

Current Trends of Intellectual Property Law in India

By: Dr. Tabrez Ahemad and Jaya Godhwani

TABLE OF CONTENT

| | |
|---|----|
| 1. Introduction..... | 4 |
| 2. Important IP Development in India in Last 12 Months..... | 5 |
| 3. India's Laws Evolving To Protect IP Domestically | 9 |
| 4. India on the United States Trade Representative's Special 301 Watch List In 2010 | 12 |
| 5. IP Case Law Development: Relevance to Global Pharmaceutical | 13 |
| 6. Further Legislation Is Necessary to Bring India's IP Regime up To International Standards..... | 16 |
| 7. Steps Taken by the Government to Improve Enforcement of IP | 17 |
| Steps taken by FICCI..... | 19 |
| 8. Conclusion | 20 |

Current Trends of Intellectual Property Law in India

*Dr. Tabrez Ahmad**
*Jaya Godhwani***

ABSTRACT:

The twenty-first century will be the century of knowledge, indeed the century of the intellect. A nation's ability to translate knowledge into wealth and social good through innovations will determine its future. Thus innovations hold the key to the creation as well as processing of knowledge. Intellectual property can be characterised as the property in ideas or their expression. It is a creation of the mind, which protects the rights of individuals and businesses who have transformed their ideas into property by granting rights to the owners of those properties. Intellectual property can be classified into the following four categories: patents for inventions, copyrights for literary works, trademarks, and trade secrets. In the paper the researcher will be dealing with the following issues as the development of intellectual property in India has always engendered heated debate and keen interest around the world. In recent years India has made robust progress not only in implementing its obligations under the WTO Agreement on TRIPs Rights, but also in developing its own IP regime which endeavors to balance the trade-off between monopoly rights and free access to knowledge. Although no new IP laws have been enacted over the last year, it would be wrong to say that there have been no parliamentary developments with respect to intellectual property.

The project focuses on issues like what is the most important IP development in India over the past 12 months? ; How are India's laws evolving to protect IP domestically? How is IP case law developing in India, such as in the case of pharmaceutical patents? ; Is India still placed on United States Trade Representative's Special 301 Watch List in 2010? ; What further legislation is necessary to bring India's IP regime up to international standards and recent efforts have been made to improve enforcement of IP legislation in India? Fair, strong and non discriminatory IPR enforcement only create economic incentives that encourage innovation thus it's necessary to bring India's IP regime high up to international standards and the paper gives certain recommendations like awareness among right holders, policy dealing machinery etc.

KEYWORDS: India's IP regime, Development, Legislation.

*Associate Professor of Law, School of Law, KIIT University, www.technolexindia.com

** 4th Year BScLL.B Student, School of Law KIIT University

Introduction

Intellectual property is the key to India's expanding knowledge economy. Having grown in leaps and bounds, the Indian IP industry is fast reaching new heights. With the advent of the new knowledge economy, the old and some of the existing management constructs and approaches would have to change. From striking a balance between IP rights protection and public policy to promoting IP rights education, Alfred Marshall¹ believed that with advancements in technology, commodities alone would no longer be the primary factor in determining the real value of money: "But if inventions have increased man's power over nature very much, then the real value of money is better measured for some purposes in labour than in commodities."² Today, the intrinsic labour value exists in the form of knowledge. The knowledge economy places a tag of urgency on understanding and managing knowledge based assets such as innovations and know-how. Intellectual property rights have become important in the face of changing trade environment which is characterized by the following features namely global competition, high innovation risks, short product cycle, need for rapid changes in technology, high investments in research and development, production and marketing and need for highly skilled human resources. India is a member of the World Trade Organisation's and a signatory to the Trade Related Aspects of Intellectual Property Rights Agreement. In the last few years India has been in the process of modifying its Intellectual Property laws to ensure adequate protection to Intellectual Property owners. Indian legislature has made efforts to implement better IP rights enforcement and protection. On the other hand, the judiciary has not been far behind in contributing to the development of IP rights. Litigation regarding trademarks, copyrights and patents has set new precedents, with the Indian courts adopting international principles and rulings to protect IP rights in order to deter infringers. Overall, the progress over the last year has set new milestones in IP rights for the challenging times ahead.

¹ Ankit Prakash , India: IP Value 2009: Recent Developments In Intellectual Property, available at <http://www.mondaq.com/article.asp?articleid=76022> (visited on 27th January,2011).

² Id.

Important IP Development in India in Last 12 Months

In recent years the Indian economy has opened up and grown dramatically. As a result, India's prominence in the global economy has increased significantly, sparking huge interest from foreign investors.³ In almost all industry sectors, multinational companies are now doing business in India. As a result, India's intellectual property laws and enforcement regime are being brought into the limelight and subjected to scrutiny for their adequacy and compliance with established global standards.

The development of intellectual property in India has always been the heated debate and keen interest around the world. In recent years India has made vigorous progress not only in implementing its obligations under the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights , but also in developing its own IP regime and to balance the trade-off between monopoly rights and free access to knowledge.

On **October 15, 2010** Federation of Indian Chambers of Commerce and Industry had launched an **Anti Piracy Coordination Cell** with the approvals of Government of India. In order to curb piracy the three important pillars i.e. the legislation, enforcement and awareness needs to be properly dealt with. The cell will act as a platform where stakeholders can interact. The four main segments i.e. the film industry, music industry, publishing and software industry are getting adversely affected by piracy.⁴

Justice Muralidhar, on **November 26,2010** had passed the rule stating that **Certification of CD's and DVD's henceforth to be made compulsory**, i.e. the manufacturers, distributors and sellers of

³ Rouse , IP environment in India ,available at

<http://www.inhouselawyer.co.uk/index.php/intellectual-property/7552-ip-environment-in-india> (visited on 28th January, 2011).

⁴ Mr. T.C James, Consultant FICCI IPR Division & Former Director, Department of industrial Policy & Promotion, Government of India, available at http://www.ficci.com/sector/24/Add_docs/ipr-dec2010.pdf (visited on 2nd february 2011).

cinematographic films to get their CDs/ DVDs certified by the Central Board of Film and certification (CBFC) before selling them in the market. The decree is only prospective and not retrospective, hence proper caution was given to the officials not to file cases against films or materials distributed or sold before this dictum.⁵

Geographical Indication tags are given to goods based on their geographical uniqueness. GI tag in general, is thus a certification of uniqueness of a product either by its origin, process or availability. These tags usually help in enhancing the marketability.

In September,2010 Geographical Indications Registry in Chennai has recorded GI for a record number of products which includes Central Travancore Jaggery, Wayanad Gandhakasala Rice and Jeerakasala Rice from Kerala, Champa Silk Saree and Fabrics from Chhattisgarh, Kota Doria (Logo) Handicraft from Rajasthan, Nashik Grapes from Maharashtra, Bikaneri Bujiya from Rajasthan, Phulkari from Punjab⁶, Surat Zari Craft from Gujarat, Cherial Painting and Pambathi Metal Craft from Andhra Pradesh.⁷ In 2010 alone about 37 products have received GI tags which include the Bhadohi Carpets from Varanasi. The All India Carpet Manufacturers Association (AICMA), Great Bhadohi Handicraft Society and the office of Joint Director of Industries are the applicants for GI over the Bhadohi carpets.⁸

⁵ <http://ipr.indlaw.com/guest/displaynews.aspx?092706d9-f478-43de-8ea0-dd7dfc735681>, also see to http://www.ficci.com/sector/24/Add_docs/ipr-dec2010.pdf (visited on 2nd february 2011).

⁶ GI Status for Phulkari , Times of India, Jan.19, 2011.

⁷ Daniel P George, Scotch whisky, Karnataka's Byadgi Chilli get GI tag, Times Of India, Feb 16, 2011.

⁸ Binay Singh, Many artifacts of region await GI Status, Times of India, Jan 13, 2011

The government has already approved the proposal to establish a *National Institute of Intellectual Property Rights Management at Nagpur*.⁹ The primary functions of the institute include training, education and research, in addition to acting as a tank on key IP policy matters. The government has already put forward plans to expand and modernise further the IP offices in order to make them world class.¹⁰

The *International Searching Authority and International Preliminary Examining Authority* is to provide reports on a unique search and examination reports on a variety of inventions for patenting. India has been discussed in the plan to get recognition for Indian Patent and Trademark Office as International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty Office.¹¹

Formation of Mashelkar Committee:-Government of India has created a group of technical experts to examine the following issues in patent law: whether it is compatible with TRIPS to limit the granting of a patent medicine applies only to new chemical entities or new medical device and whether it is compatible with the TRIPS Agreement excludes the patenting of micro-organisms.¹²

⁹ Intellectual property and its importance to development in india, available at <http://collegeproperty.info/intellectual-property-and-its-importance-to-development-in-india.html> (visited on 1st february,2011).

¹⁰ Anand Pravin and Sumeera Raheja, “India: The Changing Face Of Intellectual Property”, available at http://www.buildingipvalue.com/08_AP/203-206Anand.pdf (visited on 1st february 2011).

¹¹ Anand Pravin and Sumeera Raheja ,*Supra* note 10.

¹² *Supra* note 10.

10th August 2010, the Parliament, has passed the Trademarks Amendment Bill, 2009. The only recommendation that was not agreed to by the Committee was the new Section 36H¹³. The Bill would implement the Madrid protocol in India and the Madrid protocol offers trademark owners the opportunity to obtain international protection for their domestic trademarks with the filing of one single application. Further, the bill prescribes a period of 18 months for the grant of an application to register a trademark, in line with the provisions of the Madrid Protocol.¹⁴

20th May 2010, The Trade Mark Rules, 2002 have been amended and Trade Mark (Amended) Rules, 2010 have come into force.¹⁵The major change is amendment in Fourth Schedule of the TM Rules i.e. *adoption of all 45 international* classes. Earlier international classes 43, 44 and 45 were merged in class 42 in India, but from May 20, 2010 separate application has to be filed for services covered under International class 43, 44, 45. Another change in insertion of proviso to Rule 62(3)¹⁶

The Union government introduced the Copyright Amendment Bill, 2010, in the Rajya Sabha that seeks to amend the Copyright Act, 1957. The Bill, the most comprehensive attempt to amend the 1957 Act, will have far-reaching implications for the music and film industry.

¹³ “shall apply as far as possible the same trade description as to the standard of quality of its goods or services in all the Contracting Parties granting the protection.”

¹⁴ See SpicyIP Guest Post: The Trademarks (Amendment) Bill 2009 - Implementing the Madrid Protocol , Rajya Sabha passes the Trademark Amendment Bill, 2009 after a spirited debate, available at <http://spicyipindia.blogspot.com> (visited on 28th January,2011).

¹⁵ IP Environment in India, available at <http://www.inhouselawyer.co.uk/index.php/intellectual-property/7552-ip-environment-in-india>, (visited on 4th february 2011).

¹⁶ issuance of copy/ duplicate registration certificate without any additional cost, if the Registrar is satisfied on a claim of Registered Proprietor supported by evidence that registration certificate has not been received by him. But further proviso specifies that no such copy/ duplicate registration certificate shall be issued where such request is received after expiry of time limit for renewal or registration or restoration of the registered trade mark.

It seeks to **give independent rights to lyricists, composers and singers** as the authors of literary and musical works in films. If the Bill is enacted, authors, especially lyricists, will get royalties and other benefits from the commercial exploitation of their work. Under the present copyright regime, the right to receive royalty vests with the music firms and producers.

The draft Bill envisages a change in the role of directors. “After the commencement of the Copyright Amendment Act, 2010, **the producer and the principal director shall be treated jointly** as the first owner of copyright,” according to the draft.¹⁷ Under the present law, only the producer enjoys such rights. Further, the term of the **copyright for films can be extended from 60-70 years** provided the producer enters into an agreement with the director.¹⁸ The Bill also seeks to introduce statutory licensing to broadcasting organizations to access literary and musical works and sound recordings. A statutory licence or compulsory licence is a copyright licence to use content under reasonable and non-discriminatory terms.¹⁹

India's Laws Evolving To Protect IP Domestically

India has adopted a unique set of legislations for IPR in line with prevailing socio economic condition of the country, not only they are exhaustive but they have been interpreted by judiciary in such a way as to balance the rights of the individual as well as public on the other hand. IP laws are not enforced internationally they are for the nation's own interest that is the fundamental principles in Berne and TRIPS and thus government has the freedom to choose their IP regime. The Government of India has taken **several measures to streamline and strengthen the**

¹⁷ <http://jurisonline.in/2010/09/copyright-amendment-bill-2010-an-analysis> (visited on 17th February,2011)

¹⁸ Copyright Amendment Bill 2010. Available at <http://www.prindia.org/uploads/media/Copyright%20Act/The%20Copyright%20Bill%202010.pdf> (visited on 2nd March,2011)

¹⁹ <http://spicyipindia.blogspot.com/2010/12/copyright-amendment-bill-2010.html> (visited on 17th February,2011)

intellectual property administration system in the country These remedies include civil, criminal and provisional remedies. when a party proposed to take a civil action against any infringer, it has to file a *Suit for infringement or passing off* in a High Court or a District Court. Upon a successful suit for patent infringement, the court will order an injunction restraining the infringer from working the patented invention for the entire term of the patent. In addition, the court will either order the infringer to pay damages for infringing the patent or give account of the profits. The holder of an exclusive license is also entitled to damages or account of profit. Further, the court has the power to seize, confiscate and destroy the infringing goods without payment of any compensation. If the infringer can show that the infringement was innocent, the court will not order the payment of either damages or account of profits. The remedies of injunction and damages/account of profits are also available for trade mark and copyright violation. In addition to these civil remedies, the court has in the case of *Time Incorporated v. Lokesh Srivastava*,²⁰ awarded punitive damages for infringement of ‘Time’ trade mark. The courts are not averse to considering foreign jurisprudence in arriving at a conclusion and in this case, American jurisprudence regarding punitive damages was applied. In another case, the court allowed Whirlpool Corporation to recover damages against a trade mark owner who had wrongfully registered the ‘Whirlpool’ mark in India.²¹ A similar decision was reached in a case involving Allegan Incorporation where the court recognized that in case of passing off of an unregistered trade mark, worldwide reputation of the product/mark was an important factor.²² The court has also decided that the premises of an alleged infringer may be searched if the claimant can show the court that abstention from such a search may result in the destruction of the infringing goods. This court can pass such an order even in an ex parte proceeding. Thus, the Indian courts have donned the mantle of protecting IP rights in India. The willful disobedience of any judgment of the Court amounts to contempt of court and it attracts penal consequences under the Contempt of Court Act, 1971.

There are no criminal sanctions for infringement of patents. In respect of copyright and trade mark violation, the court can order imprisonment of the infringer for a term ranging from six months to

²⁰ *Time Incorporated v Lokesh Srivastava* (2005) 30 PTC 3

²¹ *N.R Dongre v. Whirlpool Corpn & Ors.*(1996) 5 SCC 174

²² *Milmet Oftho Industries and Ors.v.Allergan Inc* (2004) 12 SCC 624.

three years. In addition to imprisonment a fine is imposed upon the violator. In case of copyright, a repeat violation can attract even more severe punishments.

The Patents Act, 1970 grants power to the courts for making a declaratory judgment as to non-infringement. The validity of the claims contained in the patent cannot be the subject matter of such proceedings. Thus, the declaration of non-infringement does not affect the validity of the patent in question. Further, the court has the power to grant relief by way of a declaration to the effect that the allegations of infringement of patent made by a person are unjustified. Such declaratory judgments are also available under the trade mark and copyright laws.

The courts can also order interim relief pending final settlement of the matter. A court may order is the grant of an interim injunction whereby the defendant may be restrained from using the plaintiff's invention, or mark or work until hearing of the suit or further order.

Criminal action: In so far as criminal actions are concerned, in case the counterfeiting goods are available on a large scale in the market, and a Mark, or a copyright is infringed at different places, generally the clients is advised to file a Criminal Complaint before the Court of Metropolitan Magistrate and obtain Search & Seizure Orders against Unknown persons/firms etc.

Once Search & Seizure Orders are obtained from the Court, the raids can be got conducted with the help of the Police and fake/duplicate goods can be recovered and seized by the police and the same remain in Police custody. Criminal action leads to criminal prosecution.

Further, provisional measures, such as injunctions and 'Anton Piller' orders, are available through the Indian courts to stop infringement and to contain any damages.

Civil proceedings against piracy have been quite effective - a result unique in the global enforcement against copyright piracy. In keeping with international practice and in order to harmonies IP legislation with the Customs Act 1962, on May 8 2007 the Ministry of Finance and the Department of Revenue implemented the IP Rights (Imported Goods) Enforcement Rules 2007. The new rules give the Customs Authority the power to adjudicate on issues involving the import or export of infringing products. Under Rule 3, if a rights holder learns of the import of goods that infringe its IP rights, it may notify a customs officer at the port of entry of the infringing goods, requesting the detainment or clearance of the infringing goods. Once such a request has been made, Customs will notify the rights holder of the rejection or acceptance of that request

within 30 working days of receipt, during which time Customs will provide assistance to the rights holder. The new rules provide that if a rights holder alleges that certain goods infringe its IP rights, it must execute a bond with Customs to cover any charges incurred for the destruction, demurrage and/or detention of the infringing goods if it is later found that the goods are non-infringing. In addition, Customs has the power to suspend the customs clearance of the goods if it has *prima facie* evidence or reason to believe that the imported goods are infringing IP rights. Sunglasses Company Ray Ban filed the first notice under the new rules in order to prevent the import of counterfeit sunglasses into India. The significant powers awarded to Customs allow it to tackle the counterfeiting and piracy of goods at international level.²³

As a consequence of the number of measures initiated by the government, there has been more activity in the enforcement of IP Law in the country. Over the last few years, the number of cases registered has gone up consistently. The incorporation of such amendments and efforts made by the government shall go a long way in establishing a fair and equitable procedure with respect to border measures enforcement for intellectual property rights in India.

India on the United States Trade Representative's Special 301 Watch List In 2010

The Special 301 Report is an annual review of global state of Intellectual Property Rights protection and enforcement, conducted by Office of United States Trade Representatives pursuant Section 182 of the Trade Act, 1974. This report reflects the administration's resolve to encourage and maintain effective IPR protection and enforcement worldwide. USTR has created 'Watch List' and 'Priority Watch List' under special 301 provisions.

India remains on the Priority Watch List in 2010. India continues to make gradual progress on efforts to improve its legislative, administrative, and enforcement infrastructure for IPR. India has made incremental improvements on enforcement, and its IP offices continued to pursue promising modernization efforts. Among other steps, the United States is encouraged by the Indian

²³ Anand Pravin , Supra note 10.

government's consideration of possible trademark law amendments that would facilitate India's accession to the Madrid Protocol. The United States encourages the continuation of efforts to reduce patent application backlogs and streamline patent opposition proceedings. Piracy and counterfeiting, including the counterfeiting of medicines, remains widespread and India's enforcement regime remains ineffective at addressing this problem. Amendments are needed to bring India's copyright law in line with international standards, including by implementing the provisions of the WIPO Internet Treaties.²⁴ Additionally, a law designed to address the unauthorized manufacture and distribution of optical discs remains in draft form and should be enacted in the near term. The United States continues to urge India to improve its IPR regime by providing stronger protection for patents. One concern in this regard is a provision in India's Patent Law that prohibits patents on certain chemical forms absent a showing of increased efficacy. The United States also encourages India to provide protection against unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products. The United States encourages India to improve its criminal enforcement regime by providing for expeditious judicial disposition of IPR infringement cases as well as deterrent sentences, and to change the perception that IPR offenses are low priority crimes. The United States urges India to strengthen its IPR regime and will continue to work with India on these issues in the coming year.²⁵

IP Case Law Development: Relevance to Global Pharmaceutical

In recent years there have been commendable developments regarding Indian patent legislation. Indian law recently recognized patent protection for pharmaceutical compounds. As a result, the

²⁴ Special 301 report, available at

http://ustraderep.gov/Document_Library/Reports_Publications/2004/2004_Special_301/Special_301_Priority_Watch_List.html, Also See <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/ustr-releases-2010-special-301-report-intellectual-p> (visited on 3rd March 2011).

²⁵ Ambassador Ron Krik , Prepared by the Office of the United States Trade Representative , 2010 special 301 report, April 30 2010, available at http://www.ipophil.gov.ph/document/8dfdf5ee_301Reports_2010.pdf (visited on 3rd March 2011).

courts in India have only recently dealt with patent enforcement issues and are still finding their way in handling complex patent issues. The standards for claim interpretation, trial, and enforcement of injunctions are still under development. Generally, the courts have no standards for issuing injunctions and have not given deference to the determinations of the Patent Office.

The section 3 of Indian Patent Act is considered as a roadblock for patenting invention by many global pharmaceutical industries.²⁶

In India the agreement on TRIPS was brought about through an amendment to the Patent Act of 1970 and became active as on January 1, 2005 and was obliged from that day to grant patents for pharmaceuticals. In 2005 the Indian Patents Act, 1970, which provides patent protection for pharmaceutical products or drugs, was amended. However this amendment was only applicable for patentability of pharmaceutical substances to new chemical entities. A side effect of the amendment has been an increase in the number of pre and post-grant oppositions filed. Of 190 such cases, at least 90 per cent come from the pharmaceutical sector.²⁷ Section 3(d) of the Patents Act, 1970 explains that the new form of a known substance, new property / new use for a known substance and the mere use of a known process are not patentable and is not different from the known substance and is, therefore, not an invention, unless there is a significant increase in efficacy. Though, there were several outcries from the both the generic companies and the innovator companies, the fact of the day is that the section still exists.²⁸

The first product patent for a combination was granted to Roche for the Pegasus product. The Patent Amendment Rules 2006 introduced a substantial degree of accountability to the patent regime in terms of the administrative delays in prosecuting and proceeding with the grant of patents. To deal with this shortcoming, on April 2 2007 the Intellectual Property Appellate Board was charged with handling pre and post-grant opposition proceedings. All patent cases pending

²⁶ Soni Vijay, "Indian Patent Law Relevance to global pharmaceutical industry", available at

http://www.pharmafocusasia.com/strategy/indian_pharma_patent_law.htm (visited on 15th February 2011).

²⁷ Anand Pravin and Sumeera Raheja, *Supra* note 10

²⁸ See <http://spicyipindia.blogspot.com/2010/05/raising-bar-for-post-grant-oppositions.html> (visited on 17th March,2011).

before the Delhi High Court as of that date were automatically transferred to the board. Another significant change resulting from the act and the rules has been the substantial increase in patent litigation over the last two years. In a long-awaited patent decision, Novartis suffered a blow when the Madras High Court dismissed its challenge of the patent law. Novartis had argued that Section 3(d) of the Patents Act 1970 was unconstitutional and did not comply with the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights. The court went on to state that it lacked jurisdiction to rule on whether Section 3(d) of the 2005 act contravened the TRIPs Agreement, and that the appropriate body to adjudicate this issue was the World Trade Organisation. Novartis launched its challenge after its patent application for Glivec was rejected under Section 3(d) of the act, which restricts what can be patented. In particular, Section 3(d) states that salts and other derivatives of known substances “shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy”. As India is known to have a booming generic drugs industry, organisations campaigning for greater access to medicines claimed that, if Novartis’s challenge to the act succeeded, the decision would restrict access to affordable medicines in the developing world. The court also stated that the question of TRIPs compliance should be dealt with by the WTO using its dispute resolution mechanism. The decision was historic not only for India, but also for the rest of the world, since India produces drugs worth \$5 billion, 65 per cent of which are exported to underdeveloped countries. Indian patent legislation has come a long way from its foundations to reach international standards, providing statutory relief and administrative efficiency for the public.²⁹

The recent momentous decision of the patent office is likely to have impact on Indian patent jurisprudence, the Indian patent office held against Roche in a post grant opposition challenging the validity of its patent covering valcyte. The Roche’s patent which covered the L-Valinate Ester of Gancyclovir and all acceptable salt was opposed under section 25(2) by Cipla, Bakul Pharma, Matrix Labs, Indian Network For People Living With HIV/AIDS, And Ranbaxy.³⁰

The Controller, SP Subramaniyan, appears to have struck down the patent mainly on grounds of lack of inventive step. According to the Controller Roche’s claim of an increase in bio availability

²⁹Soni Vijay, *Supra note 26*

³⁰*Supra note 28*

does not necessarily equate to an increase in efficacy. This case is yet blow to MNC pharma patents in India. Barring Pegasus, most other pharma patent decisions appear to be going against MNC's. The first high profile MNC case was Novartis' Gleevec, where the patent was refused by the IPO and the IPAB (an appeal is now pending before the Supreme Court). The second was Roches' Tarceva , where the court refused to restrain Cipla from selling a generic . And the third case is that of Roche's Valcyte where the IPO has now struck down the patent. This means that Cipla can safely sell its Valcept version, unless the IPO's ruling is reversed by the IPAB or the courts. With all these decisions, India appears to be sending out a strong signal that it will not tolerate frivolous pharmaceutical patents.³¹

Further Legislation Is Necessary to Bring India's IP Regime up To International Standards

The legislation pertaining to the Trademark, copyright and patents have not been able to fully address the issues of piracy, counterfeiting etc.as the provisions relating to them and others to protect the IP law domestically are scattered in Indian Penal Code, CrPC, CPC, Customs Act and so on. Thus, it is of utmost importance that the strong IP law must be ably supported by an equally strong enforcement mechanism. It is therefore, necessary that any law providing for the protection of IP should also provide strategic remedies for prevention of it's infringement through effective enforcement mechanism. fair, strong and non discriminatory IPR enforcement can create economic incentives that encourage innovations and thus to meet up to the international standards several steps need to be taken:

- Awareness among right holders for initiating/pursuing legal (civil/criminal/administrative) actions.
- Provide an effective compulsory licensing system and adequate government use provisions.
- Policy machinery dealing with such problems should be well equipped for taking immediate actions. However, unfortunately, the law itself provides for impediment for

³¹ *Supra* note 28

immediate actions of search and seizure, one of them being the requirement for obtaining of certificate from registrar of trademark by right holders before initiating such actions.

- Apply strict standards of novelty; inventive step and industrial application or utility, and the section 3 of the Patent Act, 1970 should be amended so that more and more pharmaceutical companies in India can come.
- Judges handling the IP cases ought to be well conversant with intricacies, technicalities and technological developments in the field and appreciate liberal interpretations of academic standards to secure interest of the right holders against the infringers.
- Provide means to prevent the granting or enforcement of patents comprising biological material or associated traditional knowledge obtained in contravention of access legislation or the provisions of the CBD.
- Before the Madrid Protocol is adopted in India, few practical issues have to be looked into. Like every country will have independent and different standards for prosecution of trademark applications and indeed some countries may have much stringent procedures for securing and/or maintaining trademark registrations. Also, the basic principles of trademark law may differ from country to country as, for instance; an invented mark or a unique mark in India may be deemed as a generic or even obscene mark in some other country. Therefore, there is a need to introduce a common appraisal system.
- Law designed to address the unauthorized manufacture and distribution of optical discs remains in draft form and should be enacted in the near term

Steps Taken by the Government to Improve Enforcement of IP

To make IP work for countries and business organizations, the governments of respective countries must take strong positive action and impose stringent punishment on the infringers.

Some of the measures that could be taken to protect IP would include the provision of a transparent and enforceable IP rights ownership, irrespective of nationality. The accessibility of national and global IP systems has to be enhanced by ensuring that the costs of applying, maintaining and enforcing IP rights are minimal; by simplifying the procedures; and by harmonizing the IP systems globally and reducing the costs of obtaining IP rights in multi-countries. The government has to patronize and implement effective IP policies with proper financial management and infrastructure of IP institutions. It has to take up the task of educating local communities, business enterprises, and general public on the potential benefits of an efficient IP system. The government should offer assistance to innovators, producers, creators on the use, protection and commercialization of IP. It has to take rigorous steps against counterfeiting and piracy and strengthen the legal framework to ensure effective implementation and enforcement against IP theft.

The Government of India has taken several measures to streamline and strengthen the intellectual property administration system in the country like:

- The Government has organized many seminars/lectures to create awareness of IPR laws amongst the stakeholders, enforcement agencies, professional users like the scientific and academic communities and members of the public. Copies of the Handbook have been circulated free-of-cost to the state and central government officials, police personnel and to participants in various seminars and workshops on IPR.
- National Police Academy, Hyderabad and National Academy of Customs, Excise and Narcotics conducted several training programs on copyright laws for the police and customs officers. Modules on IPR infringement have been included in their regular training programs.
- The Bihar government request made through the department of science and technology to the Union ministry of micro, small and medium enterprises (MSME) for opening the facilitation centre at Patna is under active consideration and the centre is likely to be

opened by the end of 2011, they organized a two-day workshop for MSME policy makers and facilitation agencies and entrepreneurs to support and protect the IPR.³²

- Madhya Pradesh Government is emphasizing that the IPR should be part of the higher education curriculum.³³
- The Department of Education, Ministry of Human Resource Development, Government of India has initiated several measures in the past for strengthening the enforcement of copyrights that include constitution of a Copyright Enforcement Advisory Council creation of separate cells in state police headquarters, encouraging setting up of collective administration societies and organization of seminars and workshops to create greater awareness of copyright laws among the enforcement personnel and the general public.
- Government of India has created a group of technical experts i.e. known as *Mashelkar Committee* to examine the issues in patent law.
- The government has already approved the proposal to establish a National Institute of Intellectual Property Rights Management at Nagpur.

Steps taken by FICCI

- Workshop on Border Measures on Enforcement of Intellectual Property Rights for customs officers were held at Kolkata, Chennai and Mumbai.

³² Ravi Dayal, Experts offer support to entrepreneurs on IPR, Times of India, March 3, 2011.

³³ IPR must be part of curriculum: MP, Time Of India, Feb 10, 2011.

- FICCI–NIAPC has done mass awareness campaigns against Piracy and Counterfeiting through interactive events, PR and advertising campaigns. They have shot two small ad films on Anti – Piracy, (30 Secs & 60 Secs) which were telecast on National Television (Doordarshan) and Channels like Star TV, Fox TV, SONY TV etc, Trying to increase airing frequency and involve more channels.
- A working group on Optical Disc Law coordinated by FICCI-NIAPC has developed an action plan and identified the key areas to be covered and developed for effective enforcement policy to tackle Optical Disc Piracy. (Recently handed over the draft to the Ministry of Information and Broadcasting for consideration).
- FICCI-NIAPC has been actively associated with and provides policy inputs to all IP related initiatives being taken by the Government and international organizations including the World Intellectual Property Organization.

Conclusion

- The Indian IP regime has taken great strides towards the increased protection and enforcement of IP rights. Protection of Intellectual Properties is a very critical element in the offshore business model. India has charted its own IP path over the last 35 years, attempting to foster the growth of a domestic pharmaceutical industry and access to medicine while more recently also addressing the requirements of the international IP regime. Multinational pharmaceutical firms have responded to the Indian movement towards TRIPS compliance by increasing the quantity and quality of FDI in the areas of R&D and manufacturing. By contrast, MNCs have adopted a more cautious attitude toward patenting and commercialization of pharmaceutical products in India, waiting to see how Indian courts and patent office’s interpret the new laws, and awaiting the enactment of data exclusivity legislation. The ultimate success of India’s “calibrated approach” to fostering the domestic industry and access to medicine while also addressing international intellectual property requirements remains to be seen. The government should give incentives like tax rebates, besides taking steps to protect

copyright laws, in order to boost India's animation and gaming industry. The Indian IP regime has come a long way in recent months, IP rights in India has never looked more positive. With the Indian judiciary showing enthusiasm for and commitment to the protection of IP rights, IP owners have become more proactive in enforcing their rights by all means, and are exploring uncharted waters to obtain unique remedies from the courts. Although the benefits of specialised IP courts are still under debate in India. While much still remains to be done regarding the criminal justice system, the Indian civil system for the protection of IP rights is improving daily. Although recent substantive developments have reaped significant rewards for IP owners in India, there are still uncharted waters waiting to be explored in the worldwide IP pool.

Bibliography

Articles and Web Sources:

1. Ankit Prakash , India: IP Value 2009: Recent Developments In Intellectual Property, available at <http://www.mondaq.com/article.asp?articleid=76022> (visited on 27th January,2011).
2. Rouse , IP environment in India ,available at
3. <http://www.inhouselawyer.co.uk/index.php/intellectual-property/7552-ip-environment-in-india> (visited on 28th January, 2011).
4. Mr. T.C James, Consultant FICCI IPR Division & Former Director, Department of industrial Policy & Promotion, Government of India, available at http://www.ficci.com/sector/24/Add_docs/ipr-dec2010.pdf (visited on 2nd february 2011).
5. <http://ipr.indlaw.com/guest/displaynews.aspx?092706d9-f478-43de-8ea0-dd7dfc735681>,also see to http://www.ficci.com/sector/24/Add_docs/ipr-dec2010.pdf (visited on 2nd february 2011).
6. Intellectual property and its importance to development in india, available at <http://collegeproperty.info/intellectual-property-and-its-importance-to-development-in-india.html> (visited on 1st february,2011).
7. Anand Pravin and Sumeera Raheja, “India: The Changing Face Of Intellectual Property”, available at http://www.buildingipvalue.com/08_AP/203-206Anand.pdf (visited on 1st february 2011).
8. See SpicyIP Guest Post: The Trademarks (Amendment) Bill 2009 - Implementing the Madrid Protocol , Rajya Sabha passes the Trademark Amendment Bill, 2009 after a spirited debate, available at <http://spicyipindia.blogspot.com> (visited on 28th January,2011).

9. IP Environment in India, available at <http://www.inhouselawyer.co.uk/index.php/intellectual-property/7552-ip-environment-in-india>, (visited on 4th february 2011).
10. <http://jurisonline.in/2010/09/copyright-amendment-bill-2010-an-analysis> (visited on 17th February,2011)
11. Copyright Amendment Bill 2010. Available at <http://www.prsindia.org/uploads/media/Copyright%20Act/The%20Copyright%20Bill%202010.pdf> (visited on 2nd March,2011)
12. <http://spicyipindia.blogspot.com/2010/12/copyright-amendment-bill-2010.html> (visited on 17th February,2011)
13. Special 301 report, available at http://ustraderep.gov/Document_Library/Reports_Publications/2004/2004_Special_301/Special_301_Priority_Watch_List.html, *Also See* <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/ustr-releases-2010-special-301-report-intellectual-p> (visited on 3rd March 2011).
14. Ambassador Ron Krik , Prepared by the Office of the United States Trade Representative , 2010 special 301 report, April 30 2010, available at http://www.ipophil.gov.ph/document/8dfdf5ee_301Reports_2010.pdf (visited on 3rd March 2011).
15. Soni Vijay, “Indian Patent Law Relevance to global pharmaceutical industry” , available at http://www.pharmafocusasia.com/strategy/indian_pharma_patent_law.htm (visited on 15th February 2011).
16. See <http://spicyipindia.blogspot.com/2010/05/raising-bar-for-post-grant-oppositions.html> (visited on 17th March,2011).

Newspapers Articles:

1. GI Status for Phulkari , Times of India, Jan.19, 2011.
2. Daniel P George, Scotch whisky, Karnataka's Byadgi Chilli get GI tag, Times Of India, Feb 16, 2011.
3. Binay Singh, Many artifacts of region await GI Status, Times of India, Jan 13, 2011
4. Ravi Dayal, Experts offer support to entrepreneurs on IPR, Times of India, March 3, 2011.

Legislatures and Statutes:

1. Indian Patent Act, 1970
2. Copyright Amendment Bill, 2010
3. Trademarks Amendment Bill, 2009
4. Trade Mark (Amended) Rules, 2010

Cases Referred:

1. Time Incorporated v Lokesh Srivastava (2005) 30 PTC 3
2. N.R Dongre v. Whirlpool Corpn & Ors.(1996) 5 SCC 174
3. Milmet Oftho Industries and Ors.v.Allergan Inc (2004) 12 SCC 624.
4. Novartis case
5. Roche's Valcyte