



### RESEARCH ARTICLE

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### MISUSE OF INTELLECTUAL PROPERTY RIGHTS - IMPACT OF TRIPS

**B. Lavaraju**

KLEF College of Law, Vaddeswaram, Guntur.

#### Manuscript Info

#### Abstract

Intellectual Property is one of the properties entertained and exercised by human beings. Intellectual Property is a legal concept which refers to creations of the mind for which exclusive rights are recognized. The Intellectual Property Law protects the Intellectual Property owners from the infringement and counterfeiting. The recognition of these rights is a new trend. The most important feature of the property is that the owner or proprietor may use his property as he wishes and that nobody else can lawfully use his property. The main reason behind this is to give an incentive for innovation, research and development. In the absence of IPR protection, other firms would be able to take a free ride on the research and development investment made by the inventor firm. The Intellectual Property Laws work towards creating monopolistic rights. They guarantee an absolute right to the creators and owners of work which are a result of human artistry. Also, they prevent commercial exploitation of the innovation by others. IP protection provides incentives for innovation and technological diffusion. The implementation of Intellectual Property Rights has been recognized by more and more sections of the society as a result of the campaigns awareness programmes undertaken by the Government, industry and World Intellectual Property Organisation (WIPO). The object of Intellectual Property Law is to protect the creator, inventor or author of an intellectual property. But, due to his monopolistic control over his invention could provide him an opportunity of tilting the market equilibrium, like fixing the price, dominating and exploiting the market understanding etc. The author considers that this may leads to unfair advantage to the Intellectual Property owners. The author tries to encapsulate various provisions in TRIPS to control misuse of Intellectual Property Rights that help in controlling, governing the possible misuse or over-use of these rights.

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**Corresponding Author:- Dr. B. Lavaraju**

Address:- KLEF College of Law, Vaddeswaram, Guntur

**Introduction:-**

Intellectual Property is one of the properties entertained and exercised by human beings. These are produced by human skill, knowledge or intellectuality and labour. It is a new kind of property. Immovable property can be sold, mortgaged or leased from one person to another. In the similar way, the Intellectual Property also can be sold, mortgaged or leased from one person to another. Intellectual Property is a legal concept which refers to creations of the mind for which exclusive rights are recognized. Under Intellectual Property Law, owners are granted certain exclusive rights to a variety of intangible assets such as musical, literary and artistic works, discoveries and inventions, and symbols. Common types of intellectual property rights include copyrights, trademarks, trade dress, and in some jurisdictions trade secrets, patents, industrial designs, and geographical indications.

The recognition of these rights is a new trend. The Intellectual Property Law concerns the legal rights associated with creative effort or commercial reputation and goodwill. These laws create certain legal rights on part of the inventor or author and impose obligations on part of the user, consumer or infringer. This is based on the concept that not to take unfair advantage of one's own work, industry and labour or reputation of another person.

**Indian Scenario:**

According to Article 27 of the Universal Declaration of Human Rights (UDHR) 'everyone has the right to protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'

Intellectual Property includes all rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. The most important feature of the property is that the owner or proprietor may use his property as he wishes and that nobody else can lawfully use his property.

Intellectual Property is an invention, idea, product or process that has been registered with the Government and that grants the inventor or applicant exclusive rights to use the invention for a given period. It confers right to exclude others from making using or selling the invention within the national territory.<sup>1</sup>

Intellectual Property is protected by the Government in a variety of ways. Copyrights are awarded to protect original works of authorship such as literary artistic and musical works; trademarks allow manufacturer exclusive rights to a distinguished name, symbol or marks.

These rights are only valid in the countries in which a patent application has been awarded. This lack of an international IPR system could have a significant impact on the amount of innovative activity.

In India, pursuant to the replacement of Monopolies and Restrictive Trade Practices Act, 1969 by the Competition Act, 2002 clarity emerged that unfair trade practices would continue to be dealt under the Consumer Protection Act, 1986<sup>2</sup>. The Act of 1986 under Section 2 (r) defines the phrase 'unfair trade practice' 'with certain exceptions'.<sup>3</sup>

The object of Intellectual Property Law is to protect the creator, inventor or author of an intellectual property. If 'X' invites a new thing, the patent laws protect him from infringement of his right by any person. It provides monopoly to 'X'. Thus, the same right may adversely affect upon the society. Due to monopoly over the thing 'X' may fix abnormal prices for the thing he invented and exploit the society. This is unfair advantage from the side of the Intellectual Property owners.

In India, this is solved by two methods.

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<sup>1</sup>Dolly Biswas: 'Intellectual Property - Rights and Unfair Trade Practices' Indian Bar Review Vol.44 Oct – Dec 2017, Number 4, pg. 57.

<sup>2</sup>In India, to restrict such monopolistic and unfair business, the Union Parliament passed the Monopolies and Restrictive Trade Practices Act, 1969 which is replaced by the Competition Act, 2002. The provisions of the Competition Act, 2002 prohibit the abuse of a dominant position of the Intellectual Property owner.

<sup>3</sup>Section 2 (r) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, explained in clauses 1 and 2.

### **Monopolies and Restrictive Trade Practices – Competition Act**

To restrict such monopolistic and unfair business, the Union Parliament passed the Monopolies and Restrictive Trade Practices Act, 1969 which is replaced by the Competition Act, 2002. The provisions of the Competition Act, 2002 prohibit the abuse of a dominant position of the Intellectual Property owner. Thus, it is seen an irreconcilable conflict between the basic monopoly concept of a trademark or patent and the rights of such property owner.

### **Time Limit**

For every Intellectual Property the makers of the respective laws, imposed certain time limit, after which the monopoly of an owner of Intellectual Property exists or comes to an end.

### **Misuse of IPRS with special reference to compulsory licensing of IPRs**

Transfer rights related to intellectual property takes place between two or more parties depending on mutual agreement and standard legal principles unlike transfer of rights, compulsory license is non-voluntary and through particular causes in the national or regional IPR Laws, the compulsory license is enforced on the owner of the intellectual property. This is carried-out to prevent any activity that can be harmful to the competition and is applicable to various forms of IPR such as copyrights, trademarks, trade secrets, patents and design registration.

The need for compulsory licensing arises when the unrelated problems are tied-up with patent technology purchases and sold in combination. In the similar banner when the license is forced to use the licensors present and future technologies the practice is considered to be unfair. This type of restrictions may lead to the delay in the development of competition technologies, allows artificial entry barriers for others which finally results in unfair dominance of a supplier in the market.

### **Problems associated with IPRs – Compulsory Licensing**

The different provisions of compulsory licensing would be imposed on IPR-holders, in case of performing the following inappropriate behaviour, such as....

1. Introducing new products and incompatibilities without improving the performance or minimizing the costs which is treated as illegal and inadequate,
2. Restricting the licensing practices that can be harmful to competition or that can alter the market,
3. Disagree to deal,
4. Disagree to licensing authority,
5. Vertical mergers which may reduce competition or try to develop monopoly, and
6. Non-working and insufficient supply of a protected creation.

The provisions laid down by the compulsory licensing or competition laws must not have any impact on the legitimate enforcement of IPR-holders rights. These provisions must be used very carefully. Otherwise, there would be a negative effect on...

1. Goodwill of the business,
2. Introduction of new technologies,
3. Establishment of new works,
4. Economic and social incentives to invest in Research and Development, etc.

The other problems associated with IPR are as follows ...

1. Anti-competitive practices in contractual licenses,
2. Compulsory licensing for encouraging consumer interest, private use and utilized by the Government in public interest,
3. Licensing provisions,
4. Promoting the use of dependent patents,
5. Insufficient supply of the patented product and ideal patents, and
6. Interaction between competition parties and Intellectual Property Rights.

### Various provisions in TRIPS to control misuse of IPR

Articles 13, 17, 21, 24, 30, 37, 40 and 44 of the Berne Convention<sup>4</sup> discuss the provisions in Trade Related Intellectual Property Rights (TRIPS<sup>5</sup>), that help in controlling, governing the possible misuse or over-use of Intellectual Property Rights. Moreover, TRIPS have special provisions under Article 73 which are served as 'security exceptions. The two main purposes of these special provisions are:

1. To stop members from carrying-out the actions for the purpose of maintaining an international peace and security under UN Charter,
2. To protect and maintain various aspects of national security.

For compulsory license, other Articles such as Articles 1, 7, 8 and 27.1 are applicable.

#### Articles in TRIPs and Special Measures

1. Article 132 states that in case of copyrights, members must restrict exceptions or limitations for the selected rights to retain special cases that will not contradict with normal misuse of works and will hurt the permissible interest of the right holder.
2. Article 17 states that in case of trademarks provided with restricted exceptions to the rights guaranteed by a trademark (like the correct utilization of descriptive terms) but the condition is that such exception should take into consideration the lawful interest of the trademark owner,
3. Article 21 states that the owner of the registered trademarks will have the rights to transfer the trademarks either with or without the transfer of business to which actually the trademark related compulsory licensing of the trademarks is not allowed and the members can decide the terms and conditions of the licensing and assignment of trademarks.
4. Article 24 highlights the conditions for international negotiations and the exceptions concerning geographical indications,
5. Article 30 states that the member states can allow limited use of their rights for
  - a. Research and experiments,
  - b. Private and non-business purpose,
  - c. Teaching to get permission for generic medicines, and
  - d. Pharmacies can use for the preparation of an individual medicines.

National laws can be framed by the member states based on the above specified guidelines.

6. Article 31 has the following features: the use of rights must be authorized usually for the supply of domestic market. The use of patent rights is not exclusive, and the patent-holder must be compensated. If the situations concerning authorization of use, has to be reviewed by a distinct higher authority of the member state.
7. Article 37 emphasises those conditions in which compulsory license for layout designs of integrated circuits can be acquired if any person, unknowingly have applied for protected integrated circuit or obtained, then it will not be regarded as an unlawful act. But, if the person comes to know that the integrated circuit has been utilized in an illegal way, then he has to pay to the right-holder the money equal to which is a reasonable royalty which he would have paid under freely negotiated license.
8. Article 40 states that member states accept that few licensing practices related to the Intellectual Property Rights which control competition may have negative impact on trade and may hinder the transfer and promotion of technology.
9. Article 40.2 explains three non-limiting acts about abusive licensing practices such as coercive packing licensing, conditions limiting challenging to validity and exclusive grant-back conditions.

<sup>4</sup>The Berne Convention, 1886 deals with the protection of works and the rights of their authors. It contains a series of provisions determining the **minimum protection** to be granted, as well as special provisions available to **developing countries** that want to make use of them.

Available at [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html) last visited on 23rd September 2019 at 12pm.

<sup>5</sup>The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all the member nations of the World Trade Organization (WTO). It sets down minimum standards for the regulation by national governments of many forms of intellectual property (IP) as applied to nationals of other WTO member nations. TRIPS was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) between 1989 and 1990 and is administered by the WTO.

Available at [https://en.wikipedia.org/wiki/TRIPS\\_Agreement](https://en.wikipedia.org/wiki/TRIPS_Agreement) last visited on 23rd September 2019 at 12pm.

10. Article 40.3 and 40.4 mainly emphasize on the provisions concerning inter-member consultations on compliance and violation by the Intellectual Property Rights-holders in their respective nations. Hence, Article 40 and its sub-sections are flexible enough and are important elements in any national competition policy.
11. Article 44 is an essential clause relating to injunctions. It states that in case of litigations involving use by third parties recognized by the Government without permission from the right-holder.

### **Recent Developments in Intellectual Property Laws in India<sup>6</sup>**

The Government of India undertook a series of steps, to conform India IP legislation to acceptable international standards. In order to bring progressive changes towards a free market society, rapid liberalization of international trade practices and demonstrating its commitments to the World Trade Organisation (WTO) under the Trade Related Intellectual Property Rights Agreement (TRIPS).

Some of these developments are as follows....

### **Amendments to Trademark Law<sup>7</sup>:-**

India replaced the Trade and merchandise marks Act, 1958 with the Trademarks Act, 1999. The Act of 1999 has been passed with the following objectives

1. To bring Indian trademarks law in line with international practices, and
2. To ensure implementation of India's commitments under the TRIPS agreement.

The Act of 1999 brought the following changes.

1. The definition of 'trademark' now includes graphic representations, shapes, packaging and combinations of colours, thereby widening IPR protection.
2. The procedure for registration of trademarks expedited by removing the earlier system of Part A and B registration.
3. The definition of 'trademark infringement' has been broadened to give protection beyond the use of identical/deceptively similar marks in relation to goods for which they are registered.
4. An action for infringement of trademark or passing-off can be filed in a district court within whose jurisdiction the trademark proprietor resides or carries on business, as against the earlier law which required the suit to be filed at the defendant's place.
5. Under the new law, both registered and unregistered trademarks can be assigned with or without the goodwill of the business.

### **Legal Protection to Geographical Indications**

India has enacted the Geographical Indications of Goods (Registration and Protection) Act, 1999. The Act of 1999 provides for registration and better protection of geographical indications relating to goods to help identify the place of origin of goods, quality, reputation and other distinctive characteristics of these goods. The GIG Act now helps in protecting unique Indian products linked to some geographical region of India, such as Basmati Rice, Darjeeling Tea, Alphonso Mangoes, Malabar Pepper, Cardamom and Hyderabad Grapes, which are all well known in the international market. The Act of 1999 helps prevent geographical indications of goods becoming generic which may otherwise lead to a loss of distinctiveness and consequently loss of protection.

### **Amendments to Copyright Law**

The 2012 amendments in copyright law, which were made to make Indian copyright law compliant with the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty, introduced technological protection measures, ensured that fair use survives in the digital era by providing special fair use provisions, made many author friendly amendments, special provisions for disabled, amendments facilitating access to works and other amendments to streamline copyright administration.

<sup>6</sup>Diljeet Titus & Rai S Mittal: Recent Developments in Intellectual Property Laws in India, available at [http://economictimes.indiatimes.com/articleshow/47780087.cms?from=mdr&utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cpst](http://economictimes.indiatimes.com/articleshow/47780087.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cpst) last visited on 25<sup>th</sup> September 2019 at 3.25 p.m.

<sup>7</sup>Ibid.,

**Amendments to Patents Law**

Modifications in Indian patent laws have been made in accordance with TRIPS by widening the list of inventions not patentable, incorporating greater rights of the patentee, reversing the burden of proof in an infringement suit on process patents and creating a uniform period of patent protection of twenty years for all categories of invention.

**Legal Protection for Plant Varieties and Rights of Farmers**

India, in giving effect to the provisions of the TRIPS Agreement, the Union Government enacted the Protection of Plant Varieties and Farmers Rights Act, 2001, with an object to provide for the establishment of an effective system for protection of plant varieties. The Act of 2001 recognizes and protects the rights of farmers for their contributions made in conserving, improving and making available plant genetic resources for the development of new plant varieties. A variety that conforms to the criteria of novelty, distinctiveness, uniformity and stability is registrable under law. The Act of 2001 provides for a total eighteen years protection for trees and vines and fifteen years for other plants.

**New Designs Law**

India enacted a separate law for the protection of copyrights in an industrial design. The Designs Act, 2000 repealed the earlier Designs Act, 1911. The new law protects proprietors of novel or original designs and enforces those rights against infringers.

The new law incorporates the definition of the term 'original' to specify what a registrable design is. In relation to a design, the term 'original' includes designs, which though old in themselves, are new in their application. Any design which is new or original, not previously published in any country, whether India or outside India, and which is not contrary to public order or morality is registrable under the Act. The new Act amplified the definitions of 'article' and 'design' to bring them in conformity with internationally accepted definitions for providing wider protection.

In compliance with obligations under the TRIPS Agreement, India has enacted the Semiconductor Integrated Circuits Layout-Design Act, 2000. The Act of 2000 provides for registration of original, inherently distinctive and not yet exploited layout-designs. Any misuse of a registered layout-design can be prevented by way of an infringement action. Although the Indian IP laws are still in the stages of development but the same are very much in conformity with the international IP laws as India is a signatory to international conventions and treaties including Paris Convention for the Protection of Industrial Property, Berne Convention on Copyright and TRIPS Agreement.

**Conclusion:-**

Different nations around the world used different laws. They face many issues related to Intellectual Property Rights while dealing with issues they agree very less in court decisions, due to lot of conflicting interpretations and judgments in different nations of the world. In order to overcome the issues, the countries must strengthen their IPR frameworks, establish competitive markets and should maintain balance between competitive environment with proper competition laws and consumer protection laws. This would result in discouragement of unfair monopolistic practices. Thus, the regulation provisions in TRIPS must be regarded in integration with the provisions that offer strong IPR protection and enforcement. Likewise, it is necessary to design and implement high stand national IPR framework which can efficiently encourage these provisions of TRIPS. The IP law regime has seen rapid change in the last decade or so in India. Today, there is greater awareness amongst the legal community and the courts. In the wake of India's accession to TRIPS that Intellectual Property Right is a significant driver of economic development.