



Role of Judiciary in Indian IP

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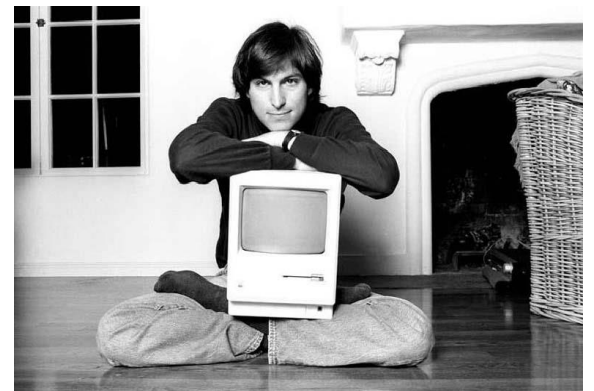
National Judicial Academy, Bhopal

Introduction

- Evolution of Indian IP Jurisprudence
 - India Specific Jurisprudence
 - Holistic IP jurisprudence (“balancing”)
 - Policy Sentinel
 - Creative Court (Jugaad Justice?)
- Future of IP
 - Valuation/Economics
 - ADR
 - Participatory Justice

Creative Courts: Jugaad Justice

- Positive connotations
- Resource constrained settings
- Less is more!
- Rubber band example
- Minimalism
- Small is beautiful
 - Schumacher
 - Gandhi

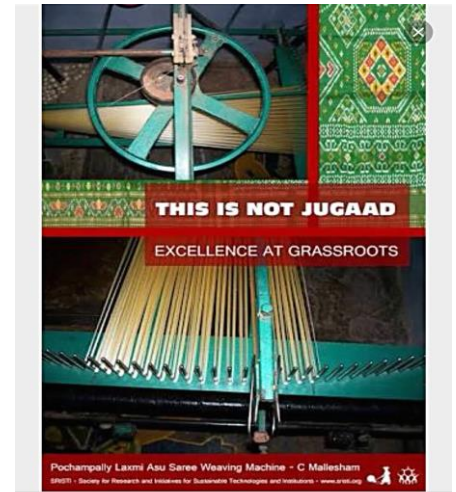


Constraint Induced Creativity

- Constraint Induced Creativity
- Dipa: Law & Gymnastics
- Informal Innovation: Learnings
- Frugal Innovation
- Less Use of Resources



“GREEN” JUGAAD: MITTICOOL



TVS vs Bajaj

- Bajaj' s Patent related to spark plug (4 stroke)
- TVS counterclaimed invalidity
- Court held in favour of TVS
- Supreme Court ruled that it does not make sense to decide the interim issue (since pending for more than 2 years!)
- Rather asked trial court to decide expeditiously (4 months)



Creative Courts: Doing Away with the Interim

- Lets do away with the interim phase altogether!
- Patent Disputes: Often Complex, since it involves validity
 - So any good assessment is going to be a mini trial anyway
 - Quick decision making: Chance of wrong decision high
 - And “interims” settle the dispute for all purposes
- Therefore dispense with “interim” phase when the matter is complex

Creative (Justice) Katju

- Vardhman Mills case:
- *“Without going into the merits of the controversy, we are of the opinion that the matters relating to trademarks, copyrights and patents should be finally decided very expeditiously by the Trial Court instead of merely granting or refusing to grant injunction. Experience shows that in matters of trademarks, copyrights and patents, litigation is mainly fought between the parties about the temporary injunction and that goes on for years and years and the result is that the suit is hardly decided finally. This is not proper.”*

But Sustainable Solution?

- Systemic Issues of delays in our courts
- Sitagliptin: Merck vs Glenmark
- Patented Diabetes Drug
- Justice Gogoi: Same logic as Justice Katju
- Why have “interims”? (2+ years)
 - Trial court denied. Appellate court granted. Supreme court stayed.
- But had strict time line and monitoring for the trial itself
 - 1 year: to examine one expert witness
- Court commissioner: to be monitored by trial court
- And to be replaced if it moves slowly (by even registrar of the court)

Other Creative Cuts from Courts

- Difficult to Estimate Damages in IP cases
- Creative Solution: Do social good!
 - Baba Zarda case
 - Microsoft software infringement (antipiracy campaigns)
- Enforcement as well!
 - Burger King: TM infringement case against a highway restaurant.
 - No appearance
 - Court commissioner: Physically paint over impugned mark (on milestones/ hoardings along the highway).

Jugaad vs Sustainable: A Fine Balance

- Institutional Innovations
 - Retired judges to hear matters and take evidence etc: appointed as “court commissioners”
- Balance between Jugaad and Long term sustainable solutions
- SEP cases (what is FRAND royalty etc): need to assess damages

Holistic Jurisprudence: Roche vs Cipla

- Roche sues Cipla for Infringement of patented anti cancer drug, Tarceva
- Justice R Bhat (Delhi HC)
 - Decides against Roche
 - Credible challenge to patent
 - Public interest: “Price” (3 times price)
 - 1,50,000 (Roche) vs 50,000 (Cipla)
- Division Bench upholds
- Creatively interprets “public interest” to be part of “balance of convenience”



Participatory Jurisprudence

- Justice Patel: The John Doe Orders
 - Impacts “innocent” third party
 - Balancing out competing concerns
 - More “Participatory Justice”
- GI case: whither individual artisans?
 - they must get notice of this (Justice Sridevan)
- DU Photocopy case: Authors speak out!
- Roche vs Cipla (Public Interest)

Novartis Case: Generalist Wisdom

- Section 3(d): To be patentable, a pharmaceutical derivative needs to demonstrate enhanced “efficacy”
- SC: efficacy means “therapeutic efficacy”
- Mere tweak not enough (solubility etc)
- Evidentiary principles (Novartis admission)
- And claim commensurate with description
- A fine balance between “general” vs “specialist”
- India Specificity:
 - SC had to re-evaluate facts again! (counsels heard at length)
 - Refused to lay down broader standards



The Future: The “Flow” of IP..

- Is IP Like Real Property?
- Hugo Grotius: Water (Flow) vs Land (Bound)
- IP = Information (Flows even more)
- No automatic injunctions...
 - Property Rule vs Liability Rule
- So more amenable to mediation....(since more commercial players!)
- Creative Solutions

The Future: The End of Exclusivity?

- 3 Factor Test for Interim Injunctions
 - Prima Facie Case
 - Irreparable Injury
 - Balance of Convenience
 - Public Interest
- Irreparable injury
 - Is IP irreparable?
 - Or compensable with money?
- On going royalties
 - Judicial Compulsory Licences!
- Future: Compensatory Commons?

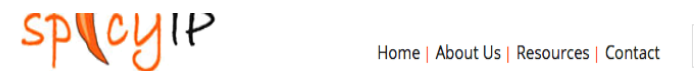


The Future: Will Turn on IP Value...

- Most disputes will center around royalty
- But IP Value: Difficult to Determine
- Role of Experts..
- PhD thesis
 - IP vs Investment Protection
 - Work away from lawyers to accountants!

The Future: Mediation?

- Loreena Mckennitt vs Deepak Dev
- Restraining order against Dev...
- For other languages (Hindi, Tamil etc)...
- But damages?
- Piracy = Bad?
- Or helps the artist?
- Creative solutioning..



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De-Coding Indian Intellectual Property Law

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Bollywood Copycats: Inspiration vs Perspiration

by Shamnad Basheer | December 5, 2011 | 16 Comments

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A wise inventor named Edison once remarked that genius was "one percent inspiration and 99 percent perspiration". Since

Indian IPDR: From Plaintiff (centrism) to Policy Sentinel..

- Earlier: Interim injunctions in IP cases
 - Even Ex Parte Cases! (including patent cases)
 - Matter then Settled
 - But, are these fair settlements? (gun point)
- Now more circumspect injunctions...
 - Defendants fight it out!
 - No more innovator vs copier
 - Courts conscious of “public interest”
 - And their role in “policy”
 - More data (Artificial Intelligence)

Cultivating Creative Lawyers

- Catch them young!
- “Conceptual” and “Creative” lawyer
- IDIA: Increasing Diversity by Increasing Access to Legal Education
- CHAMPS
- **C**reative/**H**olistic/**A**ltruistic/**M**averick/
- **P**roblem **S**olvers
- Community Lawyering



Thank You Very much!

- *There are some things in Indian IP that cannot be explained*
- *For everything else, there's **SpicyIP!***
- www.spicyip.com



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Other Creative Cuts

- Counterfeit RAY BAN sunglasses: directed to distribute 500 pieces of unbranded glasses to the Blind Relief Association
- *Dharampal Premchand v Tata Zarda Factory*, (BABA ZARDA trademark). Court ordered the defendants to install spittoons in cancer hospitals
- A defendant caught with unlicensed Microsoft software was directed to work with Microsoft in anti-piracy campaigns and participate in

My personal favourite...

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