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Intellectual Property Rights: Concept, Growth and Challenges in India

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ABSTRACT

This document provides some minimal guidelines (and requirements) for writing a research paper. Issues related to the contents, originality, contributions, organization, bibliographic information, and writing style are briefly covered. Evaluation criteria and due dates for the research paper are also provided.
Keywords: Research Paper, Technical Writing, Science, Engineering and Technology

I. INTRODUCTION

Intellectual property (IP) refers to the creations of the human mind like inventions, literary and artistic works, and symbols, names, images and designs used in commerce. Intellectual property is divided into two categories: Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, 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. Intellectual property rights protect the interests of creators by giving them property rights over their creations.

The most noticeable difference between intellectual property and other forms of property, however, is that intellectual property is intangible, that is, it cannot be defined or identified by its own physical parameters. It must be expressed in some discernible way to be protectable. Generally, it encompasses four separate and distinct types of intangible property namely — patents, trademarks, copyrights, and trade secrets, 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 gambitof intellectual property. In recent times, geographical indications, protection of plant varieties, protection for semi-conductors and integrated circuits, and undisclosed information have been brought under the umbrella of intellectual property.

The Concept of Intellectual Property:
The concept of intellectual property is not new as Renaissance northern Italy is thought to be the cradle ofthe Intellectual Property system. A Venetian Law of 1474 made the first systematic attempt to protect inventions by a form of patent, which granted an exclusive right to an individual for the first time. In the same century, the invention of movable type and the printing press by Johannes Gutenberg around 1450, contributed to the origin of the first copyright system in the world. Towards the end of 19th century, new inventive ways of manufacture helped trigger large-scale industrialization accompanied by rapid growth of cities, expansion of railway networks, the investment of capital and a growing transoceanic trade. New ideals of industrialism, the emergence of stronger centralized governments, and nationalism led many countries to establish their modern Intellectual Property laws. At this point of time, the International Intellectual Property system also started to take shape with the setting up of the Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886. The

premise underlying Intellectual Property throughout its history has been that the recognition and rewards associated with ownership of inventions and creative works stimulate further inventive and creative activity that, in turn, stimulates economic growth.

Over a period of time and particularly in contemporary corporate paradigm, ideas and knowledge have become increasingly important parts of trade. Most of the value of high technology products and new medicines lies in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not usually because of the plastic, metal or paper used to make them. Many products that used to be traded as low-technology goods or commodities now contain a higher proportion of invention and design in their value, for example, brand-named clothing or new varieties of plants. Therefore, creators are given the right to prevent others from using their inventions, designs or other creations. These rights are known as intellectual property rights.

The Convention establishing the World Intellectual Property Organization (1967) gives the following list of the subject matter protected by intellectual property rights:

- ✓ literary, artistic and scientific works;
- ✓ performances of performing artists, phonograms, and broadcasts;
- ✓ inventions in all fields of human endeavor;
- ✓ scientific discoveries;
- ✓ industrial designs;
- ✓ trademarks, service marks, and commercial names and designations;
- ✓ protection against unfair competition; and
- ✓ "all other rights resulting from intellectual activity in the industrial, scientific, literary or 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. 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. The areas of intellectual property that it covers are:

(i) Copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcastingorganisations);

(ii) Trademarks including service marks;

(iii) Geographical indications including appellations of origin;

(iv) Industrial designs;

(v) Patents including protection of new varieties of plants;

(vi) The lay-out designs (topographies) of integrated circuits;

(vii) The undisclosed information including trade secrets and test data.

II. THE IPR SYSTEM IN INDIA

India's IPR system is underscored by a number of policies, laws, and internationalagreements that shape protections for domestic rights holders as well as how the country views its global obligations. The origins of India's IPR system date back to British colonial rule, when as a colony the state enacted various rules and enforcement mechanisms pertaining to IP rights. Post-independence, India retained elements of these structures while updating some guiding regulations and other bureaucratic structures. As India moved toward liberalization, privatization, and globalization in the 1990s and later, Indian policymakers made further adjustments to keep up with growing needs of domestic and international stakeholders. As a result, today

thestatutory foundation of India's IPR regime is composed of a patchwork of key laws, governing bodies, and international agreements. These structures are further detailed below.

Types of Protected IP and Their Coverage by Indian Law

Under Indian law, there are six discernible major categories of innovations that are eligible for IP protections.

Patents: Patents are a set of exclusive rights that are granted to an inventor for making, selling, or using an invention. Three core pieces of legislation—the Patents Act of 1970, Patent Rules of 2003, and Patent Amendment of 2005—form the basis of patent law in India. The Patents Act has provisions with respect to compulsory licensing, the government's rights to fix prices for patentable goods, and use of some patents for the government only. The Patent Amendment also allows petitioners to file applications through electronic media (though the paper copy should be filed within one month). Of note, over the course of several decades, India's patent law has taken a range of different approaches to the question of "process patents"—that is, whether processes (in contrast with products/molecules/chemical compounds) may be patented. The 1970 law granted process patents, and under its provisions, patents for chemicals, medicines, and drugs were initially granted for a period of fourteen years. This situation changed with the enacting of the Patent Amendment Act of 2002 and Patent Rules, which extended the patent term for a period of twenty years (as well as adding several other provisions related to fees and other questions). Yet with the Patent Amendment of 2005, process patents were completely abolished. This amendment has specific implications for chemical and pharmaceutical industries in particular, which will bediscussed later.

Trademarks: Trademarks are recognizable signs, designs, or expressions that identify the goods and services of a producer as being distinct from another. In India, the Trademark Act of 1999 was a redrafted version of the Trademark and Merchandise Marks Act of 1958 that extended trademarks to services as well. Coverage for trademarks in India is ten years from the date the application is first made, while a 2010 amendment to the act enabled stakeholders totake advantage of provisions in the Madrid Protocol, a treaty that protects trademarks in multiple countries through the filing of one application with a single office.

Copyrights: Copyrights are a form of intellectual property that grants the creator of an original work exclusive rights for distribution for a limited period of time. The first copyright act came to India in 1914, which was modeled on the British Act of 1911. After independence, India's copyright regulations underwent thorough revisions, ultimately resulting in the Indian Copyright Act of 1957, which included (among other provisions) an extension of copyright protections to cover 50 years of protection. Since then, the act has been amended five times (most recently in 2012), with amendments covering further extensions of the copyright period, updates to reflect the digital environment, and coverage for other media forms, including radio diffusion, cinematographic film, and others.

Geographic Indicators: A geographic indicator highlights a place of origin for a product and for the purpose of IP may be closely linked to the perceived value of the good. Examples of geographic indicators include Darjeeling tea, Banarasi Saree in India and Havana, and Champagne internationally. India's Geographic Indications of Goods (Registration & Protection)

Act is relatively new, as it first passed in 1999 and was made in fulfillment of obligations under GATT, to which India is a signatory. The purpose is to exclude unauthorized persons from misusing geographic indicators and protecting consumers against deception from passing off goods not related to any geographic area. The registration of such indicators is valid for a period of ten years and can be renewed for further periods of ten years successively.

Industrial Designs: Indian law also safeguards IP protections for industrial designs based on the unique look or feel of an invention, such as its pattern, shape, or texture. For the purpose of registration, design-related IP protections can be conferred on fourteen classes of goods. Once registered the period of design is fifteen years with renewals at every five-year period. After fifteen years the design becomes open and public property.

III. GROWTH OF IPRs IN INDIA

Aquick search of the decided cases in the Supreme Court and the High Courts in India with reference to Section 64 (revocation of patents) of the Patents Act, 1970 gives 22 results. Only one case is from the Supreme Court of India, ten from the DelhiHigh Court, five from the Calcutta High Court, three from the Madras High Court, two from the Gujarat High Court, and one from the Bombay High Court. Revocation of patents is a very contentious issue and such a small number of patent cases on this issue in the lastfour decades in India speaks volumes about the awareness about patents and the importance given to patents as a tool to protect the intellectual property by businesses. Out of these twenty two cases, twelve have been decided post-2000, i.e., in the last eight years. Only ten were decided prior to the year 2000. Five cases have been decided in the last three years. This number is surely going to increase and as the awareness grows, the number is expected to increase dramatically. Historically, patent litigation (legal action relating to patent infringement and revocation) in India has never been a very well-defined profession, as there were not enough number of cases for the lawyers to specialize in this field. The primary work of the patent lawyers in India has been patent prosecution, which describes the interaction between an applicant and the patent office. Since the year 2000, more and more applications are being filed in the patent office and many disputes are also arising. Cases like that of Bajaj-TVS and Novartis are reaching the High Courts and more and more businesses are challenging the decision of the Patent Office. To handle the increasing number of prosecution and litigation matters, there is an urgent need of qualified and competent patent examiners, lawyers, judges, and court staff. We must make the necessary changes in the curriculum of business schools, law schools, and other schools to have graduates specializing in patent law. Most of the patents are highly technical in nature and require blending of legal knowledge with technical knowledge. More and more institutions on the lines of Rajiv Gandhi School of Intellectual Property Law at IIT Kharagpur are needed. There is also an urgent need topay realistic salaries to the patent examiners. As of now, the patent office is being used by patent examiners as a platform for launching their careers with private pharmaceutical and biotechnology companies. The Indian law does not allow per se software and business method patents. The day, these patents are allowed, the position will become worse as it would be next to impossible to somehow retain the patent examiners in the patent office. We also need more number of law graduates with specializationin intellectual property toact as lawyers and later as judges. It will not be an exaggeration to say that the American story of economic development and prosperity is the story of strong protection of patents in particular and other branches of intellectual property in general.

The American courts even recognize the conceptof trade dress, which was learnt bitterly by ITC's restaurant 'Bukhara.' So much protection already in place is making it very difficult for any new business to get proper protection from the law. It costs a lot of money and time to file for patents or trademark or design as the case may be. The same is true about offices dealing with different branches of intellectual property in India. Small innovators find it very difficult to file their applications for intellectual property protection. We may like to follow the petty patents model used by Australia. There is also a need to protect the traditional knowledge and build electronic data banks for this purpose. A lot of work is being done in this regard; however, in a country like India with continental dimensions, it will take a pretty long time. One area of concern for India is the weak enforcement of IP laws. Pirated software and printed material can be bought from any roadside seller. Training to police to nab the culprits, particularly for copyright violation, is far from adequate. There is a need to have stronger intellectual property laws with equally strong enforcement in India.

IV. CHALLENGES FACED BY THE INDIAN IPR SYSTEM

The modern IPR system in India, in the real sense, is a post-WTO phenomenon which has many new dimensions such as protection of IC layout design, geographical indications, and new plant varieties which were not part of the earlier Indian system. Earlier there were only four forms of IPR prevalent in India namely, patents, copyrights, trademarks, and registered design. It would be safe to state that most contesteddisputes in the country fell inthe categories of copyrights andtrademarks. The Indian patent laws were comparable to those of many countries except that product patents in

the area of drugs, chemicals, and food items were excluded from patentability.

Now, however, the laws are fully TRIPS-compatible and also allow product patents in all areas of technology. However, there are some provisions in the law, mandated by the social and political thought process, which do not allow certain types of invention to be patentable. Patents were not used as a competitive tool in the pre-WTO days because we had a centralized economy with very little competition. Globalization and opening up of the economy have increased competition and it will continue to rise at a rate not witnessed in the past. Obviously, each cubic centimeter of space in the world of trade will be strongly contested by many players. IPR will play a very important role in the competitive world and it would be in the interest of every one that there is a legal framework which is sensitive to the social, cultural, and political needs of the country but still provides enough incentives for innovators and the process of innovation. What we see today in terms of increasing IP issues was anticipated by many when it was decided to modify our IPR laws. It may be difficult to go back to the old system. Property always causes conflicts and disputes. This has now started happening in India in the IPR area as well and can be considered normal. When brothers can fight with each other on property matters, fight between two companies on IPR matters should not be a cause of disturbance and alarm. What perhaps would be required in disposing such disputes is judicial maturity, understanding of technological issues, and a balanced interpretation of patentable inventions to meet social goals. One will have to depend on the case laws within our country for developing a robust system for resolving IPR disputes. Indian courts had, for example, earlier disallowed the use of word 'scotch' for Indian whiskies. Yet, in another case, the Supreme Court has recently allowed the use of the word in respect of Peter Scotch. The IP system of a country is now heavily influenced and governed by the IP systems of other countries, especially the developed ones.

Patent practices in respect of biotechnological inventions were revolutionized in 1980 in USA; many similar events have been occurring since then. We must learn to develop a foresight to anticipate what is likely to happen.For example, inventiveness will occupy the attention of many law-making authorities, international agencies, and judiciary. Indian inventors and their employers (if applicable) will have to pay serious attention to this aspect if they wish to have a right which can be defended in a court of law. The success will depend on critical scientific enquiry of each invention. Similarly, novelty determinationis very crucial in light of expensive litigationand risk of losing market position. Therefore, awareness and training continue to be important elements for tilting the IPR system to our advantage. New challenges are likely to emerge with the introduction of a system for protecting the new plant variety. One of the most important ones would be to register farmers' varieties because no nationwide system is in place to undertake this massive task. It may be reckoned that one will have to take farmers in confidence and educate them about the new laws which are farmer-friendly. There should be systems to identify such varieties, generate adequate scientific data to establish their reproducibility, stability, and the unique traits before going in for registration. This may become handy to address food security problems in the rainy days. Geographical indications are becoming popular.

As the social and politicalramificationscould be serious in some cases where more than one state could be the interested parties, it would be a good idea to have government intervention right at the beginning. One of the important principles to be adopted for ensuring that wrongs are not done is to examine whether unfair trade practices are being encouraged by the use of IPR.

There are many dimensions to this aspect including transaction of IP. The Competition Commission of India has brought out some guidelines to avoid unfair trade practices which are quite similar to what are being followed elsewhere in the world. It may be reckoned that TRIPS also endorses that unfair trade practices in IP-related contracts should be avoided. Open source system for collating and utilizing innovations is in the nascent stage and is yet to generate enough evidence for its candidature as an effective tool for generation and sharing of IPR. It may perhaps make an impact if suitable models for benefit sharing is evolved which could provide enough remuneration to inventors. In the present form, it seems to lack equitable sharing of IPR. Perhaps patent pooling in the specificareas regulated by standards may be a better candidate to be pursued provided a proper legal framework is worked out. There are many issues which need to be studied and researched in the Indian context to work towards a balanced

practical state for our IPR system. In the absence of data, it is not possible to establish the advantage or disadvantage of the existing system. The research should be interdisciplinary in nature involving laws, science, engineering, business, economics, commerce, and social sciences.

V. CONCLUSION

The broad level contours of IP policy are now visible in the form of the national IP policy. India now needs to improve the IPR regime both from the side of the legislation and also from the side of enforcement of laws. This improvement will help in the creation of a better environment for improving the overall innovation in the country. The need also exists to start looking at and understanding the IPR regimes abroad and, more importantly, bringing in the requisite changes, such as better digitization, in the present regime. For this, Indian states as well as industry will have to play a proactive role in asking the central government for a better IP protection regime so that there is greater innovation at the state level, which contributes toward the future competitiveness of India. Particular industries' performance, namely the pharmaceutical industry, will depend on the kind of IPR regime prevalent in India. It is important, however, that the likely impacts of introducing various measures are taken into account before framing and implementing IP policy.

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