

# ROLE OF JUDICIARY IN IPR DEVELOPMENT AND ADJUDICATION\*

**F**rancis Bacon has said – “The works of founders of states, law givers, tyrant destroyers and heroes cover but narrow spaces, and endure but for little time, while the work of the inventor though of less pomp is felt everywhere and lasts forever”.<sup>1</sup> It is this work of the inventor which the laws relating to Intellectual Property seek to protect.

Intellectual Property refers to property that has been created by one's intellect. It is the creation of the mind. Today, the expression “intellectual property” is used even more broadly, to refer to all creations of the human mind. There are several intellectual properties that are commercially very valuable and are protected by different intellectual property rights.

What is worth copying is *prima facie* worth protecting. This is the genesis for the intellectual property rights. No person shall like to invest his time and resources into creating something unless he is assured of the use of it and in cases where monetary gains are involved, he is assured that he shall have the exclusive right to make such gains.

## **Changes in IPR Laws**

We are spectators to a phenomenal change in how a sovereign exercises its legislative powers and reacts to international demands and obligations. The law-makers while introducing new laws and amending old ones are no more governed only by the need of our nation, especially in areas which have acquired an international colour. The law-makers today are influenced by the need to bring the laws in shape with the international conventions and agreements to which India is a party. The opening up of the domestic economy to the world is followed by a profound impact on our domestic laws.

Our Legislatures are called upon to amend our laws in conformity with the international treaties. Under the World Trade Organisation obligations, each member-State is required to provide for a minimum level of protection of IPR embodied in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The recent changes in IPR laws, reflect India's compliance with the obligation under the TRIPS Agreement. For example, the Copyright Act, 1957 has been amended to include computer program as literary work as required by Article 10 of the TRIPS Agreement. The Trade and Merchandise Marks Act, 1958 has been replaced with the Trade Marks Act, 1999 which includes protection of well-known marks, certification marks and collective marks. It now provides for registration of trade mark for services as well. This is in compliance with Article 16 of the TRIPS Agreement. Other recent legislations include the Geographical Indications of Goods (Registration and Protection) Act, 1999, Designs Act, 2000 and Protection of Plant Varieties and Farmers' Rights Act, 2001. The preceding five years have seen many new IPR enactments. With globalisation, liberalisation and privatization, the ambit of IPR has grown multi-fold and its importance has amplified, having a profound impact on commercial interests.

### **Economic Importance of IPR**

Intellectual property is important for a common businessman. The country's economy is opening up. Industries of our country are going far and away into different countries to open up business. Foreign entrepreneurs are fast entering into domestic economy. We need to protect our businessmen. In recent times, one of the most valued asset, a person has, is the intellectual property. For example, for a businessman, it is his trademark; for an author, copyright over his work; for a fabric manufacturer, his design; for our inventors, the patent; for our industrialists, their trade secrets. In every nook and corner of the commercial world, big or small it might be, intellectual property has grown multifariously.

### **Duty of the Courts**

It is now the duty of the courts to march keeping pace with law-makers. We, as members of the Indian judiciary, are to keep abreast of the laws and help the industry leap into the 21st century with the confidence that their intellectual property is secured. We, as Judges, are required to interpret the IPR laws and adjudicate upon the disputes between the parties on IPR issues. The more important and long-term issue is the one concerning interpretation of the new statutes. It is desirable that the interpretation of the IPR laws is uniform across the country. It is essential for the High Courts, across the country to have due regard to the interpretation given by any other High Court as regard the same IPR of the same person, be it trade mark or patent or copyright. Consistency in the growth of Judge-made law is too precious in the field of IPRs. An IPR Judge cannot afford to be oblivious of developments, elsewhere. While innovation is the privilege of any Judge, too much of innovation by an uninformed Judge may prove misadventure and a price too heavy to be paid by the development of IPRs.

### **Due regard to International Law**

The members of the Indian judiciary need to gear up with the changing phenomenon of the IPR world. They are to keep themselves well posted with the developing IPR international law and keep a positive bent of mind while interpreting the provisions of the amended IPR laws in India so as to bring them in harmony with the international conventions and most importantly, be able to contribute to the international community by their positivist approach and succinct interpretation.

We cannot content ourselves with the knowledge of the national IPR laws alone but have also got to learn about the international conventions and agreements upon which the national laws are based and further, fairly acquaint ourselves with the interpretations given by different jurisdictions around the world with a view to reach consistency in interpretation of laws.

### **Need for a Balanced Approach**

Though, in a case concerning an international convention, it is obviously desirable that decisions in different jurisdictions should, so far as possible, be kept in line with each other, yet, today many of us might find ourselves at a cross-road. There is the need of interpreting our laws in tune with the contemporary international law. At the same time, we cannot do away with the notion of protecting our economy and our commerce. We cannot, by our decisions, torch the fundamental commercial interests and rights of our citizens. In this context, one is reminded of the ringing words of Lord Steyn who, while interpreting Article 11 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and

Commercial Matters (1968), stated, “[T]he primary search must be for an objective and independent interpretation, capable of accommodating the needs of a diversity of legal systems.” [*Baltic Insurance Group v. Jordan Grand Prix Ltd.*, (1999) 2 AC 127].

India has its own elaborate educational infrastructure and a reservoir of knowledgeable talent. Over the decades, especially in 1970’s and 80’s what was named as “Brain Drain”, has today the potential of becoming the “Brain Gain”. The achievements and the exploitation of knowledgeable talent, during information technology revolution, has resulted in substantial economic gains. IP laws now form the backbone and are the driving force in the protection and exploitation of this reservoir of new knowledge and ideas. Humanity constantly progresses in culture and the impact of judicial pronouncements, in shaping the course of any nation’s life, cannot be denied.

The judiciary interprets IP Statutes while adjudicating upon IP disputes. It is through the process of pronouncement and the interpretation of the laws involved therein that the judiciary leaves its imprint on the march of trade and commerce and consequently the nation’s progress. A country, having agreed to be a party to the TRIPs and to WTO regime, is bound to legislate in harmony with the international agreements, phasing out the pre-existing IP legislations. These new laws, not only call for the change in the existing IP laws but also in many cases, take up the need for setting up new and modernised institutions. Many IP laws are at times just rushed through without giving due weightage to the long-term implications of the new provisions. The judiciary would have an important role to play in interpreting these laws and in case of conflict, striking a judicious balance between the interest of the nation and the demands of global justice.

One of the best examples, highlighting the importance of interpretation of IP Statutes is the case of *Diamond v. Chakraborty*, (65 L Ed 2 d) (447 US 303), decided in 1980 by the US Supreme Court. The Chakraborty case is still a leading case that divides many nations of the world over the interpretation of “Novelty” in respect of Patents. In brief, the International test for the registration of Patents is that of “Novelty or newness”, “Useful” and “Non-obvious”. However, the key lies in understanding what exactly is “New”. The question before the US Supreme Court was, whether a discovery of an article that existed in nature but was yet unknown to mankind, would constitute to be something new? The matter came up as Dr. Chakraborty, an Indian scientist, residing in the US and an employee of GE Inc. had developed a bacteria that could make crude oil soluble in water. This had great implications as it meant that whenever there was an oil spill in the Ocean, the same could be prevented from causing harm/damage to the ecology of the Ocean where the accident might have taken place. The bacteria was a living matter, developed from a natural source, and modified to perform a certain function. While adjudicating on the said matter, the US Supreme Court passed a judgment, stating that patentability included anything under the sun that is made by man and alive human-made micro-organism is patentable as it constitutes ‘manufacture’ or ‘composition of matter’ and so could be seen as ‘human-made inventions’. Thus, Chief Justice Burger, by a majority of 5 is to 4, allowed the registration of the Patent and held that while laws of nature, physical phenomena and abstract ideas are not patentable, Dr. Chakraborty’s claim was not to a hitherto unknown natural phenomenon but to a non naturally occurring manufacture or composition of matter — a product of human ingenuity “having a distinctive name, character (and) use”.

The implications of this decision would mean that today if any person extracts the herbal ingredient from the Tulsi plant, that may have any feature attributable to human ingenuity and seeks to Patent the same, it may be permissible. It may seem strange, but it is a true feature that needs to be realized no later than now.

Intellectual property refers to property rights in creations of the mind, such as inventions, industrial designs, literary and artistic works, symbols, and names and images. Among the different kinds of Intellectual Property Rights (IPRs) are trademark, patents, copyright, geographical indications, designs, trade secrets, etc.

There are four stages in the life cycle of any intellectual property: (i) creation, (ii) protection, (iii) utilization and (iv) enforcement.

Article 300A of the Constitution of India guarantees that no person shall be deprived of property save by authority of law. This provision in reference to IP ensures the right of the inventor/author over his or her invention/work. The enforcement of contractual obligations, under contracts dealing with IP, tantamounts to creating the intellectual property. There are different forms of IP protection available in India:

1. Patent
2. Designs
3. Trade Mark & Service Mark
4. Copyright
5. Plant varieties & Plant breeder's rights (under consideration of the Parliament)
6. Trade Secrets (along with Data Protection)
7. Geographical Indications

The judiciary will be called upon to protect the right, once created. The exploiting of intellectual property may involve licensing and cross-licensing arrangements, assignments, transfer of property and so on. Legal implications arise out of such instances. Provisions of statutes like the Indian Contract Act, Indian Stamp Act, Transfer of Property Act and now the Securitisation Act are attracted, in their applicability to the licensing arrangements. The provision of compulsory licensing has its own peculiarities. The judiciary would be faced with the challenge of striking a judicious balance between monopoly rights, guaranteed under a patent and the social needs and commercial advancements. Enforcing the intellectual property is an important stage in the lifeline of an intellectual property. This stage prevents others from unauthorized use and exploitation of protected intellectual property, during the period of the protection. Misappropriation and Infringement of Intellectual Property is a crime and the Statutes governing IP, list out as to what constitutes an infringement. However, there is a serious need for sensitivity in handling such matters because there is a dearth of judicial precedents and lawyers may often have to cite foreign cases to explain, advance and support their respective submissions. This inflicts a huge amount of pressure on the Court to consider the true context in which a foreign jurisdiction had passed its order and also to try and evaluate the appropriate extent of the action in India.

The pressure on the Judiciary is not only because of the lack of judicial precedents, but also because of the urgency that is shown by the parties in seeking relief. Corporations, individuals and the like come to the court, seeking immediate remedy, while the court does have to look not only into the validity of the claim but also into the aspects like jurisdiction,

International registrations of IP, market reports, etc. An IP case in court, on account of high stakes and commercial sensitivity, may be made to seem like a high profile matter, but the need for careful adjudication is at its highest form and the Court is not to be overtaken by what is being made to appear, except the need for expeditious decision. Patent Law assumes notable and immediate significance, akin to a threat before the Judiciary in a sense, as the gestation time given to India with regards to compliance of Patent Terms under the TRIPs, expires on 31st December, 2004. After January 2005, Patent Law will allow the processing of Product Patents and many more other forms of inventions such as micro-organisms, genetic materials, etc. A case relating to such subject matter will be having high stakes, a big dose of technical sciences and it is possible that twisted precedents, from various countries, are also pressed into service.

Piracy is developing in the business society as an evil and so is counterfeiting. Laws are there; the need is for a pro-active and tactful judiciary to handle such issues with competence, promptness and firmness. The judiciary needs to have a wider vision which can comprehend the impact on the global economy vis-à-vis national economy. The issue has a singular significance in the context of India. India has found an ironical benefactor in its population. Over the years, the second most populous country of the world had considered its huge population as one of the impeding features in its growth. But today India is one of the 'youthful' nations in the world. The average age of an Indian national is between 30-45 years. Almost 70% of Indian population is in its working age. With the demand for a global work force increasing day by day, India is also the largest supplier of knowledgeable workforce. The direct implication of this is that these very eligible people shall be the minds that will be used in the creation of the technology of tomorrow. Without the proper system to promote and protect creativity, this window of opportunity may soon close for India. IP provides jobs. It is a large contributor to the economy as well. The onus will come on the judiciary to uphold the effectiveness of any IP system and ensure that creation of IP along with enforcement of IPRs is maintained effectively. Any slackness is likely to have an adverse effect on the culture, associated with investment, job creation opportunities and GDP growth. These are the few reasons why the National Initiative Against Piracy and Counterfeiting (NIAPC), under the umbrella of FICCI, has felt concerned and taken the initiative in organising such a Round Table.

It is said that the road to achievement is always under construction. We have to keep working. I hope this Round Table would prove to be a milestone on the road to achievements for the judiciary. The Indian judiciary has to rise to the occasion as it has always done, and play the role that is expected of it.

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\* Extract from inaugural speech delivered on the 'Role of Judiciary in IPR Development and Adjudication on 30th June, 2004, at Round Table on IPRs for Judges, held at NJA Bhopal.

1. Quoted in *Mainly on Patents* (1972), Ed. By Felix Liebesny, p. 1, Butterworths.