

**GUESSING THE TEMPORARY: INJUNCTION OR
INJUSTICE? ANALYSING THE POSITION OF TEMPORARY
INJUNCTIONS IN IPR MATTERS**

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ABSTRACT

As the society advances in technology, protection of intellectual property rights (“IPR”) becomes a necessity to promote innovation and competition. At first blush as well, when a courtroom witnesses an IPR injunction matter, the Civil law comes in handy with not only its inscribed, but also with judge-made jurisprudence. However, if one may embark upon the statistics concerning the grant of temporary injunctions in IPR matters specifically, it becomes evident that India’s justice-disposal is problematic for being caught up with delay, inadequate addressal, and pushes a clear saga of injustice. Thus, the main thrust of the present analysis is to identify the reasons behind such delay and explore a possible redressal.

The paper begins with part I, which lays bare the position of IPR injunction in the Indian legislative bedrock. Against that backdrop, part II sheds light on the objectives of granting such injunctions and draws inspiration from international jurisprudence to connote the same. Then emerges the Triple Test, which is explained in depth impart III. Part IV

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then critically analyses the jurisprudence by relying on statistics and practical application of the law. Lastly, part V proposes solutions to the identified problems, and concludes the article.

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I. UNDERSTANDING IPR INJUNCTIONS

A. INJUNCTION: MEANING AND APPLICABILITY

As the Latin phrase “*Ubi jus ibi remedium*” suggests, “*where there is a right, there must be a remedy.*”¹ In the world of intellectual property (“IP”); copyrights, trademarks, and patents are the major forms of rights available to an inventor or creator, whereby, he generates value and recognition for his own idea and business, and prevents others from using it in their own name. However, infringement of such rights remains inevitable; thus, in accordance with the cardinal legal principle, major jurisprudential regimes provide both civil and criminal remedies in order to avoid IPR infringement. One of such civil remedies is in the form of injunctions,² which is defined as “*a judicial process which compels a party to do, or to refrain from doing an act, until the Court conducts the trial or makes any other relevant order.*”³ An injunction can be granted against acts only *in personam*, and it can be pursued by either the plaintiff or the defendant, but not by a third party or stranger.⁴ An injunction aims to “*maintain the status quo*” of circumstances and prevent a future possible injury to cause “*irreparable damage towards the subject matter of the dispute*” until the trial is disposed.⁵

It is pertinent to note that injunctions have the following bifurcation: first, “*a temporary or a preliminary injunction, that is issued once the*

¹ DR. ASHOK K. JAIN, CODE OF CIVIL PROCEDURE (Ascent Publications, 3rd ed. 2012).

² See THOMAS F. COTTER, COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS (Oxford University Press, 13th ed. 2013).

³ C. K. TAKWANI, CIVIL PROCEDURE 360 (EBC, 9th ed. 2021).

⁴ *Id.* at 362.

⁵ See Shiv Kumar v. Municipal Corporation, Delhi, (1993) 3 SCC 161.

institution of suit is confirmed,” and second, a *“permanent or final injunction issued after the trial.”*⁶ A temporary or interim injunction is regulated under Order XXXIX of the Code of Civil Procedure, 1908 (“**CPC**”) and compels a party at any stage of the suit to *“restrain from doing a specific act until disposal of suit or till further orders of the court.”* It *“can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of injunction,”*⁷ while a permanent injunction, on the other hand, is governed by Sections 38 to 42 of the Specific Relief Act, 1963 (“**SRA**”), and *“restrains the party for ever from doing an act and can be granted only on merits at the conclusion of the trial after hearing both the parties in the suit.”*⁸ With regards to the present article, discussion shall be relevant only to temporary or interim injunctions.

B. INJUNCTION IN IPR SUITS IN INDIA: LEGISLATIVE BEDROCK

In India, major IPR suits seeking interim injunctions revolve around patents, which allow the inventor to *“prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing”*⁹ their invention. Section 108 of the Patents Act, 1970 (“**Patents Act**”) provides recourse remedies in cases of infringement.¹⁰ The section reads: *“The reliefs which a court may grant in any suit for infringement includes an injunction (subject to such terms, if any, as the court thinks fit) and, at the option of the plaintiff,*

⁶ TAKWANI, *supra* note 3.

⁷ Yogesh Pai, *Patent Injunction Heuristics in India*, K.L.I. 1,10-11 (2019); *see also* The Specific Relief Act, 1963, No. 47, Acts of Parliament, 1963, §37 (India).

⁸ JAIN, *supra* note 1.

⁹ The Patents Act, 1970, No. 39, Acts of Parliament, 1970, §48 (India).

¹⁰ *Id.* at §108.

*either damages or an account of profits.*¹¹ The court has two levels of discretion to decide whether to issue an injunction—one, “*whether or not an injunction should at all be granted; two- if the court indeed grants an injunction, it may subject it to ‘such terms, if any, as the court thinks fit.’*”¹²

Rules 1 to 5 of Order XXXIX of the CPC regulate the concerned procedure in several parts. Rule 1(a) specifically allows the court to “*grant an injunction wherein any property in dispute is in danger of being wasted, damaged or alienated by any party to the suit.*”¹³ Rules 2(2) of Order XXXIX allows the court to grant injunctions “*on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.*”¹⁴ In a way, this gives the court the authority to order the plaintiff to pay the defendant’s damages.

Rule 3 requires that “*the Court before granting an injunction must give notice of the injunction application to the opposite party,*” while also creating an exception wherein “*if the Court is of the opinion that the object of granting the injunction would be defeated by delay, a court may grant an injunction without giving notice to the other party.*”¹⁵ Moreover, there are safeguards provided by Rule 3. First, the court must give grounds for believing that the delay would defeat the purpose of granting the injunction. A second safeguard is the requirement that the “*applicant deliver a copy of the application, the plaint, and all relied-upon documents to the opposing party and file an affidavit to support that delivery on the same day or the*

¹¹ See *Mahesh Gupta v. Tej Singh Yadav*, (2009) 41 PTC 109.

¹² *Pai*, *supra* note 7.

¹³ *Id.*

¹⁴ The Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, Order XXXIX, Rule 2(2) (India).

¹⁵ *Id.* Order XXXIX, Rule 3.

following day” that any such *ex parte* injunction is obtained. In addition, the defendant under, Rule 4 has the right to ask the same court to overturn the injunction after it has been granted. It mandates that courts set aside *ex parte* orders obtained through false or deceptive statements, and that “*an ordinary injunction granted after hearing both parties can only be revoked in cases where a change in circumstances has put the party in question through hardship.*”¹⁶ Additional protection has also been granted in the form of Rule 3A, which requires that “*once an ex parte injunction has been granted, the Court should dispose-off the application within 30 days and record its reasons in case of failure to resolve the dispute.*”¹⁷ However, the court’s power is not limited to Order XXXIX. Section 151 of the CPC, provides for “*inherent powers of the Court to grant injunctions in cases not covered by these Rules.*”¹⁸ Furthermore, Section 94(c) and (e) of the CPC empowers to court to grant interlocutory reliefs in the form of interim injunctions and other interim orders to prevent the ends of justice from being defeated as may appear to the court to be just and convenient in the given circumstances.¹⁹

II. OBJECTIVE FOR GRANTING TEMPORARY INJUNCTIONS

Due to the constantly evolving nature of new inventions in the high-technology sector, complex products with multiple components have been designed and developed (e.g., a laptop, a smart phone, a complex gas

¹⁶ *Id.* Order XXXIX, Rule 4.

¹⁷ *Id.* Order XXXIX, Rule 3A.

¹⁸ Tanusree Basu v. Ishani Prasad Basu, (2008) 4 SCC 791.

¹⁹ Pai, *supra* note 7.

turbine). The availability of the entire product on the market may be affected by the granting of an injunction prohibiting the sale or use of such complex products based on an alleged violation of a few patents that may be relevant to a component (accounting for a small portion of the entire product). Thus, even though the infringement has not yet been established, such an injunction may have a significant impact on consumers and the companies that make such complicated products. A study of the requirements/standards for establishing each ground for granting injunctions has taken on significant importance in light of the suitability of injunctions for such complex products.

A. SHEDDING LIGHT ON THE JURISPRUDENCE

The case of *American Cyanamid Co. v. Ethicon Ltd.* (“**American Cyanamid case**”) constitutes the cornerstone of the law upon injunctions and is being followed by the Indian courts time and again. The Court stated that the objective of granting injunctions was to protect the plaintiff against any injury, which damages would possibly fail to compensate, if the case favoured him at the end of the trial. However, the defendant’s legal rights are also to be balanced against such protection, so as to avoid him an injury if he was to be favoured in finality.²⁰ The Court also stated, “*if damages in the measure recoverable would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage.*”²¹

²⁰ *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396.

²¹ *Id.*

In *Gujarat Bottling Co. Ltd v. Coca Cola Company*, the Supreme Court, setting out the objective for granting an interim injunction, emphasised that “(a) grant of interlocutory injunctions is at the discretion of the courts and (b) that there has to be a balanced approach in granting such interlocutory injunctions.”²²

B. PEGGING THE PARAMETERS

Accordingly, various jurisdictions have enunciated three common parameters, also known as the “Triple Test,” that are required to be proved by the plaintiff in order to get interim injunction against the other party:²³

“(i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.”²⁴

A fourth parameter of ‘public interest’²⁵ has also been added by the Indian courts to their jurisprudence on injunctive relief. Notably, none of these three principles are explicitly mentioned in Order XXXIX of CPC.

III. ANALYSING THE TRIPLE TEST FOR GRANTING TEMPORARY INJUNCTIONS

A. THE PRIMA FACIE STANDARD

i. The Jurisprudence

²² *Gujarat Bottling Co. Ltd v. Coca Cola Co.*, AIR 1995 SC 2372.

²³ *Hybritech Inc. v. Abbott Labs*, 849 F.2d 1446, 1451; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396.

²⁴ See *Gujarat Bottling Co. Ltd v. Coca Cola Co.*, AIR 1995 SC 2372; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396.

²⁵ *F. Hoffmann La Roche Ltd. v. Cipla Limited*, (2008) 148 DLT 598.

A prime facie case is one of the most crucial requirements when it comes to the grant of temporary injunction in the case of IPR matters. The wisdom of the House of Lords gave birth to this standard in the *American Cyanamid* case, which stated that “*all that an applicant needs to prove a prima facie case was that ‘the claim was not frivolous or vexatious: in other words, that there was a serious questions to be tried.’*”²⁶ The precedential legacy has been followed by the Indian courts ever since,²⁷ and has bifurcated itself into the relative assessment test and the triable issue test.²⁸

The *American Cyanamid* case leaned towards the relative assessment standard, which relatively assessed the cases of each party, and “*determine if the plaintiff is more likely to win.*”²⁹ Lord Diplock supported the lower threshold of this standard by emphasising that “*a temporary injunction phase is not inherently suited to a rigorous assessment of arguments and evidence and that any such effort could risk converting the interim proceeding into a mini trial.*”³⁰ A bonafide contention notwithstanding a pre-judgement against the case became the only requirement.³¹

²⁶ *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396.

²⁷ See *Gobind Pritamdas Malkani v. Amarendranath Sircar*, [1980] 50 Comp. Cas 219; *Amal Kumar Mukherjee v. Clarian Advertising Service Ltd.*, [1982] 52 Comp. Cas. 315; *Amar Talkies v. Apsara Cinema*, (1982) 117 J.L.J. 812.

²⁸ *Shamnad Basheer, Jay Sanklecha, Prakruthi Gowda, Pharmaceutical Patent Enforcement: A Developmental Perspective*, SSRN (Dec. 14, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535763.

²⁹ See also *J.T. Stratford & Sons Ltd. v. Lindley*, (1965) A.C. 269 (H.L.) 331.

³⁰ *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396.

³¹ *Kashi Nath Samsthan v. Shrimad Sudhindra Thirtha Swamy*, (2010) 1 SCC 689.

Hence, the concept of establishing a “*prima facie*” case emerged, which required a showing of “*a probability that the plaintiff is entitled to relief*”.³² It meant that “*he has a case which is not liable to be thrown at the out-set but which requires to be given consideration*”.³³ Similar notion was propounded in the case of *Martin Burn Ltd. v. R.N. Banerjee*,³⁴ where the Supreme Court of India observed: “*While determining whether a prima facie case has been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on the evidence.*”³⁵

Prima facie case became a *sine qua non* for the grant of temporary injunction,³⁶ and the burden to satisfy the Court by leading evidence or otherwise to have *prima facie* case in one’s favour leaned on the plaintiff.³⁷ If plaintiff fails to prove the same, other requirements cannot follow the examination, and no temporary relief shall be granted.³⁸

Nevertheless, certain judges felt the lower threshold to go against the rule of justice and circumvented the standard by creating a new one - the triable issue standard. The triable issue standard, as Lord Denning proposed, was inclined to “*scrutinize the issues more carefully in order to determine which party had a stronger probability of winning at trial,*” by establishing the evidence via affidavit, and the court analysing the pleadings and documents

³² *Preston v. Luck*, (1884) 27 ChD 497 CA.

³³ *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396.

³⁴ *Martin Burn Ltd. v. R.N. Banerjee*, AIR 1958 SC 79.

³⁵ *Id.*

³⁶ *Nawab Mir Barkat Ali Khan v. Nawab Zulfiqar Jah Bahadur*, AIR 1975 AP 187.

³⁷ *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719.

³⁸ *Kashi Nath Samsthan v. Shrimad Sudhindra Thirtha Swamy*, (2010) 1 SCC 689, 692.

on record³⁹ since the “*interim stage was dispositive and settled the matter once and for all.*”⁴⁰ However, it may be noted that the latter standard is more likely to turn the interim proceeding into a mini-trial, which robs the proceeding of its purpose of providing speedy remedy. This makes the paper lean to favour the relative assessment threshold, which shall be analysed in later part of the paper.

ii. Application in IPR Matters

Given the relatively younger development of IPR enthusiasm and legal support, courts in India often incline towards avoiding time-consuming proceedings that destroyed the very ratio of temporary injunctions. Therefore, in matters of temporary injunction against patents, grant of patent by the Indian Patent Office (“**IPO**”) itself became an acceptable notion to lean in favour of rejecting an injunction.⁴¹

In *K. Ramu v. Adyar Ananda Bhavan and Muthulakshmi Bhavan*,⁴² the court observed that “*the certificate of patent in favour of the plaintiff was found adequate for the establishment of a prima facie case. Mere production of a certificate of Patent as the satisfaction of the requirement for establishing a prima facie case.*”⁴³ Similarly, in *Gandhimathi Appliances Limited, Kelambakkam, Kacheepuram*

³⁹ See *Shiv Kumar Chadha v. Municipal Corporation of Delhi*, (1993) 3 SCC 16; *Uniply Industries v. Unicorn Plywood*, (2001) 5 SCC 95.

⁴⁰ *Followes & Son v. Fisher*, (1976) Q.B. 122, 132-134.

⁴¹ See *Rajesh Kumar v. Manoj Jain*, (1998) 47 DRJ 353; *Prasanta Kumar Ganguly v. Ashir Chandra Sen*, 2012 SCCOnline Cal 10192; *Supreme General Films v. Durgaprasad*, 1984 AIR (Bom.) 131.

⁴² *K. Ramu v. Adyar Ananda Bhavan and Muthulakshmi Bhavan*, 2007 (34) PTC 689 (Mad.).

⁴³ *Id.*

District, Tamil Nadu v. L.G.Varadaraju and others, and CTR Mfg Industries Ltd. v. Sergi Transformer Explosion Prevention Technologies Ltd. I.A., it was observed that a plaintiff is “always entitled, at a *prima facie* stage, to rely on the secured patent as *prima facie* proof of validity,” and puts a “burden of proof on defendant to prove the vulnerability of the same in regard of denying a *prima facie* case of the plaintiff.”⁴⁴

However, another line of judicial determination has emerged such as in *Novartis AG and Anr. v. Mehar Pharma and Anr.*, that “... the settled law appears to be that in relation to a patent, the Court will not grant an interlocutory injunction unless satisfied that (a) there is a real probability of the plaintiffs succeeding on the trial of the suit, and (b) where the patent is of a recent date, no interim injunction should be granted.”⁴⁵ Thus, “the mere grant of a patent is not in and of itself sufficient to warrant interim relief”⁴⁶ and brings the defendant into the witness box with a burden to prove the vulnerability of the plaintiff’s patent.

B. THE IRREPARABLE INJURY TEST

i. The Jurisprudence

Though the establishment of a *prima facie* case is a condition precedent, let alone it being proved does not induce the applicant’s entitlement to relief.⁴⁷ A second condition that follows the court’s scrutiny

⁴⁴ Gandhimathi Appliances Limited v. L.G.Varadaraju and others, (2000) 3 MLJ 85 (Mad.).

⁴⁵ Novartis AG and Anr. v. Mehar Pharma and Anr., 2005 (3) Bom C.R. 191.

⁴⁶ Strix Limited v. Maharaja Appliances Limited, I.A. No.7441 of 2008 in C.S. (OS) No.1206 of 2008 Del. (10th Sept. 2009).

⁴⁷ Dalpat Singh v. Prahlad Singh, 1 SCC 719; *see also* CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Transmission Corporation of AP Ltd. v. Lanco Kondapalli Power (P) Ltd, (2006) 1 SCC 540; State of Karnataka v. State of A.P., (2000) 9 SCC 572; Best Sellers Retail v. Aditya Birla, (2012) 6 SCC 792.

is that of ‘irreparable injury,’ whereby, the plaintiff needs to prove two things: first, “*that he will suffer irreparable injury if the injunction as prayed is not granted,*” and second, “*that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury.*”⁴⁸ It was further explained by the Delhi High Court in *Shenzhen OnePlus Technology Co. Ltd. v. Micromax Informatics Ltd.*, that when deciding whether to grant a temporary injunction, it is essential to maintain a delicate equilibrium between the plaintiff’s rights and the defendant’s rights. Only if the court determines that the harm is severe, irreparable, and cannot tolerate even the slightest delay, alongside a strong preliminary case, would it be appropriate for the court to issue a temporary injunction.⁴⁹ Here, it is pertinent to note that the term ‘irreparable injury’ signifies a material injury that cannot be adequately compensated by damages or any specific or fixed pecuniary measures, unlike any other “*physical possibility of repairing the injury*”.⁵⁰

ii. Application in IPR Matters

In the IPR regime, the test of irreparable harm has forever been a subject of great debate. The reason falls back to the fundamental point that “*every loss caused to the patentee-plaintiff can be compensated through damages*”.⁵¹ However, the Delhi High Court has judiciously argued against the premise stating that denying an injunction solely based on the possibility of

⁴⁸ See *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396; see also *Attorney General v. Hallett*, 153 ER 1316.

⁴⁹ *Shenzhen OnePlus Technology Co. Ltd. v. Micromax Informatics Ltd.*, No. 3761 of 2014.

⁵⁰ See *Manohar Lal Chopra v. Seth Hiralal*, AIR 1962 SC 527; *Cotton Corpn. Of India v. United Industrial Bank Ltd.*, (1983) 4 SCC 652.

⁵¹ *Pai*, *supra* note 7.

compensating financial losses upon patent owner success is unjustified. Closer examination reveals that certain damages can be irreparable, highlighting the third principle: allowing infringers to operate during trial can lead to price reductions and increased profit, while patent owners face risks. Furthermore, even if the patent owner wins and recovers financially, prices may not fully rebound. Thus, the patent owner's victory should yield tangible, not symbolic, outcomes.⁵²

On the same lines, patent cases concerning pharmaceutical matters have seen a trend that a temporary injunction not only stops a company from operating for a significant duration but also prevents the public from accessing affordable and essential medicines. Now envisioning a security bond that requires the party requesting the injunction to deposit a sum upfront, covering potential harm caused to the defendant's business and, importantly, potential damages to the public interest not only offers some redress to the defendant if an interim injunction is wrongfully imposed but also serves as a check to ensure that plaintiffs only seek such injunctions when genuinely necessary.⁵³

It is in consonance with Rule 2(2) of Order 39 of the CPC, which prescribes for “the discretionary power of courts to put in place terms on the grant of an injunction, including keeping accounts, giving security, or any other manner” the court thinks fit, and has been reaffirmed by the Apex Court in *Raunaq International Ltd. v. I.V.F Construction Ltd.*, that “*the party at*

⁵² Merck Sharpe and Dohme v. Glenmark Pharmaceuticals, (2013) 201 DLT 126.

⁵³ See Swaraj Paul Barooah, *Interim Injunctions: What's the Damage? – Part II*, SPICYIP (Sep. 8, 2020), <https://spicyip.com/2020/09/interim-injunctions-whats-the-damage-part-ii.html>.

whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. ... the petitioner asking for interim orders, in appropriate cases should be asked to provide security for any increase in cost as a result of such delay, ... in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution.”⁵⁴ Another recourse opted has been to deny the temporary injunction if it is visible that “*the defendant could not be adequately compensated through a cross-undertaking in damages.*”⁵⁵

C. BALANCE OF INCONVENIENCE AND PUBLIC INTEREST

i. The Jurisprudence

The third and final condition required to be satisfied in order to claim interim relief is the ‘balance of convenience’ being in favour of the plaintiff/applicant. Herein, the Court requires to get satisfied that “*whether the refusal or grant of an injunction will cause an adverse impact on any of the parties before the court; and whether or not comparative mischief or inconvenience will be caused to any of the party either by granting or denying the injunction.*”⁵⁶ As observed in the *Dalpat Kumar* case, “*if on weighing conflicting probabilities, the court is of the opinion that the balance of convenience is in favour of the applicant, it would grant injunction, otherwise refuse to grant it.*”⁵⁷ In a nutshell, the Court weighs the need of one party against the other, and determines where the ‘balance of convenience’

⁵⁴ *Raunaq International Ltd. v. I.V.F Construction Ltd.*, (1999) 1 SCC 492.

⁵⁵ *Hindustan Pencils v. India Stationery Products*, AIR 1990 (Del.) 19.

⁵⁶ *Pai*, *supra* note 7.

⁵⁷ *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719.

shall lie.⁵⁸ Public interest, “*whether the fact that the accused infringer’s product was being sold at a price significantly lower than the price at which the patentee was apparently making available the said patented technology through its own products*”⁵⁹, has also sought its genesis within the test of comparative convenience, and is now ascertained simultaneously.

ii. Application in IPR Matters

As seen in *Roche v. Cipla*, a pharmaceutical patent dispute, the applicant sought an injunction against a life-saving drug. The Court observed that the “*stark price difference between competing medications and the public interest in ensuring that people have access to life-saving medications would tip the scales in favour of the defendant.*”⁶⁰ However, later in *F. Hoffmann-La Roche Ltd. v. Cipla*, the division bench chose to focus on the element of “*irreparable harm being caused to several lives.*”⁶¹

An interim injunction is granted to “*lessen the risk of injustice to the plaintiff while the case is ongoing,*” the Supreme Court noted when discussing the balance of convenience.⁶² The defendant must be protected from the harms brought on by an injunction that “*prevents him from exercising his own legal rights because he cannot be adequately compensated for those injuries,*” so this injustice must be balanced against that need. The Court must therefore

⁵⁸ American Cyanamid Co. v. Ethicon Ltd., [1975] AC 396.

⁵⁹ Pankhuri Agarwal, *Understanding the Public Interest Element of the Injunction Analysis in Patent Infringement Cases*, SPICYIP (May 30, 2018), <https://spicyip.com/2018/05/understanding-the-public-interest-element-of-the-injunction-analysis-in-patent-infringement-cases.html>.

⁶⁰ *F. Hoffmann-La Roche Ltd. v Cipla*, (2009) 159 DLT 243.

⁶¹ *Id.*

⁶² *Hindustan Petroleum Corp. Ltd. v. Sriman Narayan*, (2002) 5 SCC 760.

consider these elements when deciding the balance of convenience. As a result, this decision is highly fact-specific and unique in each instance.

IV. CRITICAL ANALYSIS

While there seems to be a rhetorical affirmation that the injunction jurisprudence has strong pillars to deal with IPR matters, the reality does not translate the same.

A. SPEAKING “STATS”

As indisputable as it is, the IPR regime in India has juvenile roots, and applications for patent registration, and grants are only rising.⁶³ The Indian Patent Office only suffers from a chronic shortage of specialised and well-trained officers.⁶⁴ Patent offices are further burdened with corruption charges and “*cosy linkages between patent agents and patent examiners/ controllers.*”⁶⁵ This reflects institutional infirmities that Indian offices work upon, such as found in the PTC Journal for 2016-19, “*of the 13 patent cases heard in the High Courts in this period, interim injunctions were granted in 5.*”⁶⁶ Furthermore, if one combs through 143 patent injunction suits filed between 2005 and 2015, the data suggests grant of mere 5 judgements, underscoring major

⁶³ Annual Report 2015-16, *Intellectual Property India the Office of Controller General of Patents, Designs, Trademarks and Geographical Indication India*, IPINDIA (Mar. 31, 2015), https://ipindia.gov.in/writereaddata/Portal/IPOAnnualReport/1_71_1_Annual_Report_2015-16_English_2_.pdf.

⁶⁴ Peter Drahos, *Trust Me: Patent Offices in Developing Countries*, Centre for Governance of Knowledge and Development Working Paper, SSRN (Nov. 9, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028676.

⁶⁵ BHAVEN SAMPAT, INSTITUTIONAL INNOVATION OR INSTITUTIONAL LIMITATION? THE IMPACT OF TRIPS ON INDIA'S PATENT LAW & PRACTICE (2010).

⁶⁶ Barooah, *supra* note 53.

procedural delay by High Courts of Delhi, Madras, Gujarat, Bombay, and Calcutta.⁶⁷ While Justice Katju ordered in *Bajaj Auto Ltd. v. TVS Motor Company Ltd.*, that such trials must conclude within 4 months,⁶⁸ research shows that the delay extends for a couple of years at times.⁶⁹

B. THE PRIMA FACIE “PROBLEM”

As already noted, the triable issue test stands more problematic as compared to the relative assessment threshold. The reason behind such bent is found in the statistical evidence on institutional infirmities that Indian offices work upon.

As per Professor Dr. Ramakrishna Thammaiah’s empirical study on prima facie case establishment and the consequent grant of injunctions,⁷⁰ it is notably found that in 69% cases where permanent injunctions were not granted, in 60% of cases, interim injunctions were granted.⁷¹ It raises an eyebrow at the fact that interim measures are granted swiftly, while they later turn towards a different road of conclusion.

The reason can be found as two sides of the same coin discussed above— on one, a plaintiff is not automatically entitled to an injunction simply because he has a patent that has not yet been invalidated; on the

⁶⁷ Prashant Reddy, *143 patent infringement lawsuits between 2005 and 2015: Only 5 judgments*, SPICYIP (June 5, 2017), <https://spicyip.com/2017/06/143-patent-infringement-lawsuits-between-2005-and-2015-only-5-judgments.html>.

⁶⁸ *Bajaj Auto Ltd v. TVS Motor Company Ltd.*, (2009) 41 P.T.C. 398 (S.C.).

⁶⁹ Barooah, *supra* note 53.

⁷⁰ Prof. Dr. Ramakrishna Thammaiah, *An India Perspective on Establishing a Prime-Facie Case in Patent Suits*, SSRN (Oct. 4, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3047057.

⁷¹ *Id.*

other hand, a defendant cannot disprove an injunction claim by merely stating that the validity of the patent is proposed to be challenged; instead, they must prima facie show vulnerability. The practice holds three key issues. *Firstly*, given the institutional infirmities of the offices granting patents, either test falls short of approval. *Secondly*, the practice of granting a temporary injunction based on the certificate of patent also disregards the law as noted in *Bishwanath Prasad RadheyShyam v. Hindustan Metal Industries*, that “*it is noteworthy that the grant and sealing of the patent, or the decision rendered by the Controller in the case of opposition, does not guarantee the validity of the patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings. It is pertinent to note that this position, viz. the validity of a patent is not guaranteed by the grant, is now expressly provided in Section 13(4) of the Patents Act, 1970.*”⁷²

The plaintiff (or the person requesting an injunction) must demonstrate the veracity of the allegations or averments made in the application in order to establish a prima facie case. The criteria for proving a *prima facie* case, however, are not made explicit.⁷³ Therefore, when examining patent infringement lawsuits, it is crucial to either (a) define a suitable standard for establishing a prima facie case or (b) establish a new process for granting injunctions while taking into account the relative interests of a plaintiff patentee and a defendant. It is rational and instinctive to: (a) first credibly demonstrate that the patent is legitimate and (b) then

⁷² *Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries*, (1979) 2 SCC 511.

⁷³ *Power Control Appliances v. Sumeet Machs Pvt. Ltd.*, (1994) 2 S.C.C 448.

convincingly set up that the alleged item is encroaching the instant patent in order to determine an acceptable standard for constructing a prima facie case. The conclusion is precisely that “*grant of a patent by itself should NOT be considered as a strong ground for granting an ex-parteorinterim injunctions.*”⁷⁴

Thirdly, there is absolutely no question that patent owners should be entitled to fair compensation for their hard work, and they should even be paid if someone else uses their patent without their permission. However, injunctions do not accomplish this. Temporary injunctions in favour of a patentee will actually harm innovation, competition, and consumers if the courts do not take the time to fully comprehend the case.

C. (DIS)BALANCING THE INCONVENIENCE

Although the practise of balancing of inconvenience leans towards serving both parties and the public, certain thorns in the rose need deliberation.

Patent seekers do not simply come for a single-component plastic item, but a multi-component product, such as a mobile device or a medicine composed of different chemicals. It appears that the granting of preliminary injunctions to halt the sale of multi-component products based on a patent lawsuit brought by a patentee with one or two active patents equates the worth of one or two patents to numerous thousands of patents embodied in a product and, consequently, to the worth of the entire product itself. While the legal remedies for single component and multi-component

⁷⁴ *Standard Essential Patents: How Do They Fare?* RPX CORPORATION, <https://www.rpxcorp.com/wp-content/uploads/2014/01/Standard-Essential-Patents-How-Do-They-Fare.pdf>.

product remains same, the patent infringement assessment is not different for each; leading only to irregularities in the assessment.

Furthermore, while denying an injunction, the court often ignores the multiple “indirect parties” not limited solely to the consumer public, in the injunction matter. These can be stakeholders such as the producers, manufacturers, and workmen involved in the process. Since temporary injunctions are more *in personam* specific, the same requires reconsideration, as noted by the Delhi High Court as: “[s]tultification of defendants investment, loss of employment, public interest in the product (such a life-saving drug), product quality coupled with price, or the defendant being smaller in size, may go against the plaintiff.”⁷⁵ While the courts rhetorically consider the public interest when granting an injunction, but if the case involves, for example, access to medications used to treat diabetes, a disease that is very common in India, courts may occasionally disregard the public interest in favour of preserving the integrity of the patent system itself, preventing the distortion of a legitimate monopoly.

D. IRREPARABLE HARM AND THE RELEVANT ISSUES

Another significant problem with granting temporary injunctions without considering the case's merits is that it encourages the plaintiff patentee who has an injunction granted in his favour (against the defendant) to decide against taking the matter to trial. Even before the case is decided on its merits, there is significantly less incentive to move the case forward to the trial phase, and the defendant continues to experience the hardship

⁷⁵ Franz Xaver Huemer v. New Yash Engineers, AIR 1997 (Del.) 79.

of the interlocutory injunction. It goes against the caution raised in *Bajaj Auto Ltd v. TVS Motor Company Ltd*, that “*In our opinion, in matters relating to trademarks, copyright and patents the proviso to Order XVII Rule 1(2) C.P.C. should be strictly complied with by all the Courts, and the hearing of the suit in such matters should proceed on day to day basis and the final judgment should be given normally within four months from the date of the filing of the suit.*”⁷⁶

However, it must also be noted that patent disputes are complex and require high scientific scrutiny. Although such scrutiny can be avoided at a ripe stage as that of an injunction, door to errors shall never be closed if blindly disregarded, and at the later stage of trial, a grave miscarriage of justice shall be present. Thus, only while rectifying the errors in other parameters in granting temporary injunctions, time limit factor can be focused upon.

Furthermore, tipping on the point of accused infringer selling the product on a lower price should not be the point alone for ignoring a valid patent. This way, companies are likely to set lower price differentials than their competitors to rescue their litigation, and later increase the price, causing the loss of both the applicant and the consumers. Focusing on utility of item should be a more rigorous approach since it will cover not just pharma products, but also other commodities on the grounds of patentable inventions under the relevant law,⁷⁷ rather than focusing merely on the price differentials as done in *Roche v. Cipla*.⁷⁸

⁷⁶ *Bajaj Auto Ltd v. TVS Motor Company Ltd.*, (2009) 41 PTC 398 (SC).

⁷⁷ See The Patents Act, 1970, No. 39, Acts of Parliament, 1970, §§3, 4 (India).

⁷⁸ *F. Hoffmann-La Roche Ltd. v. Cipla*, (2009) 159 DLT 243.

V. CONCLUSION

The present article has aimed to address the fundamental meaning and objective of temporary injunctions and how they apply in IPR matters. By conducting a step-by-step analysis of the triple test, the paper seeks to conclude by providing the following suggestions:

- Proper standards for assessment of the triple test must be elucidated.
- Grant of Patent certificate should not be construed as a perfected prima facie case.
- Temporary injunctions should reckon the initial object of fostering innovation and competition, rather than adjusting damages between the parties albeit them being the main point of contention.
- Public interest is a crucial factor for recognition; however, it shall also not infringe upon the inventor, distributor, manufacturer, and other relevant indirect *in personam* parties to the case.
- Different modes of assessments must be deduced for single and multi-component patents, so as to avoid harm to producers involved against a product.
- While keeping in mind the technical and scientific scrutiny of the patent product, time limit favouring the very nature of temporary injunctions must be valued.
- Instead of focusing on price differentials, utility of the product must be considered.

Injunctions, being discretionary and equitable reliefs and not available as a matter of right, must be granted with a spirit of judicial activism intended to further the ends of justice.