

IMPORTANCE OF TRADEMARKS AND COPYRIGHTS FOR THE IT COMPANIES

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Abstract

Trademark and copyright are very essential tools of intellectual property rights¹. IPR are important business assets that a business person or an entrepreneur can own. The scope of IPR is not limited to copyrights which has been highly misused by people, whereas, it has three primary areas, i.e., trademarks, patents and copyrights.

The protection from trademarks is provided to both businesses and the consumers, by which the trademark owner has the right to stop others, including its competitors, to use its trademark or to use any other mark that is similar. It not only protects you from your competitors but also getting trademarked gives legal protection which plays a very crucial role in the franchised businesses like Nike, Burger King, etc.

Copyrights is a symbol © that one sees, involving various works. For example- as a creator, one would own copyright for any original literature, music, film, art, and other web and non-literary content, however, the registration of copyrights is not compulsory but it is suggested to get it registered for getting legal rights.

In today's era, it is evident that IT companies have captured a great market. They are related to all big businesses and are responsible for making sure that all the operations of various companies run smoothly and their data remains secure. Along with that, they are responsible for installing hardware, software and other technical support. Now with such wide range of responsibilities that too while dealing with sensitive software related issues, it is important for these companies to get their trademarks and copyrights registered in order to avoid similarity and identity.

This article talks about those importance and other aspects related to trademarks and copyrights, and case laws related to the same.

¹Referred to as IPR for the purpose of this document.

Introduction

With the development in technology, this cannot be denied that there is a wide range of competition all across the globe. To achieve the desired results, people are working hard to develop the latest software, microprocessors, and other technologies. This has definitely increased the opportunities for the people but with that comes a variety of cases of violation of the rights. Indeed, it's a new form of threat and danger to people's right that needs to be cured. As a society, we are aware of a variety of forms of violation of such rights, such as, software piracy, unauthorized reproduction, data and information theft, etc.

Do the Intellectual property rights provide any prevention to these occurrences? The answer is, yes, they provide incentives to the creator of the work, which may be in any form, say, copyright, trademark, patents, etc.

There is no denial to the fact that intellectual property is one of the most important aspect of the company. The role of intellectual property is not limited to a business or a company but also extends to the trade of every nation which comes into picture when there is a need to protect the stealing of creative ideas without the consent of the author contributing to the economy of respective state. Intellectual property rights acts as a shield of intangible properties that are open to the public and can be replicated by anyone quickly. With the development of digitalised era IP crimes have become part and parcel of this time.

Looking at a few benefits of IPR in modern era we may say that it has the potential to convert innovation into product and service making them commercially viable resulting in growth of economy, improving the productivity of a company and giving more export business opportunities, encouraging the ideas by providing security to the creator, and acting as a shield for the goods and services of a company increasing its profit and enhancing its growth.

In the present situation where the world is hit by pandemic, the community of techies including Microsoft, Amazon, Twitter, IBM, Hewlett Packard and Sandia National Laboratories has vowed the free use of their IPR. This has led to curing of acute public health crisis which is the result of acceleration of production and implementation of vaccination, medical equipment, diagnostics and other technological solutions.

Keeping all this in mind let's look at why IPR, especially trade mark and copyright, are essential for an IT company and is the role any different from other sectors of the economy. In this article we shall look the role of IPR in protection and growth of IT companies.

Why is Trademark essential for an IT Company?

For understanding the role in an IT Company, it is important to understand the Trademark and how it is an asset for any company.

Anything that is used to differentiate the goods and services of a company from other companies is a Trademark, which in business world is referred as a 'brand name'. It includes words, names, logos, symbols, tag lines and also covers service marks and are essential for the growth of the franchised business such as Burger King, Dominos etc.

Talking about why it is an asset for a company it is important to mention that they are a medium of identifying and distinguishing a company's products and services in the market from that of its competitors. A trademark owner has the right to stop other companies including its competitors from using its trademark or any similar mark which may confuse the public at large. Now let's look at the trademark issues with domain name in the Cyber space.

Cyber Squatting

It is an act where a person registers a domain name with malafide intentions and no interest in the business just to sell it to the trademark owner at a higher price to make profit because the person knows that the trademark owner would want it. At international level, the problem can be resolved by ICANN, i.e., Litigation and other dispute resolution mechanisms whereas in India there is no explicit legislation. However, under the Trademarks Act a complaint can be filed to seek relief or to go for the 'passing off' remedy.

Profit Grabbin

Profit Grabbing and Cyber Squatting are almost similar whereas in profit grabbing the intention is not to sell the domain name but to exploit it for commercial success. In the case

of (**ErvenWarnink BV v J Townend & Sons (Hull) Ltd**)², Lord Diplock laid down the parameters for passing off remedy which is available for both Cyber Squatting and Profit Grabbing, i.e., “there should be misrepresentation by a trader in the course of the business to a prospective consumer/ ultimate consumer of the goods and services supplied by him, which is calculated to injure the business/ goodwill of the person bringing the action and causes actual damage to him”. This parameter was redefined by Lord Oliver in the case of **Reckitt Colman Ltd. v Borden Inc** in which it was stated that there should be Goodwill, misrepresentation and Damage to seek the remedy of passing off. As per the Trademark Act, there is concept of identical/deceptively similar for which the regards should be given to the nature of marks and goods, resemblance degree, in which they are used as trademarks, along with other relevant and surrounding circumstances.

Typo Squatting

It is another form of Cybersquatting which relies on typographical errors while putting a website address into a browser which includes misspellings/minor changes made to the domain name. For instance, In the case of **Rediff Communication Ltd v Cyber Booth**³, the defendant made a domain name www.radiff.com and an injunction was granted against him.

Concurrent Use

Generally, there cannot be two domain name owners, however, if there are legitimate interest and the issue of concurrent arises with different top level domain names it is acceptable. For instance, www.nissan.com and www.nissan.net.

As per U.S laws, Trademark registration for the name of a software is important with regards to an IT company. It is important to consider the filing of a trademark for the name of a software whether it is an app for the phone or any other classic software for computer use. While a Federal Trademark is applied on the name of the software the Trademark owner gets the right to protect it as his own in all the states, However, if not a federal registration, then only common law trademark rights can be granted which will protect a company or

² [1979] AC 731

³ AIR 2000 Bombay 27

individual's IP even when it is not a registered trademark with the USPTO (United States Patent and Trademark Office).

In India, the Trademarks Act is the legislation that is used as shield to protect the trademarks of the company. As mentioned above trademarks are distinctive signs denoting the source of goods and services from other companies for example Apple Tech company has its own symbol which is well recognised both nationally and internationally. The goodwill of a business is represented by its trademark which is indefinitely renewable. For an IT company involved in software development it is important to ensure trademarks as it is currently evident that there are several IT companies doing similar jobs, resulting in increased competition which may have similar sounding names in the internet pool of today's world which might lead to serious violation of original creation. With regards to a software developer, say A, who had created an app which is used across country, the question arises whether she has a common law right across the country or not. The answer to it is 'No', and the lack of trademark in such a situation could cause a lot of money.

For instance, say you developed an app called 'deliver slice', that helps the users to uncover the best places for pizza in any given city and get it delivered. However, the creator 'C' was busy in launching the app in some other country, say New York and never filed a trademark for his app. One day, while searching for his app in the Play store he noticed that an app with a very similar name "Delivering Slice" has been launched by someone else in Los Angeles (LA). The LA app may not be able to come to New York because of the common law IPR but it cannot be expanded to LA by C because of the common law trademark rights in LA.

Trademarks are not only the picturised logo but are also the tools to convey emotional attributes and messages about the company and its product and services. In the crowded market place where it is hard to distinguish the business trademarks makes it easy for the customers to find the right and registered application. Highlighting the reputation of the business. When we talk of IT companies that usually deals with intangible matters and are available on virtual platforms, trademarks become even more important in order to prevent exploitation of the branding or the symboling of any particular software, application etc, benefitting the trademark holder, both legally and economically.

In the case of ‘**Yahoo Inc. v. Akash Arora**’⁴, the court said that the domain name of a company is a way of creating its presence on the internet, and noted that though yahoo.com was the domain of the plaintiff which was not registered in India, but it was popular in India for providing first web directory services.

Case laws on trademark violations

1. Microsoft Corporation vs Mr. Kiran and Anr. on 7 September, 2007⁵

The plaintiff in this case had exclusive ownership and rights over the well renowned and registered trademark “Microsoft”. The defendant had wrongly infringed the trademark rights of the company. The observed that it is a serious infringement of the trademark rights of the plaintiff because the exact same name was used to sell the softwares that are owned by the plaintiff, such an infringement also results in “Counterfeiting or piracy”. Apart from financial loss to the plaintiff, there is a larger harm to the trust and confidence of the public. The innocent public gets deceived and confused by such intentional acts of IPR infringement. “Courts in India have been progressive in taking actions in such cases of infringement and the claimant holds the right to damages, regardless of the defendant’s state of mind.”

2. Thought works Inc vs. Super Software Pvt Ltd. &Anr on 12 January, 2017⁶

The petitioner is a company involved in IT consultancy. It had filed a petition against the arbitral award given in the favour of the respondent. In this particular case, the high court reversed the arbitral award, stating it to be impugned. By the decision of the court in this case, it can be safely inferred that there can be procedural errors while delivering an arbitral award if the arbitrator is not considerate about all the technicalities, this might lead to injustice and harm the “fundamental policy of India”. On the aforementioned grounds, the court allowed the petitioner’s case which had the potential of proving a trademark infringement by the respondent.

⁴(1999 PTC (19) 201 Delhi)

⁵ MIPR 2007 (3) 214, 2007 (35) PTC 748 Del

⁶ (2017) 161 DRJ 333, (2017) 69 PTC 303

3. Microsoft Corporation vs Vijay Kaushik&Anr. ⁷

In this case plaintiff contended that the defendant company was selling pirated softwares with fake licenses. The plaintiff company held a registered trademark in India under the name “Microsoft”. And selling of pirated programs harmed the reputation of the company, it had to face financial losses. The contention of plaintiff’s counsel was that selling of pirated softwares also includes infringement of the very renowned trademark, court accepting this view said that such infringement also disincentives the company from indulging in R&D for newer softwares, which negatively affects the technological field and gave the judgement in plaintiff company’s favour.

4. Icon Health and Fitnes, Incvs Sheriff Usman and Anr⁸

In this case, both the companies who were involved in a trademark dispute were not registered in India. Along with dealing the trademark dispute, the court also elaborated on the aspect of territoriality and whether the case will fall under its jurisdiction. The dispute was related to the naming of the application and the kind of e-commerce business which was being done. The court observed that in the post-internet era there has been an expansion of services and their accessibility. Applications and software of a particular company have trans-border operation which builds on to its reputation under the trademark. Owing to such justifications, the court rightly had the jurisdiction to try such cases.

5. Aktiebolaget Volvo v A.K. Bhuva⁹

The court in this case observed that it is important that the aggrieved party in cases of infringement of IPR, which also includes trademarks should be awarded additional punitive damages. The need for punitive damages was justified by saying that the law breakers should bear a heavy loss of the harm they caused to aggrieved party and the public, it also deters them from further involvement in such infringement.

⁷ (2011) 48 PTC 127

⁸ (2017) 161 DRJ 333, (2017) 69 PTC 303

⁹ <https://www.casemine.com/judgement/in/56ea91e6607dba371ebcaab3>

6. Toyota Jidosha Kabushiki Kaisa v. M/s Prius Auto Industries Ltd.¹⁰

The court in this case settled that the trademark rights are territorial in nature and not global. In this regard, it gave out two principles to determine the validity of the trademark in trans-border cases. The first principle is whether the company with the trademark has a reputation or goodwill in foreign jurisdiction and the second, whether the domestic jurisdiction has knowledge about the reputation in foreign territory pertaining to the trademarks.

7. Milmet Of tho Industries &Ors. vs Allergan Inc¹¹

The court in this case extended protection to foreign brand for its trademark even though the trademark was neither registered nor used in the Indian jurisdiction. The court did so because the respondent company was globally the first company to enter the market with the mark and whether it operated in the Indian land is not material. Also, the services it provided was related to medical safety and confusion due to mark can cause harm of a serious and aggravated nature.

8. Cadila Healthcare Limited vs Cadila Pharmaceuticals Limited¹²

- “a) The nature of the marks i.e., whether the marks are word marks or label marks or composite marks, i.e. both words and label works.
- b) The degree of resemblances between the marks, phonetically similar and hence similar in idea.
- c) The nature of the goods in respect of which they are used as trademarks.
- d) The similarity in the nature, character and performance of the goods of the rival traders.
- e) The class of purchasers who are likely to buy the goods bearing the marks they require; on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.
- f) The mode of purchasing the goods or placing orders for the goods and

¹⁰ CIVIL APPEAL NOs.5375-5377 OF 2017

¹¹ Appeal (civil) 5791 of 1998

¹² Appeal (civil) 2372 of 2001

g) Any other surrounding circumstances which may be relevant in the extent dissimilarity between the competing marks.”

The essentials are to be measured in accordance with the facts of the case.

Why is copyright essential for an IT Company?

The original work of authorship including literary, dramatic, musical and other artistic work are the work of creator protected through copyright. Under this the copyright owner gets the exclusive right to reproduce, prepare derivatives, distribute copies, perform publicly and display the copyrighted work for a very long time. Unlike trademark which protects the brand name or logo contained in the creative work, copyrights protect the form of expression rather than the subject matter. The company's original creative works such as promotional materials instruction manual, sales, brochure, website content etc. can be protected by copyrights from being used by other companies without the permission of the copyright owners. It is the right of the copyright owner to control how his work will be reproduced, distributed and be presented in the public, also, he can stop other competitor to use any similar work. It is pertinent to mention here that the legislature of copyright is not compulsory and the ownership is bought by simply creating the original work.

As per Section 2(a) of the copyright Act, the computer programme comes under the ambit of literary work. Further, under Section 13 of the said Act it is stated that copyright subsists in a literary work, and thus, it would subsist in a computer programme too. Article 10 of the TRIPS agreement also talks about computer programmes. Computer programmes have a source code and an object code which are copyrightable under the Indian Copyright Act.

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Linking

There are two types of linking namely, surface linking and deep linking. If the link takes you to the home page it is called Surface linking and if the links takes you to any subsequent pages, it is called deep linking. if someone reproduces something that the author had written on the website without consent, it creates copyright issues

Caching

The process of storing data in a temporary storage area of a computer's memory called cache is known as caching. Cache memory is used to store temporary information in local hard drive of the computer to access HTML pages, images and files faster. Cache memory is stored without knowledge of the user for instance when a website is visited by a person the files are pulled by the browser from cache saving the user's time and reducing the traffic.

Right to Distribution

As mentioned, u/s 107 of the said Act, if multiple copies are made and sent to multiple people then the defence of fair use cannot be taken.

U/s 55(1) (1) of the said Act, if the defendant can show that he was not aware or had no reasonable ground for believing the presence of copyright at the date of infringement then in such a case the plaintiff will only be entitled to the injunction resulting in reduction of damages payable. Section 55 of the Copyright Act gives civil remedies for infringement such as injunction, damages, rendering of accounts for profits. Section 63 of the Act gives criminal remedies for infringement i.e., imprisonment, fine. (For this section to apply the person should knowingly infringe/ abet the infringement)

One of the major sources of revenue for the IT companies is providing software solution to business entities depending on the needs and requirement of such entities. Keeping this in mind it is very important for an IT company to get copyright for its software solutions. Though the copyright registration is not compulsory, it is advised to get it registered for more legal protection. The benefits can be listed as-

Inexpensive registration

Not in India, but in all the countries, the copyright registration fees is nominal and while registering, the application form, registration fees and copy of a part of the source code and object code, needs to be submitted.

The protection is granted to the structure, organization and sequence of the software. Not just the code, but also the elements are copyrightable.

Registration of copyrights allows the owner to seek legal remedies and claim legal rights in case of any infringement or software piracy.

With copyright comes the rights and license agreements that are granted to the owner for their original work.

One drawback can be that copyright laws protect only the literal expression and not the idea and hence, the non-literal elements such as, designing, structure, organization, user-interface, etc., of the software, that cannot be protected under the copyright laws.

In the case of **Maraekatinfotech Ltd. v. Mr. Naylesh V. Kothari &Ors.**¹³, the court tried to bridge this statutory gap by considering non-literal similarity in the cases of infringement of softwares where it was assessed that whether or not there is a 'substantial similarity' in the programme structure and design features between the software. However, it cannot be considered as a viable option as the software developer has to go to the court persistently to safeguard from piracy and significant losses might be suffered by the developer by the time judiciary would act on it.



Case laws on copyright violations-

1. UTV Software Communication Ltd., v. 1337X.TO and Ors.¹⁴

The Court elaborated on the concept of a Rogue website. These websites are those that primarily share illegal or infringing content. The Court noted that the piracy of music and films is made easier online by rogue websites. In order to detect a corrupt website, the Court has registered certain factors that includes, among other things, whether the website is primarily intended for copyright infringement, takes appropriate action after receiving notification of infringement regarding copyright infringement, high traffic, and submitting guidelines on the website to prevent access to the website for reasons of copyright-related infringement, etc.

The Court then ruled on a test for a rogue website. Two contrasting tests around the world in determining the 'rogue website' have been described.

¹³ 2016 SCC OnLineBom 2369

¹⁴ <https://indiankanoon.org/doc/47479491/>

2. Google Llc V. Oracle America, Inc. [Certiorari to The United States Court Of Appeals For The Federal Circuit No. 18–956.]¹⁵

The Federal Circuit Court of Appeal decided in Oracle v. Google case has confirmed that copyright protection is not limited to copying the source code. Indeed, the design, sequence and editing of computer software also has the right to publish. The outcome of that case is significant because it means that the third party will not be able to avoid a copyright infringement by simply typing a different code to perform exactly the same functions or processes installed on your software.

3. Exphar SA and Anr. v. Eupharma Laboratories Ltd. and Anr.¹⁶

Jurisdiction of a Court for the purpose of Section 62 is wider than that of the Court as prescribed under the Code of Civil procedure, 1908.

Section 62 prescribes an additional ground for attracting the jurisdiction of Court over and above the grounds as laid down in Section 20 of the Code of Civil Procedure.

In coming to the said conclusion, the Hon'ble Supreme Court also relied on the following extract from the Report of the Joint Committee published on 23rd November, 1956.

“In the opinion of the Committee many authors are deterred from instituting infringement proceedings because the court in which such proceedings are to be instituted is situated at a considerable distance from the place of their ordinary residence. The Committee feels that this impediment should be removed and the new Sub-clause (2) accordingly provides that infringement proceedings may be instituted in the district court within the local limits of whose jurisdiction the person instituting the proceedings ordinarily resides, carries on business etc.”

4. Gramophone company of india ltd. Vs. Birendrabahadurpandey and ors.¹⁷

The state government may enforce copyright or trademark if the goods in the transit violate the same. India, in this case, will have the right to seize the consignment heading to Nepal and seek a remedy for copyright infringement. It has been resolved that such provisions will

¹⁵ https://www.supremecourt.gov/opinions/20pdf/18-956_d18f.pdf

¹⁶ (2004) 3 SCC 688

¹⁷ 1. 1984 AIR 667

only be binding as long as they do not violate by-laws (municipal laws). It was made clear that, in dealing with the issue of copyright infringement, even if infringing goods are not of Indian origin and are not intended for the Indian market, they are subject to Indian law and infringe a copyright.

5. TATA Sons (P) Ltd. v. Electro International¹⁸

It was alleged that the defendant had entered the word 'smart' in the name of an unauthorized domain. Defendant was selling the products of plaintiff 1's company on its website, which was infringing a registered trademark and copyright.

6. Midas hygiene industries private limited and others vs. Sudhirbhatia and others¹⁹

In the event of a trademark infringement and copyright infringement, a given order cannot be waived after that only because of a delay in delivering the action. The use of 'Magic Laxman Rekha' by the defendant proved that the acceptance of the mark itself was unreliable and that the issuance of the order was required.

7. Eastern book company and others v. D.b. modak and another²⁰

Judgments of the Supreme Court are in the public domain and its production or publication does not infringe the copyright. Copy-making decisions will not satisfy copyright by limiting the amount of skills, personnel and costs incorporated into copyrighted inputs and original or new artistic ideas are not fully included, therefore, original or new ideas are required to establish copyright in the author's work; of copyright in judgments rendered by the court, it is required that the staff, skill and investment must be sufficient to communicate or convey a formal judgment of copies of a particular quality or character that is not original and which distinguishes the actual judgment from the printed. A novelty or invention or a new idea is not a requirement for copyright protection but requires a little ingenuity.

¹⁸ 2021 SCC OnLine Del 3743

¹⁹ AIR 2004 SC 121, (2004)3SCC90

²⁰ AIR 2008 SC 809

8. Ratnasagar (p) ltd. V. Trisea publications &ors.²¹

The case examined the considerations of copyright protection under Order 39, Rules 1 & 2 of the Civil Procedure Code, 1908. The publication of the work had to be protected. The fact of the group's right to such work as a result of the author's assignment has not been proved and is not appropriate in this section. Therefore, the Court forbade the violation of copies under Sections 14 and 19 of the Act.

9. Super cassettes industries ltd. V yahoo inc. &anr²²

It is ready to be permanently banned, to prevent copyright infringement caused by unauthorized distribution of SCIL copyright in the Yahoo portal of video.yahoo.com.

Yahoo has taken refuge under the Digital Millennium Copyright Act (DMCA) saying it will remove the violation when it is notified by copyright owners, which does not apply in India.

The Court has issued an injunction restraining defendants and / or its officers, employees, attorneys and attorneys from being prevented from reproducing, modifying, distributing or transmitting in any way on their website, 'www.video.yahoo.com' or otherwise in any way unlawful, cinematograph films, sound recordings and / or basic writing or music activities of the plaintiff, where the plaintiff seeks copyright, without obtaining a valid license from the plaintiff.

10. The chancellor masters and scholars of the University of Oxford v. Narendra publishing house &ORS, I.A. 9823/2005, 51/2006 and 647/2006 in CS(OS) 1656/2005, del HC and syndicate of the press of university of Cambridge V. B.D Bhandari&Ors, RFA (OS) no. 21 of 2009 and FAO (OS) no. 458 of 2008

The law stipulates that not all efforts or industry, or the application of a skill, lead to copyrighted work, but only those that perform different functions morally, put in a certain intellectual effort, and involve a certain level of art. The doctrine of fair use justifies the reproduction of a copyrighted work as long as the purpose achieved by the subsequent or infringing work is very different from the objective accomplished by the previous work.

²¹ 1996 PTC (16) 597

²² CS (OS) 1124/2008