

New IPR (Intellectual Property Rights) Legislation and Regulations for Marketing Activity

*Prof (Dr) V.V. Sople
Ms. Jyoti Gattani*

Abstract

Consumers have traditionally called for government intervention, when the marketers fail to produce a socially desirable outcome. Governance is that broad field of economics, which concern the design of regulatory system through which exchange is smoothly conducted. The economic theory of regulation, most often examines how collective action by individuals, through the auspices of government, affects the incentives of participants in markets. The basic assumptions of approach to government regulations are:

- Industrialization gives rise to concentration of power, increased uncertainty, performance failures, uncompensated costs, unfair trade practices, miscommunication and adverse distributional effects.
- Regulation must promote public interest or social values that cannot be derived exclusively from monetary or market-oriented measures.
- With proper implementations, regulation promotes higher levels of market efficiency and greater consumer choice.
- Regulatory intervention may change with evolution of markets.

The role of government in regulating the marketing activities must be to contribute to the development of an efficient system, for creation of products or services; communication and delivery to the consumers. It should establish an efficient structure for governance of marketing activities, which involves the standardization and refinement of marketing tools and techniques for consumer benefits. A second role for government lies in reducing complexities in transactions and thereby reducing the transaction cost. Traditional regulatory methods involve restricting the unfair and restrictive trade practices. But new IPR regime, created new challenges to law makers and regulators in evolving and implementing regulations for marketing activities.

In a product patenting regime in India effective January 2005, multinational drug makers think of pricing their blockbuster drugs high after patenting them. To counter this, the proposed new Competition Commission of India (CCI) ensures that corporations do not go too far with their intellectual property rights (IPRs) so as to leave the consumer bleeding. There are certain market segments (e.g., the network environment) in which risks of abuse may be greater than in others.

This paper examines the implications of amended IPRs Acts vis-a-vis regulatory provisions of Competition Act, 2002 & Consumer Protection Act, 1986 in India and also the current attitude of competition law authorities toward IPRs.

Introduction

Activists claim that patent protection will restrict the supply of cheap drugs in India. However, on the other hand, the poorly copied drugs will further worsen the plights of the poor. Hence, the law maker has to do a task of both boosting IP development through protection of innovators and also regulate the marketing activities to protect the interest of the consumers.

Innovations and the new product developments are the key success drivers in almost all the industries today. Knowledge produced by employees of the organization through the handwork, experience and invention, is the intellectual property of the firm or an individual, which needs to be captured, preserved and protected for the future use and for not being used by the rivals and the purpose to carve out a market place or gain competitive advantage over the others. In the technology intensive and competitive business environment the management of patents is at the core of the competitive strategy. Globalization has further necessitated a proper legal strategy on the part of the organization to protect their innovative processes and products. These innovations are legally protected under patents, trademarks, designs and copyrights acts giving the exclusivity in using their property rights.

On the other hand the marketing regulations are enforced through marketing laws which ensure:

- **Consumer protection**

The major area of legislation is to curb the unfair trade practices by businesses to protect the gullible consumers from unscrupulous marketers. The regulations keep checks on the false and fake advertisements, deceptive packaging and marketing of unsafe goods.

- **Promoting healthy competition**

In the free market economy, the competition is the fundamental strength for achieving the growth. However, some firms in order to dominate the market may adopt the restrictive trade practices. The legislation is to curb such business practices.

- **Environmental protection**

The regulation is aimed at holding the business responsible for social costs incurred while manufacturing of products they manufacture and the manufacturing process they adopt

Patents Protection

Patents means an official document giving the holder of the patent the sole right to make, use or sell an invention and preventing others from imitating it. From the manufacturer's prospective patents create a market barrier to other competitors and they can also charge royalties on the license of patents to third parties. Though patents give effective protection to invented new technology; it is an expense. It allows the owner to commercially exploit the consumers. The patent system has protected inventors by giving them an opportunity to profit from their labours, and it has benefited society by systematically recording new inventions and releasing them to the public after the inventors' limited rights have expired.

India made its patent laws compatible with the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement under WTO by 2005 and has incorporated all changes in the Patent Act, 1970 through various amendments. These changes caused paradigm shift in the thinking of the intellectual property managers and inventors.

Trademarks Protection

Trademark symbolizes the value or goodwill associated with the goods and which can be assessed by the extent to its perception in the public mind with regards to its quality and specific source. The goodwill associated with a trademark can be among a company's greatest intellectual property assets. Protecting one's trademarks by using them properly, promoting them, and monitoring one's rights by challenging infringers, is essential in maximizing their value.

Trademarks rights are infringed, when one party uses a mark of another party and that is likely to cause confusion in the minds of consumers as to which party is the source of the original goods or services, he/she wants to purchase. In determining whether two marks are "confusingly similar," courts look at the overall commercial impression made by the two marks from the standpoint of a reasonable customer. Do they look alike or sound alike? (Piknik v. Picnic) Do different words have a similar or identical meaning? (play boy v. play men; Aqua-care v. Water Care)?

Disposing the appeal and remanding the case to the trial court, Cadilla Healthcare for 'Falsigo' v. Cadilla Pharmaceuticals for 'Falsitab', an anti-malarial drug, the honorable Supreme Court set out the following general factors for deciding of deceptive similarity in an action for passing off on the basis of unregistered trademark:

- The nature of the marks –word marks/ label marks/ word and label marks;
- The degree of resemblance between the marks, both phonetically and in ideas;
- The nature of the goods in respect of which they are used as trademarks;
- Similarity in the nature, character and performance of the goods of the rival traders;
- The class of purchasers who are likely to buy the goods bearing the marks, their education, intelligence and the degree of care they are likely to exercise in purchasing and/or using the goods;
- The mode of purchasing the goods or placing orders for the goods; and
- Any other extraneous circumstances which may be relevant in the extent of dissimilarity

between the competing marks.

The Patent & Trademark office owns no responsibility with regard to the misuse of trademarks by unauthorized parties. The owner of a registered mark has to be watchful to find out infringement, file a suit and enforce its rights. Once the owner determines that another party is infringing, a simple 'cease and desist' letter from the trademark authority is sufficient to end the infringement. Further the registered user can sue the infringer in Indian Court, which is potentially a costly proposition. The owner needs to access the commercial value of the mark and the possible economic loss that would result from the dilution of the mark's distinctiveness caused by the infringer. It is important to note that an infringer will be less likely to succeed in infringing an arbitrary or fanciful mark because of its inherent distinctiveness. Conversely, descriptive marks are much easier to successfully infringe because of their inherent weakness in distinguishing the products or services they denote.

Design Protection

As per Design Act 2000, design refers to the features of shape, configuration, pattern or ornamentation, which can be judged by the eye in finished products. Design registration is used to protect the visual appearance of manufactured products. A registered design gives you a legally enforceable right to use your product's design to gain marketing edge. It also prevents others from using the design without your agreement. The design registration in India is intended to:

- Protect only for the appearance of the article and not how it works.
- Protect features of shape, configuration, pattern or ornamentation.
- Protect designs, which have an industrial or commercial use.
- Exclude the designs, which are essentially 'Artistic Works,' which are covered by copyright legislation and are not eligible for design registration.
- Protect the features which appeals to and is judged by the eye. The features are applied by industrial process.

Copyrights Protection

The Copyright Act, 1957 in section 14, describes copyright as the exclusive right subject to the provisions of this Act. It authorizes the copyright owner for the reproduction or copying in respect of a work or any substantial part thereof, namely:

- Copyright vests in original work involving skill, labour and judgment in respect of literary (such as books, publication including computer software); dramatic and musical works, artistic works;
- Engineering drawings;
- Sound recording;
- Musical work;
- Cinematography film, etc.

Computer programs are entitled to protection under the present laws. Computer software comprises program manuals, punched cards, magnetic tapes, disks, and papers etc. which are needed for the operation of computers. Manuals, papers and computer printouts can be classified as literary but the concept of algorithms, normally used in programming are not covered under copyright protection. Software containing certain special information in a particular notation, mainly punched cards is considered as a literary work. The magnetic tapes and disks, on which electronic impulses are recorded, are considered as literary work.

As per Section 51 of the Copyright in a work shall be deemed to be infringed:

- When any person without a license granted by the owner of the copyright of the Registrar of Copyrights under this act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act-
 - does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or
 - permits for profit, any place to be used for the communication of the work to the public

where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

- When any person
 - Makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
 - Distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
 - By way of trade-exhibits in public, or
 - Imports into India.

In India, the unauthorized hire and sale of copies of video films, cassette recordings for public performance and books is regarded as a violation of Copyrights Laws. Against such violations, civil suits provide remedy for claiming compensation for loss of profits. If copies of the work done outside India, are produced in India it would infringe the copyright of the owner, and its import will be banned. Mere import of such material would result in the infringement of the copyright law in India.

The Intellectual property is one of the corner stones of modern economic policy at the national level. It is increasingly becoming an important tool for sustainable development in the knowledge-based society of this millennium. Therefore, understanding and appreciating the economic foundations of the IP systems is a prerequisite for comprehending its increasing importance and role in national strategies for enhancing competitiveness and accelerating socio-economic development. As the IPR legislation gives protection to the marketers or owners of the IPRs, it may lead to the monopolistic situation and exploitation of the consumers. However, through the enactment of the following laws the consumer's interest is protected.

Consumer Protection

The Consumer Protection Act, 1986 is an important social legislation to protect the consumers from exploitation from the business and trading community with bad intentions. Under this act the government has made provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for the matters connected therewith to secure speedy and inexpensive redressal of their grievances. With the enactment of this law, consumers now feel that they are in a position to deal with the business community and corporations against their exploitation. The broad salient features of Consumer Protection Act are:

- The Act is exclusively passed for the interest of the consumers
- It seeks to promote the rights of the consumers
- It covers private, public and co-operative sector
- The provisions of Act are compensatory in nature

In short, it protects the consumers from influences of the seller's (marketer / manufacturer) coercive power by way of unfair trade practices to restrict competition.

The Consumer Protection Act, 1986 prohibits marketers from adopting the following unfair trade practice {Section 36A and Section 2(1)mn}:

- False representation of the quality, composition, style or model of goods and services.
- Falsely alleging affiliation and misleading statements about the usefulness of goods and services.
- Warranties or guarantees given without adequate tests, or expressed in misleading terms, giving false or misleading facts disparaging the goods, services or trade of others.
- Announcing bargain prices for goods, which are either put on sale or are offered in quantities which are not reasonable with respect to the nature of the trade, offering gifts, prizes or other items with the intention of not providing them as offered.
- Sale of substandard and hazardous goods under defined conditions.

Restrictive trade practices

Consumer Protection Act defines the following trade practices as restrictive and regulates conditions regarding any agreement arising between the seller and purchaser in the course of business.

- Restrictions on the sale of goods to certain person or class of persons.
- Restrictions on purchase of goods on the conditions of purchase on other type of goods.
- Restricting the purchase of goods on the conditions such as not to deal with goods other than those of seller.
- Restricting purchasing and selling of goods only at prices stipulated therein.
- Allowing the concession of benefits by way of discounts, rebate, allowances, and credit terms in connection with dealing.
- Restrictions on resale prices (lower than stipulated) of the goods or otherwise stated.
- Restrictions on the quantity, output and the area of disposal of goods.
- Restrictions on employment in manufacture of goods.
- Restriction on resale prices with a result of elimination of competition.

With a complaint from the aggrieved party (individual or firm) or on its own, regarding the unfair or restrictive trade practices, the regulators are empowered to initiate enquiry and impose the penalty or issue 'cease-and desist' order.

Promoting Competition (CA)

The Competition Act, 2002 endeavours to shift the focus from restricting monopolies to promoting fair competition, so that the Indian market is equipped to compete with market world-wide. The object of Competition Act is to promote fair competition in the market, to protect consumers, firms from each others and the interest of the society. The highlights of the CA are as follows:

- The anti-competitive practices such as price-fixing, output restrictions, bid rigging and market restriction are prohibited.
- Regulates the mergers and acquisitions above threshold limits.
- CA emphasizes in competition advocacy.

The overall direction of this Competition Act is to protect the interest of the consumers, freedom of trade and promote healthy competition.

IPR vs. Regulations

IPR ensures protection by prohibiting unauthorized use and thus reward original effort owner. Regulatory aspects are legal regulations associated with manufacturing (particularly in pharma sector) to ensure the safety and quality of products, which are meant for human consumption. Unlike IPR that are voluntary in nature, regulatory aspects are laws, which are to be obeyed and complied with. They remain in force as long as a product is being manufactured and primarily aimed at public health by ensuring safety and quality of the products being manufactured and marketed. The regulatory procedures ensure that safety, quality control and testing parameters are not compromised by the manufacturers or marketers for the profit motives. Thus the focus of IPR and Regulatory Aspects is entirely different i.e. while IPRs focus at encouraging innovations and new developments, regulatory aspects deal primarily with ensuring consumers interest by way of ensuring safety in manufacturing, usage, consumption, fairness in distribution for product availability and truthfulness in communication to the consumers. On the marketing side, the regulatory aspects ensure availability of quality product at reasonable prices looking into the interest of the masses and create deterrents for unscrupulous marketers. Thus the regulations empower the consumers to exercise his various rights such as fundamental rights, constitutional rights, investors' rights, medical rights and legal rights.

Conclusions

The Intellectual property is one of the corner stones of modern economic policy at the national level. It is increasingly becoming an important tool for sustainable development in the

knowledge-based society of this millennium. Therefore, understanding and appreciating the economic foundations of the IP systems is a prerequisite for comprehending its increasing importance and role in national strategies for enhancing competitiveness and accelerating socio-economic development. IPs are increasingly being recognized the world over as an important commercial assets and as a driving force in technological progress and socio-economic development. IPs seek to create a broad-based sustainable improvement in the quality of life and standard of living.

However, in Pharmaceutical sector multinational drug makers thinking of pricing their blockbuster drugs very high after patenting them, cannot do so, as both Consumer Protection Act and Competition Act ensure that corporations do not go too far with their intellectual property rights (IPRs) so as to leave the consumer bleeding.

This could be an absolute dampener for multinational drug makers which now charge lakhs of rupees for just a dose of their latest cutting edge cancer, transplant and HIV drugs even without patent rights since there are no equally good alternatives.

The under the Competition Act, legislator will not take for granted the rights a company secure under the IPR Acts like Patents Act, the Trademarks Act, the Copyrights Act, the Designs Act or the Geographical Indication of Goods Act. Instead, the guardians of law would scrutinize how they enforce their IPRs. In short, the Government would not permit MNCs to be too aggressive with their patent muscle while exercising their rights. This may have implications on their pricing strategy as well as on how they tackle other players, but it will be in the benefit of the consumers. The idea is to allow patent holders to impose only 'reasonable' conditions, while exploiting their rights or stopping others from infringing on the owner's rights. The word 'reasonable' here will be interpreted from a consumer perspective, when disputes occur to tackle monopolistic practices. IPRs cannot be misused to escape provisions of the competition law by using unreasonable conditions. And this would be the second instrument that will keep a check on the prices of patented drugs here; the first being a price negotiation as a pre-condition for giving marketing approval to any patented drug in India.

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