



## INTELLECTUAL PROPERTY RIGHTS- A LONG WAY TO GO

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### WHY ARE IPR PROVISIONS NECESSARY?

Intellectual property includes artistic, scientific, technical or literary creation. Intellectual property rights are rights associated with these creations and are provided to the inventor or creator, for his invention or creation, but for a certain period of time.<sup>1</sup> IPR associated with a property, provides the owner with exclusive rights which enable them to use that property for commercial benefits. These kinds of property play an important role in development of Indian economy.

For enhancing innovations, it is necessary to give importance to the intellectual labour associated with it. With increase in competitions, there has been considerable increase in the costs of research and development to bring out new innovation or creations. Subsequently there has also been a rise in the investments to come up with new technologies.<sup>2</sup> With the increase in stakes there is also increase in risks associated with it. Major risks include theft of such property. Thus there is need to protect these properties, and the resources used for their creation and lastly the time, money and energy of the investor through stringent legislations. The Intellectual property rights, through various

acts protect these properties and promote healthy competition, encourage industrial development and thus help in economic advancement.<sup>3</sup> But with the advancement of time they also need reform, because people intending to abuse those exclusive rights come up with new methods, and the existing laws might fail to protect them.

This paper is an attempt to explore the reasons behind the infringement of intellectual property by understanding the rights and the loopholes that might be present especially in the acts for patent, Copyright Trademarks and geographical Indication. Further some suggestions to improve the conditions of the IP in India are also stated.

### TYPES OF IPR

#### ➤ Patent

A patent is a contract between the inventor of the intellectual property and the state. The state provides monopoly to the inventor, but only for a certain period of time, in exchange of which the inventor agrees to provide the information related to the invention which can be used for public good. Patenting inventions ensures that the patent is in good hands at the same time it can be used for public good. Giving this exclusive right to the inventor promotes technological and scientific inventions that can be used for the public good.

When the government realised the need for protecting the inventions, the patent act of 1970 was made. The objective of this act was

<sup>1</sup> Raghbir Singh, 1 Law relating to intellectual property: a complete comprehensive material on intellectual property covering acts, rules, conventions, treaties, agreements, digest of cases and much more ... (2004)

<sup>2</sup>. Anonymous. Research and development statistics. New Delhi: Department of Science and Technology (DST), Government of India; 2002

<sup>3</sup> S Saha & S Bhattacharya, *Intellectual property rights: An overview and implications in pharmaceutical industry*, Journal of Advanced Pharmaceutical Technology and Research 88-93 (2011), <https://www.ncbi.nlm.nih.gov/pubmed/2217129>



to encourage scientific research and development, help in developing new technology and progression of industries. This act mandates the inventor to pay the price for the monopoly, in exchange of the disclosure of information related to the invention at the patent office, for a fixed period of time, which according to the s. 53 of patent act 1970 is 20 years, after which it passes in public domain. The fundamental principle behind this act is encouraging the inventions which have novelty and utility. The patent is granted to the inventor only when the invention is the inventor's own innovation and not just mere conferment or verification of the already existing notion which was known. The invention, in order to be eligible to have a patent, can be an improvement of something known before, or a combination of different matters already known before the date of patent, but it should be more than a mere workshop improvement and it should satisfy the condition of being an invention. Further the invention should result in a new product, or a better version of an already existing product, or a cheaper version of an already existing product. If this product does not include any inventive quality, it becomes ineligible for a patent.

Infringement of patent can happen when someone uses the invented product for the which it was not authorized. This use can include selling, offering to sell, manufacturing; importing or using in a way which was not allowed by the owner. Proceeding against this kind of infringement can only be initiated when the patent of the infringed product has been granted in India, but may include a claim retrospectively from the date of application for the grant of the infringed product. Under the patents act, only

a civil action can be initiated. The guidelines relating to the infringement of patents is provided in Section 104 to 114 of Indian patents act 1970.

#### ➤ Trademark

With the globalization and privatisation, the value of brand names or trademarks, through which the organization maintains its uniqueness, has attained immense importance. TRIPS has recognized this importance and has thus framed certain standards of protection of these brand names or trademarks and guidelines to ensure their enforcement. India, keeping in stride with the global standards, framed Trademarks act 1999 which confirms with TRIPS, a modification of the earlier law Indian Trade and Merchandise Marks Act, 1958.<sup>4</sup>

The Trade Marks Act provides, inter alia, for registration of service marks, filing of multiclass applications, increasing the term of registration of a trademark to ten years as well as recognition of the concept of well-known marks, etc.<sup>5</sup>

Infringement of a trademark of a product or service mark of a service, is violation of the exclusive rights that are given to the registered owner of that trademark or service mark. This violation occurs when somebody other than a registered owner, uses an identical or similar mark without the authorisation of the registered owner or proprietor. This law protects the right of someone who has used the trademark or service mark identical or similar to the one registered, before it was registered.

Passing off is a common law tort used to enforce unregistered trademark rights. Passing off mostly occurs where the reputation in the trademark of party A is



misappropriated by party B, such that party B misrepresents as being the owner of the trademark or having some affiliation/nexus with party A, thereby damaging the goodwill of party A. For bringing an action of passing off, registration of a trademark is irrelevant. Court reliefs granted in a suit for infringement or passing off include permanent and interim injunction, damages or account of profits, delivery of the infringing goods for destruction and cost of the legal proceedings.

### ➤ Copyright

Copyright protects the literary or artistic work of a composer. The law made for the same gives exclusive rights to the creator, which allow the creator to reap financial benefits from exercising such rights of reproduction or any other use allowed under the act. Infringement of copyright would happen when a person other than the creator of the work uses the work, with any authorization or license from the creator. Copyright, like patent is also granted for a specific time period. If any other person makes use of the copyrighted work after expiration of such period, then it won't come under infringement. The exclusive rights would vary with the nature of the work. The type of the acts which would constitute infringement would also depend upon the nature of the work. Section 51 of the Copyright act of 1957 defines infringement of the copyright. Section 52 provides for acts which do not constitute infringement. These

are the exceptions of the exclusive rights provided to the owner. The exclusive right provided to the owner includes the translation of the work or a substantial part of the work. Thus infringement of copyright will also include using a substantial part of the work. Substantial part would vary case to case.

Copyright is a proprietary right and its infringement is actionable without proof of damage or likelihood of damage. If thus, infringement is established there is no need to consider whether the defendant's work is likely to compete with the plaintiffs' work, it becomes apparent. Given below are the loopholes which are the reasons for copyright infringement.

### ➤ Geographical indication

Protection of GI has been one of most contentious issues of IPR in the realm of TRIPS. TRIPS define geographical Indication (GI) as indication which would identify a product as originating from a place, and where certain quality, reputation or any other characteristic of the product are attributable to that place. GI gives exclusive rights to a region to use its name for a product, which has certain characteristics that corresponds with the region. Section 1(3) (e) of the GI act <sup>6</sup> has clarified that any name which is proposed to be used as the name of the GI but it is not the name of a country town or origin can also be considered as GI if it relates to a specific geographical area and is used in relation to particular goods of that that

<sup>6</sup> "Geographical indication", in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable

to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.



country, region or locality, as the case may be. This provision enables the providing protection to symbols other than geographical names, such as ‘Basmati’.

India, keeping in strides with the global standards made, Geographical Indications of Goods (Registration and Protection) Act, 1999 and Geographical Indications of Goods (Registration and Protection) Rules, 2002 (GI Rules) to protect the GI's in India. If a product is registered under the act as GI, protection in terms of Infringement is granted.<sup>7</sup>

GI has gained enormous significance because of its increased commercial potential. Therefore it has become necessary to have legal protection for GI. Without it the competitors not having any legitimate rights might use its reputation for their own personal benefits. Then this would result in loss of revenue of for the legitimate holders of the GI. Moreover, such practices may eventually hamper the goodwill and reputation associated with the GI.

Unlike TRIPS<sup>8</sup>, in the GI Act does not restrict itself to wines and spirits<sup>9</sup>. It has left the discretion to the central government to decide which products should be granted higher level of protection. This is an attempt to provide stringent protection to GI, similar to the one guaranteed under TRIPS.

#### WHERE DO WE LACK?

<sup>7</sup> The Geographical Indications of Goods (Registration and Protection) Act, 1999 – Section 22

<sup>8</sup> TRIPS AGREEMENT – Article 23

<sup>9</sup> The Geographical Indications of Goods (Registration and protection) Act, 1999 – Section 2 (e)

<sup>10</sup> Rajiv Choudhary, Recognizing (patent) flaws and dealing with them SpicyIP (2016), [https://spicyip.com/2016/08/recognizing-patent-](https://spicyip.com/2016/08/recognizing-patent-flaws-and-dealing-with-them.html)

#### ➤ Patent law

The law seems to work fine on the paper. But when it comes to practical implication there are many shortcomings which might be the reason for increasing patent infringement cases in India. Between 2005 and 2014, 143 patent infringement cases were filed in different high courts across the country.<sup>10</sup> In the amended patent law of 2005, section 107 A(b) of the Indian patent act allows local companies to import drugs, which are a copy of the generic drugs of the less developed nations such as Bangladesh and several African Nations, without the authorization of the patent holder. Earlier this authorization was mandatory. This new provision may not be in compliance with the WTO guidelines. But a simple reading of this section would suggest that a pharmaceutical company of India could set up its subsidiary in these nations and then export patented drugs to India. This might also violated the exclusive right to import under the Trade related aspects of Intellectual property rights or TRIPS.<sup>11</sup> Apart from this problems arise in the filing of the patents, which can act as discouragement for inventors and might refrain from patenting the product. For instance – A period of protection of patent is upto 20 years, but the filing may take upto 3-4 years. Further the costs of the patent might range from 10000 to 100000, if the person is lucky enough to have not forced to give bribes. This

flaws-and-dealing-with-them.html (last visited Apr 14, 2020)

<sup>11</sup> C H Unnikrishnan, *Cos rush to exploit patent law loophole*, livemint, April 25, 2008, <https://www.livemint.com/Home-Page/XWUnnH2frhbjN1I2jIwIfM/Cos-rush-to-exploit-patent-law-loophole.html> (last visited Apr 14, 2020)



might encourage the inventor to go around the system, instead of following it.

The major problem arises when the patent law is implemented. Because there is lack of scrutiny, low quality patents are granted. A study published in 2018, has mentioned that 2293 patents are granted between 2009 and 2016. Most of them are granted to products that are marginal improvements drugs whose patents already existed. A study published by Azim Premji University, found out that the only 15 percent of the patents were subject to strict scrutiny.<sup>12</sup>

India acts as a pharmacy to most of the developing countries by providing medicines at the time of crisis. Our priority is to make sure that people have medicines when needed. But the administration is not aligned with such generous objectives. Pharmaceutical companies invest millions into research and development, but are unable to receive full patent protection like Stockpiling, compulsory Licensing etc. Thus these companies, under the pressure of maximizing profits, maintain the monopoly. Although this is allowed under international agreement such as TRIPS and Indian patent laws, but when this looked from humanitarian aspect is completely wrong. Thus there is a need for compensating the pharmaceutical companies for their investments made to come up with beneficial innovations. Otherwise the objective of the patent act, that is encourage innovation would not be successfully achieved.<sup>13</sup>

<sup>12</sup> Joe C Mathews, *Who should fear India's patent law?*, Business Today, February 22, 2020, <https://www.businesstoday.in/current/economy-politics/who-should-fear-india-patent-law-intellectual-property-right/story/396709.html> (last visited Apr 14, 2020)

### ➤ Trademark law

Trademark law is also not devoid of imperfections. There are many provisions in the trademarks act which when implemented without any malicious intent of any person, are beneficial to public interest. For Instance section 134 of the trademark act, confer jurisdiction in the case of infringement upon district court.<sup>14</sup> But the plaintiff can only institute the suit from where he resides. This section is inserted in addition to the general provision of CPC. This can be grossly misused by the multinational corporation against and individual or a smaller unit who operates only from India.

Further the statute does not have any provision for awarding cost of damages. Although the courts have been following a high court judgement of Hero Honda Motors Ltd. v. Shree Assuramji Scooters<sup>15</sup> to award damages, but is put little restraints on the infringers. Same is in the case of 'Passing off', as copying well known marks are a big phenomenon in India.

Further, the ex parte orders are also causing a menace in the industry of trademarks, as these orders are passed without a sufficient cause or reason. Mostly courts pass ex parte temporary injunctions orders, which more than often hurt the business against which it is issued. This is mostly the case for small business holders, as there business find it hard to revive once they are shut down after the court's order. Further once a temporary injunction is issued, and the business does not

<sup>13</sup> Daureeawo, Raheel. (2009). Controversy of Section 3(D) of the Indian Patent Act

<sup>14</sup> Trademarks Act 1999

<sup>15</sup> 125 (2005) DLT 504



revive then the business owners find it hard to fight off the injunctions.

### ➤ Copyright Act

Fair dealing is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work. It permits reproduction or use of copyrighted work in a manner, which, but for the exception carved out would have amounted to infringement of copyright. It has thus been kept out of the mischief of copyright law.<sup>16</sup> The defence of "fair dealing" was initially originated as a doctrine of equity which allows the use of certain copyrightable works, which would otherwise have been prohibited and would have amounted to infringement of copyright. The main idea behind this doctrine is to prevent the stagnation of the growth of creativity for whose progress the law has been designed.

The laws relating to fair dealing have been incorporated in Section 52 of The Copyrights Act, 1957. As the Indian Copyright Act does not defines the term "fair dealing", the courts have on various occasions referred to the authority English case Hubbard v Vosper<sup>17</sup> on the subject matter. The words of Lord Denning in this case lay down a much descriptive outline of fair dealing-

"It is impossible to define what is "fair dealing". It must be a question of degree. You must first consider the number and extent of the quotations and extracts.... then you must consider the use made of them....Next, you must consider the proportions...other considerations may come into mind also. But, after all is said and done, it is a matter of impression."

<sup>16</sup> Sk Dutt v.Law Book Co.& Ors. AIR 1954 ALL 750

Undoubtedly, "fair dealing" is a necessary doctrine, not only in the Copyright laws but also in strengthening the protection given to the citizens under Article 19 of the Constitution of India. But the Indian law related to fair dealing is very limited and confined as compared to the US fair dealing laws which is more elaborate and keeps a flexible approach. Perhaps, the Indian legislators wanted more certainty in the provisions that is the reason behind the conservative approach which reflects in Section 52 of The Indian Copyright Act.

### ➤ GI Law

India, a home to social, cultural, ethnic diversities, has thousands of products that can qualify for the tag of GI. But most of the times, the products that are unique to these diversities are made in households or small production units. So it becomes difficult to recognize these products. Also most of the producers are uneducated and thus don't know the importance of getting GI for these products. Further If an Indian Product is given GI tag, infringement of that would only be punishable if the infringement is in India, if the infringement is outside India then the petition would have to file out of India, in the country where infringement has taken place. To prevent that problem from happening again, GI has to filed in that country also.

### WHAT CAN WE LEARN?

#### ➤ Strong Administration

As mentioned above, IPR provisions fail when they are implicated. Mostly, because administrative functioning in India is not strong enough to cater to such large population. Therefore crimes like 'passing off' happens. To curb these, foremost need is to strengthen the scrutiny procedures at the

<sup>17</sup> (1972) 1 All ER 1023 p. 1027.



level of administration. This would also avoid the accidental infringement of patents, as before the patents are filed there would be strict cross checking to see if the similar patents exist or not.

#### ➤ **Practical Implication of Laws**

Further, there are some provisions which are not practical at the ground level because of malicious intent of one party. The focus should also be on eliminating this factor. Sections like 134 of the trademarks act 1999 should be amended the affected person should be allowed to institute the suit where the cause of action has arisen rather than, from his place of residence. Similarly, the provision of 'proposed to be used' registration should also be amended. The objective behind the trademark law is to protect the person who uses such trademark which is identified by the good and services. Existence of such provision might result in fraudulent registering of trademarks, with ulterior motive of selling them to reap commercial benefits. If the administration is strong, there are chances that these problems are eliminated.

The abuse of IPR can also be prevented through competition law, as fundamental objective of the competition law is to protect the integrity of the markets by promoting healthy competitions. But the competition law should be inconsistent with the TRIPS agreement.<sup>18</sup>

#### ➤ **Managing Costs**

The cost for registering a patent, trademark, or especially GI which includes cost of application, cost of running the system and

cost of compliance apart from whatever was invested in the research and development of the product, are very high which is not possible for the some of the economically backwards creators to bear. Thus, among other schemes by the government there needs to be such schemes which encourage creators to come up with innovations. Through these kinds of schemes government can bear some, if not all, of the financial burden.

#### ➤ **Strict Scrutiny**

Strict scrutiny should be maintained in terms of GI protection, where the persons register The GI in its own country and the data is uploaded on the WTO website. This should be alternate to registering in every country. This would allow the non-infringement of GI in other countries as well.

To avoid copyright infringement, the registrar and the owner should prepare a notice which shall state that the work is protected under law. In that notice the date of registration should be mentioned. Along with it, the evidence of progression should also be made, such as rough sketches, recordings etc. This is normally done to protect the works of larger artists. But it should also be extended to smaller artists as well. The company should keep strict scrutiny to ensure that the artists has compulsorily maintained this.

#### ➤ **Promoting Research and Development**

Funded institutions should be established to promote research in unexplored areas. This would ensure maximum IP capture. The results of these institutions should be allowed to commercialize and the innovators be allowed to reap benefit from them along with

<sup>18</sup> Amiti Sen, *Competition law could be an effective tool to check IP abuse*, Hindu Business line, June 8, 2018, <https://www.thehindubusinessline.com/news/world/c>

[competition-law-could-be-an-effective-tool-to-check-ip-abuse/article24116625.ece](https://www.thehindubusinessline.com/news/world/c/competition-law-could-be-an-effective-tool-to-check-ip-abuse/article24116625.ece) (last visited Apr 14, 2020)



the delineation with the name and ownership. Through this a network of innovators should be established to share experience.

### CONCLUSION

The importance of IPR has been acknowledged over and over again. They are important for progression of every sector. India, with the advancement of time also acknowledged the fact, and became signatory to various international conventions and treaties. This has helped country to become attuned to world approaches and change its attitude towards IP protection. India through various IP laws has complied with the TRIPS regulations and guidelines. On lower level also, India has taken steps to protect IP rights. Many IP cells has been established, with special trained police officers keep in check IP infringements.<sup>19</sup> Indian music industry, a group of music companies headed by a retired police officer also became more proactive in battling music piracy. Still there is a long way to go. Not having proper fund for research and development, limited to access to resources, hoarding of resources by larger private players, theft of intellectual property, etc. acts as a demotivating factor to the innovators or creators. Thus there is a need of getting rid of these problems to promote more innovations or creations. Start could be done by taking small steps instead of large decisions, such as a new policy or large funds. Smaller steps such as appointing more people to take care of IP filing, more people to check the proofs and previous records, can be taken. Stringent rules should be made to see that the funds that are allocated for the development of intellectual property are only used for that

purpose only. People should be made aware about their IP rights and should be encouraged to not keep their ideas in the bud, but to let it grow. Because every innovation was idea at first.

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<sup>19</sup> FICCI, National Intellectual Property Rights Policy (Industry Concerns and Suggestions), (2014)