NATIONAL JUDICIAL ACADEMY

(P-1263)

National Workshop for High Court Justices on Intellectual Property Rights
(IPRs)
16-17 October 2021

PROGRAMME REPORT

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(Online Mode)

Introduction

The workshop discussed various dimensions acquired by Intellectual Property Rights [*hereinafter*, IPRs] in contemporary times. It was highlighted that the abolishment of Intellectual Property Appellate Board (IPAB) is anticipated to upsurge the burden of High Courts which may lack the technical acquaintance and proficiency in the field of IPR. The approach of a judge plays a substantial role in delivering timely justice. The workshop underlined that for judges, presiding over IPR matters it is significant to comprehend the essence of time. Therefore, the insinuation of injunctions in IPR is all the more imperative. The last 15 years have seen cardinal revolution in IP laws owing to the last stage of amendments to Patents Act, 1970 in 2005 in compliance to TRIPS. There is a lot of uncertainty in many IP areas and the judiciary needs to lead the way forward. It was underscored that in the fast moving ecosystem of the IP sector and equally rapid need for laws to regulate the same, the judicial system needs to incessantly contribute by introducing guidelines and setting standards and checks for tackling infringement. The workshop stressed that the role of Indian judicial system is inevitable in effective enforcement of IPR which is reflected through abundant judgments and orders over the years.

Session – 1

Contours of IP Legislations: The Overlaps

- Overlap between Patents & Design
- Design vis-à-vis Copyright debate
- Overlap between Domain Name & Trademark
- Relationship between Trademark Rights & Unfair Competition

Speakers: *Justice Prathiba M. Singh & Mr. Pushpendra Rai*

The session emphasized upon the overlaps between patents & design; design vis-à-vis copyright debate; overlap between domain name & trademark and relationship between trademark rights & unfair competition. The discussion initiated by highlighting the scope of IP rights. It was accentuated that the core concern in IP rights is to maintain a balance between protecting rights and upholding public interest. It was stressed that IP has progressively become inter-disciplinary in nature mainly due to the extension in new areas and responses to technological challenges that has led to overlaps. Subsequently, the overlaps between designs, patents and trademarks were discussed. It was underscored that '*Industrial Designs'* is a discrete component of IP which is aimed at satisfying both aesthetic and functional purposes when assimilated in a tangible product. In other words, it is the intersection of art and technology. The protection is only for appearance or aesthetic features of a product. On the other hand, the protection for the technology or functional characteristics is conceivable only through a Patent. With respect to inventions, patent protection preempts any other form of IP and failure to seek one cannot be offset through other means of protection since, in principle, other forms of IP will not apply to inventions of a strictly technical nature.

While particularising on trademarks and domain names it was accentuated that trademarks have been recognized by courts globally since about 500 years. For instance, the principle of 'passing off' was established in *Southern vs How* in 1617, in this case a clothier who had gained reputation by putting his marks on clothes made by him was used by another to deceive and make profits. Conversely, domain names are much recent developments. The Domain Name framework was established in 1999 with the *Uniform Domain Name Dispute Resolution Policy,* which is basically a framework for resolution of disputes between domain name registrant and third party (i.e., a party other than the registrar) over abusive registration and use of an Internet domain name in the generic top-level domains or gTLDs

(e.g., .biz, .com, .info, .mobi, .name, .net, .org), and country code top level domains or ccTLD. This policy provides faster and cheaper resolution of disputes. Lastly, *Bigtree Entertainment v Brain Seed Sportainment* 2017 SCC OnLine Del 12166 : (2018) 73 PTC 115 *and People Interactive (India) Pvt. Ltd. v Vivek Pahwa & Ors.* 2016 SCC OnLine Bom 7351: (2016) 6 AIR Bom R 275 were elaborated.

Session- 2

Protection of Intellectual Property and Trade Secrets

- The Paris Convention for the Protection of Industrial Property (Paris Convention)
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).
- IP rights on confidential information
    - Not being generally known [or] readily ascertainable
    - Derives independent economic value
    - Efforts that are reasonable to maintain the secrecy

Speakers: *Justice Sanjeev Sachdeva & Mr. Pushpendra Rai*

The session initiated by highlighting various connotations attached to Intellectual Property Rights. Meaning of "Trade Secret" was elaborated along with the nature of its protection, status of confidential information, and commercial value attached. The session further elaborated upon various conditions that qualifies the watertight compartment of any information to obtain the demarcated status of trade secret such as- potentially valuable to its owner; not generally known or readily ascertainable by the public; made a reasonable effort to keep it secret; and the cost associated with its development.

It was highlighted that trade secrets directly impact business output, revenue generation, and market position. Reference was made to the formulation of Coca-Cola, wherein the company has been taking stringent measures to protect the secrecy of its formula. It was emphasized that confidential information of this nature can only be protected by keeping it a secret and there is no specific registered or unregistered protection available pertaining to the trade secret. It was further highlighted that trade secrets encompasses technical information that includes information concerning the manufacturing process, pharmaceutical test data, design, and drawing of a computer program, and commercial information such as distribution methods and advertising strategies.

Correspondingly, reference was made to the survey conducted by the U.S. International Trade Commission, wherein more than 7000 U.S. firms were involved to study the economic effects of India's trade and industrial policy on their business operation and 56 percent of it reflected their apprehension about the protection of the trade secret. Reference was also made to the international standards for protection (called "undisclosed information") established as a part of TRIPS (1995) and the Paris Convention (1967). It was underlined that member states shall protect "undisclosed information" against unauthorized use "in a manner contrary to honest commercial practices" (this includes breach of contract, breach of confidence, and unfair competition)

Session- 3

Essence of Time in IP Litigation: Judicial Approach

- Issues relating to awarding Injunctions as primary relief
- Impact of Commercial Courts Act , 2015 on IP Litigations
- Case Management

Speakers: ***Justice Prathiba M. Singh, Justice Manmohan Singh & Mr. Pravin Anand***

The session highlighted various changes that are expected to reduce the time consumption in IP litigation such as- amendment in the Civil Procedure Code, Commercial Courts Act, Delhi high court (original side) rules 2018, and Draft IPR division rules 2021. It was emphasized that the Commercial Courts Act was essentially meant to speed up adjudication and bring down the life of litigation involved in IP cases. It was pointed out that there are specific provisions enacted for speedy hearing that includes; summary judgment –order 13A, fixing time slots in case management – Order 15, rule 2 (g), strict timelines for written submission and disposal of appeals within six months – Section 14. It was emphasized that trademark and copyright cases does not involve complicated adjudication contrary to the patent cases which require in-depth analysis. Reference was made to *Ajit Mohan vs. National Legislative Assembly of Delhi (writ petition no. 1088 of* 2020) wherein the Apex court emphasized the importance of time-slots as need of the hour. Subsequently, various judgments of the Delhi High Court wherein the court has elucidated upon fixing the time-slots in IP case such as; *AstraZeneca v. Intas (2020 SCC Online Del 1446), Pharmacyclics v Hetero, Roland v Sandeep Jain [CS(COMM). No. 565 of 2018] and ISRA v Ashok Singh [CM (COMM) 356/2016]* were discussed. The speaker further highlighted that backlog of cases, misuse of Supreme Court's extension of limitation order, and

frequent roster changes are few of the roadblocks to time management in IP cases. To improve the overall time management following methods were suggested like- pre-recording arguments, virtual filing, and dedicated judges.

Further, the session accentuated upon different types of injunctions and orders like; Ex-parte, Ad-interim, permanent, Anton Piller order, Mareva injunction, John Doe orders, and dynamic injunction. During the course of the discussion – "Place of business", "Purposeful availment of forum court", and "Global Injunctions" were emphasized upon concerning the jurisdictional issues in the digital age. Reference was made to various cases including *Burger King Corporation v. Techchand Shewakramani [CS (COMM) 919/2016], World Wrestling Entertainment Inc. v. M/s Reshma Collection [2014 (6) PTC 452 (Delhi HC)], Millennium & Copthorne Intl, Ltd v. Aryans Plaza Serv. Pvt Ltd [CS(COMM) 774/2016], Juggemaut books Pvt Ltd v. Ink mango Inc. & Ors. [CS (COMM) 421/2019], Swami Ramdev & Anr. v. Facebook & Ors [CS (OS) 27/2019], MySpace Inc. v. Super Cassettes Indutries [236 (2017) DLT 478].*

Session- 4

Intellectual Property Rights in Digital Age: Avenues & Challenges

- Artificial Intelligence: Navigating IP challenges
- Emerging trends in IP Regime

Speakers: Justice *M. Sundar & Mr. Pravin Anand*

The session deliberated on the latitude of artificial intelligence [*hereinafter* AI] in navigating IP challenges and the emerging trends in IP regime. The discussion commenced by highlighting that AI is not capable of a precise definition rather it can only be at best described. While describing AI in science parlance it was stressed that any system basically has three aspects i.e., data, software and algorithms. In AI unlike the conventional software development these three aspects are dynamic. Conversely, in arts parlance AI is the system which can assimilate aspects of learning as well as features of intelligence with a synergy to get an output. Thereafter, problems that AI is drawing before judges was discussed by emphasizing certain case laws. In *Naruto v. Slater* 888 F.3d 418 (9th Cir. 2018) the court held that copyright cannot vest in an animal. In *Thaler v Commissioner of Patents [2021] FCA 879, [*DABUS *(*Device for the Autonomous Bootstrapping of Unified Sentience) *Case]* the appeal court ruled that AI cannot be the inventor of a patent. It was further highlighted that in India for the first

time, the copyright office recognized an AI tool *Raghav* [Robust Artificial Intelligent Graphics and Art Visualizer*]*, as the co-author of a copyright protected artistic work. In *Ferid Allani v.. Union of India* (2020) 81 PTC 489, the court held that the bar on patenting extends only to 'computer programs per se' and not all inventions based on computer programs. While discussion *Parle Products (P) Ltd. v. J.P. and Co.,* (1972) 1 SCC 618 it was emphasized that in trademark cases, judges ought to get into the shoes of a person with average intelligence, ordinary prudence and imperfect recollection and see whether such person can be lured into.

While deliberating upon the emerging trends in IP regime it was emphasized that in the digital environment traditionally there were cases of phishing , spamming, meta tagging, hyperlinking, framing; Cases of domain name theft e.g. cybersquatting or reverse domain name hijacking etc. The recent trends shows a rise in intermediary liability cases which involves Section 79 of The Information Technology Act, 2000; Defamation/disparagement tarnishment type cases of various types; Hacking and related cyber security issues; Privacy and GDPR; data protection; Privacy and GDRP - data protection; Straight copyright infringement detected through phone home technology. The distinction between Artificial intelligence (AI), artificial general intelligence (AGI) and Artificial Super Intelligence (ASI) was highlighted. AI is also called artificial narrow intelligence. In this intelligence is displayed by machines to perform specific tasks requiring domain expertise. While in AGI the ultimate vision is to create systems that can make future plans based on previous knowledge and to apply knowledge from one domain to another and adapt to changes in the environment. On the other hand ASI are systems that can outperform humans in every domain. However, the latter two AI's are yet to be touched. Subsequently, elements, aspects and applications of AI were also discussed. The challenges surrounding AI in the light of *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, Article 21 of the Constitution of India, Justice B. N. Sri Krishna Committee Report 2018 and the Personal Data Protection Bill, 2019 were also discussed.