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FARM TO FOOD: KEY TRENDS AND REGULATORY OUTLOOK IN AGRITECH

INTELLECTUAL PROPERTY

8. Traversing issues under intellectual property and allied laws *vis-a-vis* food and agri sector

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Traversing issues under **intellectual property** and allied laws *vis-a-vis* food and agri sector

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In this era of fast paced technology and digital information, it is of utmost importance for all industries, including agricultural and food industries to constantly keep a watch on market trends and market their products accordingly. In doing so, these industries are required to not only make continuous investments in branding and innovation but should also endeavour to seek legal protections for these investments and build a comprehensive intellectual property (IP) portfolio. Complete brand protection in terms of captions, slogans, product packaging, product layout, etc. can primarily be protected by Trademarks [1], Copyright [2], Designs [3], Geographical Indications[4] to some extent and by related common law rights. On the other hand, to protect innovations/inventions involving technical ingenuities, these industries will have to avail protection by way of Patents[5], Plant Variety Protection [6] and trade secrets. Pertinently, in some cases prior to availing the aforesaid protections, the agritech and food industry has to abide by various regulatory compliances including the biodiversity law. [7] This article deals with the imperative issues pertaining to some of the aforesaid laws in relation to agricultural and food industries.

ARTICLE IN FOCUS

Food and agri-based industries are witnessing unprecedented levels of innovation which gives further impetus for patent protection and accordingly the necessity to assess and overcome the hurdles in this regard.

Protection afforded to plant varieties and breeders under the PPVFRA, makes it one of the most important IP legislations for the agri-tech and food industries and it is essential to be apprised about the issues plaguing registration under this statute.

Agricultural crops are not driven by the 'end use' of biological resources, which begs for the adoption of a more sectoral approach for the 'access and benefit sharing' obligation under the BDA.

Comparative advertising and the importance of trademarks in this regard is an important and unavoidable reality in today's advertising ecosystem. Hence, it is prudent to be aware of the legal landscape in this regard.

Issues under IP and allied regimes impacting patents regarding the food and agri sector

Coming to the aspect of inventions and scientific breakthroughs, it is important to mention that to stay competitive in the market, businesses are required to continuously innovate as well as to seek patent protection for such innovations to ensure that the competitive edge is not lost easily. A robust patent portfolio shows the technical competence of the entity. Food and agricultural industries can patent their chemicals, specialised machineries, processes, etc. that are being used at various levels of the product cycle such as for cultivation, processing, preservation or storage of food. Today, all industries including food and agri-based industries are

witnessing unprecedented levels of automation and this makes patents even more crucial for industries.

To obtain a Patent, the invention by way of a product or process, should be novel, non-obvious with some technical advance or economic significance and should be useful for the industry.[8] However, besides the stated criteria, there are certain subject-matter exclusions[9] in the Indian Patents Act, 1970 (Patents Act). Primarily, two subject-matter exclusions which are imperative for the agriculture and food industry are Section 3(j) and Section 3(h) of the Patents Act.

- **Section 3(j) of the Patents Act:** Section 3(j) of the Patents Act excludes plants and animals, wholly and partially, from patentability, including seeds, varieties and species and essentially biological processes for production and propagation of plants and animals. However, micro-organisms are not subject to this exclusion. The phrase "essentially biological process" used in the section has neither been defined in the statute nor has the exact scope of this phrase been affirmed by judicial decisions, the Biotechnology Guidelines[10] or the manual published by the patent office[11].

Every industrial sector in today's world must make sure to adopt a core strategy of marketing its products as per contemporary market trends which includes branding, innovation and seeking appropriate IP protection.

Interestingly, biotechnology guidelines, in one of the examples[12], states that a claimed method involving the step of cross-breeding for producing pure hybrid seeds, plants and crops constitute an "essentially biological process" and as a result will be excluded from patentability. However, this example fails to consider whether any human intervention in any of the intermediate steps in such a method will render it patentable and, if it does, to what extent should that human intervention be significant in the claimed process for it to fall outside the scope of Section 3(j) of the Patents Act.

There are some pending litigations in the Indian courts such as *Monsanto Technology LLC And Ors. vs Nuziveedu Seeds Limited & Ors.*[13] which may provide some insight on this issue in the future.

- **Section 3(h) of the Patents Act:** Section 3(h) of the Patents Act is another exclusion which excludes from patentability methods of agriculture and horticulture. In all likelihood this provision was intended to exclude processes or methods pertaining to age old traditional practices and conventional breeding or agriculture from patent protection. However, the terms 'agriculture' or 'horticulture' have not been defined in the statute and there is a lack of judicial precedent or guidelines in the manual of the patent office[14] providing clarity regarding the interpretation of this section. It is also unclear as to how closely a method needs to be associated with 'agriculture' or 'horticulture' to be excluded from patentability under this provision. Therefore, this provision may prove to be an impediment to the players in the food and agri sector pending judicial determination.

Plant Variety Protection

An important legislation for food and agri companies is the Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPVFRA). Article 27.3(b)[15] of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) mandated that all World Trade Organization members shall provide IP protection to plant varieties either by way of patent protection or through a sui generis system or a combination thereof. In India, PPVFRA was enacted in the year 2001 with an aim to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants.[16]

The statutory provisions of PPVFRA provide that plant varieties can be registered under four categories, i.e., new variety, extant variety, essentially derived variety and a farmers' variety. For registration as a new variety, it is required that the plant variety fulfils the conditions of novelty, distinctiveness, uniformity and stability as envisaged under the PPVFRA. The aforesaid criteria of novelty and distinctiveness, uniformity and stability (DUS) are evaluated by the Protection of Plant Varieties and Farmers' Rights Authority (PPVFR Authority) during field tests of the varieties. One of the notable features of this legislation is that it not only provides protection to the plant variety but also protects the denomination accorded to the variety by the breeder applying for protection under PPVFRA. Also, another noteworthy feature of this legislation is that unlike other IP laws, PPVFRA provides for interim protection to the breeder against any abusive act committed by any third party during the period between filing of application for registration and decision taken by the PPVFR Authority on such application.[17]

Section 3(j) and 3(h) of the Patents Act are pertinent exclusions which should be borne in mind by the agriculture and food industry while filing for patents.

A recent concern which arose for the industry under the PPVFRA , is with respect to the public notices issued by the PPVFR Authority which have huge ramifications on the agriculture sector. In this regard, it is necessary to mention the Public Notice No. 01 of 2019, issued on May 17, 2019 (Public Notice) providing for the guidelines/procedure for DUS testing of a hybrid variety compulsorily with its parental lines in the case of seed propagated notified plant species. This in turn resulted in promulgation of certain guidelines inter alia mandating registration of hybrid plant varieties along with their parental varieties in the form of a new "hybrid system" registration, new procedure for DUS testing and new time limits for the registration period granted to such hybrid varieties-none of which was contemplated under the PPVFRA. In view of the Public Notice, the PPVFR Authority mandated DUS tests in respect of parental lines where the breeders were not seeking protection in respect of the parental lines but sought protection of the hybrid variety only. The Public Notice was challenged by the Federation of Seed Industry of India before the Delhi High Court on the ground that the notice was arbitrary, illegal and inconsistent with the scheme of the PPVFRA and the rules framed thereunder and this is currently pending adjudication. It is hopeful that this adjudication will clear the ambiguity pertaining to DUS

tests, timelines etc. for registration of hybrids as well as parental lines.

Biological Diversity Act

For the food and agri sector, it is not only important to build a robust IP portfolio, it is also equally important to comply with the prevailing regulatory laws. One such noteworthy regulatory statute is the Biological Diversity Act, 2002 (BDA). Pursuant to the Convention on Biological Diversity (CBD), 1992 the BDA was enacted in the year 2002 and the charging sections were notified and brought into force on July 1, 2004. The BDA is directed towards conservation and sustainable use of biological resources, as well as to ensure that benefits arising from utilisation of biological resources are shared equitably with the relevant stakeholders. The provisions of the BDA are implemented through the National Biodiversity Authority (NBA) at the central level, the State Biodiversity Boards (SBBs) at the state level and the Biodiversity Management Committees (BMCs) at the local levels. Under the BDA, two distinct categories of applicants have been carved out. The first category refers to purely Indian persons or entities and the other refers to foreign nationals or entities having any non-Indian participation in its share capital or management. Depending on the said categorisation of the applicant, necessary approvals are to be sought either from the NBA or the SBB. These approvals are granted in the form of agreements wherein the benefit sharing component is mentioned under the access and benefit sharing mechanism (ABS) based on ABS Regulations, 2014 framed pursuant to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits.

> Recent public notices issued by PPVFR Authority have raised some concerns for the agricultural sector.

The delay in proper and timely enforcement of the BDA and framing of appropriate guidelines for ABS by the concerned authorities led to wide spread non-compliance of the BDA. In addition, the lack of judicial precedents under the BDA has resulted in greater confusion in relation to the scope of the various terms and provisions under the BDA, such as 'conventional breeding', 'value added products' and the scope of the exemption under Section 40 of the BDA. Hence, there is an urgent need for scientific and detailed explanation either by judicial precedents or changes in the law in relation to the key terms under the BDA. Similarly, clarity is lacking as to the scope of the terms 'or knowledge associated thereto' with respect to biological resources occurring in India under Section 3(1) of the BDA for access approval, especially when seen in the light of the CBD and Nagoya Protocol that refer only to 'traditional knowledge associated' with biological resources.

Another important concern is the lack of sectoral approach by the authorities while determining the ABS obligations for applicants. Based on the ABS mechanism of Nagoya Protocol which advocates a sectoral approach for access and benefit sharing and intends the authorities to act as a facilitator and not a regulator, the ABS Regulations, 2014 (ABS Regulations) were enacted. In this regard, it has been observed that the ABS

Regulations also expressly recognise the sectoral approach. It is important that the agri sector, especially the seed sector is not unduly burdened with onerous ABS obligations. Further, a sectoral approach for the ABS obligations should be adopted since most of the agricultural crops or biological resources that are the subject matter of the applications filed by the agriculture industry, specifically seed companies, fall within the scope of the International Treaty on Plant Genetic Resources for Food & Agriculture. Moreover,this sector, unlike the FMCG sector is not really driven by 'end use' of the biological resource. Hence, there exists a need to adopt a sectoral approach in enforcing the ABS mechanisms and uniform ABS obligations being imposed across the board to all sectors is not only burdensome but also unreasoned and not in consonance with international treaties and the BDA. Moreover, the insistence by the authorities under the BDA on monetary modes of ABS while completely ignoring the non-monetary modes as prescribed under the ABS Regulations appears to be unjust.

Trademark law and the food industry

While issues under patent law, plant variety protection and laws related to biological diversity occupy the major share of concerns facing the food and agri sector, certain issues under trademark law also impact this sector, especially the food sector. This aspect is discussed thoroughly in the section below.

The BDA was enacted towards conservation, sustainable use of biological resources and to ensure equitable benefit sharing arising from said resources.

Trademarks and advertising

The most effective way for an entity to protect the brand value of its products is available under trademarks law and related common law rights. Trademarks can be applied for registration for, among others, not only words, phrases, logos, labels or combination of colours, but also for sounds, shapes, motion marks, etc. Trademarks should be distinctive in character, capable of distinguishing the goods or services of one entity from those of another entity and must be put to use prior to any other similar mark. Trademark registration provides initial protection up to 10 years which can be subsequently renewed every 10 years until perpetuity. Trademark protection is, in addition, supplemented by common law rights which in the absence of a registration, help in protecting prior use of the marks as well as the goodwill and reputation of the businesses acquired under the marks in use.

In addition to trademarks, an entity can protect its trade dress using the common law rights. Trade dress is nothing but the overall look and appearance of a product or packaging that signifies the source of the product to the buyer. An entity can also seek copyright protection over the overall look and appearance of the product/packaging or trade dress.

Advertising also plays a major role in building brand reputation and goodwill, which have attained greater significance in today's fiercely competitive marketing environment due to dawn of the information age. Lately, comparative advertising has garnered prominence for building brand reputation. Comparative advertising is a type of advertising where

a goods/services provider compares its goods/services with that of a competitor in an attempt to claim that its goods/services are better than that of the competitor or exceeds in some parameter, i.e., price, quality or some other parameter.

While on one hand, comparative advertising may promote healthy competition, on the other hand it may be detrimental to the reputation of goods/services of another entity, such that the advertiser may gain unfair advantage by tarnishing the competitor's goodwill and reputation. Such advertising could also result in infringement of registered trademarks if it takes unfair advantage of such mark, which is contrary to honest practices in industrial/commercial matters. Comparative advertising is also detrimental to registered trademarks' distinctive character or is against the reputation of the trademark.[18] Whereas if the comparative advertising is in accordance with honest practices in industrial/commercial matters and is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trademark, then it shall not amount to infringement of the registered trademark.[19]

The ASCI Code while making comparative advertising permissible makes an attempt to regulate the extent of comparison that may be allowed, keeping in mind the fairness in competition.

To ensure that advertisements in India are fair and do not exert any undue influence upon the consumer or competitors, the Advertising Standards Council of India (ASCI) was established in the year 1985 as a self-regulatory voluntary organisation of the advertising industry in India. The Advertising Standards Council of India Code (ASCI Code) permits[20] advertisements containing comparisons with other manufacturers, suppliers or products, including those where a competitor is named, in the interests of vigorous competition, provided that the aspects being compared must be clearly mentioned; the comparison must be factual, accurate and capable of substantiation; there should not be any likelihood of the consumer being misled; and the advertisement must not denigrate, attack or discredit other products, advertisers or advertisements, directly or by implication. ASCI Code while making comparative advertising permissible makes an attempt to regulate the extent of comparison that may be allowed, keeping in mind the fairness in competition. It states that the comparative advertising is allowed provided, *"the subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case".*[21]

If the proprietor of a trademark finds that certain comparative advertising is detrimental to its interests it may choose to seek remedial action in the ASCI or the courts or both. While the self-regulation mechanism of ASCI may seem akin to alternate dispute resolution whose findings are not binding on the parties especially non-members of ASCI, the court has held that, "industry/sector specific self- regulatory bodies should be encouraged, and that ASCI Code has statutory flavour"[22]. However, this position is not yet unanimous and there still appears to be lack of consistency as to the role of ASCI in dispute resolution.

Concluding remarks

The above is by no means an exhaustive elucidation of the challenges or issues with

respect to the IP and allied statutes in India facing the food and agri sector. It is however important that all industry players are apprised and aware of these challenges so that appropriate strategies can be adopted to tackle the same in a timely manner. Although courts are the ultimate destination for redressal of most of these challenges and issues, it is prudent to also explore other avenues such as utilising industry organisations to liaise with the authorities for resolution of at least some of these issues.

The authors would like to thank **Sutapa Jana**, *Principal Associate;* **Godhuli Nanda**, *Senior Associate* and **Ayushman Khetarpal,** *Consultant;* at the firm for their assistance.

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ENDNOTES

1 Trade Marks Act, Act No. 47 (1999), § 1 et seq.

2 The Copyright Act, Act No. 14 (1957), § 1 et seq.

3 The Designs Act, Act No. 16 (2000) § 1 et seq.

4 The Geographical Indications of Goods (Registration and Protection) Act, Act No. 48 (1999), § 1 et seq.

5 The Patents Act, Act No. 39 (1970), § 1 et seq.

6 Protection of Plant Varieties and Farmers' Rights Act, Act No. 53 (2001), § 1 et seq.

7 Biological Diversity Act, Act No. 18 (2002), § 1 et seq.

8 The Patents Act, Act No. 39 (1970), §2(1)(j).

9 The Patents Act, Act No. 39 (1970), §3.

10 Office of Controller General of Patents Designs and Trademarks, Government of India, *Guidelines for Examinations of Biotechnology Applications for Patent* (Kolkata, 2013), https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_38_1_4-biotech-guidelines.pdf.

11 Office of Controller General of Patents Designs and Trademarks, Government of India, *Manual of Patent Office Practice and Procedure*, (Kolkata, 2019), https://ipindia.gov.in/writereaddata/Portal/Images/pdf/Manual_for_Patent_Office_Practice_and_Procedure_.pdf.

12 Office of Controller General of Patents Designs and Trademarks, "Biotechnology Applications for Patent," 16.

13 Monsanto Technology LLC & Others v. Nuziveedu Seeds Limited & Others, Del. HC Order dated February 19, 2016 http://delhihighcourt.nic.in/writereaddata/orderSan_Pdf/vsa/2016/73743_2016.pdf.

14 Office of Controller General of Patents Designs and Trademarks, "Manual of Patent Office Practice."

15 As a point of reference see, World Trade Organisation, Agreement on *Trade-Related Aspects of Intellectual Property Rights* (Uruguay, 1995), Art. 27.3(b), https://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm.

16 Protection of Plant Varieties and Farmers' Rights Act, Act No. 53 (2001), § 1 et seq.

17 Protection of Plant Varieties and Farmers' Rights Act, Act No. 53 (2001), §24(5).

18 Trade Marks Act, Act No. 47 (1999), §29(8).

19 Trade Marks Act, Act No. 47 (1999), §30(1).

20 The Advertising Standards Council of India, *The Code for Self-regulation of Advertising content in India* (Mumbai, 2017), Chapter IV, https://www.ascionline.org/images/pdf/code_book.pdf.

21 Advertising Standards Council of India, "Self-regulation of Advertising," Chapter IV (1)(b).

22 Metro Tyres Ltd v. The Advertising Standards Council of India & Anr, 2017, (70) PTC 394(Del).

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