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ROLE OF INTERNATIONAL INSTITUTIONS IN PROTECTING INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT

This paper tends to discuss the international institutions which protect the intellectual property rights. The paper initially discusses the exigency of protection of IPR in contemporary time and how various economic activities are influenced by the same. Further, it unfolds international institutions aiming at gatekeeping the Intellectual Property Rights specifically emphasising on World Intellectual Property Organisation's contribution. Also at last there will be certain case laws to understand why protection of Intellectual Property Rights is important in today's world.

Key words: Intellectual Property, Patent, WIPO, TRIPS, WHO

INTRODUCTION

Ideas, innovations, and creative expressions on the basis of which there is a public desire to grant the status of property are referred to as intellectual property rights (IPR). In order for the inventors or developers of that property to profit commercially from their creative endeavours or reputation, IPR grant them specific exclusive rights.¹ According to WIPO the term connotes to Intellectual Property Rights the "creation of mind" which incorporates Inventions, literary and artistic works, designs, and symbols, names, and pictures used in business.² The following are currently included among internationally recognised IPRs: patents, copyrights and related rights, industrial designs, trademarks, trade secrets, rights of plant breeders, geographical indications, and rights to integrated circuit layout

¹Chandra Nath Saha, Et. al., *Intellectual property rights: An overview and implications in pharmaceutical industry*, J Adv Pharmaceutical Technology and Research, v.2(2) 88–93, Apr-Jun 2011.NCBI.

² What is Intellectual Property?, About IP, WIPO, <https://www.wipo.int/about-ip/en/>.

designs. The most economically significant of them are probably patents, copyrights, and trademarks. IP protection is important because it provides a financial incentive for creativity and innovation. By allowing creators and inventors to control the use of their work and reap the rewards, IP protection encourages investment in research and development and fosters creative expression. Additionally, IP protection helps to ensure that the public has access to new and innovative products and services.³

However, enforcing IP rights can be difficult, especially in the digital age. The ease of copying and distributing digital works has led to widespread piracy and infringement of copyrights. This has resulted in ongoing efforts by governments and industry groups to update IP laws and regulations to better protect IP in the digital world. One way to protect IP is to register it with the relevant government agency. IP disputes often arise when one party believes that their IP rights have been infringed which can lead to legal proceedings, such as lawsuits and arbitration.⁴ The outcome of IP disputes can have significant consequences, including financial damages, injunctions, and criminal penalties.

RESEARCH QUESTION

- Whether protection of IPR is need of the hour.
- Whether World Trade Organisation is self-sufficient to protect IPR.
- How WHO contributes to protecting Intellectual Property?
- How effective is WIPO in protecting IPR?

Whether protection of IPR is need of the hour?

The European Commission estimates that SMEs make up 99 percent of all companies in the EU. SMEs with IP rights had a 68 percent higher revenue per employee than those without IP rights, even after controlling for pertinent variables like nation or industry sector.⁵ Additionally, SMEs that possess all three types of IP rights—patents, trademarks, and registered designs—generate nearly twice (98 percent) as much money per employee as businesses that do not. The European Union

³ Maria Julia Oliva Et. al., *A Guide to Intellectual Property Issues in Access and Benefit-sharing Agreements*, WIPO; Geneva, 2018.

⁴ Settling Disputes and Enforcing IP Rights, WIPO, <https://www.wipo.int/sme/en/settle-ip-disputes.html>.

⁵ Maria del Coro Gutierrez Pla Et. al., *Managing intellectual property rights in innovation: the key to reaching the market*, WIPO Magazine, March 2021.

Intellectual Property Office (EUIPO) and the European Patent Office (EPO) report on intellectual property rights and firm performance in the EU affirms the close association between a company's possession of various IP rights and its financial success.⁶

Not every business operates in the same environment. While some have the necessary technology resources, others must work with other knowledge sources to complete the innovation process.

The exclusivity and protection given by IP rights can be crucial for innovative SMEs to appropriate the value of their ideas and assure a return on their investments in intangible assets in a closed innovation model, where the entire innovative process is carried out internally by enterprises.⁷ But under an open innovation approach, when collaboration with other businesses, research and technology groups, or universities is used to produce novel solutions, intellectual property rights become utterly strategic. Intellectual property rights have the advantage of preventing unauthorised use of trademarks, designs, and other developments. But open innovation also has a lesser-known advantage that enables businesses to safely share their technology and products. IP rights play a crucial role in facilitating appropriate technology transfer, or, to put it another way, the selling or licencing of the IP rights to another organisation, in the context of open innovation. They also help to decrease operational risks and promote knowledge exchange.

There are two factors at play when such intellectual property is granted protection:

- First, to give context to the moral sentiment that a creator, such as a craftsman, should partake in the benefits of his creation.
- Second, to promote the allocation of talent, time, money, and other resources to innovative activities in a way that benefits society. These goals are accomplished by granting him a set of time-limited exclusive rights and protection for his intellectual property, allowing him to regulate how it is used.

The promotion of innovation depends on IP protection. Owning IP rights will give a business a stronger competitive edge and legal defence against copying. Such legal protection is essential, especially for businesses looking to export to untapped regions. Additionally, businesses with IP

⁶ Intellectual property rights and firm performance in the European Union, Firm-level analysis report, European Union Intellectual Property Office, February 2021.

⁷ Ibid.

rights have the option to sell or licence those rights, which lowers operational risks and promotes knowledge sharing in open innovation scenarios.⁸

Whether World Trade Organisation is self-sufficient to protect IPR.

The World Trade Organization (WTO) is an international organization that helps regulate and promote global trade. One of its key functions is to promote and protect intellectual property rights (IPRs) through the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Trade-Related Aspects of Intellectual Property Rights TRIPS

The United States and several European nations expressed their severe displeasure with what they considered to be insufficient safeguard of intellectual property in many developing countries during the 1980s and the early 1990s. The Uruguay Round of trade negotiations saw the developed nations place a high priority on improving intellectual property rights (IPRs). The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), one of the key outcomes of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), is probably the most significant legal document on IPRs at the international level.⁹ It is overseen by the Geneva-based World Trade Organization (WTO). TRIPS establishes enforceable global minimum (and high) standards of protection and enforcement for virtually all of the most important IPRs in a single agreement.¹⁰

TRIPS sets minimum standards for the protection and enforcement of IPRs, including copyrights, trademarks, patents and trade secrets. This agreement seeks to balance the rights of intellectual property owners with the larger public interest and the promotion of technological innovation. One of the key objectives of TRIPS is to ensure that IPRs are protected in a manner that contributes to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

⁸ Supra note 5.

⁹ Marion Motari Et. al., *The role of intellectual property rights on access to medicines in the WHO African region: 25 years after the TRIPS agreement*, BMC Public Health 21, 490, 2021.

¹⁰ Christophe Bellmann Et. al., *Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability*, Taylor & Francis Group, 2003. ProQuest Ebook Central.

TRIPS also provides for the enforcement of IPRs through civil and administrative procedures, including injunctions and damages and provides for the possibility of border measures to prevent the import and export of counterfeit and pirated goods.¹¹

While TRIPS provides a basic minimum level of IP protection, it is not sufficient on its own to guarantee full protection of intellectual property rights. There are a number of reasons for this. Firstly, TRIPS allows for some flexibility in the way that its provisions are implemented, which means that there can be significant differences in the level of protection provided by different countries.

Secondly, TRIPS do not cover all forms of IP, and there are some important gaps in the agreement, particularly in the area of new technologies and digital IP. This means that certain forms of IP may not be fully protected under TRIPS.

Thirdly, TRIPS do not provide a mechanism for dispute resolution in the event of disputes over IP rights. This means that in the event of a dispute, parties must rely on national courts and legal systems, which can lead to inconsistent interpretations and enforcement of IP rights.

World Health Organisation

The World Health Organization (WHO) plays a significant role in the protection of intellectual property rights (IPR) related to health and medicine. The organization works to balance the interests of public health and innovation by promoting access to essential medicines and supporting the development of new and improved treatments.

WHO's main role in IPR is to promote access to essential medicines and health technologies, especially in low- and middle-income countries. This includes advocating for the use of compulsory licenses, which allow governments to override patents in the interest of public health. WHO further supports the development of intellectual property policies that promote the availability and affordability of health technologies, while also promoting innovation. Health technology patents have

¹¹ § 2, Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995.

been widely exploited, particularly by the pharmaceutical industry.¹²

In fact, the reliance on patents by the pharmaceutical industry to recover R&D costs sets it apart. The purpose of patents is to encourage investment in invention and to provide a mechanism to ensure that the information included in the patent documents is available to the public. Patents can be used to organise and specify¹³.

The organization also plays a key role in promoting the transparency of the pharmaceutical patent landscape. This helps governments, health providers, and researchers to understand the existing patents and to determine the feasibility of producing generic medicines. Additionally, WHO works to ensure that the data generated during the development of new medicines is used to improve public health, by promoting the sharing of data between researchers and stakeholders. WHO also provides technical assistance to countries on intellectual property and public health. This includes helping countries to develop and implement national policies and strategies on access to essential medicines, as well as advising on the negotiation of international agreements on intellectual property.

In addition, WHO collaborates with other international organizations, such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), to promote the protection of public health in the context of intellectual property. The organization also participates in international negotiations on IP and health, such as the World Health Assembly and the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Public Health.

The Commission on Intellectual Property Rights, Innovation, and Public Health (CIPRH) was created in 2003 by a resolution WHA5627 passed by WHO member states.¹⁴ The CIPRH made recommendations to WHO, including that it “develop a global plan of action to secure enhanced and sustainable funding for developing and making accessible products to address diseases that

¹² Hans Georg Bartels Et. al., *Medical technologies: the innovation dimension*, Promoting Access to Medical Technologies and Innovation Intersections between public health, intellectual property and trade, Intellectual Property: WHO-WIPO-WTO.

¹³ *Ibid.*

¹⁴ Public health, innovation and intellectual property rights, *Commission on Intellectual Property Rights, Innovation and Public Health*, World Health Organisation, 2006.

disproportionately affect developing countries and continue monitoring from a public health perspective, the impact of intellectual property rights on the development of novel products and access to medicines and other health care products in developing countries.”¹⁵ The WHO-WIPO-WTO trilateral cooperation, an interagency collaboration on public health, intellectual property, and trade, was launched in 2009 as a result of these recommendations, which also led to the adoption of the Global Strategy and Plan of Action on Public Health, Innovation, and Intellectual Property (GSPOA-PHI).¹⁶

TRIPS also acknowledges the need to limit the exclusive rights of IPRs owners in specific circumstances, such as for the protection of public health. The Doha Declaration on the TRIPS Agreement and Public Health confirmed the right of WTO members to use compulsory licensing and parallel importing of patented pharmaceuticals in order to address public health crises, such as HIV/AIDS, tuberculosis, and malaria.¹⁷

How effective is WIPO in protecting IPR?

In terms of the effectiveness of WIPO in protecting IP rights, it is widely recognized that WIPO has played a significant role in advancing the global IP system. The organization has helped to create and administer a number of important IP treaties, including the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Patent Cooperation Treaty (PCT).¹⁸ These treaties provide a harmonized framework for the protection of IP rights and have been widely adopted by WIPO’s member states. Along with enforcing the abovementioned conventions the Organisation is responsible for 2 more crucial patent treaties¹⁹; The Budapest Treaty; allows deposit of micro-organisms or biotechnology products for purpose of patent. The Strasbourg agreement relating to international patent classification; aims at coordinating the international search and retrieval of patents along with technical documents.

¹⁵ Ellen 't Hoen, *Report of the Commission on Intellectual Property Rights, Innovation and Public Health: a call to governments*, Bulletin of the World Health Organization, 84 (5), May 2006.

¹⁶ *Ibid.*

¹⁷ WT/MIN(01)/DEC/2, Declaration on the TRIPS agreement and public health, Doha WTO Ministerial 2001: Trips, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

¹⁸ Overview: the TRIPS Agreement, WTO, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

¹⁹ Gerald J. Mossinghoff Et. al., *The World Intellectual Property Organization: A United Nations Success Story*, Sage Publications, Inc, World Affairs, FALL 1997, Vol. 160, No. 2 (FALL 1997), pp. 104-108 JSTOR.

One of the key strengths of WIPO is its ability to bring together IP stakeholders from around the world to discuss and address important IP issues. This has allowed for the creation of international norms and standards for IP protection, and has helped to reduce the risk of IP-related disputes between countries.

WIPO also provides a range of services to support IP rights owners in obtaining and managing their rights. For example, WIPO's Patent Cooperation Treaty (PCT) provides a streamlined process for obtaining patent protection in multiple countries, while WIPO's Madrid System provides a centralized system for obtaining trademark protection in multiple countries. These services have been widely used by IP rights owners and have been instrumental in helping to simplify and streamline the process of obtaining IP protection.

WIPO Green platform is another example, which helps to connect innovators and investors in the field of green technologies, including those related to health and the environment. This platform provides a space for innovators to showcase their technologies and connect with potential investors, as well as access to relevant information and resources related to IPR.²⁰

CHALLENGES

In his 2010 assessment, Professor Hargreaves said it succinctly: "IP rights cannot succeed in their basic economic function of encouraging innovation if rights are ignored or are too expensive to enforce." "The absence of any rights regime is preferable to an ineffective one."²¹ It is also important to note that the effectiveness of WIPO in protecting IP rights is limited by the willingness of its member states to adopt and implement its treaties and recommendations. While WIPO can provide a framework for IP protection, it ultimately depends on each individual country to put these provisions into practice. This can be a challenging process, as the laws and regulations governing IP protection can vary greatly between countries.

Another issue that has been raised in terms of the effectiveness of WIPO is its ability to respond to

²⁰ Amy Dietterich, *WIPO GREEN: supporting green innovation and technology transfer*, World Trade Organisation, WIPO Magazine, March 2020.

²¹ Baroness Neville-Rolfe, *The challenge of protecting intellectual property*, WIPO Magazine, Special Issue 11/2016, November 2016.

the rapidly evolving landscape of IP and technology. With the advent of new technologies such as artificial intelligence and blockchain, the IP system is being challenged in new and innovative ways. This requires WIPO to be flexible and adaptable in its approach, and to continue to evolve its services and procedures to ensure that they remain relevant and effective.

Additionally, the issue of IP enforcement is a key challenge facing WIPO and its member states. While WIPO can provide a framework for IP protection, it is ultimately up to each country to enforce its IP laws and regulations. This can be a complex and costly process, and can be hindered by a lack of resources and political will. Furthermore, IP enforcement can be complicated by cross-border issues, such as the movement of goods and services across borders, and the increasing use of online platforms.

RECOMMENDATIONS

Some of the key recommendations provided by WIPO include²²:

Adoption of comprehensive IPR legislation: WIPO recommends that Member States adopt comprehensive IPR legislation to provide effective protection and enforcement of IPR.

Establishment of specialized IPR courts: WIPO recommends that Member States establish specialized IPR courts to ensure that IPR cases are handled by judges with expertise in IPR law.

Training for IPR officials and practitioners: WIPO recommends that Member States provide training for IPR officials and practitioners to ensure that they have the necessary knowledge and skills to effectively protect and enforce IPR.

Promotion of public awareness of IPR: WIPO recommends that Member States promote public awareness of IPR and the importance of respecting IPR in order to encourage innovation and creativity.

²² WIPO, *WIPO Intellectual Property Handbook*, WIPO., No. 489 (E), 2 ed., 2008.

Cooperation with other countries: WIPO recommends that Member States cooperate with each other and with international organizations in the protection and enforcement of IPR to ensure effective cross-border protection of IPR.

These are just some of the recommendations provided by WIPO. The organization also provides technical assistance and support to Member States to help them implement these recommendations and develop their IPR systems.

CASE LAW

BACARDI and Co. LTD vs. BAHETY OVERSEAS Pvt. Ltd and Others

FACTS

The plaintiff of the case is a known alcoholic beverage manufacturer whose products with numerous fruit essences are sold under the mark “BREEZER”. Whereas, defendants are also a beverage manufacturer but majorly fruit-based that is non-alcoholic and sells it under the name “FREEZ Mix”. The present suit of trademark infringement and passing off has been filed by Bacardi (Plaintiff) against Bahety (Defendant). It was alleged that the defendant has been using the mark “FREEZE” and trademark “FREEZMIX” in such a manner that it explicitly infringes the registered word mark along with the shape mark of the plaintiff. As a result, the plaintiff filed for an injunction against the defendant’s product.

ISSUES

- Whether the defendants’ mark constitutes an infringement of the plaintiff’s registered trademarks.
- Whether injunction shall be granted.

RULES

Section 9(3), Section 28(1) Section 29 and Section 31(1) of the Trade Marks Act, 1999 (‘Act’).

ANALYSIS

Plaintiff Contention

The counsels appearing on behalf of the plaintiff presented five-fold contentions majorly. Firstly, the

defendants' action of continuing usage of the device mark "FREEZ" even after failing to secure its registration. It was claimed that they persisted in infringing the plaintiff's trademark even after a month of receiving a desist notice. The second contention that was presented was related to the similarity between the shapes of the bottles which both parties manufacture. It was submitted that the defendants copied the varied features of the bottle that the plaintiff manufactures. Thirdly, the factor of colour, as the flavour of the plaintiff's beverage and the colour of the bottle are in correspondence, it was contended that the same is being followed by the defendants.

Further, it was asserted that there was a phonetic and visual similarity between the mark "BREEZER" and "FREEZE". It was claimed that the word "mix" in the mark "FREEZ mix" are written in a non-discernible manner which is challenging to identify and is not visible in an instance. Indicatively, it seems like an intentional attempt to jeopardize the plaintiff's goodwill.

Lastly, the counsels contended that the defendants have deliberately designed their product in an almost similar manner to deviate and create confusion among the consumers. As a result, this would lead to a misconception among the consumers to believe that there is an association between the products.

Defendant's Contention

The counsels appearing on behalf of defendants highlighted Section 9(3) and stated that the Act bars the registration of the bottle's shape as a trademark because the same is familiar to the business. Thus, mere similarity in shape does not constitute a case of trademark infringement.

Further, the counsels denied the claim of any visual or phonetic similarity between the logo. It was pointed that the term "BREEZER" consists of two syllables, whereas "FREEZ" includes only one syllable. Also, it was submitted that the place of selling and the targeted consumers for both the products are entirely different as the plaintiff's product is an alcoholic beverage and the defendant's product is non-alcoholic.

Moreover, countering the claim of colour similarity, the counsels' responded that the plaintiff's product uses all the seven primary colours, and hence, there stands no claim on its exclusivity. Therefore, the trade dress and the products of both the parties are entirely different and could not be

claimed as confusing to one another.

OBSERVATIONS OF THE COURT

The fact that despite the defendants being aware of the plaintiff's registered trademark did not seek for the revocation of its mark was observed to be unjust. On the other hand, as the plaintiff has registered the "shape mark" and the trade mark "BREEZER" u/s 31(1), it does provide exclusivity to use the same. As a result, the court observed that if any party uses the shape which is deceptively similar to the plaintiff's product and has the tendency to confuse the public, then it does lead to infringement as according to Section 29(2)(b) of the Act.

Hon'ble J. Hari Shankar observed that though the defendants registered for the trademark "FREEZEMIX", but herein the word "FREEZE" is majorly depicted to the public in inexplicably large letters with the word "mix" written in comparatively much smaller letters. This, in particular, cannot be believed to not have caused any confusion among the mark of both parties. Thus, it was stated that the same tends to portray an association between the plaintiff and the defendants.

Hence, by virtue of Section 29(2), it was stated that the defendant's mark is likely to cause confusion among the public; further, by relying on the judgment *Amritdhara Pharmacy v. Satya Deo Gupta*²³, it was quoted that "when the test of phonetic similarity is applied, then in such case one shall compare the marks for the viewpoint of a person of imperfect recollection, and not one who is familiar with the marks". Conclusively, the court found a phonetic similarity and observed the defendants had adopted a trade dress similar to that of the plaintiff.

CONCLUSION/JUDGEMENT

It was concluded that there was a deliberate attempt on the part of Bahety Overseas to establish such a trademark that resembles Bacardi's. The court observed a similarity in the marks as well as in the designs, which tended to lead an unfamiliar customer to presume that there exists an association between the two marks. Hence, the court granted an interlocutory injunction in the plaintiff's favor and restrained the defendants to further use the mark "FREEZE mix" and associated trade dress. The injunction shall remain in force till further order.

²³ *Amritdhara Pharmacy v. Satya Deo Gupta*, AIR 1963 SC 449.

CONCLUSION

The protection of intellectual property is crucial to encourage innovation and creativity. By providing a financial incentive for creators and inventors, IP protection fosters investment in research and development and promotes the creation and dissemination of new products and services. However, enforcing IP rights can be challenging, especially in the digital age. To protect IP, it is important to understand and comply with relevant laws and regulations, and to take action if IP rights are infringed. WHO plays a crucial role in the protection of IPR related to health and medicine. Through its efforts to promote access to essential medicines, the development of intellectual property policies, and the provision of technical assistance, the organization contributes to the advancement of public health. WHO's work helps to ensure that the interests of public health and innovation are balanced, and that the rights of patients to access essential medicines and health technologies are protected. The cooperation between WIPO and WHO supports the WHO's goal of ensuring universal access to health and is an important step towards addressing the challenges of the global health crisis and promoting innovation in the health sector. By working together, WIPO and WHO can help to ensure that IPR policies are aligned with public health goals and that access to health technologies is not restricted by IPR.

The WTO and its TRIPS agreement play a crucial role in promoting and protecting IPRs globally. It sets minimum standards for the protection and enforcement of IPRs and seeks to balance the interests of intellectual property owners with the public interest and technological innovation. However, the agreement also acknowledges the need to limit IPRs in specific circumstances, such as public health emergencies.

WIPO has been successful in advancing the global IP system and providing a range of services to support IP rights owners, its effectiveness in protecting IP rights is limited by the willingness of its member states to adopt and implement its provisions, and by the ongoing challenges posed by the evolving landscape of IP and technology. Nevertheless, WIPO continues to play a critical role in promoting the protection of IP rights around the world, and is likely to remain an important player in this field for many years to come.

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