

Legal issues in Permitted use and Franchising in India

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ABSTRACT: Like the United States, the Indian legislature is expected to create legislation to ensure so none of the parties are subjected to any kind of manipulation and prescriptions that might contribute to the growth of these relations. The definition of licensed use in intellectual property law is discussed in this article and how permitted use of one's intellectual property over another can lead to both a mutually supportive relationship between the clients. Allowable use through licencing, along with its position in today's business and economy, was discussed along with the notion of franchising as a method of licencing and how it holds a prominent place in the marketing strategies of the world. The article ends by highlighting the need for legislation to be framed for franchising in India.

KEYWORDS: Trademark, Intellectual Property rights, Franchising, Permitted use.

INTRODUCTION

There is something for everyone specialization in the vast field of modern antitrust law: enough to interest the philosopher, student on justice, scientist, politician, artist, musician, writer, banker, and perhaps even businessman. The power of intellectual property law applies to any division of society's umbrella. The legislation of copyright law gives meaning to them, from the apparently innocent shape of a pen to the construction of a famous house, from the marks found on the package of a snack to the globally recognised five-ring Olympics logo. In novels, movies, drama, music, images, the electronic sources of knowledge we use, and even the breakthroughs that a scientist makes, the legislation often establishes and preserves rights. In the form of creation and language, these embodiments of the human mind are transformed into privately owned land and therefore are covered by law it through framework of intellectual property. These types of property, including certain copyright, patents, trademarks, classified information and innovations, are specified and differentiated into different fields.

Looking through the eyes of a businessman, two categories of individuals can be said to exist with respect to a particular instance of a particular Intellectual Property. One, who is the creator or the owner of the intellectual property, and the other category consists of third parties, who might come into contact with the intellectual property either through usage or exploitation. The different forms of intellectual property have a tradable nature and licencing is one important way of trading in them whereby the owner grants rights to another to use that property while continuing to retain ownership over it.

Intellectual property is a negative right in that it grants the creator a right without authority to prevent anyone from copying it. Under specific conditions, the owner's confidentiality here is not to exert this negative right with regard to a foreign government that either forms the core of the licencing of intellectual property. That implies that the company (licensee) intends to not even sue the someone else (licensee) if the property is exploited in accordance with the terms of the licence. The licensee usually agrees to pay attention to the licensor in exchange for this commitment made by the licensor. Thus, a licence allows the licensor, in proportion to the profits from his own development of the land, to maintain possession of the property and to obtain royalty income from it at the same time. Licensing thus provides a source of revenue, disseminates intellectual property to different groups of consumers, and serves as a platform with further growth and investment.

A licence may be described as a programs also offer by the licensor that, in accordance with the terms between them, the contractor would not petition for the use of its property. Any form of misuse, without a licence, of intellectual property would constitute an infringement of that property.

DISCUSSION

Permitted use:

In the introduction paragraph, it was mentioned that an individual who does not have a registered licence can be punished on the ground of violations by the owner. However, in lieu of the old Trademarks Act 1958, a revolution in the term 'authorised use' led to the new Trademarks Act, 1999 (simply referred to as the Act).

In other words, "permitted use", in relation to a registered trade mark means the use of the trade mark:

- by a registered user of the trade mark in relation to goods or services
- with which he is connected in the course of trade; and
- in respect of which the trade mark remains registered for the time being; and
- for which he is registered as registered user; and
- which complies with any conditions or limitations to which the registration of registered user is subject; or
- by a person other than the registered proprietor and registered user in relation to goods or services
- with which he is connected in the course of trade; and
- in respect of which the trade mark remains registered for the time being; and
- by consent of such registered proprietor in a written agreement;
- which complies with any conditions or limitations to which such user is subject and to which the registration of the trade mark is subject.

Under the 1999 Act, the above meaning provides for the allowed use of a registered user and of a person who is not a registered proprietor or a registered user but who uses the registered trade mark in relation to the products or services with which it is related in the course of trade and who, with the written permission of the registered proprietor, uses the trade mark and complies with any conditions. According to which the usage has been approved by the licenced proprietor and also according to the conditions regulating the registration of the trade mark.

Role of licensing in business and economy:

When related to goods and services, intellectual property is a means of creating wealth. The owner of such property has both the right to make full use of it, but if he welcomes others to make excellent use of his property, the buyer of such property can make much better use of it, which can only be achieved by licencing his property to each other by imposing a verbal contract contingent on both party. According to which the usage has been approved by the licenced proprietor and also according to the conditions regulating the registration of the trade mark.

It is apparent that in today's market and economy, intellectual property licencing plays a major role. In an economy which is rapidly becoming competitive and global, one of the biggest challenges for companies today is to stay profitable. Businesses are always under incredible pressure from existing intellectual capital to be groundbreaking and create possibilities capital investments. To develop new products, improve product line and enter new markets, new ideas as well as fresh cultural products are regularly required.

These have been eloquently had said the money of the eighty couple of decades is intellectual property and those who own and/or control it control the marketplace. In order to survive in a competitive marketplace, licencing has become very necessary today, as it leads to a greater commodification of the intellectual registered owner by trying to maximize the applicability of its use.

Licensing also has vast effect on the industry. The greatest economic value of intellectual property comes from its use in licencing. The dependence on licencing strategies as a source of income for holders of intellectual property rights has seen a dramatic increase in the last two decades.¹

¹Allianz Global Investors of America LP v. Middlefield Capital Corporation available at <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/72399/index.do>

Franchising:

Franchising is a practice whereby two parties, the franchisor and the franchisee agree upon the use, by the franchisee, of the system developed by the franchisor in accordance with the prescription of the franchisor in exchange of some consideration. The licencing of intellectual property has caught fire into a multibillion-dollar industry and retail sales of licenced consumer products massive global alone exceeds a few other hundred billion dollars per year.

According to International Franchise Association's definition of franchise:²

“A franchise operation is a contractual relationship between the franchisor and franchisee in which the franchisor offers or is obliged to maintain a continuing interest in the business of the franchisee in such areas as know-how and training; wherein a franchisee operates under a common trade name, format and/or procedure owned or controlled by the franchisor, and in which the franchisee has or will make a substantial capital investment in his business from his own resources.”

The European Commission defines franchising as³:

“[A] package of industrial or intellectual property rights relating to trademarks, trade names, shop signs, utility models, designs, copyrights, know-how and patents, to be exploited for the resale of goods or provision of services to end users.”

Francine Lafontaine and Roger D. Blair define franchising as:⁴

“Contractual agreement between two legally independent firms in which one firm, the franchisee, pays the other firm, the franchisor, for the right to sell the franchisor's product and/or the right to use its trade mark(s) and business format in a given location for a specified period of time.”

Through a franchise agreement, the owner of some technological or other expertise that has typically acquired a reputation in connection with the use of a trade mark or service mark (franchisor) may partner with another company (franchisee) to bring its own expertise or financial resources directly to the customer to provide products or services. Through the provision of technology and management expertise, the franchisor shall ensure that the franchisee retains quality and other requirements with regard to either a trade mark or service mark, that almost always include such standardised attributes, such as uniform trademark law, for instance.⁵

Franchising depends on contract law from a legal point of view and, thus, does not generally require any new regulatory or legislative frameworks to work and expand. Since the U.S. has franchising laws that provide franchisees with security measures to safeguard them against abuse that they will have to face from franchisors that are normally large corporations. A legislative code of conduct expressly designed for revenue sharing does not exist in India. Since it is an arrangement, it is managed by Indian Contracts Act.⁶

Intellectual Property falls at the front and centre of a lease contract and can be considered to be the general tone of that agreement since it is essentially the intellectual property of the franchisor which is still being granted to the franchisee under certain user agreement. Franchising has become a common business procedure for the licencing of trademarks and has contributed to the emergence of new rationale for trademarks as a symbol of product quality. When private information are included in trade marks in a franchising agreement, greater discretion is given for specifying that the company buy his commodities from the franchisor.⁷

² John. N. Adams, Julian Hickey and K.V. Prichard Jones, *Franchising*, Tottel Publishing, UK 2006.

³ Commission Regulation (EEC) No. 4087/88.

⁴ Francine Lafontaine and Roger D. Blair, *Economics of Franchising*, Cambridge University Press, UK 2005.

⁵ World Intellectual Property Organization, “Franchise or Trade License Agreements”, http://www.wipo.int/sme/en/ip_business/licensing/franchise_license.htm.

⁶ Allianz Asset Management of America L.P. v. Middlefield Capital Corporation available at <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/72355/index.do>

⁷ “Trade Secrets: Knowing What Not To Tell”, <http://www.wnlaw.com/?id=Mjk2>.

CONCLUSION

The invention of an intellectual property, particularly in the present day and age, brings into the picture many potential for the resource to be put into use and used to the best of its capacity, and indeed the creator of its property alone sometimes cannot do the same. More than a few arms need to get the vast promotion that it can be exposed to, what brings into the picture the provision of licencing the rights in order to jointly leverage it, which will lead to greater income for the parties. One of the ways to go about it is franchising, which has been discussed in this article, and has proven to have made great profits for franchisors as well as franchisees. The growing franchising practise has led to a - need to prescribe to the parties of a franchise a proper set of laws and code of conduct in order to allow a friction-free flow throughout the practice. Like the United States, the Indian legislature is expected to create legislation to ensure so none of the parties are subjected to any kind of manipulation and prescriptions that might contribute to the growth of these relations.

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