Leveraging the Process of Interim Injunction as a Strategic Instrument in India & U.S. IP Litigation

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THE PROCEEDING THAT OFTEN DECIDES THE CASE

Speak to any litigator that has experienced both sides of a preliminary injunction hearing in an IP matter, and this is the same message that will be repeated over and over again: in far too many cases, the injunction hearing is the entire case. Not a preview of the fight to come, but the fight itself. Once a drug is enjoined at the height of its entry into the market, there is nothing the defendant can do, even when he succeeds without question after three years to recoup his losses. By the time the case comes up for argument, the counterfeiters would have long scattered. A company ordered to remove content from its entertainment platform because of ongoing litigation loses audience members and advertising revenue along the way at a rate that no amount of eventual damages can make up for. Each of these instances involves a procedure whose effect simply cannot be undone by a later financial reward.

The interim injunction is a pressure point. The applicable standard does not merely determine whether a party gets an injunction. It determines who controls the market during litigation, which is effectively the same as determining who wins. IP practitioners who have worked in multiple jurisdictions understand this well enough. Less examined is how differently the two most commercially significant IP systems outside Europe, the United States and India, have calibrated this instrument, and what those differences reveal about each system's underlying assumptions on enforcement, judicial capacity, and the proper relationship between process and merit.

This article examines that calibration and identifies what each system gets right, where each has fallen short on its own terms, and to honestly engage with whether institutional convergence between them is desirable or even realistic.

TWO DOCTRINAL SYSTEMS, BUT AN EQUITY AIM TO BOTH

It is helpful to recognize the shared aspects of these two systems before proceeding to describe the differences between them. Both the American system of four factors and the Indian system of three have their foundation in the equitable tradition's reluctance to disturb commercial relations absent strong justification. The courts in both jurisdictions seek evidence of likely success, balance the equities in terms of hardship, and consider whether the remedy should come in money damages. They represent a heritage of English chancery law.

But identical elements do not necessarily create identical consequences. The comparison of these systems centers on the extent to which those factors are rigorously applied by the courts and the way they interact with one another to create particular outcomes in contested cases. On this point, the two systems have evolved down markedly different paths, for doctrinal, institutional, and strategic reasons.

INDIA: RESPONSIVE RELIEF FRAMEWORK

The Tripartite Test and Its Real Requirements

The Indian test for IP injunction applications consists of a combination of two legal precedents: one being the judgment in *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*[1] and the other in *American Cyanamid Co. v. Ethicon Ltd.*[2] The test comprises three elements: Has the claimant made out a prima facie case? Is it convenient for the relief to be granted to the claimant? Will the claimant be suffering from irreparable damage if the relief is not granted? These elements sound familiar to those in America. But there are differences.

'Prima facie case' in Indian IP litigation does not carry the weight those words suggest to American ears. It does not require showing that the plaintiff is more likely than not to prevail. It requires only that the plaintiff has raised a serious question deserving adjudication. This is a threshold drawn directly from *American Cyanamid*. The Supreme Court reinforced this in *Wander Ltd. v. Antox India (P) Ltd.* and *Dalpat Kumar v. Prahlad Singh*,[3] both of which made clear that the prima facie stage is not an occasion for predicting who will win. Indian courts have taken that to heart in IP matters, especially trademark and copyright cases where the plaintiff's ownership of the right is clear on the face of the pleadings, even when the actual infringement is contested.

However, in practice, it seems that the first aspect acts more as a standing requirement rather than a merits test. Where the plaintiff is able to submit the certificate of registration, evidence of use and an affidavit detailing the alleged infringement of the defendant, in all likelihood, he has satisfied the requirements. The real difficulty arises while analyzing balance of convenience and irreparable harm, but again, even these tests are premised on certain assumptions that tilt the balance of power

in favor of plaintiffs in consumer-related IP cases that form the bulk of disputed cases.

Ex Parte and Ad Interim: The Sharpest Divergence

Nothing in Indian IP practice departs more sharply from American norms than the routine availability of *ex parte* injunctive relief. According to Order 39, Rules 1 and 2 of the Code of Civil Procedure, 1908, in conjunction with the relief clauses of the Trade Marks Act, 1999 and the Copyright Act, 1957, a plaintiff can apply for a temporary injunction prior to service of process on the defendant through the submission of an affidavit that satisfies the tri partite test. The order becomes effective forthwith. In the case of counterfeiting of goods, it is accompanied with a warrant issued by a local commissioner granting the right to enter and seize goods. This is India's version of the Anton Piller order devised decades ago in England.

This model of interim relief has been well developed by the Intellectual Property Division of the Delhi High Court as well as the commercial bench of the Bombay High Court. The Intellectual Property Division in Delhi was formed as per the High Court of Delhi (Amendment) Act, 2021, and it operates along with the Commercial Division as per the Commercial Courts Act, 2015. It has become the favorite forum for brand owners and content owners who find themselves in situations of counterfeiting and internet infringements. This willingness of the Court to accept an ex parte application has been justified with the fact that counterfeiters are mobile and liquidate their stock before they can be served. Only an asymmetric first strike will help.

However, that very procedure produces an anomaly in respect of defendants who are not engaged in counterfeiting operations. In contrast to the defendant who has an opportunity to oppose relief before it is granted, a defendant who receives an active ad interim injunction, which is effective the minute the defendant becomes aware of the action, finds itself in quite a different situation. Instead of the plaintiff proving why he should get the action done by the Court, the defendant has to prove why it shouldn't. In a system where an interlocutory hearing could take months, this is going to translate into commercial damages. When the enjoined activity is a product launch, a seasonal campaign, or an entertainment release, the delay alone may render the eventual outcome of the injunction hearing commercially beside the point.

Furthermore, Indian courts have developed flexible injunctive remedies to address infringement by unidentified and subsequently identified online actors. In *UTV Software Communication Ltd. v. 1337X.To*[4], the Delhi High Court recognised the grant of John Doe orders against unidentified infringers and, in the context of online infringement, developed the concept of dynamic injunctions, enabling rights holders to seek extension of injunctive relief to subsequently identified mirror, redirect and related infringing websites and URLs.

In the context of standard-essential patent ("SEP") disputes, Indian courts have also employed pro tem monetary deposits as an alternative to immediate injunctive relief. In *Nokia v. Oppo* (Delhi High

Court, 2023)[5], the Court directed the implementer to deposit a pro tem amount as a condition for avoiding an injunction. This approach was subsequently followed in *Dolby International v. Oppo and Vivo* (Delhi High Court, 2025)[6], where the Court similarly directed a pro tem deposit in the context of an SEP dispute.

THE UNITED STATES: DOCTRINAL RIGOR AND ITS TRADE-OFFS

eBay and the End of the Presumption

Before *eBay*, Federal Circuit doctrine effectively allowed patent plaintiffs to presume irreparable harm once they had shown a likelihood of success[7]. This is a rule grounded in the premise that a valid patent is an exclusionary right and that infringement is therefore inherently damaging[8]. The Supreme Court ended that unanimously in *eBay Inc. v. MercExchange, L.L.C.*[9] The reasoning was straightforward: the Patent Act authorizes injunctive relief "in accordance with the principles of equity," and equity means actual analysis, not categorical shortcuts. All four factors must be genuinely satisfied. Being an IP plaintiff confers no special status[10].

In *Robert Bosch LLC v. Pylon Manufacturing Corp.,*[11] the Court stated that even without the presumption of irreparable harm, market displacement is still relevant; rather, the burden shifts to the plaintiff to establish it. Evidence of direct competition, proof that the patentee practices the patent actively, and loss of client relationship all remain relevant. On top of this, *Apple Inc. v. Samsung Electronics Co.*[12] established an additional requirement, which is that the movant must prove causation between the particular elements accused of infringement and the harm suffered.

Winter's Four Factors in Various IP Areas

What prevails as a legal standard in American federal court system is the four factors of *Winter v. Natural Resources Defense Council*:[13]: the probability of success on the merits, the probability of irreparable injury, balance of the equities, and public interest. The Winter was not an intellectual property case, however, its framework is applicable in IP disputes and is used in patent, copyright, trademark, and trade secret areas. Probability of success means not the colorability of the claim but the actual likelihood of winning of the movant.

In trademark litigation, courts still frequently find irreparable harm on the specific facts. Consumer confusion really does threaten goodwill in ways that are genuinely hard to quantify. But the conclusion must be based on factual findings not the assumptions. The requirement is very important because it forces the parties to submit economic evidence and movants unable to prove anything lose.

The Bond Requirement: Theory and Friction

Rule 65(c) of the Federal Rules of Civil Procedure provides that where a court grants an interlocutory injunction, it shall be subject to the condition that the applicant furnish a bond in such amount as will secure the enjoined party against any costs and damage he may suffer by reason of the issuance of such an order.[14] The logic behind this requirement seems impeccable since having the applicants post a bond according to the possible damage they can cause will make the former pay for their mistake and allow the latter to recover if the injunction is later set aside.

That said, the bond requirement has its own pressure points. Where a small-entity patentee or independent inventor is suing a large company, the bond may be sized to reflect the defendant's scale of operations rather than what the plaintiff can realistically afford. The meritorious plaintiff who cannot post the bond simply cannot obtain the relief that the doctrine would otherwise authorize. This dynamic rarely comes up in the post-*eBay* reform conversation, but it feeds the same underlying problem: for all the rigor of the American framework, access to interim relief is not evenly distributed across the full range of plaintiffs who might legitimately need it.

CROSS-CUTTING TRENDS: RACE, FORUM SELECTION, AND LACHES

The Market Window

IP disputes take place on a time scale of years. Important markets function on a time scale of weeks or months, even days. It is the tension between these two clocks that drives much of the leverage generated by the dynamic. The party that wins the race to succeed in obtaining an injunction during the product launch window has accomplished something that the later merits decision cannot undo.

However, this harsh requirement is somewhat mitigated in the United States, although not completely. A person who cannot prove his claim of both success and irreparable harm will not receive an injunction. The high costs associated with the proceeding, which can be several hundred thousand dollars even before any witnesses have been heard, weed out many of the weaker claims. However, there are many good claims that are weeded out by this process, and they are weeded out in direct relation to how much the plaintiff has in litigation resources. Small inventors or small companies simply have a different calculus than large companies.

India's version of the problem runs the other way. The current threshold for ad *interim* relief means that a plaintiff who moves quickly and files a competent affidavit may obtain an injunction that takes effect immediately and that the defendant must work to reverse. The pressure on defendants to settle, is built directly into that structure.

Selection of Forum as Substantive Strategy

For the most part, selection of the forum for filing a lawsuit is a procedural matter in the United States. Factors that influence such a decision include the rate at which matters can be filed in that district, the judge(s) there, and other factors like the composition of juries in that district. The standard for granting an injunction remains constant.

India works almost in reverse. Section 134(2) of the Trade Marks Act gives trademark plaintiffs what amounts to a home-court option. Infringement actions may be filed where the plaintiff resides or does business, regardless of where the alleged infringement took place.[15] After *Exphar SA* read that provision broadly, the jurisdictional provision becomes a substantive tool.

Delay and the Message of Inaction to the Court

In both cases, the underlying assumption made by the court is identical: if the injury were truly irreparable, there would be no delay. Courts in the U.S. have adopted this approach with vigor, rejecting requests for a preliminary injunction if the plaintiff acted several months after discovering the infringement.[16]

Indian courts apply the same principle with more flexibility. Delay has been excused where the plaintiff was in settlement talks, or where the full extent of the infringement only surfaced gradually. There is a reasonable basis for that. It would be genuinely counterproductive to penalize parties for attempting negotiation before resort to litigation. But the laches defense is worth raising, but its outcome is hard to predict.

In *Cadila Healthcare Ltd. v. Cadila Pharmaceuticals Ltd.*, (2001) 5 SCC 73[17], the Supreme Court laid down the governing factors for assessing deceptive similarity between competing marks, emphasising that a stricter standard is warranted in pharmaceutical cases given the potential consequences of confusion or mistaken identification.

Similarly, Indian courts have consistently held that mere delay in approaching the court does not, by itself, disentitle a rights holder from injunctive relief where infringement is established. In *Midas Hygiene Industries v. Sudhir Bhatia*, (2004) 3 SCC 90[18], the Supreme Court held that delay alone cannot defeat an injunction where the defendant's adoption and use are prima facie infringing.

WHAT EACH SYSTEM DOES

The Three Things Interim Relief Is Supposed to Do

Any honest assessment of these frameworks needs to start with what they are actually supposed to accomplish. It is because the purposes of interim injunctive relief in IP cases are not all pointing in the same direction.

First, this is an aspect of preservation: Interim relief is meant to stop irrevocable changes in commerce prior to court resolution of the underlying dispute, ensuring that whoever turns out to be right can actually benefit from that fact. Second, this aspect is one of compensation more broadly conceived, as it stops forms of damage that cannot be remedied through the legal system's mechanism of damages because not all things of value can be reduced to a dollar amount. Third, it is an aspect of deterrence: By making these IP rights enforceable, the system ensures that the incentive structure which makes these rights worthwhile continues to operate.

A high standard of proof satisfies the first two goals quite well. It is prudent when it comes to tampering with commerce until the issue of merit is sorted out, and it demands proof of actual harm that cannot be compensated with money. However, push it to the limit, and it will undermine the third goal: a rights holder whose rights are infringed upon and who suffers real damage in commerce will not receive remedy, and the function of deterrence itself will begin to weaken. A low standard satisfies the third goal quite well.

The American Approach: Solid in Principle, Troubled in Practice

The American approach to dealing with post-*eBay* situations is the one that is more sound from a doctrinal perspective. The fact that the American approach calls for an individualized equitable analysis, does not rely on any categorical presumptions, and insists on developing evidence in regard to all four factors is fully in accordance with the way equity jurisdiction is intended to work and statutory provisions on the matter.

Where it has gone wrong is in its application to plaintiffs who cannot match a large defendant's litigation capacity. The framework has made it systematically harder for small-entity patentees, independent inventors, and early-stage companies to obtain preliminary injunctions. This is not because their claims are weaker, but because they cannot absorb the cost of building a fully developed merits and harm record.[19] A standard designed to prevent the abuse of injunctive process has produced a system in which access to that process correlates strongly with the size of the plaintiff's budget. That is an equity problem, and the patent reform conversation has not been nearly as direct about it as it should.

The Indian System: Workable on Both Ends

The Indian system achieves its purpose within the circumstances within which it operates. In the face of large counterfeiting efforts, where the economic logic is fast distribution, where the defendant cannot point to any valid business concern to protect, and where post-infringement damages would not serve as an effective deterrent, the ex-parte injunction is precisely the right remedy. Considering the history of IP infringement cases in India, as well as the practical difficulties with damage recovery in such cases, it makes sense to have a lower threshold of relief.

What happens, though, is that sometimes the same approach is used in the whole range of IP litigation, even in those situations where the defendant is a bona fide competitor with legitimate commercial stakes in the matter. It is at such time that the permissive criterion, the lack of an adequate enforcement procedure, and the plaintiff-friendly territorial rules come together to create a situation where the interim process becomes a substitute for merits determination instead of serving as a precursor to it. The balancing of convenience is supposed to provide an independent test. What tends to happen, though, is that the test simply becomes a reiteration of the prima facie determination. There is meaningful evidence that balance-of-convenience is receiving more genuine and independent scrutiny than it has historically.[20]

On the Question of Convergence

The natural response to all of this is to argue for India to move toward the *eBay/Winter* standard, and perhaps for the United States to soften the edges of post-*eBay* rigor enough to restore some access for smaller rights holders. A growing body of comparative scholarship takes roughly this position,[21] and the appeal is understandable: transnational IP litigation is common enough that divergent standards create real opportunities for strategic forum selection and impose real unpredictability on rights holders trying to manage global portfolios. However, such standards must be assessed against the institutional environments they exist in. What is required is parallel improvement of each approach according to their specific institutional limitations[22].

NAVIGATING BOTH SYSTEMS

For practitioners advising IP owners with assets or enforcement needs across both jurisdictions, a few practical points follow from this analysis.

In U.S. practice, building the harm record is the decisive preparatory task. It has to begin well before any motion is filed. The economic evidence the *Winter* factors require, i.e. market displacement data, pricing analysis, expert testimony on the inadequacy of monetary relief, cannot be assembled in days before a hearing. As far as patents are concerned, the requirement for a causal nexus between the commercial harm suffered by a plaintiff and infringement becomes even more significant. Not only should a defendant's competition be commercially harmful but the infringement itself should cause this harm. It is a higher standard and in order to meet it, one should spend some time prior to a lawsuit doing research on both economic and technical fronts[23].

In India, the key to the situation lies in speed. Ad interim injunction works best when a defendant is unaware of the process that is going on. By filing a timely motion and preparing an affidavit, a counsel has all chances to secure his client without any form of adversarial process. It is completely opposite to the strategy used in America[24].

Where parallel proceedings are running in both jurisdictions, the existence and status of each needs

to be disclosed to both courts A coherent global enforcement strategy needs to be mapped out before either set of proceedings is launched[25]. The anti-suit injunction and the anti-ani suit injunction doctrine has developed in Indian courts in the standard-essential patent context, and it creates a genuine risk that an order in one jurisdiction will constrain what counsel can do in the other. Practitioners who do not account for those interactions from the outset are working with an incomplete risk picture.

CALIBRATION AND NOT CONVERGENCE

Injunctions granted in cases of IP disputes are tools for market power, and the rules for these injunctions determine which parties will exercise such power. The US approach, where there is a requirement of stringent evidence, a resistance to general assumptions and emphasis on customized equitable considerations, is an intentional judicial effort to place an IP claimant at par with others claiming equity and to require hard evidence before going through the rigors of shifting market position. The Indian system, with its more flexible approach to initial evidentiary burden, reinforced by ex parte practice and jurisdictional structure represents another set of choices.

Endnotes

1. Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545.
2. American Cyanamid Co. v. Ethicon Ltd., [1975] AC 396 (HL) (UK).
3. Wander Ltd. v. Antox India (P) Ltd., 1990 Supp SCC 727; Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719.
4. UTV Software Communication Ltd. v. 1337X.To, AIRONLINE 2019 DEL 773
5. Nokia Technologies Oy vs Guangdong Oppo Mobile, FAO(OS) (COMM) 321/2022
6. Dolby International AB v. Oppo and Vivo (CS(COMM) 1425/2016 and CS(COMM) 1426/2016)
7. Order 39 Rules 1–4, Code of Civil Procedure, 1908 (India); Section 135, Trade Marks Act, 1999 (India); Section 55, Copyright Act, 1957 (India).
8. See Sameer Aggarwal, Undertaking as to Damages in Interlocutory Injunctions: An Underenforced Remedy in Indian Courts, 12 Indian J. Intell. Prop. L. 45, 61–68 (2021).
9. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).
10. See Christopher Seaman, Permanent Injunctions in Patent Litigation After eBay: An Empirical Study, 101 Iowa L. Rev. 1949 (2016).
11. Robert Bosch LLC v. Pylon Manufacturing Corp., 659 F.3d 1142 (Fed. Cir. 2011).
12. Apple Inc. v. Samsung Electronics Co., 695 F.3d 1370, 1374 (Fed. Cir. 2012).
13. Winter v. Natural Resources Defense Council, 555 U.S. 7 (2008).
14. Flexible Lifeline Systems, Inc. v. Precision Lift, Inc., 654 F.3d 989 (9th Cir. 2011).
15. Section 134(2), Trade Marks Act, 1999 (India); see Exphar SA v. Eupharma Laboratories Ltd., (2004) 3 SCC 688.

16. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified at 18 U.S.C. §§ 1831–1839).
17. Cadila Healthcare Ltd. v. Cadila Pharmaceuticals Ltd., (2001) 5 SCC 73
18. Midas Hygiene Industries v. Sudhir Bhatia, (2004) 3 SCC 90
19. Fed. R. Civ. P. 65(c). See W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 770 n.14 (1983).
20. Section 134(2), Trade Marks Act, 1999 (India); see also Pankaj Goel, Forum Shopping in Indian Trademark Litigation: Systemic Asymmetries and Their Reform, 9 NUJS L. Rev. 123 (2016).
21. See Tough Traveler, Ltd. v. Outbound Products, 60 F.3d 964, 968 (2d Cir. 1995); 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 31:38 (5th ed. 2023).
22. See John M. Golden, Working Without Laws: Technology Companies and Intellectual Property, 103 Minn. L. Rev. 2129, 2175–80 (2019); see also Colleen V. Chien & Mark A. Lemley, Patent Holdup, the ITC, and the Public Interest, 98 Cornell L. Rev. 1 (2012).
23. See Commercial Courts Act, 2015 (India), as amended; Intellectual Property Division, Delhi High Court, Establishment Notification (2021); Prashant Reddy T. & Sumathi Chandrashekaran, Create, Copy, Disrupt: India's Intellectual Property Dilemmas 278–91 (2017).
24. See Michael D. Birnhack, Judicial Borrowing in International IP Law, 19 Chi. J. Int'l L. 375, 402–07 (2019); Graeme B. Dinwoodie, Developing a Private International Intellectual Property Law: The Demise of Territoriality?, 51 Wm. & Mary L. Rev. 711, 773 (2009).
25. See Mark A. Lemley & Carl Shapiro, Patent Holdup and Royalty Stacking, 85 Tex. L. Rev. 1991 (2007); F. Scott Kieff, The Case for Registering Patents and the Law and Economics of Present Patent-Obtaining Rules, 45 B.C. L. Rev. 55, 119 (2003).

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