

Comparison of Certain Intellectual Property Laws

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Abstract

Intellectual property rights refer to the general term for the assignment of property rights through patents, copyrights and trademarks. These property rights allow the holder to exercise a monopoly on the use of the term for a specified period. In this paper an attempt is made to compare certain Intellectual Property Rights laws such as Patent Law, Copyright Law and Trade Mark Law. Comparison is made on various aspects such as protectable subject matter, Statutory protection period, areas in which the grant is not allowed by law, important exceptions to the right given such as fair use provision, revocation of the right given to the holder, and how the holder can assign or grant licence to the third parties and so on.

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INTRODUCTION

Pharmaceutical Companies generally invest huge amounts of money in research and development. After inventing a new chemical molecule, they prefer to obtain a patent grant over it. However, we have seen that procedure for obtaining patent grant is a complex one.

Now, after obtaining the patent grant, the Pharmaceutical Companies enter commercial world. They must advertise the patented product. Here comes the importance of Copyright Law and Trade Mark Law. While preparing the 'medical description' of the patented product, the pharmaceutical companies need to know the legal aspects of Copyright Law. The 'medical description' which is generally associated with the products comes into the category of 'literary works', which in turn is protected by Copyright Law. So, while preparing 'medical description' caution must be exercised by the Pharmaceutical Companies.

Commercial success of any product is generally associated with a distinctive Trade Mark which it carries. While marketing a product, Pharmaceutical Companies should know the legal aspects of Trade Mark Law for its commercial success and to avoid unnecessary litigation.

Comparison of Patent Law with Copyright Law and Trade Mark Law also helps us in a different way. If any useful provision exists in Copyright Law or Trade Mark Law, the same can be imported into Patent Law and thus public interest can be protected in a better way.

Requirement of Copyright

What does copyright protect? Subject Matter of Copyright

To secure copyright protection it is required that the author must have bestowed upon the work "sufficient judgment, skill and labour or capital". It is immaterial whether the work is accurate or inaccurate, wise or foolish or whether it has or has not any literary merit [1].

Copyright protects the skill and labour employed by the author in the production of his work [2].

The owner of a copyright has no monopoly in the subject matter. Others are at liberty to produce the same result (from the common source) provided they do so independently and their work is 'original'. Another person may create another work in the same general form provided he does so from his own resources and makes the work he so originates a work of his own by his own labour and industry bestowed upon it [3].

The owner of a copyright has no monopoly in the subject matter. Others are at liberty to produce the same result if they do so independently and though they are not the first in the field, their work is nonetheless 'original' in the sense in which that work is used in the Copyright Act [4].

A person may have a brilliant idea for a story or for a picture but if he communicates that idea to an artist or play writer then the production which is the result of the communication of the idea is the copyright of the person who has clothed the idea in a form (whether by means of a picture or play) and the owner of the idea has no rights in that product [5]. Since there is no copyright in ideas or information, it is no infringement of copyright to adopt the ideas of another or to publish information derived from another, provided there is no copying of the language in which those ideas have or that information has been previously embodied.

Distinction between Contract of Service and Contract for Service

The author may create work independently or he may create work under a contract of service or contract for service.

Contract of Service

Where a man employs another to do work for him under his control so that he can direct the time when the work shall be done, the means to be adopted to bring about the end, and the method in which the work shall be arrived at, then the contract is a contract of service.

In *Beloff v. Pressdram* [6] it was decided that the true test is whether on one hand the employee is employed as part of the business and his work is an integral part of the business or whether his work is not integrated into the business but is only accessory to it or the work is done by him in business on his own account. In the former case, it is contract of service and in the later case; it is a contract for service.

In the case of contract of service, the status of the author is that of an employee. For example, whenever an employee of a solicitors' firm drafts a document during his employment, the employer is the first owner of copyright.

Contract for Service

If a person employs another to do a certain work but leaves it to the other to decide how that work shall be done, what steps 'shall be taken to produce that desired effect, then it is a contract for service. His status is that of an independent contractor who himself decides about the manner of doing work, in such cases the copyright vests in him and not the employer. For example, an architect who is hired by the company to construct a plan for their new building, in such a case the copyright vests in the architect himself [7].

The Copyright Cess Bill, 1992 was introduced in the Lok Sabha in May 1992 which provided for a cess on sale of reprographic machines, such as tape recorders, video cassette recorders, the proceeds of which were to be distributed to copyright owners through association of copyright owners who administer their rights on their behalf. This Bill has not yet been passed by the Parliament. Hence to this date, no statutory provision exists to curb this kind of infringement of copyright [8].

ILLUSTRATION

X buys a cassette containing songs of the latest popular Hindi film. This cassette is sold in the market say by HMV; his friend borrows the cassette and makes his own copy by recording the same in his own cassette recorder. Such an act is reprography which is a subtle form of infringement, but the present Copyright Act does not provide any remedy for such form of infringement.

Meaning of Copyright

Every author has a copyright in the work he creates. This is inherent in him because he is an author. It creates in the author an exclusive right to produce, reproduce, publish and perform his work in all ways known and possible. Whether he gets his copyright registered or not this right subsists in him. If that be the case, one may ask where is the necessity for the author to get his work registered under the Copyright Act? It is not as though there are no advantages at all if the registration of copyright is obtained. In the first place, if the copyright is registered, the certified extract thereof furnishes evidence of

the authorship of the work and then his title to copyright. If the author intends to assign or licence his work on royalty, production of the registration extract will assure the prospective assignee or the licensee of the author's right to assign or licence his copyright. Since the extract contains several including commencement of the right and its subsistence, and also the prior transactions over that right if any, the registration extract is like a non-encumbrance certificate issued by the registrar of assurances relating to immovable property which provides similarly all the particulars of the title and encumbrances over the property [9].

If the author intends to take any legal action against the predators of his copyright in any court of law, courts will unhesitatingly accept his right to approach the court if the registration extract is produced. As years go by proof of facts to establish, copyright becomes more and more difficult and evidence to prove facts will also become scarce.

The registration extract of copyright will be useful to the author and his successors and assignees to establish their title in cases of dispute with other persons who for one reason or other may claim to have some interest in copyright in relation to the work in dispute.

Further, registration of copyright has since become necessary in the context of the recent amendment to Copyright Act. The Government may in some circumstances levy and collect royalty and pay the same to the Copyright holder. It may be that unless the registration extract is produced the Government may be reluctant to pay those amounts. Compulsory licencing is another field where prior registration of copyright helps determination of issues easier.

In other words, the certified extract of the Copyright is as good and useful as the birth certificate, the utility of which is sure to be felt through out the life time of the author and also of his successors for a period of 60 years after the death of the author.

Production of the certified extract of the registration is the only way of proving Copyright in foreign countries.

Even though the Copyright Act does not mandate registration of copyright as a condition precedent for the exercise of rights under the Act, it is advised that authors of artistic works get their copyright registered. Registration does not create any obligations on the author nor is he burdened with any liability to renew it or pay any fees for retaining the registration [10].

Content and Substance of Copyright

The Copyright Act specifies the following works only as the works in which a person can have copyright. They are-

- (a) Original literary, dramatic, musical and artistic works and includes computer programs;
- (b) Cinematograph films;
- (c) Sound recordings.

Compulsory Licenses

Copyright confers on the author an exclusive right to publish his own work. It also confers on him a right to restrain others from publishing his work. So long as the publication of works goes on smoothly with the author himself or through his assignees or licensees doing the business of publication, there are no difficulties. Situations may however, arise where some other person may have to be permitted to undertake the publication, when the works are not either made available or if made available, they are available only at high prices or in a language not generally used by the public. Sometimes authors may refuse to republish or refuse the performance of the work or refuse broadcast of the work or refuse recording or recording in sound recording thereby withhold.

Fair Use: Acts which do not Amount to Infringement

Ideas, systems, information, things of practical use are not subject to copyright. Nobody can claim copyright in works which are by themselves not original or lacking any merit. Hence, reproduction or use of any of them does not constitute infringement of any copyright. One of the purposes of Copyright Act is the promotion of science and arts by granting certain monopoly rights to the authors of original works [11]. This purpose is better served even as the protection to the rights of copyright holders are assured, if a right to

reproduction and use of such works is also granted in favour of the community without diminishing the financial benefits of the authors. Such rights intended for the benefit of the community are termed under the Act as fair uses of copyrighted works. Fair use is thus a recognised and valid defence to a charge of infringement.

COPYRIGHT SOCIETIES

Neighboring rights mean, rights related to or closely associated with the Copyright. Assuming that, we have an original song, the Copyright is protected for the composer and lyric writer. When it is sung or performed by another, such singer and performer also need protection. If the singer wants to have the song broadcasted, it involves engaging another person who wants to be protected before it enters into an agreement with the singer. Thus, the rights of performers, singers, actors, dancers and musicians are neighbouring rights to the author. There are another set of persons who also come under the category of neighbouring right holders. They are phonogram producers. That is why, the producers of sound recordings have also been granted rights analogous to Copyrights.

Copyright Society is an innovation in copyright jurisprudence. It is a society formed by the owners of the copyright and those interested in the subject matter of the copyright. The objects of the society are to protect and promote the interests of the owners of the copyright and those who use the copyrighted work. The Copyright Act prohibits any person or society to deal in the copyright such as granting of licences and permission etc., unless such society is registered under the Act. The functions of the society shall be to act on behalf of the members who are the owners of the copyright to licence the copyrighted works and grant permission for their performances, collect the fees from the users of copyrighted works and pay over the same to the owners of the copyright. The members shall enter into an agreement with the society authorising it to act on their behalf. Notwithstanding the agreements, the owners of the copyright will continue to retain all their rights including the licencing except to the extent they have

granted authorisation to the society. The society shall function also as a watch dog overseeing the infringement of the copyright wherever the rights are infringed. They are, however, not entitled to file any proceedings against infringers [12].

The function of copyright society is to collect licence fees and royalties from the licensees and pay over the same to the copyright owners. However, if copyright societies are absolute assignees they can take any action against infringers. The society has a right to negotiate and settle terms about the management of copyrighted works with foreign society having similar objectives. It is therefore, advisable for owners of the copyright to organise themselves into association called copyright association whose expertise in the field of copyright can be utilised for bettering the business prospects of the owners of the copyright. For purposes of achieving its objects a copyright society may enter into agreements or arrangements with similar societies functioning in other countries which accord to Indian copyright holders the same treatment which they accord to their own citizens.

Threats of Unjustified Action and Slander of Title

There are two more problems relevant to the copyright which are troublesome for the real authors. The first one is called unjustified threats of action. Here the pretender issues threats of action in infringement against the author claiming that the farmer only was the author. Such threats may be in the form of publications in the press or through pamphlets and any other means of communication including direct notices. In such circumstances the threatened author to protect his interest has a right to claim a declaration against the fake author and damages also. The unjust threats must be proved to be malicious to establish the claim for damages [13].

The other problem is technically called, the slander of title. Here the authorship is wrongfully appropriated by another. If 'A' is the real author of a work, 'B' claiming to be its author publishes the work in his own name or the publisher publishes A's work in the name

of B. Such things may occur clandestinely and wrongfully appropriating manuscripts of one author by or in favour of another. They may often occur in the hands of publisher. Here the genuine and real author can sue the other person under whose name the work is published holding the publisher also liable for damages.

The difference between the unjustified threats of action and the slander of title consisted in that, in the case of unjustified threats the fake author threatens the real one by wrongfully claiming authorship and in the case of a slander of title the real author who is deceived, acts against the fake author and the publisher for wrongful appropriation of his work. In the case of unjustified threats, the threats must be proved to be motivated and malicious, while in the case of slander of title, wrongful appropriation of authorship and publication by themselves entitle the real author for damages.

TRADE MARK

Rationale for Protection of Trade Mark as (a) an Aspect of Commercial and (b) as an Aspect of Consumer Rights

Trade mark is as sensitively significant to the trader in the market as the name to the individual in his social life. Trade mark is a mark of distinctiveness which makes the goods marketed and services rendered with a trade mark stand apart and often in the estimate of its owner far above the rest of the goods of the same class. Trade mark infuses in the trader and service provider a new youthful spirit of showing himself up above his competitors in the field. Trade mark provides the trader a thrust to market the goods with confidence. Backed by an adequate publicity, trade mark helps the trader to improve his sales. Trade mark guarantees also the consistency in quality of goods and services. Set in an aggressive advertisement nothing sells the goods and services better than a trade mark. At a time when brand names and trade slogans are sweeping the market, trade mark has a very important role to play in the domestic and international market. The fact that the number of applications for this mark made to the Registrar has gone up from 18,266 in 1987–1988 to 36,268 in 1993–1994 and requests for information have gone up from

9508 in 1987–1988 to 38,093 in 1993–1994 indicates the popularity the trade mark is gaining in market.

For a consumer trade mark helps easy identification of the goods and services he is searching to purchase and for a trader the trade mark builds enormous good will.

To the public, trade mark is useful. Based on their experience as consumers, they may return to the desirable product which they know or avoid it as undesirable if they so choose.

That is why the mark chosen for registration shall be easy to pronounce, easy to remember with attractive sounds. There shall not be any difficulty in recalling the spelling of the word or words used in the trade mark.

The trade mark shall be capable of suggesting the article and service, to which it is appended. Above all it shall be able to stand out independently as a new and distinct expression capable of earning instant popularity.

Definition and Conception of Trade Mark

Trade mark in its physical form is a symbol. It can be a label which can be affixed to the article. It can be a ticket which can be tagged or stitched. It can be embossed or integrated into the article such as “tiger’s head” or “excel 1 bond” in the white paper or into the carbon sheet or woven into a fabric. Trade mark may be a design which may be plain or artistic, composed with several features. In its content it may contain a name, signature, word, letter, numeral or any combination thereof in their innumerable shapes and colours. Distinctness in appearance, shape and sound is the criterion for securing registration of trade mark. Distinctness means any thing that strikes or draws compelling attention of the customers to identify the product, its source and utility and the service offered and its utility. A composite trade mark means the letters with logo and artistic design which can be copyrighted [14].

A TRADE MARK AND COPYRIGHT

Copyright is granted to the manner of expression and style of writing and execution. Trade mark is given to distinctness in appearance and presentation. Copyright is

granted to art. Trade mark is granted to be used primarily and wholly for commercial purposes. Infringement in copyright occurs in copying. Infringement in trade mark occurs in similarity. Remedies can be sought only when infringement occurs. Threat to commit infringement and prospects of infringement in future are not actionable in both trade mark and copyright.

Advantages of Registration

Registration of trade mark is not compulsory. There are however, certain advantages. If the trade mark is registered, registration enables the owner of trade mark to establish his title to it. It protects owner against un-authorised infringement since the registration stands as a threat to anybody who may attempt at infringement either directly or by dubious other ways. Registration helps the owner of trade mark to easily negotiate for business deals with-the Government, semi-Government and other business houses and agencies. Once the trade mark is registered its exclusive use by the owner cannot be threatened by any other person except by questioning its very validity.

Marks which are not Registrable

A mark which is devoid of distinctness and mark which directly attempts to describe the shape, quality and quantity of the article or the nature and quality of service are not registrable. A mark which consists of words which are in common use in trade is not registrable. A square can be a trade mark for any commodity, but it cannot be a trade mark for goods which are by nature in square form. Similarly, legal solutions can be a trade mark for a publisher of books, but it cannot be a registrable mark for legal consultancy. A trade mark which by its nature is deceptive or a mark which offends religious sentiment of any class of citizens or a mark which contains scandalous and obscene matter or a mark which depicts emblems which are prohibited to be used by the Emblems and Names (Prevention of Improper Use) Act 1950 are not registrable. Trade mark containing names of any single chemical element or single chemical compound and a mark which contain the names which the World Health Organization prescribes as international non-

proprietary names and a mark which is deceptively like those of others are also not registerable. Trade marks which are likely to create confusion in the market being akin to or like the mark or marks already in use or which is likely to lead consumer to associate the mark with another which has become distinct and popular are also not acceptable for registration. Trade marks which otherwise prohibited by any law for the time being in force such as those prohibited under the Drugs and Cosmetics Act 1940, Drugs and Magic Remedies (Objectionable Advertisements) Act 1954, Sections 28, 47, 50, 56 and 78 of Foreign Exchange Regulation Act of 1973 (Now FEMA) and the trade mark which the Court rendered the applicant ineligible to hold the mark are also not registerable. The selected mark shall not be the name of the product itself such as fountain pen or motor car [15].

A mark is said to be common to the trade when it is in common use in the trade or when it is open to the trade to use it. Any symbol, word or get up commonly used by traders in connection with their trade and in respect of which no trader can claim an exclusive right to use may be considered common to that particular trade or to the general community of traders. Further, the words, expressions or devices which are descriptive of goods are open to the use by all persons engaged in the trade. Such matters which are generally of a non-distinctive character may or may not be in actual use at any time, what is important is that the trading public has a right to and is entitled to use them in connection with their business and trading activities.

Known and Well-known Trade Marks

A trade mark is known if it is known widely in the field of the services and goods in respect of which it is granted registration. For example, *Amrutanjan* is known as pain reliever and is popular in drugs and medicines. *Cibbaca* is known as a Cosmetic and is popular in beauty aids and not a dental medicine. The popularity or the popular knowledge about the known trade marks may be estimated by the number of actual or potential consumers of those products and services the number of persons involved in the channels of trade and in the distribution of the consumer goods & services

and the measure of its popularity in the relevant business circles and the public. It is not necessary for such a mark to be a mark already registered for determining the mark as a known mark. If such mark is otherwise known in the business and in the public can also be treated as a known mark.

The well-known trade-mark is different from known trade-mark in that the later is known in the wider circles in addition to the field of trade, goods and services for which it is registered. In other words, what is universally recognised and known as a flag name for successful business is well-known trade mark. For e.g., Tata, Ford, Ceat, Firestone, Birlas cannot be assumed as trade names by anybody else except those who own them.

Where a Trade mark which is not otherwise not registerable such as “Gujarat”, has been under use since a long time and has established a reputation in the market, for a certain type of goods, the holder of such Trade mark can seek a relief in a passing off action against the infringer.

In determining whether a trade mark has been well-known the following criteria may be taken into consideration:

- 1) Knowledge and recognition gained by the mark in relevant section of public including knowledge in India and abroad.
- 2) The duration, extent and geographical area of its use.
- 3) Numerous programmes undertaken for the promotion of the mark in claiming, advertising, publicity and presentation at fairs and exhibitions.
- 4) The duration and geographical area in which the mark has been registered and the extent of its user by application; and
- 5) The record of the owner's efforts at successful implementation and prevention of misuse by others. Here also, such well-known trade mark may or may not be registered but its name and extent of its universal acceptability as a flag name is enough for determining whether the mark is a well-known trade mark or not. The importance of being a well-known trade mark is that if it is tendered for registration the Registrar if he is otherwise satisfied shall accord it the registration [16].

Thus, when it is permissible for a circus company to claim trade name as Amrutanjan circus, it is not permissible to seek registration of a trade mark as firestone circus for the former has a limited reputation as a balm while the latter reputation is general and universal. The latter reputation is also called the secondary reputation which becomes a part of the original [17].

Term of Trade Mark and its Renewal

The period of trade mark is 10 years computed from the date on which the application for trade mark is made in the first instance. This period can be extended by another 10 years and successively for any number of times by paying renewal fees in the manner prescribed. If the renewal is not applied for, the trade mark is liable to be removed from the register.

Secrecy

The law does not compel the inventor to take out patent for his invention. The inventor can keep his invention secret and work upon it himself if he so desires. It is, however, not possible to keep the secret of invention for ever unknown to others. It is bound to burst out of its bonds. The secret may get transmitted through the workers whom the inventor employs. If the subject matter of the invention is a mechanical device, the dismantling of it may disclose the secret behind it.

While that be so, a person who gets at the secret or commits a theft of the secret -, behind the inventor, may obtain a patent for himself and restrain the real owner of his invention.

Moreover, a subsequent bonafide inventor also may score over the earlier inventor if the later has not taken a patent for his invention in proper time (AIR 1953 Nagpur 154).

“Eureka” Yes; Publication ‘No’

It is in the make up of humanity to get thrilled and feel taller on inventing a thing which is hitherto unknown. The normal reaction would be to hasten, to announce and publish the invention. In the competitive world where it may become necessary to rush for a patent ahead of others, it is not wise to go for publication immediately of what has been invented.

Even Archimedes had only said, “Eureka” as he jumped out of his bath tub. The details and calculations of the invention came long after.

After a brief study of copy right law and trade mark law, the following are the points for comparison.

PROTECTABLE SUBJECT MATTER

Patent law is granted to only such of those inventions which are new, and which have commercial value. Whereas in the copyright law, protection is available to literary, dramatic, musical, and artistic works. Trade mark is given to distinctness in appearance and presentation.

Statutory Protection Period

The term of patent is 20 years from the date of issue of patent. The continuance of patent depends upon its renewal every year. The primary obligation of the patentee that he should work his invention, make available the articles manufactured by him to the public and at reasonable prices. In the case of copyrights, protection period is generally 60 years. There is no such thing like renewal fee. The moment he creates the work; he obtains copyright over the work. The period of trade mark is 10 years. This period can be extended by another 10 years and successively for any number of times by paying renewal fees in the manner prescribed.

Usefulness of the IP

In the case of patents, the invention besides being new and non-obvious must also be useful. An invention which is now non-obvious but cannot be put to any beneficial use of the mankind cannot be patented. In the case of copyrights, the legal position is diagonally opposite. To secure copyright protection what is required is that the author must have bestowed upon the work “sufficient judgment, skill and labour or capital.” It is immaterial whether the work is wise or foolish, accurate or inaccurate, or whether it has or has not any literary merit. Trade marks set in an advertisement, nothing sells the goods and services better than a trade mark.

Procedural Requirements in Obtaining the Right

Making an application for patent is not an easy matter. The application should be thorough and should comply with all the requirements specified in the rules. Casualness should be avoided. Scrupulous attempt to fulfill all the conditions in submitting the application is necessary. In the case of copyrights, the procedure is simple, in case the copyright opts to register his work with the registrar of copyright. Trade mark registration again is a complicated procedure. The trade mark registrar may deny the registration in certain circumstances.

Effects of Non-registration

The law does not compel the inventor to take out patent for his innovation. The inventor can keep his invention secret and work upon it himself if he so desires. In the case of copyrights also, registration of the work is not compulsory. The same is the situation with trade mark. But, the practicality suggests the registration of these three IP rights would benefit its owner.

The most important international organization for the promotion of intellectual property world wide is the World Intellectual Property Organization (WIPO). The main object of the WIPO is to promote the protection of various IPs throughout the world through co-operation among the nations.

What Constitutes Infringement?

Doctrine of fair use has been recognized in both patent law and copyright law. In the case of trade mark, the concept of ‘honest and concurrent user’ is a good defense in infringement cases.

Available Remedies

Patent infringement is not a crime, but copyright violation and trade violation lead to an offence. All the civil law remedies, just as compensation, injunction, Anton Pillor order are common to these three IPs.

Statutory Exceptions

Good number of statutory exceptions are available to all there three IPs. Relatively speaking the statutory exceptions are more in copyrights.

Revocation of the Right Conferred

Public interest provisions such as, compulsory licensing, Government use, acquisition, revocation of the right given upon post-grant opposition is common in patent law and copyright law.

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