

Jurisprudential Exposition of Intellectual Property Rights

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Abstract

Human beings possess human rights, fundamental rights, statutory rights and natural rights. Property may be tangible, intangible, movable, immovable etc. Properties like house, land, jewellery, utensils etc can be seen and we can store movable properties somewhere safe. Some properties or rights human beings are entitled to, which cannot be seen or kept in safe places and these properties are the creation of human mind known as intellectual property. For the overall development of a nation, granting of intellectual property rights (IPR) is inevitable. But IPRs are being subjected to various criticisms like it is against human rights, equality, human dignity, ethics, competition law etc. This paper is an attempt to analyse the different IPRs, legislative frameworks, criticisms levelled against IPRs and also some suggestions for the proper balancing of IPRs and rights of the society. The work is completed using various text books on IPR, web sites, cases of various courts, international documents and statutes. The outcome expected is to create awareness and a clear knowledge about the various IPRs, the rights of IPR holders, remedies for infringement of rights etc.

Keywords : Intellectual property, patent, copyright, trademark, traditional knowledge etc

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Meaning and classification of Property

The term property has various definitions and was added different explanations from time to time. Property is derived from Latin word 'proprietas' which means ownership.¹ That means one's property is what one owns or what one has as specially his. Once the right to property is vested in a person in respect of a thing, a corresponding duty is imposed on others not to interfere with the owner's

use of things (Dr.G.B.Reddy, 2014 , 9th edition). The Hon'ble Supreme Court had observed in I.C.Golaknath v. State of Punjab² that property right forbids all other persons from interfering with the owner when the owner exercises his right over the thing owned up to the point where limits are fixed by law. Property can be classified into corporeal, ie tangible including land jewellery and incorporeal ie intangible including intellectual property.

¹WordSenseDictionary, proprietas(Latin)https://www.google.com/search?q=WordSense+Online+Dictionary+%3Chttps%3A%2F%2Fwww.wordsense.eu%2Fproprietas+&rlz=1C1RLNS_enIN721IN721&sxsrf=APq accessed 11th February 2022

²AIR 1967 SC 1643

Meaning of Intellectual Property

Intellectual property means the rights granted by legislations, which results from using human brain or idea in the industrial, scientific, literary and artistic fields. It is more precious than the tangible ones (Dr.B.L.Wadehra, 2017). In *Gramophone Company of India Ltd v. Birendra Bahadur Pandey*³, the Hon'ble Supreme Court had observed that intellectual properties being the creativity of the authors, their efforts should be considered to be their property. The WIPO Convention⁴ establishes the matters included in Intellectual Property Rights (IPR).

Classification of Intellectual Property

Intellectual property can be classified into two branches viz Industrial Property and Copyright and Neighbouring rights. Industrial property includes Patents, Trademarks, Industrial Designs, Lay Out Design and Geographical Indications whereas Copyrights and Neighbouring rights are writings, musical works, dramatic works, audio visual works, paintings and drawings, sculptures, photographic works, architectural works, sound recordings, performance of musicians, actors and broadcasts etc (Dr.B.L.Wadehra, 2017). Patent is a right in some new invention or article created by its author or owner.

Copyright is a right in some creation of art, a manuscript or book or article, a recorded sound etc. Design right is a new design and Trademark is a mark created by its maker (P.K.Nagarajan, 2001).

International Character of IPRs

Even in the 19th century, there was Paris Convention for the protection of Industrial Property⁵ and Berne Convention for the protection of literary and artistic works.⁶ Paris Convention covers industrial property in broad sense which includes inventions, models, and appellations of origin, trademarks, service marks and industrial designs. The Berne Convention includes protection of literary, scientific and artistic domain irrespective of the form of expression (Mony, 2019). World Intellectual Property Organisation (WIPO) was created by Convention establishing WIPO on 1967 and entered into force on 1970. The aim was to promote protection of intellectual property throughout the world and to have administrative co-operation among unions, harmonising national laws in IPRs and offering assistance to nations.⁷ Trade Related Aspects of Intellectual Property Rights (TRIPS) is an agreement of WTO the objectives of which include transfer of technology to the producers and users in a mutually advantageous manner.⁸

³ AIR 1984 SC 667

⁴ It is a multilateral treaty which established World Intellectual Property Organisation in 14th July 1967. Convention Establishing WIPO <<https://www.wipo.int/treaties/en/convention>> accessed 24 October 2021

⁵ This was entered into in 1883 for ensuring that the inventors or creators will be protected in other countries. <<https://www.wipo.int/treaties/en/ip/paris>> accessed October 23, 2021

⁶ This was entered into in 1886 and pertains to artistic works, musical works, and other creators the mode of protecting their works <https://www.wipo.int/treaties/en/ip/berne/summary_berne.html> accessed October 23, 2021

⁷ Article 3 of the Convention establishing WIPO. <<https://wipolex.wipo.int/en/text/283854>> accessed 22 October 2021

⁸ Article 7 TRIPS Agreement <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> accessed 26 October 2021

Legislative Framework of IPR in India

India is one of the few countries in the world which had enacted number of legislations on IPRs⁹ which include The Patents Act 1970, Copyright Act 1957, the Trademarks Act 1999, The Designs Act 2000, The Geographical Indications of Goods (Registration and Protection) Act 1999, The Protection of Plant Varieties and Farmer's Rights Act 2001 and Biodiversity Act 2001.

Overview of Patents Act 1970

Patent is a statutory right granted by a state to an inventor for a novel, non-obvious invention having utility.¹⁰ The quid pro quo¹¹ of the contract is a public disclosure of the invention after 20 years. The Hon'ble Supreme Court opined in *Biswanath Prasad Radhey Shyam v. HM Industries*¹² that patent law is to encourage new technology and scientific research. The grant of patent is governed by the domestic patent law of a country (T.Ramappa, 2010) as all IPRs are territorial in nature. A comprehensive statute, Inventions and Designs Act 2011 was replaced by the Patents Act 1970 which was amended several times to make it in compliance with TRIPS Agreement. It consists of 23 chapters and 163 sections and consolidates and amends the law relating to patents in India. Patent¹³ is granted for any new invention of industrial

utility which can be a new product or a process which involves an inventive step. The Act specifically excludes certain frivolous or immoral inventions¹⁴ and inventions relating to atomic energy from patentability.

Procedure for Obtaining Patent

The inventor has to file application and the patent office examines the patent application for defects if any.¹⁶ Any person can oppose the application on grounds of prior use, knowledge, lack of inventive step etc. After compliance with objections, the grant of patent is again published. After grant of patent, any interested party can oppose within one year.¹⁷ If the oppositions are rejected, patent will be granted. The term of patent is 20 years from the date of filing of patent but it can be cut short by the government by the grant of compulsory licence to any person to work on the patent if the patentee fails to work on the same.

Rights of the Patentee

Patentee only can make, use sell or import the product as well as the process patented.¹⁸ When patented invention is used unauthorisedly, that amounts to patent infringement. The reliefs available to the patentee includes interim injunction, damages or account of profits or permanent injunctions.¹⁹

⁹ Misra (n 2) 60

¹⁰ Binda (n 17) 15

¹¹ Something given or received for something else. <<https://www.merriam-webster.com/dictionary/quid%20pro%20quo>> accessed 20 October 2021

¹² AIR 1982 SC 1444

¹³ Section 2 (1)(m) Patents Act-patent means any patent granted under the Act

¹⁴ Section 3 Ibid

¹⁵ Section 4 Ibid

¹⁶ Binda (n 17) 31

¹⁷ Section 25 (2) (n 30)

¹⁸ Binda (n 17) 33

¹⁹ Wadehra (n 13) 56

Summary of Trademark Law

Trademark is one which is capable of distinguishing goods and services provided by one individual from those provided by another.²⁰ It provides the customer a means to differentiate goods based on their quality. The Hon'ble Supreme Court had held in *Laxmikant Patel V. Chetanbhat Shah*²¹ that the definition for trademark also means marks which can be geographically represented and which is capable of distinguishing goods or services of one person from those of others. The law relating to trademark is Trademarks Act 1999 consisting of 159 sections.

Procedure for Obtaining Trademark

The person who likes to register a trademark shall file application to Registrar which will be published and oppositions will be heard. If the trademark is not distinctive, if deceives the public, if creates confusion, if it is scandalous or obscene or prohibited under Emblems and Names (Prevention of Improper Use) Act 1950, it will be refused. Anyone can oppose and after hearing parties, Registrar may accept or refuse opposition.²² If there is no opposition, trademark will be registered. There are different types of trademark in the Trademarks Act. Well known trademark is one which has become well known to the public and if that trademark is used, it may be considered as having connection with first mentioned goods or services.²³ Certification trademark is one

which is certified by the owner regarding the material, mode of manufacture, quality, accuracy and other characteristics.²⁴

Rights of Trademark Owner

The registered trademark owner has the exclusive right to use the trademark. He has the right to assign or file suit for infringement and get reliefs like injunctions whether permanent or temporary. Criminal remedies are also there for unauthorisedly dealing with trademarks. The validity of trademark is for 10 years renewable for unlimited number for 10 years.²⁵

Copyright Act 1957 in a Nutshell

Copyright is the first intellectual property that has been recognised in the world. The law of copyright gives protection to creative human genius including works of arts and literature.²⁶ The object of copyright law is to protect the interests of authors, composers, artists, designers and to encourage them for creating original works granting them exclusive right to exploit the work for a specific period. The law of copyright in India is Copyright Act 1957 consisting of 79 sections the object of which is to encourage authors and creators by giving them exclusive right for a period specified in the Act.

Subject Matter of Copyright

The Copyright Act provides protection to literary works, artistic works, musical

²⁰ Section 2(1)(zb) of Trademarks Act 1999

²¹ AIR 2002 SC 275

²² Section 21 (n 37)

²³ *Binda* (n 17) 87. For example, 'Apple' for computers, 'Mercedes' for cars

²⁴ ISI mark for industrial Products, FPO marks for agricultural products etc. Meenu Maheswari, Certificationmarks;An Indian Perspective(24 February 2014) <<https://www.mondaq.com/india/trademark/295156/certification-marks-an-indian-perspective>> accessed 20 October 2021

²⁵ Trademark in India <<https://www.ip-coster.com/IP Guides/trademark-india>> accessed 21 October 2021

²⁶ *Nagarajan* (n 14)) 46

works films and sound recordings.²⁷ In all the above works, copyright subsists for 60 years after the death of owner if the work was published during the lifetime of the owner. In case of anonymous works, copyright subsists for 60 years following the year of publication. On application and payment of fee, Registrar is authorised to register copyright after following procedures in the Act.²⁸

Rights of Copyright Owner

The owner of copyright has the right to reproduce the work, issue copies of work and can communicate the work to public. Even though the owner has monopoly right over the copyright, there are situations when the use of copyrighted work would not amount to infringement, which is known as the Doctrine of Fair Use or Fair Dealing. This exception is provided under the Copyright Act.²⁹ This exception is available when the work is used for personal purpose, research work or for private use.³⁰ The Act provides for civil and criminal remedies against infringement of copyright.

Overview of Industrial Design Laws

Visual appeal of articles or goods plays an important role in influencing a buyer. Industrial design means the shape, configuration, pattern or ornamentation in an article or a process. The law relating to designs is Designs Act 2000 which consists of 48 sections and the object of the Act is to consolidate and amend the law relating to designs in India. The design must be special, distinctive, and significant

and appeal to the eye for the purpose of registration. Any proprietor can file an application before the Controller General of Patents, Designs and Trademark along with four copies of design and statement of novelty. If there is no objections or if objections are removed, Controller will register the design (Narayanan, 1999).

Rights of Design Holder

On registration, registered proprietor alone will be entitled to the right to exclusive use of design which is known as the copyright in design. Proprietor will have the right to protect the design from piracy. The term of design is for 10 years.³¹ When the design is unauthorisedly used or imitated by any person, the proprietor can file suit for recovery of damages or injunction against repeating such piracy.

Protection of Geographical Indications

Some geographical names have got significance for the nature and quality of goods. The Geographical Indication of Goods (Registration and Protection) Act 1999 aims at registration and protection of geographical indications in India. It consists of 87 sections. Geographical indication is a name used on goods from a particular geographical area which carries peculiar features that is due to that place of origin.³² Any association of persons or producers who would like to register geographical indication can apply to Registrar in the prescribed format. The application should contain statement as to how the geographical indication originate

²⁷ Section 13 (1) Copyright Act 1957

²⁸ Section 44 Ibid

²⁹ Section 52 Ibid

³⁰ Dipak Rao, Sana Singh, Acceptable Use of Copyrighted Material, 10th June 2020 <<https://copyright.gov.in/Exceptions.aspx>> accessed 28 October 2021

³¹ Section 11 Designs Act

³² Singh (n 6) 450. Example includes Alphonso Mango, Basmati, Kanjiwaram Silk

from the concerned territory, the specific quality and reputation exclusive to the geographical environment, classes of goods to which this geographical indication will apply etc. The registered proprietor or authorised user of geographical indication can use it exclusively for ten years but may be renewed from time to time.³³ When any person without authorisation uses geographical indication misleading the public or do unfair competition amounts to infringement.

Farmer's Rights

TRIPS Agreement required member states to offer protection of plant variety either by patents or sui generis system.³⁴ India enacted Protection of Plant Varieties and Farmer's Rights Act 2001 to provide protection of plant varieties to ensure rights of farmers and plant breeders.³⁵ An authority is established under the Act for encouraging and development of new varieties of plants and to protect rights of farmers and breeders through registration. The registration is valid for 9 years for trees and 6 years for other crops and can be renewed.

Traditional Knowledge

The IPRs like patents, trademarks, copyrights and designs are created by individuals and they get monopoly rights over their IPRs for the limited time mentioned in the respective legislations.

But there are certain knowledge which is being transferred from generation to generation from time immemorial which is not defined anywhere there is no legislation to protect the same. Hence this has been commercially exploited by companies and corporations in developed nations depriving the indigenous communities of their rights. This mostly occurs in Ayurveda, agricultural methods, folklore and textile designs.³⁶

WIPO defines traditional knowledge referring to tradition based literary, artistic or scientific work and also undisclosed information.³⁷ It is indirectly protected in some IPR legislations. The Patents Act 1970, by the 2002 Amendment Act makes it mandatory for the applicant to disclose the source and geographical origin of any biological material.³⁸ As per Trademarks Act, marks which indicates geographical or customary origin shall not be registered.³⁹ Designs Act also prohibits registration of designs which are not original.⁴⁰ The Biological Diversity Act 2002 is for protecting biological diversity and sustainable development. The Plant Variety Protection and Farmer's Rights Act protects farmer's traditional knowledge like right to sow, use and share farm produce.

The above mentioned legislations in IPRs offers protection to IPRs in India. As IPRs contribute very much towards the economic development of the nation,

³³ Section 18 Geographical Indication of Goods (Registration and Protection) Act 1999

³⁴ Latin term which means of its own kind <<https://www.merriam-webster.com/dictionary/sui%20generis>> accessed 23 October 2021

³⁵ The object of the PPV& FR Act is to ensure proper system to encourage farmers and breeders, which consists of 97 sections in total.

³⁶ Reddy (n 3) 396

³⁷ Information relating to business, technical or scientific matter which has commercial value and known only to persons in the circle and not to others. <https://www.wto.org/english/thewto_e/acc_e/cgr_e/wtaccgr27a2_leg_1.pdf> accessed 21 October 2021

³⁸ Section 10 (4) (D) Patents Act

³⁹ 9(1)(b) & (c) of Trademarks Act

⁴⁰ Section 4 of Designs Act

it has to be properly treated. But at the same time, IPRs are confronted with various concerns relating to public health, biological diversity, research in biotechnology and human rights (NS, 2017). Some of the concerns are discussed below.

Human Rights and IPRs

Human rights are available to every human being. When IPRs were granted to owners providing them economic rights excluding all others, human rights confer equal status to everyone without excluding any one and there comes a conflict between human rights and IPRs. So in that perspective, the principle of exclusivity in IPRs are being pointed out as violation of human rights which is equally available to all.

Genetic Research and IPRs

Genetic research in human being is criticised on ethical principles. Only through research, the medicines for genetic and hereditary diseases can be found out. When research involves human materials like cells, genes and DNA, there arises the questions of ethics and arguments for human rights.⁴¹ Embryo research⁴² raises serious ethical concerns and various NGOs and Human Rights Forums are criticising this. Taking of tissues and materials from human body is alleged to be affecting human dignity and fundamental right under Article 21⁴³ of the Constitution.

Bio Piracy, Traditional Knowledge and IPRs

Traditional communities have developed their own knowledge over many years and generations through their continuous interaction, observations and experimentations with their surrounding environment.⁴⁴ Companies which loot this knowledge neither ask the permission of these communities nor even share the huge profit with the community who own these knowledge (S.K.Tripathi, 2003). There are people who claim monopoly over traditional knowledge forgetting the traditional communities (C.B.Raju, 2007). Biological materials extracted from biologically rich countries are exploited for scientific and commercial sectors (Mohop, 2007). There comes the issues of bio piracy. It can be very difficult to identify the origin of traditional knowledge since the ancient knowledge cannot be traced according to present legal or political boundaries (Apte, 2006).

IPRs and Access to Medicine

Right to health is an essential and integral part of right to life under Article 21 of the Indian Constitution. Right to health can be guaranteed only if all the people have equal access to medicine.⁴⁵ In a country like India, where the majority is struggling to attain their daily meals, affordability of medicines poses a serious human right as well as social justice question. When giant pharmaceutical companies manufacture medicines for life threatening diseases and obtain patent

⁴¹ Ibid 20

⁴² Research is conducted using material from embryo for studying about genetic deficiencies, abnormal growth <[https://www.fertstert.org/article/S0015-0282\(19\)32482-3/fulltext](https://www.fertstert.org/article/S0015-0282(19)32482-3/fulltext)> accessed 27 October 2021

⁴³ Article 21 of the Constitution guarantees to all persons right to life and personal liberty in India.

⁴⁴ P.Pushpangadan and K. Narayan Nair, Value addition and Commercialisation of Bio Diversity and Associated Traditional Knowledge in the Context of the IPR Regime, *Journal of Intellectual Property Rights*, September 2005, 442

⁴⁵ *Bandhua Mukti Morcha v. Union of India* (AIR 1984 SC 802), *Paschim Bengal Khet Mazdoor Samity v. State of West Bengal* (AIR 1996 SC 2426)

and fix prices for the same in an exorbitant manner, the large section of the people will not be in a position to afford the medicine.

These are some of the controversies associated with IPRs. Even though there are some human rights and human dignity issues, granting of IPRs is essential for economic development as well as for encouraging more and more research.

Revocation of IPR- Basmati Rice Controversy

In 1997, American based Rice Tec Inc. Company got patent from United States America Patent and Trademark Office (USPTO) for Basmati type of rice. US Patent Office granted this patent⁴⁶ without considering prior art⁴⁷ that existed in India. On March 4th, 1998 steps were taken by RFSTE (Research Foundation for Science, Technology and Ecology) by filing a petition before the Supreme Court for directing the Government for taking steps for revoking the patent. On 27th April 2000, Government of India filed petition before USPTO for re-examining the patent. CFTRI (Centre for Food Technology Research Institute of CSIR) could establish prior art of basmati rice prior to granting of patent by USPTO (Vandana Siva, 2002). Finally after strong legal battle, USPTO struck down

the patent on the ground of lack of novelty and inventive step.⁴⁸

Turmeric Patent issue

Two US based Indian researchers at the University of Mississippi, USA, namely Suman K Das and Hari Har P Colly got patent on wound healing properties of Turmeric (Klemm.S.Cottier, 2006). They claimed the use of turmeric also to inflammatory issues.⁴⁹ Patent⁵⁰ was objected in 1996 by CSIR as turmeric was being used in India for thousands of years for wound healing and medical use and CSIR produced documents including ancient texts. The USPTO revoked this patent also on the ground of lack of novelty.⁵¹

Neem Patent Controversy

Neem is a medicinal tree and its oil is used for treatment of cold and flu and for relief from Malaria and various skin diseases (Connor, 2007). One agricultural business Corporation based in US and Department of Agriculture in US filed patent application on neem in 1995 before European Patent Office (EPO) for the method of controlling fungi on plants using extract of neem oil and the patent was granted.⁵² This was challenged by Magda Aelvat inn 1995 for Green Group

⁴⁶ US Patent number 5663484 <<https://patents.google.com/patent/US5663484A/en>> accessed 27 October 2021

⁴⁷ It is an evidence that the invention is not new, but already known to someone. What is Prior Art? <<https://www.epo.org/learning/materials/inventors-handbook/novelty/prior-art.html#:~:text=Prior%20art%20is%20any%20evidence,very%20similar%20to%20your%20invention>> accessed 27 October 2021

⁴⁸ Charles Goldfinger, The story of the Basmati Rice patent battle, 20 May 2007, <<https://sciencebusiness.net/news/72228/The-story-of-the-basmati-rice-patent-battle>> accessed 28 October 2021

⁴⁹ Kok Peng Khor, Martin Khor, Intellectual Property, Biodiversity and Sustainable Development : Resolving the Difficult Issues (2002 edn, UK Zed Books Ltd, UK) 28

⁵⁰ US Patent number 5401504 <<https://patents.google.com/patent/US5401504A/en>> accessed 27 October 2021

⁵¹ Barbara A Johnston & Ginger Webb, Turmeric Patent Overturned in Legal Victory, Issue 41, 11 <<https://www.herbalgram.org/resources/herbalgram/issues/41/table-of-contents/article1242>> accessed 28 October 2021

in European Parliament and Dr. Vandana Siva, on behalf of Research Foundation for Scientific, Technical and Natural Resource Policy, New Delhi along with NGOs. They submitted evidence showing that neem seeds were already in use in Ayurvedic medicines and agricultural practices in India. In May 2000, EPO revoked patent on the ground of lack of novelty and inventive step.⁵³

Conclusion

For the development of the mankind, intellectual properties need to be protected and the innovators and researchers are to be encouraged. But at the same time, protection of human rights is essential for civilisation. The government has to intervene where the human rights aspects are violated. For example when access to medicine is adversely affected, the government can invoke the provisions of compulsory licensing under the Patents Act to make the medicines accessible to all at affordable prices. Government can make alternative arrangements like the use of generic drugs also for resolving this issue. Regarding embryo research also, proper guidelines can be framed without affecting the human life. The major drawback of our traditional knowledge is that our knowledge systems are mostly transferred orally or even if written, mostly it is written in Sanskrit or Hindi language which could not be accessed by patent examiners from abroad. For resolving the issues, the appropriate authorities may make arrangements of translating the available traditional knowledge into English and make it available and accessible from any part of the world. Biotechnological inventions are also being challenged on

ethical grounds and changing the natural ecosystems. Genetically modified plants and animals are helpful to human beings for any industrial as well as medicinal purposes, but it is not useful for other species which depends on these.

Regarding protection of plant variety and farmers rights, there is a law, but the proper implementation is also essential for ensuring food security. Another criticism levelled against IPRs is that it is in contradiction with Competition law. The aim of Competition law is to regulate markets by curbing monopoly and IPR is a reward rather than monopoly and hence IPR is not anti-competitive. Both IPR and competition are necessary for the development of a country. As a conclusion it can be stated that intellectual property rights are essential for the development of a nation and an asset for industrial growth and public health.⁵⁴

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⁵² EPO Patent number 436257 B 1

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