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INTELLECTUAL PROPERTY RIGHTS (A TOOL FOR CAPACITY BUILDING IN SMALL AND MEDIUM ENTERPRISES)

K. I. Pavan Kumar
KL University & Sr. consultant IPRs in Vedha Associates.

Manuscript Info

Abstract

Entrepreneurship is an enduring asset of any nation. Entrepreneurs with original business ideas can do miracles to Indian Economy. India's Micro, Small, and Medium Enterprises (MSMEs) base is the largest in the world after China. As per the official estimates, there are about 63.05 million micro industries, 0.33 million small, and about 5,000 medium enterprises in the country. The state of Uttar Pradesh has the largest number of estimated MSMEs with a share of 14.20 percent of the total MSMEs in the country. West Bengal comes as close second with a share of 14 percent, followed by Tamil Nadu and Maharashtra at eight percent. MSMEs contribution to the GDP is 28.90% (about 9.44% growth rate). The percentage of patents granted to MSMEs is about 23.4% of the total patents granted by the Indian Patent Office. There is a raise in the Pharmaceutical trademarks applications as against pharmaceutical patents. The author believes that the MSMEs should be more proactive towards intellectual property identification, protection and commercialization. The potential of MSMEs can be explored only when robust IPR protective mechanism is in place. This article talks about the importance of IPRs for MSMEs and also how best IPRs can be used for optimization of their business potential.

Introduction:-

Business entities to sustain in the long run have to match their pace with the changing business scenario in the market. The business scenario includes business strategy, planning, the quality of the product, market expansion, brand image, know-how, policies of Government and the law operating in the business field etc. Every business entrepreneur should update himself/herself with those changes so that he would not miss the sight of his business. Those updates can be obtained by closely following the intellectual property developments in the area of once own business.

Corresponding Author:- Dr. K. I. Pavan Kumar
Address:- KL University & Sr. consultant IPRs in Vedha Associates

Intellectual Property Rights comprises of (a)Trademarks (b)copyrights and related neighbouring rights (c)Patents (d)industrial Designs (e)Geographical indications (f)plant varieties and (g) integrated circuits etc.

The SMEs that have realized the fact that business is driven by the knowledge based economy have made Intellectual Property as their integral part of the decision and policy making. Those business establishments have expanded their manufacturing base, and trade as well as export potential, by adopting the IP system to promote innovative and creative activity to enhance their business growth. Therefore understanding the importance of the IP system and using it effectively as an integral part of the business strategy of an SME is a crucial necessity for a sustained growth.

'Intellectual property', now a day, is seen as an important source of competitive advantage and a means for the creation of wealth. IPR law allows the society to take benefits of the new knowledge that has been generated. It facilitates the society in enhancing its living standards. Monopolization is the major incentive to work on new intellectual creations without any fear of unjust enrichment by third parties. Moreover, the knowledge disclosure expands the knowledge frontiers and market for commercialization. The intellectual property regime also threatens duplication1. Now let us understand how each kind of the Intellectual Property helps in sustained growth of the Enterprise.

Trademarks2: Trademarks are important for various reasons. Trademark-

1. indicates the source of origin of the goods/services: Brand names help consumers to identify the source of the product. This feature of the trademark also helps in maintaining the distinctiveness of the product/service offered by the owner of the mark, from the other competitors of the same market. This eventually helps the enterprise in retaining the demand for its products/services offered under such brand.
2. helps guarantee the quality of goods bearing the mark: With the mark being used to a product for a long and uninterrupted duration, eventually the brand get identified with the quality of the goods/services. For example when we hear the brand "Lifebuoy", we understand the brand with certain of the attributes of the product like the quality, shape and size of the product etc. Therefore, the brand of a product is not merely the name of the product rather it is a kind of a guarantee for the attributes of the product, for which it is known. The buyer gets estopped by the brand name of the product as to its quality and durability etc, breach of which amounts to criminal breach of trust3. Therefore it is a kind of protection given to a common man to get the quality he wanted from the bands.

Implied guarantee and Trademarks: However, section 164 of the Sale of Goods Act provides that there is no implied guarantee to quality or fitness for any particular purpose of goods supplied under a contract of sale. The roots of the section are in the doctrine of Caveat Emptor (let the buyer beware) which is an integral part of the Sale of Goods Act. A seller makes his goods available in the open market.The buyer previews all his options and then accordingly makes his choice. Therefore, the buyer should alone be accountable for his conscious choices. It is the duty of the buyer to check the quality and the usefulness of the product he is purchasing. If the product for any reason, turns out to be defective or does not live up to its potential the seller will not be held responsible for that. Same section also provides for an exception that if a buyer relying on a brand name makes his choice in favor of that product then the seller is not liable for his choice.

3. creates and maintains a demand for the product: trademark retains the demand for the product/service of the enterprise. The brand name eventually becomes indicator of the quality and nature of the product/services offered by the enterprise.

[1]Jyoti SA Bhatt, Small and medium enterprises and IPR,ACSI Journal of management(6 February, 2014), http://journal.asci.org.in/Vol.37(2007-08)/37_1_2008_JYOTI%20S.%20A.%20BHAT.pdf

[2] A trademarkis a word, phrase, symbol, or design, or a combination of thesethat identifies and distinguishes the source of goods of one party fromthose of others

[3] Section 103 and 104 provides for imprisonment for a term not lessthan six monthswhichmayextend up to threeyears and fined not lessthanfiftythousandrupeeswhichmayextend up to twolakhrupees in case of false application of trademark and selling of goods to which false trademark has been applied.

[4] Sec: 16 Implied conditions as to quality or fitness— Subject to the provisions of thisAct and of anyotherlaw for the time being in force, thereis no impliedwarranty or condition as to the quality or fitness for anyparticularpurpose of goodssuppliedunder a contract of sale.

4. can have great value to the enterprise: brand name creates commercial value to the brand of the enterprise which is perpetual and continues as long as the business is carried out.

The essential character of Trademarks is that they are always earned and not born. In the sense the enterprise has to earn its mark. By mere registration of the marks the enterprise will not own the mark unless the brand name has actually been put into use. In other words, the exclusive right to use the brand name comes through its actual use and not otherwise. Unlike Patents where the inventor enjoys exclusive rights over his invention irrespective of the fact whether, such patented invention is commercially exploited or not.

How to choose an appropriate Trade name? [Dos and Don'ts] Don'ts:

1. Try avoiding the trademarks that are not registrable.
2. Purely Descriptive Words shall be avoided. The descriptive words like "Cold Beer" for beverages and "pure milk" for milk product shall not be used because it describes the actual nature of the product being sold
3. Surnames should also be avoided to the product names
4. Avoid too close and too similar marks to already registered marks
5. Do not use the prohibited marks
6. Do not use the popular marks
7. It is seen in India that some of the entrepreneurs prefer using the names of gods or goddesses as their business names, but such names will not appreciate any commercial value as brand name to the enterprise.
8. Remember, adding or deleting a letter from the existing marks does not make the applied mark new. So, cannot be registered.

Dos:

1. Try using a fanciful mark Ex: 'XXX' for soups.
2. Design the mark as originally as possible. To be original, entrepreneur should do some research on the existing marks in the similar field of business and take inspiration from them to design a new logo for his/her business.
3. Even though it's not compulsory to register the trademark, registering the trademark would provide exclusive right to use and also provides a right to take action against infringer. In the case of unregistered trademarks the entrepreneur can only sue the infringer under common law.
4. Registered marks have an advantage of getting preliminary injunction more easily due to the direct establishment of a prima facie case than unregistered marks.
5. Further, the registration may also help in administrative procedures with respect to custom authorities in reference to importing of infringing products.
6. Similarly, in case of search and seizure processes, the police authorities can be involved to identify and take action on the infringers.

Therefore, registering the trademark is always advantages and preferred by the entrepreneur. Common MYTHS about Trademark Protection:

1. Generally entrepreneurs believe that the Trademark registration is easy and no advocate or professional service is required for getting the mark registered. But, the trademark application process is very technical. The processes of application passes through many technical phases like:
2. Identifying appropriate class suitable to the proposed Mark
3. Searching for the availability of the mark
4. Understanding the search results
5. Identifying the similarities of the proposed mark and the existing marks
6. Identifying the legal status of the owner.
7. Then providing the description of the mark
8. Obtaining necessary documents like Power of Attorney, Affidavit etc for filing the mark
9. Then sending replies to the objections raised by the registry
10. Getting the mark published in the Trademark Journal
11. If the objection is from the competitor then replying to the notices and submitting arguments before the Registry etc.

After filing the mark it takes a year or so on an average to get final registration certificate. Filling out the forms looks easy, but there are many small decisions that go into them even on the most straightforward applications. It is also advised to all the young entrepreneurs not to rely on the online trademark registration service providers. In my years of experience as a consultant for IPRs I have seen many people complaining about the deficiency of service by

the online service providers. Therefore, it is all the more advisable to approach nearest IPR consult and get required services.

12. Only visual trademarks are registrable: No. it is not true. Word mark or logo mark have become conventional marks. Now trademarks include sound marks5, smell marks and motion marks also have found place in the Trademark registrations. Yahoo! Inc. owned sound of human yodeling "Yahoo" (Reg. No: 2442140) in connection with computer service. Another type of non-traditional mark such as smell marks. Perfumes, synthetic lubricants (Reg. No: 2463044) etc. Another non-traditional mark is motion trademark. Generally the motion trademark is more relevant to the entertainment industry. However, a Turkish chef by name, NusretGökçe, (nicknamed Salt Bae) is known for his art of cooking and preparing meat and sprinkling salt. He had many motion trademarks to his credit6.
13. Registration of Company/partnership is a sufficient protection for trademarks also: No. Trademark registration and company name registration are two different things. Company registration can only stop others from registering another company on the same name, but it does not protect the name of the product and service offered by an entrepreneur.

Therefore, the strength of creative entrepreneur should frontend the business as trademark.

Patents and entrepreneurship:

Sections 3 and 4 of the Indian Patents Act, 1970 (The Act) specifically state exclusions to what can be patented in India. There is no definite list of what can be patented. However, there are certain criteria to be met in order to be patentable. The patentability of an invention depends on the ability to meet these criteria. According to Sec 2(j) of the Act7, 'a new product' or a new process' involving inventive step and capable of industrial application are said to be invention.

The following are the criteria determining the patentability of the invention:

1. Patentable subject matter: Section (3)8 of the Act has given the list of non-patentable inventions in addition to the inventions pertaining to atomic energy as per Section (4) of the Act.

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[5]Some of the registeredsound marks in India are: National Stock Exchange – (Themesong); ICICI Bank – (Corporate jingle – DhinChikDhinChik); Britannia Industries (Four note bellsound); Cisco – (Tune heard on logging in to the conferencing service Web Ex); Edgar Rice Burroughs – (Tarzan Yell by itstoy action figure); Nokia – (Guitar notes on switching on the device);

[6]in class 25 (clothing, trousers, jackets, overcoats, skirts, suits), in class 30 (coffee, cocoa, artificial coffee, coffee-basedbeverages, noodles, macaroni, ravioli, bread, pastry and bakeryproducts) and in class 43 (services for providingfood and drink, restaurants, cafeterias, cafés, canteen services, catering, pubs) of the Nice Classification.

[7] (j) "invention" means a new product or processinvolving an inventive step and capable of industrial application; (ja) "inventive step" means a feature of an invention thatinvolvestechnicaladvance as compared to the existingknowledge or havingeconomicsignificance or both and thatmakes the invention not obvious to a personskilled in the art.

[8]What are not inventions.—The following are not inventions within the meaning of thisAct,—

(a) an invention whichisfrivolous or which claims anythingobviouslycontrary to wellestablishednaturallaws;

(b) an invention the primary or intended use or commercial exploitation of whichcouldbecontrary to public order or morality or which causes seriousprejudice to human, animal or plant life or health or to the environment;

(c)the merediscovery of a scientificprincipleor the formulation of an abstract theory or discovery of any living thing or non-living substance occurring in nature;

(d) the merediscovery of a new form of a known substance whichdoes not result in the enhancement of the knownefficacy of that substance or the merediscovery of any new property or new use for a known substance or of the mere use of a knownprocess, machine or apparatusunlesssuchknownprocessresults in a new product or employsat least one new reactant.

Explanation.—For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and otherderivatives of known substance shallbeconsidered to be the same substance, unlesstheydiffersignificantly in propertieswith regard to efficacy;

(e) a substance obtained by a mereadmixtureresultingonly in the aggregation of the properties of the components thereof or a process for producingsuch substance;

(f) the mere arrangement or re-arrangement or duplication of knowndeviceseachfunctioningindependently of one another in a knownway;

2. 'Novelty' is another important condition for patentability. It is defined under Section 2(I)9 of the Act. It is an important criterion for determining patentability of an invention. Novelty or new invention is defined under Section 2(l) of the Patents Act. In other words, novelty requires that an invention must not have been published in public domain.
3. Inventive Step: the invention applied requires inventive step. The invention applied for must not be a non-obvious. Section 2(ja)10 of Patents Act defines inventive step as: the invention must involve technical advance to the existing knowhow or
4. It should have economic significance like the invention applied for is more cheaper than the existing invention or in case of process the applied patent process is more economical compared to the existing processes.
5. It should not be obvious to a person skilled in the respective field of invention.
6. Capable of Industrial Application: according to section 2(ac) of the Act, the invention must be of capable of being used in an industry. It precisely means, the invention cannot be in abstract. It must be capable of being used in any industry. In other words the invention must be of some industrial use to be patentable.
   In addition to the above said criteria, the draft patent application must disclose the invention specifically. To enable a person of basic skill in the field of invention to understand and carryout the invention further. If patent application is not enabling patent then it cannot be patentable.

Indian law recognizes two major varieties of Patents (1) Product Patent & (2) Process Patent. A patent is defined as a statutory privilege granted by the government to inventors, and to other persons deriving their rights from the inventor, for fixed years, to exclude other persons from manufacturing, using or selling a patented product or process. Under US Law, there are three types of patents (1) utility patents, (2) design patents, and (3) plant patents.

I strongly believe that the Indian patent regime should consider recognizing Design and utility patents as well. While in India the Designs Act, 2000 protects the designs. Design protection law contained in the Designs Act is in fact the leftover part of Patents and Designs Act, 1911. The patent provisions which were repealed from the Patents and Designs Act, 1911 were incorporated in the Patent Act, 1970 after a thorough revision on the basis of expert committee report and legislative debates11

Design and Utility Patents: Design patents protect 'appearance' like design of an ornament, design of a chair, design of an electronic gadget etc. It is simple in filing procedure and cheaper in cost. However, its overall protection is not equivalent to the utility patent. This also facilitates for frequent change in designs and encourages new designs to come up. United States Patent and Trademark Office has defined the design of an object to be the visual characteristics or aspects displayed by the object. Therefore, in designs the visual features of the product get protected. However, where the ornamental feature of a product dominates the utility of the product then design

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(g) Omitted by the Patents (Amendment) Act, 2002
(h) a method of agriculture or horticulture;
(i) anyprocess for the medicinal, surgical, curative, prophylactic diagnostic, therapeutic or othertreatment of humanbeings or anyprocess for a similartreatment of animals to renderthem free of disease or to increasetheireconomic value or that of theirproducts.
(j) plants and animals in whole or any part thereofotherthanmicroorganisms but includingseeds, varieties and species and essentiallybiologicalprocesses for production or propagation of plants and animals;
(k) a mathematical or business method or a computer programme per se or algorithms;
(l) a literary, dramatic, musical or artisticwork or anyotheraestheticcreationwhatsoeverincludingcinematographicworks and television productions;
(m) a merescheme or rule or method of performing mental act or method of playinggame;
(n) a presentation of information;
(o) topography of integrated circuits;
(p) an invention which in effect, istraditionalknowledge or whichis an aggregation or duplication of knownproperties of traditionallyknown component or components.

[9] "any invention or technologywhich has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application withcompletespecification, i.e., the subjectmatter has not fallen in public domain or thatitdoes not form part of the state of the art".

[10] *Ibid 9*

[11] Design Protection in India: A Critique Design Protection in India: A Critique" by VirendraKumarAhujaâ

patent is obtained. For example design of a chair. The very design describes its utility and advantages and the features of the product. It does not require any description of the product as to its utility.

Important condition for grant of design patent is that, it should be repetitive. In the sense, the design so patented should be repeatable. For example a wall paint design per se is not registrable unless it is repeatable.

Another important aspect is that the design patent must be new. In the sense, the design must not be identical with any other existing similar product design and must be original from the inventor. When the design satisfies originality obviously it will be non-obvious design and it will not be a combination of already existing designs. Similarly, the design patents are given to protect esthetic effect of the product. The products which don't have esthetic effect it is difficult to obtain patent for their design.

The SMEs that are relying more on their design capabilities shall take advantage of IPR laws in protection of them. Another difficulty that Indian SMEs are suffering is inability to register utility patents. India does not offer protection under Utility Patents, therefore the Indian companies and startups which seek utility patent protection can apply in the countries like UAE, Greece, Georgia, Italy Japan, Korea and Kuwait etc. India also needs independent utility patent protection because it provides many benefits in particular to small and medium enterprise.

Copyrights and SMEs: Copyright as an IP asset mostly serves those MSMEs that are engaged in creation of artistic works. Artistic work includes books, paintings, cinematographic content, music records etc. Sometimes copyrights are underrated and considered insignificant by SMEs. Any original literature, from regulatory to marketing literature such as brochures, pamphlets, package insert, product manuals etc., by an MSME qualifies for protection under copyright law.

The content placed in the website of the respective business establishment containing the services that are being offered by the SME is worth copy protection. The look and feel of the website and the logical construction of the content placed in the website are subject matters of copy protection law. The promotional videos of the business can be copy protected. The logical flow of the codes used to design in the Apps developed in the process of the business also can be copy protected.

Entrepreneurs should know about the Government Initiatives:
With a view to increase the IPR awareness among MSMEs The Development Commissioner (DC-MSME) has issued guidelines on 'Implementation of the Scheme Building Awareness on Intellectual Property Rights (IPR) for MSMEs'. National Monitoring and Implementing Unit (NMIU) shall be responsible to monitor the scheme.

The expenses incurred by MSMEs for registration of IPRs shall be reimbursed by the Government. In this regard, IP Facilitation Centres (IPFCs) will provide support and facilities for searching/mapping etc. for IPRs including evaluation for possibility of registration for patents, industrial designs, trademarks, etc.

The government has proposed to reduce fees for various intellectual property rights like patents and designs for micro, small and medium enterprises and startups to promote innovation. An individual, group or industry has to pay fees at different levels of intellectual property rights (IPR) application fillings. As per the proposal, fees for micro, small and medium enterprises (MSMEs) and startups for filing of patent applications. As per the proposal, fees for micro, small and medium enterprises (MSMEs) and startups for filing of patent applications will be reduced to Rs.1,600 or Rs.1,750 from Rs.4,000 or Rs.4,400. For expedited examination, it will be reduced to Rs.8,000 from Rs.25,000 currently. Similarly, for renewal of patents, the fees will be reduced. For design applications filing, fees for MSMEs and startups will be reduced to Rs. 1,000 from Rs.2,00012.
MSMED Act, 2006: is an important policy initiative which is intended to assist the promotion and development of MSMEs. This Act came on the day of Gandhi Jayanthi of 2006. Act aims at facilitating the promotion, development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto. This Act legalizes the MSMEs.

[12]//economictimes.indiatimes.com/articleshow/71152612.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

Technology Center Systems Program (TCSP): 18 technology Centers were established to help MSME initiatives through providing access to cutting edge technologies and to offer technological advisory support and also to develop technical skill development centers to youth like school dropouts and to graduate engineers.