



LEGAL REGIME AND CONCERN IN INTELLECTUAL PROPERTY RIGHTS: A CRITICAL ANALYSIS

By Disha Singh
Designation: Advocate
LLM
From CT University

ABSTRACT

Intellectual Property Rights may be called as an institution to safeguard the crucial part of capital and the valuation of the man's hard work for creation of certain objects which is the subject matter of intellectual property. The Intellectual property has two main features, viz. exclusionary rights and the second physical passion is not possible over such rights. No word can be confined or limited to definition, particularly in a world politically divided by states responsible to the interest of the people within their boundaries. The purpose of this Research paper is to study Intellectual Property rights with a special reference to copyrights and moral rights. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an integral part of the World Trade Organization (WTO) agreement binding on all member countries. The object of this work is to determine the meaning of intellectual property rights, to examine the concept of intellectual property and to point out the justification of such rights. To examine Intellectual Property Rights in global perspective and a specific right, viz. copyright protection in Indian perspective. To deal with the related concepts of copyright to observe the scope of moral rights and also to evaluate the judicial trend relating to

copyright. The research methodology of the proposed work will be based on available resources and relevant study material. The source material for the present inquiry are the important constitutional decisions in India and abroad besides. valuable work of distinguished writers, jurists and judges are consulted.

Keywords: *Intellectual Property Rights Legal regime and concern in IPR, Global perspective.*

1. INTRODUCTION

Intellectual Property Rights may be called as an institution to safeguard the crucial part of capital and the valuation of the man's hard work for creation of certain objects which is the subject matter of intellectual property. The Intellectual property has two main features, viz. exclusionary rights and the second physical passion is not possible over such rights. No word can be confined or limited to definition, particularly in a world politically divided by states responsible to the interest of the people within their boundaries. Every country desires to protect some such thing as intellectual property which other countries may not accept as validly falling in the realms of Intellectual Property. For example, sound trademarks prevalent in USA are not recognized as trade marks in India.¹

Intellectual property (IP) rights are the rights awarded by society to individuals or organizations principally over creative works: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. They give the creator the right to prevent others from making unauthorized use of their property for a

INDIA" (ed. 2006) at p.7.

¹ A.K. Bansal, "LAW OF TRADE MARKS IN



limited period. IP is categorized as Industrial Property (functional commercial innovations), and Artistic and Literary Property (cultural creations). Current technological developments are blurring, to some extent, this distinction, and some hybrid sui generis systems are emerging.²

Control over property rules is foundational to the sovereignty of a state and its people. Property is perhaps the most fundamental instrument which a state can use to plan its own development. By changing definitions of property, creating new rights of property and limiting rights of property the state can decide who owns resources, who can exploit resources, who benefits and who loses.³

To encourage their invention, copyright and patent laws were developed. These laws are geared towards getting mental creations into the world where they could be used and could enter the minds of others while assuring their inventors compensation for the value of their use.

Intellectual Property Rights are essentially based on a balance between two sources of value. Public welfare is furthered when new knowledge is disseminated and widely used, both in production of goods and in production of further knowledge. Private incentives to innovate are high when the inventor is able to reap the rewards from his efforts. On the one hand the inventor is granted a temporary monopoly over an invention and its derivative applications, thereby gaining

protection from unauthorized exploitation of his technical knowhow and a strong incentive to innovate. On the other hand, if technical knowledge were disclosed for public use, its accessibility would stimulate the generation of known how and the transfer of technical know—how throughout the economy. Accordingly, Intellectual Property Right legislation aims to optimize social welfare and to strike a balance between monopoly and disclosure."⁴

Knowledge is much more than intellectual property. Knowledge is embodied in people, in institutions and in new technologies in ways that have long been seen as a major engine of economic growth. Alfred Marshall, the "father" of modern economics, thought so in the 19th Century. With recent scientific and technical advances, particularly in biotechnology and information and communications technologies (ICTs), knowledge has become to an even greater degree than before the principal source of competitive advantage for both companies and countries. Trade in high technology goods and services which are knowledge-intensive, and where IP protection is most common, tends to be among the fastest-growing in international trade.

2. INTELLECTUAL PROPERTY RIGHTS AND GLOBAL CONSCIOUSNESS

Intellectual property rights have never assumed such importance as today.

² R.A. Mashelkar, Director General, CSIR, in his preface to the book, INTELLECTUAL PROPERTY RIGHTS: UNLEASHING THE KNOWLEDGE ECONOMY BY PRABUDDHA GANGULY (2001).

³ Thinking strategically about intellectual property rights; Peter Drahos; TELECOMMUNICATIONS POLIO., VOL. 21, NO.3, PP 201 211, 1997 ((-) 1997

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⁴ L Robbin Cowan and elad Harrison " JPR IN A KNOWLEDGE BASED ECONOMY (SEPT. 2001) QUOTED BY CHAKRA IN HIS TREATISE INDIA" f .n. at p. 17.



Intellectual property is basis of present information economy and can be said to be a powerful tool for economic development. Intellectual property rights are exclusive in nature, with potential for monopolistic power, subject to the nature of the right and its duration and to the availability of alternative products. Monopoly power enables a right owner to dictate numbers produced, the product's price and means of supply, as well as controlling after sales services and investment in continued development.⁵

Before narrating the jurisprudential justification of intellectual property rights, it becomes necessary to discuss the origin and development of intellectual property law especially law relating to copy right at international and national level.

Copyright was not invented until after the advent of the printing press and wider public literacy, in England the King was concerned by the unfair copying of books and used the royal prerogative to pass the Licensing Act, 1662 which established a register of licensed books and required a copy to be deposited with the Stationer Company. The Statute of Anne was the first real act of copyright, and gave the author rights for a fixed period. Internationally, the Berne Convention in the late 1800's set out the scope of copyright protection and is still in force to this day. Design rights started in England in 1787 with the Designing & Printing of Lines Act and have expanded from there.

The term Intellectual Property appears to have originated in Europe during the 19th century. French author A. Nion mentions

"propriete intellectuelle" in his "Droits civils des auteurs, artistes et inventeurs," published in 1846 and there may well have been earlier uses of the term. During the period in question, there were some controversy over the nature of copyright and patent protections in Europe; those who supported unlimited copyrights frequently used the term property to advance that agenda, while others who supported a more limited system sometimes used the term intellectual rights ("droits intellectuels"). In 1847, a U.S. circuit court defined intellectual property as "the labour of the mind, productions and interests as much a man's own as the wheat he cultivates."⁶ General Agreement on Tariffs and Trade (GATT) Intellectual Property Rights agreement originated after World War II (1939-45). The Agreement was originally a part of a draft charter for an International Trade Organisation (ITO), the third leg of the Bretton-Woods post-war order along with the IMT and the World Bank.

The TRIPS Agreement which is binding on all WTO members entered into force on January 1, 1995. The Agreement is based on negotiation held during the Uruguay Round of multilateral trade negotiations on aspects of intellectual property rights which impacted an international trade. The TRIPs at present, covers nine categories of intellectual property.

They are: Copyright, Trade Marks, Trade secrets, Designs, Patents, etc. In order to understand the function of WTO, the four fundamental principles are of immense importance. They are (i) non-discrimination, (ii) reciprocity, (iii) market access, and (iv) fair competition. All States which subscribe

⁵ CATHERINE COLSTON, "PRINCIPLES OF INTELLECTUAL PROPERTY LAW (ed. 1999, p. 15).

⁶ WOODBURY & MINOT, REP. CASES CIRCUIT COURT OF U.S., 156.



to the WTO become bound to a mutual recognition of intellectual property rights at a high level of protection, in various respects going beyond the range of international obligation achieved in the Conventions mentioned in the previous paragraph. Thus, the GATT was replaced by WTO in 1995 and 145 countries have become the members of it as of today, India was a founder member of GATT/WTO and party of TRIPs Agreement.

3. COPYRIGHT PROTECTION IN INDIAN PERSPECTIVE

Judges and Jurists often speak of copyright as a kind of "negative right", which is both inaccurate and misleading. It bears reiteration that the set of rights subsumed under the rubric "copyright is primarily defined in affirmative and positive sense; copyright constitutes property rights in personam and in rem, violation of which can be redressed under the provisions of the Act.

In *Devendra Somabhai Naik vs Accurate Transheat Pvt, Ltd.*⁷ The Gujarat High Court examined whether an application can be filed before the copyright board to cancel the registration of copyright of an artistic work on the ground that as per Section 15(2) of the act the artistic design has been reproduced as an industrial design more than 50 times. The Court held that the intention of the legislature to avoid dual protection for the same category of intellectual property.⁸ Copyright can subsist only in specified categories of works. Section 13 of the Indian Copyright Act 1957 enumerates the categories of work eligible for protection. According all original literary, dramatic, musical and artistic works; cinematographic-

films and sound recording are eligible for protection under the Act. There is no need for the registration of the work to enjoy the protection under the Act. However, in the case of a cinematograph film and a sound recording, such protection is not available if a substantial part of it is an infringement of copyright in any other work." This limitation has been placed to safeguard the rights of authors in individual works from being appropriated and exploited illegitimately. Further the Section states that the copyright in a cinematograph film or a record shall not affect the separate copyright in any individual work; respect of which or a substantial part of a which film or sound record is made⁹. This enables the author of individual works, i.e., literary, dramatic artistic and musical work to realise his rights in the work as he chooses. His control over the work is not automatically lost with the incorporation of his work into a film or a record. In *Benier vs News Group Newspaper Ltd.*¹⁰ the court confirmed that the practice of newspapers of copying a photograph from another newspaper with the intention of obtaining a license retrospectively was clearly unlawful. Nor could such use of a photograph be considered to be fair dealing for criticism or review, such a photograph being described as totally unreal. In *Indian Express Newspaper (Bombay) Pvt. Ltd. vs Jagmohan*¹¹, the Bombay High Court has emphatically stated that there is no copyright for happenings and events which could be news stories, and reporter cannot claim and copyright over such events because he has reported it for the first time.

⁷ (2005)31PTC172(Guj.).

⁸ "INTELLECTUALPROPERTYRIGHTS"(ed.2008, pp. 133.135).

⁹ See COPYRIGHT ACT 1957, SECTION 3 (4).

¹⁰ (1997) FSR 812.

¹¹ AIR 1985 Bom 229.



4. JUDICIAL TRENDS

The concept and various dimensions of Intellectual Property Rights with reference to Judicial trend have been examined and also highlighted the judicial approach towards various aspects of Intellectual Property Rights.

The *Delhi High Court in Gramophone Company of India Ltd. vs Super Cassette Industries Ltd.*¹² held that need for fixation of the musical work by either writing or graphical production for protection under the Act. Since the parties have not claimed specifically that the musical work has been printed, reduced to writing or otherwise graphically produced or reproduced, the court came to the conclusion that the record made by the parties cannot be claimed to be a musical work.¹³ Based on this observation the court refused to prevent the defendant from producing the version records.

The issue of protection of idea/concept was considered by the Delhi High Court in *Anil Gupta vs Kuna Disrupt*¹⁴ It the basis of the judgment is that the plaintiff has a copyright on the concept the duration of the copyright is life of the author and 60 years. It the basis is on confidential information the plaintiff has the right to decide when the information has to be brought to the public domain. He can keep it as secret as long as he wishes and no one can compel him to be the reason for the wrong interpretation of the law and its application in the present case. The judgment is per incuriam¹⁵.

It has been rightly submitted that the analysis

¹² 1995 PTR 64.

¹³ THE NEW DEFINITION OMITTED THE WORD PRINTED, REDUCED TO WRITING OR OTHERWISE GRAPHIHIALLY PRODUCED OR

of cases indicate the continuous effort of the judiciary to grapple with the problems that crop up in the process of interaction between the existing statute law and new socio economic development that takes place in the country.

5. COPYRIGHT AND ENTERTAIN MEDIA

In American most of the States have recognized the right of celebrities and other persons not to have their name like or increasingly identity used for commercial purpose without their consent. The American right of publicity in expanding and there is a conflict increasing in a particular direction i.e. visual arts which includes visual media, television, film, photography and portrait.

A few years earlier, in 1977, in the case of *Indian Performing Rights Society vs Eastern India Motion Pictures*,¹⁶ the Supreme Court held that the producers copyright in a cinematograph film extended to the music incorporated in its sound track, though not to the music when used separately. The amending Act of 1994 introduced a performer's right into the Copyright Act, 1957 (sections 38,39 and 39A) broadly on the lines required by the TRIPS agreement, which in turn generally followed the Rome Treaty of 1961 : the rights provided are of the fixation (and reproduction of fixations made without consent) and the broadcasting and communication to the public of live performances. These rights are subject to certain exceptions in the nature of fair use and do not extend to a performer who has once consented to the incorporation of his performance in a cinematograph film. In

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¹⁴ 2002(25)PTC1.

¹⁵ 2002 (ASIL) p. 485

¹⁶ AIR 1977 SC (1443).



relation to the performer's right, the term 'performance' means 'any visual or acoustic presentation made live by one or more performers and the performer's right accrues 'Where any performer appears or engages in any performance'. Our legislation goes beyond the minimum requirements of the Rome Treaty and of the TRIPS agreement in extending protection to variety artistes, and not merely to those who perform the works of others; the term 'performer' being defined inclusively as including ' an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, person delivering a lecture or any other person who makes a performance.

6. COPYRIGHT VIS-A-VIS MORAL RIGHTS

Copyright is not a positive right but a negative right, that is the right to stop others from exploiting the work without the copyright owner's consent or license. Thus where, for instance the work is derived from some other work in which copyright subsists as in the case for translation, adaptation or abridgement of a literary work the author of such work can stop others from exploiting it but cannot himself exploit that work without the consent or license of the original work from which the work has been derived. Copyright is not a single right but a bundle of rights which can be exploited independently. Further, the nature of these rights depends upon the category of work. But one right which is common to all works is the right of reproduce or make copies of the work. The owner-of a copyright may exploit the work himself or license others to exploit any one or more of the rights for a consideration in the form of royalty or a lump sum payment. Civil jurisdictions recognize a variety of moral rights, as has the UK since 1989: to paternity; against false attribution; and of

integrity; but they also recognize a right to determine whether a work is complete, for example, a commissioned work, and how it should be published ('droit de divulgation'), a right of access to the work (droit d'accès'), and a right to withdraw a work (droit de repentir'). The civilian moral right owner may also object to undesirable ways used to display or exploit a work and has a right to: prevent the physical destruction of a work; to respond to criticism; and to the loyalty of his publisher.

(In addition to the economic rights moral rights are also available to the author under Section 57 of the Indian Copyright Act 1957. Section 57 implements the provisions of 6 bis of the Berne Convention Article 6 bis was introduced for the first time by the Rome Convention (1928) later extended by the Brussels Convention (1948), and repeated with amendments in the Stockholm (June 1967) and Paris Conventions (1971). Article 6 bis confers on authors what is known as droit moral or moral rights as distinguished from the economic rights comprised in the copyright in a work and is of European origin. These moral rights are: (i) paternity right or the right to claim authorship of the work; and (ii) integrity right or the right to object to "any distortion, mutilation or other modification of, or other derogatory action in relation to the said work which would be prejudicial to his honour or his reputation". These rights belong to an author independently of his economic rights and even after he transfers his rights.

Breach of a moral right is a breach of statutory duty: s 103(1) of the CDPA1988. It is doubtful whether this will always secure appropriate remedies for a moral right owner, as additional damages should be available for damage to reputation. This is made clear for copyright by sec 97 of the CDPA1988, but there is no equivalent provision relating to the



moral rights, yet a moral right owner may not experience any pecuniary loss at all by infringement of the noneconomic moral right. There are also significant derogations from the remedies. An injunction will be ratified for breach of the right of integrity where the defendant makes a disclaimer dissociating the author the right of paternity will be taken into account in giving a remedy for breach of that right. An architect moral right owner can only secure the removal of his name from a building on breach of his right on integrity (ss 103 (2),78 (5),80(5) of the CDPA1988). Generally, an author or director may not be able to secure an injunction to prevent the derogatory treatment's dissemination because s 103(2) of the CDPA 1988 provided that the court may not grant an injunction where a disclaimer made' in such terms and in such manner as may be approved by the court, disassociating the author or director from the treatment of the work' would be regarded as an adequate remedy in the circumstances.

7. CONCLUSION AND SUGGESTIONS

The Intellectual Property is a broad concept that several types of legally recognized rights arising from intellectual creativity. A new form of property known as 'Intellectual property' came into existence and the 'intellectual property rights' may be defined as legal rights created by human skill and labour. The product of a human's brain may be more valuable in compare to his rights in corporal property i.e. land or chattels. The 'intellectual property rights' are 'Jus in re propria' over immaterial objects or over intangible things. That the Intellectual Property Rights have been classified as patents, Trademarks, Trade Secrets, geographical Indications, Design right and copyright. A patent may be defined as a

monopoly right granted to a person who has invented a new and useful article or a new process of making an article or an of an existing article. As far as infringement of copyright in concerned, it is submitted that an owner of a copyright work has the exclusive right to do certain acts in respect of the work. That the authors also have moral rights in their works, independent of copyright, which are related to the creative effort involved in authorship and not to the economic interest in the work. Copyright infringement in India occurs in spite of legislation that grants protection to copyright holders and provides damages for infringement of copyright work. The India legal system weakly enforces the copyright laws. The researcher suggests that there is a need for efficient & effective enforcement of the rights conferred by the copyright Act, 1957. It is suggested that the copyright Enforcement Advisory Council should make use of public information and discussion of famous musicians who copy from outside sources. The researcher, submits that the extension of exception and limitation in copyright Law of India for education would make education accessible and affordable to each and every member of the Indian society who wishes to study because 'education' alone is the founding stone on which a progressive society can be built.

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