jacqui Cheng House, *Judges patently in need of patent education*, ARSTECHNIa.com, February 14, 2007.

no clue. Perhaps there are old system diseases which we have both inherited and have developed due to numerous constraints.

In order to protect our intellectual property and its management it is obligatory to make sure that those weaknesses which occur with current legal action do not pollute this intellectual property machinery. Let us have a distinct comprehensive machinery and law to control intellectual property so that this area is not put to a crushing stop due to the faults of all practical and material law particularly law of property and others. The plan of having distinct “IP courts in India” gives a virtuous ray of hope.³³

Efforts made

Due to agony and work of legal theorists and processors and intellectual property campaigners the time of litigation in intellectual property issues has substantially reduced. It is accumulative effects of numerous changes, alterations that has been brought. Amongst the modifications introduced were: a) written declarations must be filed within 30 days, extendable to maximum 90 days, b) evidence can be led on confessions with a right to cross examine, c) evidence could be noted or presented, before a Local Commissioner instead of a Judge.

Government is making hard efforts to introduce e-court structure to support judiciary. Although till 2012 it has been effective only in Delhi High Court. In Delhi HC e-court system is working since December 2008.³⁴ This model of an electronic court, which means that there are e-filing, e-service of summons, e-hearings, e-orders, and e-evidence etc. will cut the time and length of litigation.³⁵

Establishments like National Judicial Academy, Bhopal are being established with an objective to have qualified and better prepared judges. State judicial academies in each state has also been launched, although efficiency of these organisations are still under question. Police Academy is also joining hands with judiciary and institutes like National Police Academy is also in work towards giving that chance and experience to judges.

The Supreme Court of India by some breakthrough judgment has directed all the courts in India for quick trial and clearance of intellectual property associated cases in the courts in

³³ Meg Kinnard, *Special Courts Planned to clean*, The Wall Street, April 24, 2010.

³⁴ Amit Sinha, *Can innovative e-court system eliminate India's legal anguishes?*, LITTLE ABOUT.com, Dec 17, 2009.

³⁵ Ibid.

India.³⁶ In a practically two-year-old difference concerning two companies, which have been locked in a patent dispute over the use of a twin-spark plug engine machinery, the Supreme Court witnessed that suits concerning to the matters of patents, trademarks and copyrights are undecided for years and years and lawsuit is mainly fought between the parties about the provisional injunction. The Supreme Court directed that trial in the intellectual property problems should continue on day to day basis and the final verdict should be given ordinarily within four months from the date of the filing of the suit.

The Supreme Court further directed to all the courts and tribunals in the country to promptly and devotedly carry out the aforesaid orders.³⁷

As such it is crystal clear that Indian Judiciary has a very developmental prospective role in the arena of intellectual property and the role has wide global difficulties. Indian judicial system can no more afford to be a status quest association in the sharp shifting world of intellectual property. Now the judiciary should have geometrically mounting proportions and perhaps super sonically quickening speed of change. But then our Indian judicial system has been tried on so many counts positively. I am sure that our system will prove its worth both quantitatively and qualitatively.

A suggestion

My humble opinion is that in order to improve our current system of judiciary and to make it savvy of intellectual property rights sharp design, efficient supervision and gritty will power to provide without bias, without fear and good will should be the key words of 21st century Indian judiciary of course riding on a technologically innovative vehicle. Our judiciary even though seems probable but actually it is not that. Laws, judgment and length and life of trial should be predictable.

Let the cloud or shadow of uncertainty be cleared away.

³⁶ Bajaj Auto Limited v. TVS Motor Company Limited, (2008) 726 ILLJ (Mad.).

³⁷ Ibid.