



INTELLECTUAL PROPERTY AND TECHNOLOGY LAW UPDATES



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FAIR DEALING IN INDIAN CONTEXT

SHIKHA SRIVASTAVA

“Fair dealing” is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work. The concept of fair dealing finds its roots in the doctrine of equity. As per the principle of fair dealing, use of copyrighted work is allowed which would otherwise have amounted to an infringement of copyright of the content owner. In other words, it can be said that under fair dealing prior permission of author is not required.

The Copyright Act, 1957, provides for certain exceptions to infringement of copyright under the provision of “fair dealing”. It is primarily dealt in section 52 of the Act, which lists out certain acts not to be considered as infringement of copyright, such as the act done for the purposes of private or personal use, including research, or criticism or review, whether of that work or of any other work, or for the reporting of current events and current affairs, including the reporting of a lecture delivered in public or for teaching and education purpose. The Indian Copyright Act does not have any factors to determine fair dealing. However, the Indian courts have from time to time used the US, ‘four factor analysis method’. These four factors are:

1. the purpose of use i.e., commercial or non-profit or educational purpose;
2. the nature of the copyrighted work;
3. the amount of the work used, and
4. the effect of the use upon the potential market value of the copyrighted work.

In the United States, the four statutory factors are not to be treated in isolation - one separated from another. Whereas in India, courts have used a particular factor in isolation with other factors. The first factor is the most used among all other factors i.e., the purpose of use i.e., commercial or non-profit educational purpose.

Cases of fair dealing are rare in India. A look at some of the cases where the concept of ‘fair dealing’ has been talked about and discussed in the Indian courts.

Civic Chandran V. Ammini Amma - Copyright infringement suit was filed against a play which critiqued another theatre work in Kerala High Court. The court held that even if the copying of a work is substantial it would not be infringement if it is for the purpose of criticism. In this case, court established three factors to determine work to be an infringement of copyright:

“1. The quantum and the cost issue in relation to the comment or criticism; 2. The purpose for which it was taken, and 3. The likelihood of competition between the two”.

In *Syndicate of the Press of the University of Cambridge and Anr. V. B.D Bhandari and Anr.* The court while holding the work of the defendants to be transformative and not merely a substitute for the book of the plaintiff, was reluctant to issue an injunction order because of the large-scale use of such guidebooks and dependence thereon by

students. On the other hand, in *Syndicate Press of University of Cambridge v Kasturilal and Sons*, the court went ahead to hold that even if it is assumed that the defendant's work could have enabled students to give effective answers in examinations, such a situation cannot permit purloining verbatim texts of the original work.

M/s. Blackwood & Sons Ltd. V. A.N. Parasuraman

- The court held that 'in order to constitute a fair dealing there must be no intention to compete with the copyright holder of the work and to derive profits from such competition'. Thus, to benefit from the fair use/fair dealing exception the user must not intend to compete with the copyright holder.

The Indian Copyright laws are rigid and inflexible or restrictive in nature. A more flexible approach allows the courts to develop the law on a case-by-case basis as new problems emerge. India should look towards bringing an effective reform to the fair dealing law that ensures its flexibility and relevance in the digital age, while also not ignoring the interests of rights holders. Therefore, there is a requirement of reform in the copyright provision in order to make it more elaborate and wider.

ROLE OF PATENTS IN ENCOURAGING INNOVATION

SHILPI KUMARI

The patent system has a powerful impact on innovations as well as on the patterns of inventive activity. The provision of broad access to property rights on new inventions, coupled with the requirement of public disclosure, is extremely effective in stimulating the growth of a market for technology and promoting technological change.

Patents continue to foster motivation for innovation; meaning patents induce people to invent because of the prospect of profiting from those inventions.

Innovation is crucial to the development and deployment of technologies. A widely deployed model to understand technology builds on the concept of the technology life cycle. The life cycle of technologies can be divided into stages – from invention, through research, development and dissemination (RD&D) and market development, to commercial diffusion. Different processes occur at each stage of the life cycle, providing various opportunities to employ instruments that promote innovation.

One group of such instruments relates to IPR. IPR refers broadly to the ownership of intellectual findings in the industrial, scientific, literary and artistic fields. IPR grants inventors certain exclusive rights over their creations; it aims to encourage creative activity for the benefit of society by affording inventors an opportunity to derive fair returns from their investments.

Traditionally, IPR is divided into two forms: industrial property rights and copyright. In general, copyright is a legal term describing rights given to creators over their literary and artistic creations, while the term ‘industrial property rights’ refers to certain exclusive rights regarding innovative ideas or distinguishing signs in the industrial or commercial field. Industrial property takes a range of forms and includes patents to protect inventions, trademarks, industrial designs and commercial names.

Patents can play a prominent role in the entire technology life cycle, from initial R&D to market introduction (demonstration to diffusion), and allow competitive technologies to be protected and licensed to third parties to expand financial opportunities.

Patents not only promote innovation and economic growth, they are also one of the most effective tools for knowledge-sharing and technology transfer ever devised.

A patent is the right granted to a patent holder by a state, or by a regional office acting for several states, which allows the patent holder to exclude others from commercially exploiting their invention for a limited period without authorization. By granting such rights, patents provide incentives for innovators, offering them recognition for their creativity and enabling them to appropriate the returns of their investment. A patent can be a powerful business tool allowing innovators to gain exclusivity over a new product or process, develop a strong market position and earn additional revenue through licensing.

Conclusion

Patent protection is usually sought at the research and development (R&D) stage of the technology life cycle. Various departments in companies, including research units and specialized lawyers, play a key role in the development of inventions, as well as in the process of preparing and filing patent applications and obtaining, maintaining and exploiting patents. In return for exclusive rights, the inventor must disclose sufficient information regarding the patented invention to the public to allow others to access and further develop the technology. The disclosure of the invention is an essential consideration in any patent granting procedure. In this way the patent system is designed to balance the interests of inventors and the public.

SECTION 3(E) OF THE INDIAN PATENT ACT

TUSHAR KOHLI

Section 3(e) in Food Patents

Section 3(e) of the Indian Patent Act disqualifies claims that fail to meet the test of patentability. It states that invention related to substances obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or processes for producing such substances are not patentable. In order to avoid Section 3(e), a claim must show the interaction between the components and further achieving a combined effect which is different from the sum total of the effects of the individual substances. Section 3(e) of the Indian Patent Act becomes particularly relevant when it comes to food related inventions. The said section assists patent office in determining whether the food related claim is an invention or not.

This presents a challenge before food-related inventions because usually, food items are simply the expected sum total of their individual components. A new method of cooking rice might not have been previously employed, but if it provides the nutritional value that is expected to be provided through such a method or by use of the chosen ingredients, i.e., it shows nothing more than an additive effect, then the method is non-patentable.

Pharma Patents and Section 3(e)

Section 3(e), along with Sections 3(d) and 3(i), form a set of anti-ever greening provisions present in the Act that create exceptions from patentability in order to prevent the extension of patent monopoly over variants of existing inventions. Thus, a detailed

scrutiny into whether Section 3(e) disqualifies the patent is absolutely necessary for the safeguards in the Patent Act to fully operate. While the soup mix patent does not have significant implications on public health, the Patent Office has faltered in its assessment of synergistic effect in case of other types of patents as well, including pharma patents.

Access IBSA's study of 2293 patents granted between 2009 and 2016 shows that nearly 72% of these patents were granted for marginal improvements over previously patented drugs. The study estimates that from this pool, as many as 297 patents are likely in violation of Section 3(e).

Correlation between Section 2 & Section 3

Section 2 of the Patents Act lays down the conditions of patentability, whereas Section 3 creates exceptions from patentability. *The Supreme Court in Novartis v. Union of India*, while discussing therapeutic efficacy under Section 3(d), held that in order to gain a chemical or pharmaceutical patent, a product must pass this test in addition to the requirements of Sections 2(1)(j) and 2(1)(ja).

However, pharma companies have been seen to rely on novelty and/or non-obviousness of a claim to bypass the requirements of Section 3(e). In reply to the Patent Office's Section 3(e) objection in *Application No. 4045/DELNP/2014*, the applicant stated that since the novelty of the composition was acknowledged, it cannot be deemed a mere admixture

of known components. The Controller then proceeded to grant the patent.

Considering Novartis makes it clear that the Sections 2(1)(j) and 2(1)(ja) and Section 3(d) have to be satisfied separately, the Patent Office's practice of allowing applicants to circumvent Section 3(e), a similar anti-ever greening provision, by showing novelty and/or inventive step, cannot make for sound legal precedent.

Significance of Synergy Data

Synergy effect is shown through detailed comparative analysis of the data obtained related to individual and combined results. It not only contains the statement of the result or technical effect achieved, but the description and measurements of the improvement over the prior arts.

Unlike the more controversial Section 3(d), so far Section 3(e) has not received equal international attention. However, its importance in preventing ever greening attempts cannot be undermined. Access IBSA's report shows that only 12 patents were granted where the order clearly cited the data that proves synergism. In many others, either no synergism data was reproduced in the order (it might still have been submitted to the Patent Office) or the order does not provide any clear reasoning as to how the objections were overcome. This, coupled with the estimated 72% error rate in secondary patent grants, makes it evident that the Patent Office needs to be more vigilant and observe stricter scrutiny.

IMPORTANCE OF IPR IN TODAY'S WORLD

AAYUSH

IPR is a significant tool in today's era. The risk for an innovation getting infringed without the knowledge of the inventor stands higher. With the increase in IP, instances of IP crimes have become the part and parcel of the digitized era sometimes even leading to failure of businesses. Companies rely on adequate protection of their patents, trademarks, and copyrights, while customers make use of IP to ensure that they purchase secure, assured goods. An IP asset is like any other physical property offering commercial benefits to businesses. In a web-based world, IP protection is much more relevant as it is comparatively simpler than ever to reproduce any specific template, logo, or functionality. Hence, Strong IP laws give protection to IP and contribute to the economy of the respective state. IPR is one of the sources of security for intangible properties which are still open to the public and which can be quickly replicated by anyone.

- **Patent**– A patent is used to prohibit the use, selling, by another party for a defined period of time, of original production. In brief, a sovereign authority awards the inventor the IP right after an examination of its viability.
- **Copyright** – It is the right that protects a tangible form of expression like book, painting etc. It protects the mannerism in which the idea is expressed.

- **Trademark** - It refers to the protection of logo or design that an individual or company uses. The distinguished logo or design helps the customers to connect with the brand value and thereby ensure trust on the goods and services.

The benefits of IP Rights in current times

- **Innovative idea is a means to earn profit** – Ideas have little to no worth on their own. IP has great untapped potential to turn innovations into products and services which are commercially viable. The registering of copyright and patent will result in a constant stream of fee and increased income that will boost the overall market result.
- **Export Business Opportunities** – The productivity of a company in the export market is also improved by intellectual property. An IP right holder may use these logos or designs to sell products and services in foreign countries and may obtain a franchise arrangement with the overseas corporation, or export the proprietary products.
- **Encourage the ideas by securing them** -There will still be people who will attempt to duplicate the concept or development for monetary benefit if anyone has a unique idea or

development. It is also necessary to protect the IP properties from unlawful infringement from a third party. For all forms and sizes of companies, IP security may be implemented. Thus, after evaluating the market needs and situations, a person should determine which Intellectual Property Rights (trademark, copyright or patent registration) should be used to cover various areas of its IP.

- **Business Growth** – Shielding their exclusive goods or services, which the rivals will use to take away market share, resulting in steady growth and profits, is very important for small scale enterprise. Losing a market share of a sector at the initial level can be dangerous in the long run to its corporate health.

The pandemic and IPR

Political leaders around the world have formed proposals to expand access to IP rights pertaining to COVID-19. For e.g., the EU is considering buying COVID-19 related rights to set up a pool or fund of publicly owned patents. This is an important step in the IP sector and it is an extraordinary attempt by policymakers to ensure that the battle against the pandemic is not obstructed by patents. Several countries are now considering a compulsory license scheme whereby governments permit a third party to perform or use a certain procedure without the patent owner's consent.

Strong and Enforced Intellectual Property Rights Protect Consumers and Families

- Strong IP rights help consumers make an educated choice about the safety, reliability, and effectiveness of their purchases.
- Enforced IP rights ensure products are authentic, and of the high-quality that consumers recognize and expect.
- IP rights foster confidence and ease of mind that consumers demand, and markets rely on.

Key Advantages of Securing the Intellectual Property Rights

1. TURN THE INNOVATIVE IDEAS INTO PROFIT

Ideas on their own have little or no value. IP has great untapped potential to turn your ideas into commercially successful goods and services. Registering your patent and copyright can result in a steady stream of royalty and extra revenue, which can improve the overall business bottom line.

2. MARKETING OF BUSINESS GOODS AND SERVICES

Intellectual Property is crucial for creating a unique identity for the business. It helps to differentiate the goods and services of one company from the other in the market and to easily promote them to the target customers.

3. ACCESS OR RAISE FINANCE FOR THE BUSINESS

A person can monetize the IP assets through sale, licensing or usage as collateral for debt financing. Furthermore, IP registration is also very useful to apply for government or public funding, loans and subsidies.

4. IMPROVE THE EXPORT OPPORTUNITIES FOR THE BUSINESS

Intellectual Property also increases the competitiveness of a business in the export market. An IP right holder can use these brands or designs for marketing the goods and services in foreign countries and can seek franchising agreement with the overseas firm, or export the patented goods.

5. TO SECURE THE UNIQUE IDEAS AND CREATION

When any person has a unique idea or creation, there will always be people who will try to replicate that idea or creation for monetary gains. Hence, it is crucial to secure the IP assets before they are illegally infringed upon by a third party. IP protection can be taken for all kind and size of business. So, after analyzing the business need and circumstances, a person can decide which Intellectual Property Protection (trademark, copyright, or patent registration), can be used for covering different areas of Intellectual Properties.

6. ACCELERATES THE BUSINESS GROWTH

It is very crucial for small size business to shield their unique products or services, which can be used by the competitors for taking away the market share. Losing a market share in the initial stage in a business can be hazardous to its business health in the long-term.

It is imperative to note that it is the sole responsibility of the proprietor to protect his intellectual property from infringement by any person or party, as no one else will make an effort to inform that your IP rights are violated by someone.

In view of the above, it can be concluded that IP Protection is indispensable, and all countries must have strong laws for protecting Intellectual Property Rights. It is high time for all nations to duly recognize the IP rights of their native individuals and companies.

In order to finally improve the structure of IP laws in international trade and to ensure the long-term social and economic development of society, countries need to strike a perfect balance on how to secure the Intellectual Property Rights of individual or companies. The laws should neither be too strict nor should they be too lenient.

ONLINE EDUCATION AND COPYRIGHT ISSUES

SHIKHA

The Covid-19 pandemic has created some major challenges to educational institutions all over the world. Due to this pandemic, most educational institutions have switched to online teaching which has given a global boost to e-learning or online classes. Online teaching has become the norm in the aftermath of the pandemic.

But there are a lot of issues and concerns regarding online education, the major one related to whether the copyright laws and fair use will apply to online education. The Indian Copyright Act contains exceptions for teachers to use copyrighted material. But, does this exception apply to the online education as well?

The governing law for copyright protection in India is the Copyright Act 1957. Copyright law deals with the protection of the expression of an idea, rather than an idea itself. It is a form of intellectual property protection granted under the Indian law to the creators of original works of authorship such as literary, dramatic, musical, artistic works, cinematographic films and sound recordings.

Under Section 14 of the Copyright Act, 1957, a bundle of exclusive rights is vested in the owner of a copyright. These rights can be exercised only by the owner of copyright or by any other person who is duly licensed in this regard by the owner of copyright. These rights include the right of adaptation, right of reproduction, publication, translations, and communication to public.

Copyright law also prohibits others from using author's or creators' original work without prior permission. However, in certain situations, use of copyrighted material is permitted. This is referred to as Fair use or fair dealing.

Fair dealing is an exception to the rights of the copyright owner. Further, as per Indian law fair use is determined by the purpose for which copyrighted work is being used.

Section 52 lists out certain acts not to be considered as infringement of copyright. Further, Section 52(1) (i) permits reproduction of any work by a teacher or pupil *in the course of instruction* (among other purposes).

Section 52 consists of the phrase 'in the course of instruction'. To that end, the Delhi High Court in the case of *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors.* [(2016) 160 DRJ (SN) 678] interpreted 'course of instruction' as: "... imparting and receiving of instruction is not limited to personal interface between teacher and pupil..."¹ And as per the expansive interpretation of the court, the phrase isn't merely limited to classroom lectures but includes any activity that falls within the ambit of providing educational instruction, both prior and post the actual act of lecturing², i.e., education should not be bound within four walls of a room.

1 <https://libertatem.in/articles/education-during-and-after-covid-19/>

2 <https://spicyip.com/2020/04/coveducation-and-copyright.html>

The problem associated with online teaching is uploading of course material online. In the online medium of education, teachers cannot limit the distribution of copyrighted work, i.e., the challenge is that of accessibility to copyright work.

Fair dealing allows reproduction of a copyrighted work for the purpose of imparting education but it has certain limitations. Therefore, teachers must be careful of the following points while teaching online:

- Downloading of original work shared on the internet is allowed, but work that is illegally downloaded or from websites allowing for the free download of paid material would constitute an infringement of copyright. Care should be taken that copyrighted material is downloaded only through legal means.
- Also, it should be kept in mind that copyrighted material should not be used for any purpose other than education.
- Uploading scanned copies of paid books to be shared with students in the name of fair use/fair dealing is not allowed. The 2012 Amendment to the Indian Copyright Act allows for scanned copies of paid books to be shared by institutions for the purpose of education if the institution already possesses a hard copy of the book in its library³.

Due to pandemic, we have been pushed towards online medium of education. Concerns related to copyright issues must be addressed. While fair dealing provisions allow use of copyrighted work for the purpose of education, more clarity is required in an online teaching scenario.

3 <https://www.intepat.com/blog/copyright/copyright-issues-in-online-education/>

