



Judicial Enforcement of IP: Standards?

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INTRODUCTION

- Patent Enforcement
 - Injunctions (equitable remedy)
 - Damages
- Injunctions: Permanent/Temporary
- Standards for Injunctions?
 - *American Cyanamid vs Ethicon Ltd*
 - What is “prima facie”?
- Interim injunctions vs Trials?
- Expedited Trials?



KINDS OF IPR

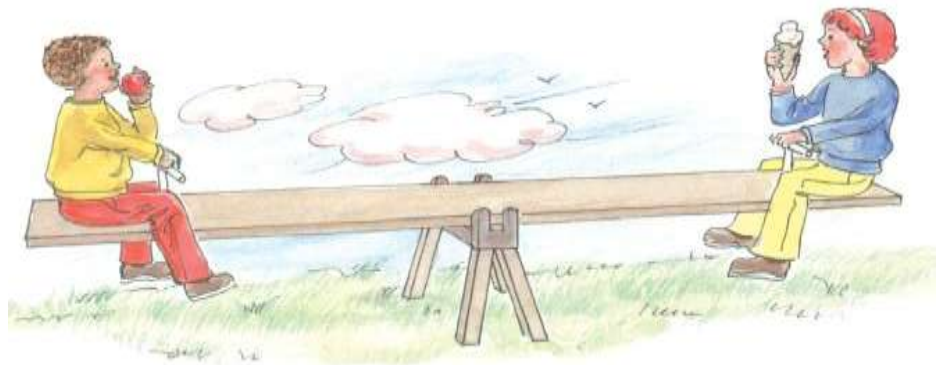
- ◆ Patents
- ◆ Copyrights
- ◆ Trademarks
- ◆ Designs
- ◆ Geographical Indications
- ◆ Trade Secrecy (case law)
- ◆ Plant Variety Protection
- ◆ Biodiversity Act
- ◆ Traditional Knowledge (pending)
- ◆ Public Funded IP Bill

The IP Machinery

- ◆ Patent and Trademark Office
- ◆ Copyright Office
- ◆ Courts (District Courts, High Court, Supreme Court)
- ◆ Specialised Tribunal: IPAB (but cannot decide infringement)
- ◆ Criminal Enforcement: Police + Magistrates

The “Interim” Injunction Phase

- Interim injunctions in Patent Cases
- To preserve the rights of the patentee till the suit is decided
- 3 factors
 - Prima Facie case
 - Irreparable Injury
 - Balance of convenience
 - Public Interest (Roche vs Cipla)



Prima Facie Standard: Logic vs Experience

- Prima Facie standard:
 - Triable Issue (not vexatious/frivolous): serious issue to be tried
 - Relative Assessment of Merits
- Lord Diplock: *American Cyanamid* (1975): triable standard
- Volta face: *Roche* case: relative assessment standard
- Was he favouring the small guy?
- Reasons:
 - If you assess the merits, you invariably convert it to mini-trial
 - Patent office grant process is now foolproof
 - We trust the patent office more

Can we trust our Patent Office?

- 84% of patents struck down by IPAB
- Comparable figures by High Court (not known)
- US: 90%!

Getting it Right!

- “Triable issue” standard: chances of final decision being overturned are quite high
 - A wrong decision in favour of infringer impacts patentee
 - A wrong decision in favour of patentee impacts competitors + consumers
- Pharma cases: Important to get close to right result!
- Eg: Tarceva (Lung cancer drug): choking supplies to consumer
- And yet routine ex parte injunctions granted
- Tharoor: “Everything you say about India can be equally true. And equally false”!

But Relative Assessment?

- Mini trial and delays!
- Relative lack of experience with patent matters
- Approximately 200-250 cases of patent infringement
- US (2005): 3000 cases filed every year!
 - And at least 90 of these go to trial!

Solution?

- Solution?
- Lets do away with the interim phase altogether!
- Patent Disputes: Often Complex, since it involves validity
 - Chance of wrong decision high
 - And “interims” settle the dispute for all purposes
- Therefore dispense with “interim” phase when the matter is complex

Roche vs Cipla

- Roche sues Cipla for Infringement of patented anti cancer drug, Tarceva
- Single judge decides against Roche
- Public interest: “Price” (3 times price)
- But holds in favour of *prima facie*
 - Although credible challenge to patent
 - Low “triable issue” standard applied?)
- Division Bench
 - Upheld single judge



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 already 2 years to decide)
- Rather asked trial court to decide expeditiously (2 months)



Dispensing with Interim: Supreme Court

- 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 expediting trials?

- Need for Speedier Trials
 - Abridged Trials
 - Day to day hearings
- Need for Specialised Courts
 - Formalise “Informal” IP Judges/benches already present in High Courts
 - Specialised IP court (IPAB): doomed to fail?
 - Commercial Courts Bill
- Institutional Innovations
 - Retired judges to hear matters and take evidence etc: appointed as “court commissioners”

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)

Patent Deference?

- But when opposed?
- 4 kinds of patent review
 - Patent office by itself
 - Pre grant opposition
 - Post grant opposition
 - IPAB revocation procedure
- But sound reasons to be provided
- Number of Opposition Challenges in India (34 out of 9719 pharma)—an abysmal .3%!
- 25/34 oppositions resulted in rejections i.e. a significantly high ratio of 73.5%!
- Therefore, if opposed, more “robust” patent evaluation

Place for Temp Injunctions?

- Patent Cases
 - Where patent validity/infringement not contested
 - Or frivolous defence put up
- Copyright/trademark cases: Relative Assessment
 - Since harm to public from injunctions (copyright: access to knowledge)
 - Also easier to do than patents
- TRIPS violation?
 - If Justice Katju logic extended
- But “irreparable injury”
 - Not compensable in monetary terms

Conclusion

- Evolution of New Injunction Framework for India
- Dispense with interim injunction phase
- But Expedite Trials
- Restraining Ex Parte Injunctions

Perception Issue

- *Everything you say about India is equally true and equally false! – Shashi Tharoor*
- Ex parte injunctions: Routinely granted, without hearing the other side (Sitagliptin)
- Media bias against MNC patents (patent wins never recorded). Only patent losses recorded
- Tykerb (breast cancer drug patented by GKS): basic patent + salt form

Thank you very much

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Creatively Construing Cyanamid?

- UK itself in a way creatively interpreted this rule
 - Justice Laddie in *Series 5 Software*: 1996
 - Exceptional cases: can look at relative strength, when it is evident that you can assess relative strength
 - “balance of convenience”
- *Colgate vs HLL (1999)*: Justice Kirpal: endorsed Series 5
- Rule: you can assess the relative strength when you are able to assess the relative strength in the short window
- Naturally corollary: dispense with this, if you cannot assess...
- But simply triable: not a good standard for pharma cases.