

AN OVERVIEW OF THE INTELLECTUAL PROPERTY CONCERNS AND TRADEMARK INFRINGEMENTS IN THE PHARMACEUTICAL INDUSTRY OF INDIA

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ABSTRACT

Medicines, drugs and other such products used in the pharmaceutical industries are considering the daily needs of millions of people, but thinking about the in-depth research or the hardcore labour which have resulted in the formation of a particular drug or technique is commonly ignored by all. The drugs, or healthcare techniques as we know them today, have not been the same for ages, they have been discovered, invented and formulated in the same with time, which has undoubtedly taken a great zeal of effort and expertise. In order to protect these efforts and skills of the people from being accessible in an unauthorised manner and getting misused, the notions of Intellectual property Rights come into play. The current article mainly and broadly focuses on the kinds of Intellectual Property Rights or Trademark Infringements that have sought a position in the pharmaceutical industry of India.

WHAT IS INTELLECTUAL PROPERTY OR INTELLECTUAL PROPERTY RIGHTS? HOW ARE THEY RECOGNISED ACROSS THE INDIAN SUBCONTINENT?

Intellectual Property as per the general notions is often defined as that property which is created, owned or discovered by the mind. Such property might include inventions or discoveries, artistic works, literature creatives, music or song, designs, symbols or logos, names or taglines, etc, which have been devised from the mind.

Intellectual Property Rights, on the other hand, are those rights that have been conferred upon individuals for protecting or conserving such pieces or properties which have been so devised through the mind. In other yet simpler words, any person who is the owner of an intellectual property is also the holder of certain kinds of rights which ensure the protection of such property, these rights are often termed Intellectual Property Rights. Such rights enable the

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holder not only to earn reputation, fame and name but also aid in earning gross margin profits or financial profits.

There are various kinds of Intellectual Property Rights available as well as widely acceptable throughout the world. These are namely:

Patents or Patenting Rights: When any person invents something by the use of his or her brain, he or she, respectively, is entitled to the right of patents. The right of patency delves upon the holder, the power and authority to decide whether or how their invention can be utilised by other individuals or institutions.

Copyrights: It is deemed to be a legal right that a person or a creator has over their artistic pieces of work, often known as Intellectual Property for eg: music, sketch or paintings, videos, photos captured by the camera, and other such kinds of intellectual property.

Trade Secrets: These are rights with regard to sensitive or confidential information as a piece of intellectual property. Such information when sold or made accessible legally does not hamper the right of protection via trade secrets, but if such information is accessed in an illegal or unauthorised manner, it shall infringe the said right of protection of intellectual property.

Geographical Indications: An item is given the designation of being GI if it is specific to that region or area and was produced there. The quality of these products is well known. Having the label of being from that area alone makes them associated with a sense of legitimacy and trust. GI is another yet important form of IPR.

Industrial Designs: Everything, ranging from the backend manufacturing, assembling and processing to how the final product shall look, is included within the ambit of industrial design. The industrial design of an article includes the colour swabs, as well as the shape in which the article is to be moulded.

Trademarks: A trademark often refers to a mark, stamp or label, which has been affixed on goods or services, in order to distinguish the same from others in the same industry.

Intellectual Property as well as Intellectual Property rights, worldwide, are governed and protected by an organization called the World Intellectual Property Organization. Which was established by the nation-states in 1967. The WIPO is responsible to formulate rules or gather

information related to Intellectual Property on such a level that is accepted across the world. Currently, the WIPO has 193 countries as its members.

In India, Intellectual Property and the Rights associated with such Intellectual Property are widely recognised just like other statutory or legal rights. The infringement of such rights is also taken into consideration in a similar manner to those of other offences. The Parliament of India has enacted various legislations governing the Intellectual Property Rights of the citizens. Such legislations are:

- *The Copyright Act, 1957*¹
- *The Patents Act, 1970*² (amended in 2005)
- *The Trade Marks Act, 1999*³
- *The Geographical Indication of Goods (Registration and Protection) Act, 1999*⁴
- *The Designs Act, 2000*⁵
- *The Information Technology Act, 2000*⁶

HOW DO INTELLECTUAL PROPERTY RIGHTS FIND THEIR POSITION IN THE PHARMACEUTICAL INDUSTRY OF INDIA?

The Pharmaceutical Industries, not just belonging to India but worldwide, in nearly the past two or three decades, have witnessed a huge amount of growth both in terms of industrial expansion as well as revenue generation. The Governments of all the countries along with its various other organs are playing a crucial role at the backend due to which the Pharmaceutical Industry is matching the global standards and is experiencing huge amounts of profits.

Intellectual Property Rights play a pivotal and vital role in the success, expansion and growth of the Pharmaceutical Industry not only in India but throughout the world. IPR in the

¹ The Copyright Act 1957

² The Patents Act, 1970

³ The Trade Marks Act, 1999

⁴ The Geographical Indication of Goods (Registration and Protection) Act, 1999

⁵ The Designs Act, 2000

⁶ The Information Technology Act, 2000

Pharmaceutical Industry protects the research, inventions or discoveries, carried out and brought forward by numerous people, from getting misused, tampered or leaked. IPR protects the rights of individuals by safeguarding and authorising such persons to establish rules as to whether, how and to what extent their piece of research or discovery can be used in the Pharmaceutical Industry.

In India, the Pharmaceutical Industry is among the leading revenue-generating industries of the nation. Such a boon is most evidently seen due to the following reasons:

- Better and Effective Administration by the Government;
- Great Profits in the Foreign Lands;
- Better and healthier trade practices;
- Efficient diversion of economic resources, thereby contributing to the growth of the industry;
- The increasing role of IPR.

The Pharmaceutical Industry mainly deals with two kinds of IPR, these are TRADEMARK and PATENT LAWS.

Pharmaceutical Industry and Trademark Laws of India

Drugs from different pharmaceutical businesses are greatly protected by trademark registration, which also considerably adds value to the process of preserving the drug's brand name in the marketplace. In India, the pharmaceutical industry in particular is responsible for the vast bulk of trademark registrations.

PROTECTION OF DRUGS USING TRADEMARK LAWS


The names of various drugs are devised by way of considering their salt composition, medicinal benefits, uses, etc., which automatically make a drug and its name unique, and therefore worthy of being claimed as trademarks. Comparatively more difficult to secure than other trademarks are pharmaceutical marks. *The Trademark Act of 1999's Section 9(a)*⁷ prohibits the registration of trademarks that are descriptive or lack any distinctiveness, i.e.,

⁷ The Trademark Act, 1999, s 9(a)

are unable to distinguish between the goods or services of one source from another, and are of a nature to mislead the public or create confusion. However, when the trademark has developed a secondary meaning or has become distinctive due to its extensive use and market familiarity.

Additionally, a trademark cannot be identical to an earlier trademark which is likely to cause confusion among consumers, according to *Section 11*⁸ of the Trade Marks Act, 1999. Customers should be able to quickly distinguish distinct products when purchasing pharmaceutical goods or pharmaceuticals based on a brand name, drug name, and trade dress in order to prevent or minimise errors. As a result, the procedure of brand name or medication name protection becomes difficult, and evidence of the secondary meaning or acquired distinctive character is the factor to decide on distinctiveness.

In light of this, the trademark should be free of the following to avoid trademark opposition or protest against the protection of the brand name or medicine name:

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- Generic Terminology - Avoid using generic terms for pharmaceutical medicines, such as "pharma" or "anti." Since these marks simply identify the substance of the products and not their source, they are not likely to be given protection and are therefore liable to mislead consumers.
 - Words or phrases that directly define the qualities or properties of pharmaceutical medicines, or that convey information about them, such as REMOVEPAIN for a muscle relaxant.
 - Words or phrases that imply traits or attributes of pharmaceutical goods and services without really identifying them, such as "GROW" for a health supplement for children.

It is evidently proven that these forms of trademark protection via laws, which not only help to distinguish amongst the competing products but also help the IPR holding institution or person to acquire huge profits, are only contemporary. There are various other ways for trademark protection apart from names of drugs or brand names. These ways are: changing the shape of the drugs, using different and unique colour swabs or combinations, etc.

⁸ The Trademark Act, 1999, s 11

In the dispute of *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.*⁹, the Supreme Court of India established some criteria for identifying a misleading resemblance between pharmaceutical trademarks, which include the following:

- The type of mark, such as whether it's a word mark, label mark, or composite mark;
- The analogy of the marks' notions or sounds, or the degree of similarity between them;
- Product characteristics;
- The type of consumers, their level of education and intellect, and the amount of caution they are likely to take when buying and/or utilising the products;
- The way in which the products are purchased or ordered; Any additional environmental factors that may be important in determining how different the competing marks are from one another.

The aforementioned criteria, when taken together with *Smith Hayden & Co. Ltd.'s Application*¹⁰ and *Amritdhara Pharmacy vs Satya Dev Gupta*¹¹, establish criteria for testing confusion, stating that in cases where a significant portion of the customers of the existing trademark are not confused or deceived, the average intelligence and imperfect memory of the layman, and that deceptive resemblance can only be established by determining the said trademark.

THE PHARMACEUTICAL INDUSTRY AND PATENCY LAWS OF INDIA

The pharmaceutical industry has always required significant investments and relied heavily on knowledge. Compared to other sectors or businesses, the pharmaceutical industry requires significantly more time to develop products before they achieve a successful conclusion. Therefore, it becomes crucial for pharmaceutical businesses to get patent rights in order to protect their inventions. In addition to protecting the capital made in research and development, patents foster innovation by encouraging inventors to pursue new ideas. However, due to legal issues, the patentability of pharmaceutical ideas has always been hotly contested, especially in India. The pharmaceutical and related inventions must pass the litmus

⁹ *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* [2001] SC [2001 (5) SCC 73]

¹⁰ *Smith Hayden & Co. Ltd.'s Application* [1946] 63 RPC 97, [p.101]

¹¹ *Amritdhara Pharmacy vs Satya Dev Gupta* [1963] SC [AIR 1963 SC 449]

test outlined in Section 3 of the Patents Act, 1970, specifically *Sections 3(d), (e), and (i)*¹², in addition to the conditions for international patentability, namely novelty, inventive step, and industrial applicability.

The true legislative intent of *Section 3(d)* of the Patents Act, 1970 was emphasised by the Hon. Supreme Court of India when it decided the *Novartis AG v. Union of India (UOI) and Ors.*¹³ case. The court stated that "Section 3(d) is meant especially to deal with chemical substances, and more particularly pharmaceutical products." In order to leave room for true and genuine inventions while also preventing any attempt at repetitive patenting or extending the patent term on fictitious grounds, the amended section 3(d) clearly establishes a second tier of qualifying standards for chemical substances or pharmaceutical products.

A fundamental tenet of the Indian Patent Laws is that a simple combination of two or more elements that serve the same purpose without the use of any inventive faculties is not patentable. The subject matter is regarded as patentable if the working relationships created by the combination of these components lead to new or better results.

In the case of *Ram Pratap v. Bhaba Atomic Research Centre*¹⁴, it was made clear that an "aggregation of properties" is defined as the simple comparison of features that were already known before the date of priority and that were arbitrarily selected from among various combinations, shall not be considered as patentable discoveries or inventions.

CONCLUSION

It is not particularly difficult to protect a drug or product and earn royalties or profits for it, despite the fact that the entire field of protecting IPR in the pharmaceutical industry is undoubtedly complex.

In the pharmaceutical industry, trademark registration is crucial since it protects the distinctiveness of medicines. The Trademark Act of 1999 and the Patents Act of 1970, which are equivalent to international trademark and patent rules but are less severely enforced, are used by the pharmaceutical sector. Drug names and new drug discoveries must both be completely original, with no possibility of stealing someone else's concept or discovery.

¹² The Patents Act, 1970, s 3[(d), (e), (i)]

¹³ *Novartis AG v. Union of India (UOI) and Ors* [2013] SC [MANU/SC/0281/2013]

¹⁴ *Ram Pratap v. Bhaba Atomic Research Centre* [1976] SC [(1976) IPLR 28 at 35]

India has always been the subject of debate over its IP regime and practises. However, in order to create uniformity in award procedures, the IP Office distributes manuals and essential instructions on a regular basis.

To encourage protection in all industries, including the pharmaceutical sector, the Indian Courts also offer clarifications for guaranteeing the protection of intellectual property rights.

