



The Efficiency of Current Measures to Protect Intellectual Property Rights in E-commerce in Saudi Arabia

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Abstract

Lack of intellectual property (IP) law may inhibit innovation and create an environment open to unfair competition. Furthermore, the protection of IP has a crucial role to play in supporting a country's economy and consequently the global economy. Recognition of this fact has led to the establishment of the World Intellectual Property Organization (WIPO), an agency that aims to support and promote the protection of intellectual property rights (IPRs) through international cooperation. The technology revolution, however, has changed how large-scale transactions are conducted. E-commerce is one of the advantages that has been generated by the introduction of the internet. Yet, while e-commerce has brought about many benefits, it has also created several unprecedented issues due to the new modes of business operation. There is a need to examine the efficiency of current measures used to protect IPRs in e-commerce. This paper will examine the methods governing the protection of IPRs in e-commerce in Saudi Arabia (SA). It will argue that, although the current measures for protecting IP are up to date, a greater effort is still required to effect improvement.

Keywords: Intellectual Property, E-commerce, Saudi Arabia, Protecting IP, WIPO.

1. Introduction

Preserving rights and property through law enforcement and judicial systems is one of the government's primary roles. Failure to do so may lead to a lack of national security, damage to resources, and the inhibition of sustainable development. Moreover, the inability to preserve property laws concerning intellectual property might negatively affect market power, economic concentration, education, politics, and social structure.¹ The protection of IP is just as important as the protection of physical property. It has been argued that IP is only understood by those working in the field; people such as lawyers and the educated.² Whether one agrees or not, this argument alerts to the necessity to promote individuals' awareness of IPRs. Hence, legislators are required to focus more attention on this area. However, the situation regarding the internet is more complicated because it is a new transaction medium.

Following an inductive and critical analysis approach, this paper aims to assess the efficiency of current measures of intellectual property protection (IPP) in e-commerce in Saudi Arabia (SA) and provide recommendations for development. In so doing, the paper will shed light on the issues in e-commerce related to IP. It will then illustrate and critically analyse the current IPP measures being utilised in SA. The next section will look at similar international measures, mainly in developing countries, in the hope of learning from their experience and solving any deficiency in current measures in SA. Finally, the paper will discuss and provide recommendations for development to assure efficient protection of IP in e-commerce in SA.

2. Intellectual Property and E-commerce

Intellectual property is a legal term that has been associated with industrial property copyrights and other rights in similar fields. IP refers to anything someone has created with their mind (for example, an invention, a literary or artistic work, a design, symbol, name, or image) for use in commerce.³ Globally, there are many agreements for protecting IP. For example, Trade Aspects of Intellectual Property Rights (TRIPS) was enforced on the first of January 1995. As per the agreement, there are minimum standards for the protection and enforcement of IPRs in member countries. Such standards are required to promote the effective and adequate protection of IPRs, which will, in turn, reduce distortions and impediments to international trade.⁴⁴ The main pillars of IP law are copyrights, patents, and trademarks, all of which are governed and described fully under several local and international laws and treaties.

Nowadays, technology has facilitated a new means of innovation. It has empowered consumers and agencies alike with the advantages of communication without restriction. The technology revolution has changed how large-scale transactions are performed. E-commerce is one of the amenities generated by the introduction of the internet. With regards to e-commerce, IP is possibly the most disregarded but the most value-bearing aspect because it is far less understood or its major connection to e-trade is not evident. Although e-commerce has brought plenty of advantages, it involves several unprecedented issues due to its novel manner of conducting business. IP issues associated with e-commerce are enormous and more complicated than they are in traditional methods of doing business. Thus, legislative authorities are required to ensure that the current legal measures are suitable and sufficient, or whether further development is required. A lack of efficient regulation may inhibit e-commerce transactions and consequently the economic sector in a country. The transformation to a digital era has necessitated the expansion of the definition of property. 'Property' refers to ownership of an asset. However, the paradigm of an asset has been dramatically changed to include new types. Traditionally, 'property' referred to houses, cars, land, etc. Most of the aforementioned are characterised by being tangible. People used to value tangible assets as they can physically feel them.

However, many types of property are intangible and have value. These assets include an author's production, novel ideas, recipes, etc. As such properties are related to thoughts they are known as intellectual property. IP has been practically defined as the property created or recognised by the existing legal regimes of copyright, patent, trademark, and trade secret'.⁵ However, the technology revolution has added more sophisticated intellectual properties that are related to technology. Technology has also indirectly made it easier to infringe upon IPRs. Thus, countries, through legislation, could play significant roles in enhancing protection. An international effort has been made through treaties negotiated via such agencies as WIPO to enhance IPRs protection and facilitate e-commerce success. A recommendation by WIPO has pointed to the significant role countries can play in ensuring efficient legal protection measures and remedies against violators.

Issues of IPP in e-commerce are plenty. While some of these issues exist in the physical world, the different nature of e-commerce transactions necessitates redefinition. New forms of IPRs apply to such things as domain names. The significance of IP in e-commerce arises from the different methods used to conduct business.

3. Definitions and Significance of IP in E-commerce

'Intellectual property rights' is the umbrella phrase used to cover a wide range of assets. While they are all intangible, and therefore share certain factual and legal particularities, they also differ considerably. At a general level, it is possible to divide intellectual property rights into two categories.⁶ The first category is industrial property. This consists of, inter alia, inventions (patents), trademarks, industrial designs, and copyright (which can, for example, be embodied in literary and artistic works such as novels, poems, plays, paintings, sculptures, and architectural designs). The second category is intellectual property law. Like private international law, this is also based on the principle of territoriality, albeit with a slightly different understanding. The first examples of exclusive IPRs could be traced back to the Middle Ages when sovereigns and princes granted exclusive monopoly rights on an individual basis.⁷

'Intellectual property' is a legal term that has been associated with industrial property copyrights and other rights in similar fields.⁸ It is a process where someone creates something with their mind (for example, an invention, a literary or artistic work, a design, symbol, name, or image) and then uses the creation in commerce.

As mentioned, supra, IP requires the protection of IP law. In the realm of entrepreneurship, start-ups, and e-commerce, ideas and trademarks may constitute the essence of the business. Thus, protecting IP in this kind of business is vital. E-commerce involves several kinds of intellectual assets that, if violated, will affect the growth of the business and consequently, the local and international economy.

Lack of IP law may create an environment for unfair competition to flourish and, thus, negatively inhibit innovation. Indeed, stealing someone's work, ideas, and efforts will definitely discourage people from inventing and investing in innovation. Technical security is, therefore, necessary to deter the less proficient thief – and IP laws are required to deal with the more serious crimes.⁹ Laws should focus on protecting IP and preventing violation of IPRs.

4. Issues in E-commerce Related to IP

There are several reasons why IP and e-commerce are important to each other. **E-commerce, more than other business systems, often involves selling products and services that are based on IP and its licensing.**¹⁰ Music, pictures, photos, software, designs, training modules, systems, etc. can all be traded through e-commerce, in which case, IP is the main component of value in the transaction.¹¹ The significance of IP in e-commerce is due to the nature of selling a product online. Due to the lack of physical interaction, sellers need to describe products in detail. Such descriptions might require the use of unique photos and designs. Moreover, new products such as digital content (books, music, games, applications) might not be protected by laws specified for traditional trade. Hence, the business might be subject to unfair competition if copyrights and trademarks are not protected. In a fundamental respect, the international character of electronic commerce raises questions for the nature of traditional legal systems in general and IP law in particular. Both are based on the notions of sovereignty and territoriality. The internet, in contrast, largely ignores distinctions based on territorial borders.¹² Laws regarding these issues in various jurisdictions are mostly incompatible. Hence, opportunities are as boundless as threats. This has led to WIPO often terming the internet as 'the world's biggest copy machine'.¹³

One of the foremost considerations that any company intending to commence e-commerce activities should bear in mind is the protection of its intellectual assets.¹⁴ The internet is a boundless and unregulated medium,

and therefore, the protection of IPRs is a challenge and a growing concern amongst most e-businesses.¹⁵ While laws in SA exist that protect IPRs in the physical world, the efficacy of these laws to protect the aforementioned rights in e-commerce is unclear. Complications concerning IPRs in e-commerce can be classified into general and specific issues.

Identifying What Should be Protected:

The protection of IP in the traditional marketplace does not arise as an issue in the same way as it does in e-commerce. IP protection usually refers to protecting novelty and originality. However, the matter in question concerning e-commerce is what is considered novelty and originality. Due to the technology revolution, many intangible assets are generated that may involve areas of novelty and originality that do not take place in traditional transactions. These may include logos, designs, website design, software, etc. Therefore, it is the law's responsibility to set clear criteria for identifying what is considered novel and original in e-commerce. Accordingly, parties engaged in e-commerce will have to commit and comply with the requirements for having their intellectual property protected.

Multi-Jurisdiction:

One of the main characteristics and advantages of e-commerce is that it is unrestricted by borders. That advantage might imply compliance with regard to IPRs. Besides the issue of applicable law, there are specific issues related to e-commerce. The issues rely on the variety of protections provided to IPRs in e-commerce. Countries might have different means of protecting IPRs, depending on how they define IP. One might violate the laws intentionally or not due to unawareness or taking advantage of other laws. Hence it can be difficult to track digital and IP disputes.¹⁶ For example, a registered trademark in a country could be used by others in another country and the owner of the trademark would not be able to take action against the infringer unless there are international agreements. Similarly, an action could be considered an infringement in one country but not in another.

E-commerce entails the buying and selling of products and services from a distance. It is, therefore, becoming increasingly important to rely on the reputation attached to trademarks and other distinctive signs. Not only is the question of their protection an issue, but conflicts arise between them and internet domain names, that, though designed to serve as addresses, have acquired a further significance as business identifiers. Several addresses containing the trademark names of established companies have been registered as domain names, thus leading to disputes over their usage, as well as to allegations of what is referred to as 'cyber-squatting'.¹⁷ This practice has become so popular that it is estimated that 98% of the words in Webster's English Dictionary at present have been registered as domain names!¹⁸ WIPO last year introduced a report on the issue of trademarks and domain names, recommending practices and guidelines aimed at preventing disputes in this area. They also accept complaints and issue judgments from Geneva on the same.

The protection of IPRs requires that governments and the private sector develop and implement an appropriate mix of regulatory, contractual, and technological measures, and ensure adequate public awareness of the role of copyright and related rights in the information society. This would, on the one hand, protect local industries in global markets, and, on the other hand, promote investment and growth by providing a safe and legal environment.

Trademarks:

A trademark can be defined as a 'distinctive sign, which identifies certain goods or services as those provided by a specific person or enterprise'.¹⁹ As a law, it is described as 'a set of rules that governs the use of a device (including a word, phrase, symbol, product shape, or logo) by a manufacturer or merchant to identify its goods and to distinguish those goods from those made or sold by another'.²⁰ The latter definition indicates the role of the trademark. Consumers' buying decisions are influenced by trademarks. It is not only about the name or design, but it is also about the image associated with the trademark. Consumers might believe in specific trademarks due to the quality of associated goods, their personal experience, or the recommendation of others. This belief builds what is called consumer loyalty to a brand and it consequently affects the consumer's decision to purchase. Therefore, the violation of a trademark might negatively affect the business environment. It might have an impact on consumers' trust in the market and eventually inhibit expenditure and consumption. Moreover, it can open the door for fake products – products imitating well-known brands – to enter the market. Thus, it can be seen that lack of protection and regulation of trademarks causes serious loss to well-known companies. In addition, a country without strict laws protecting trademarks might lose the advantage of being an attractive environment for foreign investment. The violation of trademark integrity is more easily done in e-commerce than it is in physical trade transactions. Due to the lack of physical

interaction, it is difficult to examine the quality of the product, especially if the online presentation of it is of high quality. Thus, it is very important to have effective laws that protect trademarks.

Domain name:

The domain name is considered the identity of an online business. As a domain name is usually taken from the brand name, any infringement in this regard will also include violating trademark regulation. A first step in starting an online business, after deciding the brand name, is to choose and check the availability of a domain name that matches the chosen brand name. As the domain acts as an address to the business, consumers are led to the store. Therefore, it is advisable to have a domain that is simple and easy to remember. Thus, it is justifiable that it be related to the brand name.

Due to the importance of the domain name, legislative authorities have acted positively by introducing laws (either as separate laws or within a relevant category such as trademark law or e-commerce law (ECL)) to protect domain names. Such laws aim to protect domain names for companies as well as individuals. However, registration is required for protection. Therefore, an online trader should begin the registration process at the early stage of business development to ensure that it will not be taken at the launching stage. Once the domain is registered, a third party will be liable if it chooses the same or similar domain name. However, identifying similarity is another complication that should be clarified in some national laws. There are noticeable efforts by international treaties to handle such issues and to facilitate a fair environment for competition between online businesses. National laws can contribute to the enhancement of e-commerce in the country by having efficient regulations protecting domain names.

Copyright:

Copyright has been described as legal protection automatically given to original literary, dramatic, musical or artistic works, sound recordings, films, broadcasts, databases, and computer programs.²¹ Each of these types of work is protected in the realm of the internet. However, some scholars consider copyright to be property.²² The proponents of this point of view define copyright as a servant of monopoly. Moreover, they claim that it contradicts cultural concepts of community.²³ They assume that it is more beneficial to allow public use of the patent or the novel rather than restricting it to specific people. Conversely, the supporters of digital property argue that viewing copyright as a property is the essence of the problem. They add that enforcing copyright laws is a policy that does not aim to limit the benefit of utilisation but that it enhances innovation by protecting the innovator's rights.²⁴ Assuming that the benefit to the community from utilisation outweighs the benefit brought by innovation, then copyright, as a policy, does not prevent utilisation for the benefit of community. It does, however, regulate utilisation while also allowing the inventor to benefit. Copyright laws ensure that profits flow to the inventor while allowing others to utilise their IP, but not for free. This is justifiable in that measures to protect copyright prevents inventors from restricting the benefit of their innovation. This complies with the argument of Richard Epstein who provided a Lockean justification for intellectual property rights when he said '[b]efore the [copyright] monopoly should be permitted, there must be reason to believe it will do some good – for society, and not just for the monopoly holders.'²⁵

In e-commerce, innovations are accelerated. The number of unprecedented products is enormous. Some of these products exist physically while others are intangible. Some of these innovations (for example, applications used for providing government or bank services) have made life easier and provided great benefit to societies. Although inventors have benefitted, society might have benefitted more. Thus, it is a win-win situation. To promote innovation through the protection of the inventor's remuneration, society also gains. This can be enabled by instituting an efficient copyright policy. However, in e-commerce, the policy has to contend with the nature of the internet. The internet has made the infringement of copyright easier than in traditional transactions. Thus, international organisations and governments have introduced and developed measures for protecting copyright and intellectual property in general, whether it is in traditional transactions or e-commerce.

5. Current Measures Protecting IP in Saudi Arabia and their Suitability for E-commerce

Saudi Arabia, in an effort to achieve the Vision 2030 goals, is focusing on providing an attractive market for foreign investment and fostering international trade. It has been recognised that strengthened IP protection will have a significant impact on successfully achieving such goals. Therefore, the Saudi government has announced the establishment of the Saudi Authority of Intellectual Property (SAIP). The SAIP aims to organise, support, protect, and promote intellectual property. It is specifically concerned with improving IP strategies, regulations, and legislation. Additionally, it aims to raise the customer's level of focus as well as the attractiveness and quality of products and services – thus contributing to the empowerment and

exploitation of IPRs, as well as the promotion of respect for the same. Moreover, the SAIP is responsible for enforcing IPRs. However, one might wonder what the situation was before the existence of SAIP.

Several laws are directly or indirectly related to IP protection in Saudi Arabia. Some of these laws have been developed to coordinate with international measures and treaties. They could be primarily related to patent law, copyright law, commercial names law, electronic transaction law, or e-commerce law (ECL) but these laws all insist on the importance of protecting IPRs. For example, the first article of the Trademarks Law states, 'trademarks shall be names of distinct shapes, signatures, words, letters, numbers, drawings, symbols, stamps, and protruding inscriptions or any other sign or combination thereof which can be recognised by sight and suitable to distinguish industrial, commercial, vocational, or agricultural products, or a project to exploit forests or natural resources or to indicate that the object upon which the trademark is put belongs to the owner of the trademark on grounds of manufacture, selection, invention thereof or trading therewith or to indicate the rendering of a certain service'.²⁶ Notably, the developed law involves non-traditional IP such as smell and touch once they satisfy trademark requirements. Moreover, the Trademarks Law has restricted the beneficence of the registered trademark by any unauthorised third party. This is clearly stated in article 21: 'A person who has registered a trademark shall become its exclusive owner, and the use of a registered trademark by any person is subject to the consent of its owner. The owner of a registered trademark shall have the right to file a lawsuit to prevent others from using it or from using any other sign similar to it and liable to mislead the public as to the products or services for which the trademark is registered and as to similar products or services. The rights resulting from registration of the trademark do not include the fair use of the signs, statements, and descriptive drawings which do not include the special characteristic of the registered trademark'.²⁷ Similarly, ECL has outlawed the use of any trademark by an online trader unless they either own or have permission to use it. Commercial names law also penalises the use of names that are misleading or could be confused with other registered names. Furthermore, it prevents other traders from registering a name that has already been registered. All the aforementioned laws have imposed punishment to be enforced in the case of violation. However, in the realm of e-commerce, the situation may require more attention. Due to the increased use of the internet and social media in SA, and the prodigious use of e-commerce, greater numbers of vulnerable people might be targeted by misleading advertising. Moreover, the attractiveness of the medium as a business tool might attract inexperienced people to practice e-commerce. Many characteristics make e-commerce different. For example, transactions are concluded in a few minutes; consumers face a huge amount of information and advertising; consumers are more reachable than they are by traditional trade, and it is easier to violate copyright using developed software. Thus, it is necessary to add more detail and clarification to existing laws to ensure they are sufficient to prevent the violation of IP, as well as to prevent intentional and unintentional misuse of IP. This could be achieved by conforming with international organisations (such as WIPO) recommending IPRs protections. Although SA is currently taking steps to apply these recommendations, there is room for further improvement.

WIPO is an arm of the UN that aims to 'to lead the development of a balanced and effective intellectual property (IP) system that enables innovation and creativity for the benefit of all'.²⁸ WIPO, as an international organisation, was founded to help provide suitable measures for protecting IP globally. The kinds of IP to be protected range from traditional to non-traditional forms. It includes industrial property and copyrighted materials. More than 20 IP treaties are managed by WIPO. Some of the major agreements under WIPO treaties relate to trademarks and patents. Later, cooperation with the World Trade Organization expanded the scope of IP protection. Through its engagement in the resolution of domain name disputes, WIPO has shown that it has not neglected the gradual increase of e-commerce due to the technology revolution. Within the development agenda of the WIPO, attention is given to IP issues related to Information and Communication Technology (ICT), specifically focusing on its role in fostering economic and cultural development.²⁹

Saudi Arabia has been a member of WIPO since 1982. Thus, like other developed countries, SA has benefitted from the efforts of WIPO and the recommendations resulting from many WIPO administered treaties. For example, SA is a member of the Patent Law Treaty and the Patent Cooperation Treaty. Being part of such an organisation ensures that current measures remain current with international measures. Therefore, it is satisfying to say that protecting IPRs in e-commerce in Saudi Arabia will not be behind.

6. Conclusions and Recommendations

Nowadays, e-commerce plays a significant role in supporting a country's economy. Therefore, facilitating and paving the way for its development is vital, especially in developing countries such as SA. Within the Vision 2030 framework, the SA government is encouraging entrepreneurship, attracting foreign direct

investment, and diversifying income resources. To achieve these goals, developing relevant legislation as a part of the business ecosystem will be important. One of the legal areas that fundamentally impacts the conduct and improvement of business is the lack or inefficiency of laws protecting IPRs.

The review of current IPR protection measures in SA reveals that IPRs have been given a satisfying amount of attention by the government. Several developed laws protect IPRs directly and indirectly. Moreover, these laws are applicable and sufficient to protect IPRs in e-commerce. However, more clarification might be required due to the different modes of business within e-commerce. Specifically, more detail could be provided regarding what is considered a violation of IP for new products generated by the technology revolution. It would also be helpful if further clarification was provided concerning the types of alterations to trademarks that are considered violations. Although SA is a member of WIPO, it seems that this need for clarification is common even within developed countries that are members of the aforementioned organisations. So, it is not just a parochial issue. However, recommendations could be given for improving the efficiency of existing laws and preventing IP infringement. This could also be done by increasing the awareness of traders and consumers in the following ways:

- Increase traders' awareness of the importance of hiring or consulting lawyers who specialise in IP.
- Increase the awareness of young businesses and entrepreneurs regarding the importance of protecting trademarks and the negative impacts of violation.
- Increase traders' awareness of the importance of trademark registration.
- Increase traders' awareness of what constitutes a violation of IPRs.
- Increase the awareness of consumers concerning the negative impacts of buying imitation products.

Such efforts should be part of the SAIP's agenda for promoting, supporting, and providing efficient protection of IPRs in the country; applicable to both traditional trade and e-commerce.

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