Recent Trends in The Indian Intellectual Property Landscape

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I. Introduction:

In this article, Pravin Anand examines some recent trends in the Indian Intellectual Property landscape, some procedural issues and some substantive issues, viz.

1. On the procedural side, the most momentous change has been the time revolution, not only before the Courts and Tribunals but in the Patent and Trademark Offices in prosecution matters as well.
2. Root and branch changes brought in by the Commercial Court Act as per which a lawsuit can conclude within one to two years.

II. New modes of serving the Defendant:

Service of Defendants can be done instantaneously through email, SMS or even WhatsApp. Thereafter, the lawsuit progresses with strict deadlines, which if missed, could result in dismissal of the lawsuit or decree of the suit.

The most important and critical deadlines (which cannot be condoned) are as follows:

1. Filing the Written Statement by the Defendant, i.e. maximum 120 days;
2. Filing the replication by the Plaintiff, i.e. within 45 days of the Written Statement;
3. Compliance after obtaining an injunction within a day up to a week or so, as ordered by the Court; and
4. Appeals from an order of the Judge or the Registrar i.e. a month or 15 days respectively.

III. Time bound Proceedings before Trademark & Patent Office and IPAB:

1. The time changes have also come about at the Patent Office, as a patent can be granted within a period of 2 to 4 years and a trademark registered within 1 to 1½ years.

2. The speed within which the Intellectual Property Appellate Tribunal is hearing and disposing matters is also unprecedented.
3. As a practical advice to anyone whose case or matter is delayed or stuck up, Courts and Tribunals are regularly entertaining applications for early hearing of cases.

IV. Case management Hearing:

The next big change is Case Management by Judges who can regulate:

1. The number of witnesses;
2. The duration of cross examination ; and
3. The duration of interim or final arguments.

Judges are not just holding the ring but actively pushing the matter forward suggesting mediation or settlement or passing summary judgment when they do not see a need for a full trial.

V. Recording of Evidence Made Easy:

1. Another change is the collection of evidence. Local Commissioners are appointed regularly (from retired Judges or senior lawyers) to record evidence. The proceedings can be flexible as to place, date and time.
2. It is usual for evidence to be recorded at the business centre of a hotel over the weekend and beyond Court hours.
3. Where witnesses were unable to physically be present due to illness or retirement or otherwise, evidence was recorded via Video Conferencing.

VI. Flexible Approach while Adjudicating IP disputes:

1. During the Covid 19 months, the Courts, at all levels (District, High Courts and Supreme Court) have adopted virtual hearings enabling anyone from India or overseas to attend a hearing. Judges agree to screen sharing and lawyers in a team are able to collaborate from their respective homes or offices.
2. Another recent trend is a liberal and flexible approach to remedies. IP cases involve injunction and Anton Piller orders at the interim stages. They involve damages both compensatory and punitive at the final stage. Courts also grant Mareva Injunctions to freeze bank accounts etc.;

John Doe orders where the identity of the counterfeiter is unknown.

3. The Indian Courts have taken remedies to another level. Actual costs are granted to a winning party. If the Defendant is found to be an infringer, he is made to pay back to society, in some way, even if he does not have the finances to pay damages to the Plaintiff. He may be asked to plant thousands of trees to check pollution and thus benefit the public; to provide community service at an old age home or at an orphanage; to donate to a hospital or a cancer society, etc.
4. In recent years, electronic evidence has become admissible. Hence, internet downloads to prove a case of passing off is far simpler than trying to pull out old records such as invoices, orders and advertisements; photographs from a digital camera; video footage; drone evidence etc. can help prove a case. A certain procedure under Section 65B of the Evidence Act needs to be followed.

VII. Developments in disputes related to IP:

Trademark Disputes:

1. In trademark cases, the Plaintiff may seek a declaration that the trademark is well known and if granted then the trademark is put on a register maintained by the Trademark Office which has less than 100 trademarks on it. The strength of being well known is that the proprietor can stop misuse of the mark on any goods and services and the trademark does not have to be used for all those different goods. The Registry will raise a serious objection if anyone seeks to register the mark for different goods even when the proprietor has failed to file an opposition.
2. In recent years, a large number of non-traditional trademarks have been protected by the Indian Courts e.g. EPI leather surface design of LOUIS VUITTON; BERKIN bag and its shape of HERMES; Shape of ZIPPO lighters; FERRERO ROCHER chocolate with its crumpled gold foil in a tray; etc.

Domain Name Disputes:

3. The Courts have also protected Domain names and developed principles such as: the harm on the internet can be massive due to the anonymity of the wrong doer and the vast affordable distribution as compared to the physical world.

Trade Secrecy Disputes:

4. In trade secrecy cases, it is now possible to set up a confidentiality club of lawyers and external experts (and sometime representative of the parties) who alone can see documents placed in a sealed cover.
5. The club members can inspect the documents, but copies cannot be taken.
6. The members must undertake an affidavit to honour the confidentiality of the documents.Due to the above, it is now easier to get discovery of sales and expert data for computing damages. Sometimes the documents can even be redacted or be seen only by Attorneys or only by the

Judge.

Mediation:

7. Another trend is to try mediation in most cases. In fact, mediation can be sought even before a lawsuit is commenced, known as the Pre-Litigation Mediation.

Patents and Standard Essential Patent Disputes:

8. Patent cases are on the rise. The majority of these are Pharma and Agrochemical cases while Telecom cases are a close second. The Telecom cases are mostly Standard Essential Patents (SEPs) where it is usual to prove infringement through claim charts that map the Plaintiff's patent claims against some cellular or video standard (e.g. 3GPP or HEVC). The Defendant's device is often tested and also mapped against the said standard.
9. In these cases, i.e. SEP cases, injunctions are rare and most interim orders concentrate on a financial deposit or a Bank Guarantee to secure the Plaintiff, should he succeed at trial.
10. It is usual to have foreign expert witnesses to prove infringement and defend validity or to prove that the terms of the license offered by the Plaintiff were fair, reasonable and non-discriminatory (FRAND).

Copyright Disputes:

11. A large volume of copyright cases used to be software cases filed by members of the Business Software Alliance (BSA) but over the years, these have decreased in numbers. The cases started with piracy of floppy disks and then CD's. It changed to hard disk loading and then internet websites. It transitioned to end user piracy and now the cloud. 20 years has seen a dramatic change in the digital environment.
12. In the music world, copyright cases of the various collecting societies like IPRS (for musical composition and lyrics) or PPL (for recordings) have stabilized. The newest of the collecting societies, ISRA - for Singer Performers, has a number of lawsuits for establishing its rights.
13. Film piracy is rampant and a common remedy is to get a John Doe order even before release of a new film against a large number of named and unnamed parties who are believed to have indulged in piracy.***Modern Disputes in Modern Times*:**

Certain new types of cases are on the rise:

14. First are copyright in engineering drawings used to produce three Dimensional articles. The 3D reproduction is held to be infringement of copyright in the said drawings. Such cases are brought when no design or patent exists and a machine part or auto part, for example, is copied in its full dimensions.
15. Second are cases of comparative advertising in which competitors keep attacking each other and injunctions are granted against disparaging advertisements, as Courts tolerate puffery but not untrue statement or disparaging another's product. You may praise yourself but not defame the other.
16. Third category are, web portals and platforms selling legitimate goods and certain counterfeit goods. These platforms may be protected as intermediaries under Section 79 of the IT Act (Information Technology Act). The law is that if a brand owner invites their attention to such

infringing products, they are obliged to take them down. If, however, the portal has actively participated in the sellers' business, then it may be considered a rogue website and not an intermediary. If this is the case, then the URL's may be restrained, and in some cases, the whole website may be restrained.

VIII. Plaintiffs' checklist of 'Do Nots':

Before Indian Courts, a Plaintiff must remember a few things:

1. Never to conceal facts or suppress things from the Court. It is safer to overstate than understate.
2. Try not to delay filing a lawsuit as it may affect the balance of convenience and an interim injunction may be denied.
3. Never say no to a settlement offer. After considering it fairly, you may drop the settlement, but you should look fair before the Court.
4. In patent matters, particularly relating to drugs, explore a QUIA TIMET action before the release or launch of the Defendant's product.
5. Try and appoint a local person in India, for quick filing as normally processes such as notarization and apostille etc. through courier services can delay filing urgent actions, applications and appeals.
6. Always check the statement made during prosecution of either a patent or a trademark registration to ensure consistency.
7. Explore the WRIT Jurisdiction for quick remedies where the patent or trademark office is involved.
8. Explore the contempt jurisdiction in case of violation of a Court order by the opposite party. This may bring an early settlement to your action.

Since nearly 70% of IP cases are filed before the Delhi High Court, most of the examples and learning relate to the said Court. Having said that, it is imperative to mention that these principles are true for all High Courts having an original jurisdiction, apart from Delhi High Court namely, Bombay, Madras and Calcutta.

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