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RE-INVENTING IPR : JOURNEY OF IPR PROTECTION IN INDIA

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ABSTRACT:

Intellectual Property Rights play an important role in the economic life of the individuals at this stage where the individual tries to maintain parity between the changing society and the technological innovation. This research paper aims to trace the journey of IPR in India. The development of the intellectual property rights can be traced from the Statute of Monopoly and the British Statute of Anne. Different types of Intellectual property discussed here are Patents, Copyright, Trade mark, Industrial design and Geographical Indications. Intellectual Property Rights is a strong tool that helps in protecting the investments, time, money efforts and creativity of the inventors of the intellectual property and protection of ideas.

Keywords: Intellectual property rights, patents, copyright, industrial design, geographical indications

INTRODUCTION

In the recent time, intellectual property has attracted the attention of many people. The economy of the country has moved from being dominated by the tangible assets to being conquered by the intangible assets. According to World Intellectual Property Organization (WIPO), "Intellectual property (IP) refers to the creation of mind, such as inventions; literary and artistic works;

designs; and symbols, names and images used in commerce". The WIPO was established by WIPO Convention in 1967 to protect the intellectual property throughout the world. The intellectual property is protected by the law. The law under the intellectual property right guarantees that the benefit of the intellectual property must be taken by all but the creation of the intellectual property must benefit the creator only. The essential characteristic of these rights are that they are exclusionary rights through which the third party is prohibited from the use and exploitation of the subject precluded by these rights¹.

The various intellectual property rights have become relatively well known and there are many intellectual properties like trademarks, patents, copyrights, right in performance, registered designs, design rights, Geographical Indications etc. Intellectual property rights play an important role in the economic life of the individuals at this stage where the individual tries to maintain parity between the changing society and the technological innovation. The intellectual property tries to maintain a balance between the interest of the creators and the public interest so that innovation and creativity can be flourished.

Though it has been seen that protection of intellectual property might create a form like of monopoly, but such property rights are required for the economic development of the nation. Competition can play its role as a market regulator only if the product of the human labor is protected by the property rights². One of a distinctive feature of this monopoly is that, it can be easily transferable from one person to the other and these rights are even marketable. The provision of providing the property rights at each level also guarantees competition on the other level. Property rights are considered to be a pre requisite for the normal functioning of the market mechanism.³ For example, if we consider patent, "*patent explicitly prevent the diffusion of new technology to guarantee the existence of technology to diffuse in the future.*"⁴ And trademark helps in distinguishing such product and service. By this the trademarks introduce competition between the producers of the identical goods. Through trademarks, the consumer can easily distinguish the product and the services on the basis of its quality, price etc. and distinguish one product from the other. The Paris Convention of 1883 is one of an important significant part of the Intellectual Property Rights (IPR).

¹MLehman, The Theory of Property Right and the protection of intellectual and industrial property, (1985) 525, 530

² M Lehman, The Theory of Property Right and the protection of intellectual and industrial property, (1985), 531

³ M Lehman, The Theory of Property Right and the protection of intellectual and industrial property, (1985), 539

⁴ Benko, Protecting Intellectual Property Right: Issue and Controversies, 19

Article 1(2) explains that: industrial property protects patents, utility models, industrial designs, service marks, trademark, trade name, indication of the source or the appellation of origin for the repression of the unfair competition. The main purpose of the countries developing the intellectual property law is to inculcate the creativity among the citizens of the country and due credit can be given to the creator.

The development of the intellectual property rights can be traced from the statute of monopoly and the British Statute of Anne. It can be seen as the origin of the patent and copyright.⁵ The British law started in 1623 and all the major industries were controlled by them. The Britishers were having considerable powers over the trade of the products and the raw material. These guilds were also responsible to bring all new innovations to the market.

PATENTS:

According to WIPO "A patent is an exclusive right granted for any invention, which is any product or a process that provides, in general, a new way of doing something, or offers a new technical information about the invention must be disclosed to the public in a patent application". The evolution of patent law has witnessed a drastic change from the centuries. Earlier the patents were considered to be simple and easier to understand, but with the evolution of time, it has become more complex and complicated to handle.

"The history of patents does not begin with inventions, but rather with royal grants by Queen Elizabeth I (1558–1603) for monopoly privileges. Approximately 200 years after the end of Elizabeth's reign, however, the patent represents a legal right obtained by an inventor providing for exclusive control over the production and sale of his mechanical or scientific invention demonstrating the evolution of patents from royal prerogative to common-law doctrine."⁶

The patents rights were first granted in 500 BC in Sybaris. Patent rights were granted to the new dishes for the period of one year. Whereas in ancient India the invention of anything and everything useful to the society was offered as a salutation to the god, guru, parents or the ruler and in return blessed with further progress of the ruler would award him with material benefits or title and

⁵ Brad, Sherman, Lionel Bently The making of modern intellectual property law: the British experience, (1999) 1760–1911

⁶ Massof, 'Rethinking the Development of Patents: An Intellectual History, 1550–1800'

engrave the details of such invention either on stone or other inscriptions for the benefit of the whole society⁷. The US constitution is the founder of the US patent law system that was drafted during the industrial revolution. The industrial revolution played an important role in the development of the intellectual property.

Maximum of the Indian patent law is derived from the English law. This was important for the growth of the industries where they could get due credit for the work. Increase in the level of the patent and intellectual property rights leads to the increase in the development of the industries and their progress. The evolution of the patent right was quite easily visible in fifteenth century but it became more prominent in nineteenth century with the industrial revolution. Then the reward theory has been propounded. This theory propounds patent as a reward which is owed to the inventor by the society in return for his creativity and the services that are rendered to the society. Providing such patents encourage the growth of the innovation and creativity among people where more and more people came together with different ideas and leads to the development of the industries. The first patent was granted to Samuel Hopkins in 1790 for the new method of producing potash (potassium carbonate).

The first legislation in India relating to the Patent was **Act VI of 185**. This was based on the English patent system. Some exclusive advantages were given to the inventors of the products for a time period of 14 years. In the year 1911 the Indian Patent and Design Act was passed which replaced all the previous Acts. In March 1999, The Patent Amendment Act was passed and it came into the force from 1995. Right now we are following the Indian Patent Act 2005 which was effective from 1 January 2005. Last Amendment in the rules was made on 5 May 2006. India has been successful in contributing efforts in removing the obscurity in the Act and making use of all the flexibilities offered by the Agreement to serve towards the best interest of the nation.

COPYRIGHT:

Copyright is a legal right created by the law of a country that grants the creator of any original work exclusive rights for its use and distribution. *"It is a person's exclusive right to reproduce, publish, or sell his or her original work of authorship (as a literary, musical, dramatic, artistic, or architectural work)."* This is usually prescribed only for a limited time period. The exclusive rights are not absolute but they are limited by some limitations and exceptions to copyright law,

⁷ Dr. Shanthala Priyadarshini, "Indian Copyrights, Let Indian Science Flourish IPR Perish", [http:// www.ayurvedah.com](http://www.ayurvedah.com).

including its fair use. The term of copyright for any product is 50 years from the time of its first publication. A major limitation on copyright law is that copyright protects only the original expression of ideas, and not the underlying ideas themselves. Copyrights of works of the countries mentioned in the International Copyright Order are protected in India, as if such works are Indian works. The term of copyright in a work shall not exceed that which is enjoyed by it in its country of origin.⁸

Historically copyright has developed on different basis. Lot of emphasis was made to develop a link between the author and its work. The main aim of the development of the copyright law was to make sure that the author will get the credits and benefits of his own work. No other person should enjoy the benefits of other's efforts and hard work. This system mainly started with the introduction of the process of industrialization. The copyright law particularly aimed at protecting the industrial progress. There was no such evidence of any copyright law before the English Copyright Act 1842. In India we also have some good creations like "ram charit manas", "Arthashastra" etc. by some of the famous writers like Kautilya, Tulsi Das and many more. These creations are protected under the copyright law and thus their work is protected and they are given due credit for their work. Our country received the copyright law as a gift from the colonial rule.⁹

The Intellectual Property law mainly focuses and gives due importance to the legal rights which are associated with gaining the commercial reputation with the goodwill. The statute of Anne which was enacted in the year 1710 was the first copyright Act to regulate the trading of the book and protect the printed material against any kind of piracy. International copyright Act was passed in the year 1886 in the Berne convention. Another major development in the copyright law was the introduction of the copyright act 1911.

On this Copyright Act of 1911, the Supreme Court of India opined that:¹⁰

"It seems to us that the fundamental idea of violation of copyright or imitation is the violation of the Eighth Commandment 'thou shall not steal' which forms the moral basis of the protective province of the Copyright Act of 1911. It was a free law operating in an enslaved regime as the

⁹ Dr. Mira T. Sundarajan, Digital Learning in India: Problems and prospects,

d. education@homelindia.

<http://cyber.law.harvard.edu>

¹⁰ R.G. Anand Vs M/S Delux Films, AIR 1978 SC 1613(1619)

Indian Legislature had very limited power of amendment by way of modification or addition which was conferred by Section 27 of the Act"¹¹. Written records, sound recording, work of architecture gained protection under this copyright act. It also abolished the copyright law of protection of the unpublished work."

The Bombay High Court has observed that the applicability of the Copyright Act of 1911 depends upon the provisions of the Constitution of India.¹² It makes this Act applicable even after the commencement of the Constitution.¹³ It can be said that the copyright is a territorial concept, development and amendments in the independent India is the guarantee of the constitution. This act did not stand for more time and was replaced by the act of 1914. The Copyright Act 1957 was the first post-independence copyright legislation in India and the law has been amended six times since 1957¹⁴. Before the Copyright Act of 1958, the Copyright Act of 1914 was applicable in the country. The most recent amendment was made in the year 2014. The journey of the Copyright law from the Pre to the Post independence era clearly shows the position of copyright in India especially in the age of technological and electronic advancement. Copyright plays an important role to in the protection of the original work.

TRADEMARK

A trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from goods of its competitors ¹⁵. It is generally a mark or a logo. Trademark helps identifying a good with a better quality and helps in distinguishing a recognized company with a fraud one. It is simply a word or a symbol that is in connection with a product or service. The Trade Mark Act, 1999 defines "well Known Trade mark" as "*a mark in relation to any goods*

¹¹ Sec. 27 of Imperial Copyright Act 1911 stated as : ¹¹ Dr. Mira T. Sundarajan, Digital Learning in India: Problems and prospects, <http://cyber.law.harvard.edu/education/home/edl/india>.

¹¹ R.G. Anand Vs M/S Delux Films, AIR 1978 SC 1613(1619)

¹¹ Sec. 27 of Imperial Copyright Act 1911 stated as

"The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession and to works first published in the possession."

¹² Article 372 of the Constitution of India.

¹³ N.T. Raghunathan Vs All India Reported Limited, AIR 1971, Born. 48(51)

¹⁴Jatindra kumar , Law of Copyright (2015) 88

¹⁵Introduction to Intellectual Property-theory and practice(Kluwer Law International,1997)184

*and services which has become so to the substantial segment which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in course of trade or rendering of services between those goods or services and a person using the mark in relation to the first mentioned goods or services*¹⁶. Trade mark is even very important as it is indicative of the quality mark of the product. The protection of rights in torts is somehow parallel to the rights that are created by the trademark law.

In India the development of the trade mark law was through the Anglo Indian trademark law which had its origin back in 1266 and was popularly known as the bakers marking law. Trademark law was not much developed during the ancient time. The ancient people were inventors and founder of many things. They only use a mark to distinguish one product from another on the basis of the price and the quality. This practice of marking the products with different marks was considered to be a practice for their own benefit. These marks were even placed to identify its real owner and protect the products from the thieves. In our country prior to 1940, there was no official law in India related to the trademarks. But in 1940 the trade mark was established parallel to the English trademark law. After this act, there was a need for protection of the rights related to the trademark. And the act was replaced by the trademark and the Merchandise Act 1958. This act focused more on the protection of the rights and prevention of the fraud marks on the commodity. This Law also enables the registration of trademarks so that the proprietor of the trademark gets legal right to the exclusive use of the trademark¹⁷

The re-appellation of the law gave rise to the merchandise and the trademark law in 1999 which is done by the Indian government to compile it with the law of TRIPS obligation on the recommendation of the WTO guidelines. The object of the 1999 Act is to confer the protection to the user of the trademark on his goods and prescribe conditions on acquisition, and legal remedies for enforcement of trademark rights¹⁸. This act of 1999 also gave the power to the police to arrest people for the infringement of any right under this act. The rules of this act were also called as the trademark rule 2002. Presently the trademark act 1999 and trademark rules

¹⁶ P.K. Vasudeva, World Trade Organization: Implications for Indian Economy(Pearson Education,2005)169

¹⁷ Pk Jalan,Industrial Sector Reforms in Globalisation Era(Sarup and Sons,2004) 33

¹⁸ Vinod V Sople,Managing Intellectual Property(PHI Learning Pvt Ltd,2006) 107

2002 govern the Indian trademark laws in India. This trademark law served to be useful for the welfare of the country today the trademarks are having a legally protected status as it benefits the society and promotes a healthy competition among the sellers. The trademark law also protects the public from deceit and guarantees a good quality product. The law plays an important role in protecting the interest of the trademark holders by allowing them to be registered and to be used exclusively by the trademark holders

A trade secret is any formula, practice, process, instrument, pattern, commercial method, or compilation of information not generally known or reasonably ascertainable by others by which a business can obtain an economic advantage over competitors or customers. Trade secrets are usually hidden from the public. The owner attempts to keep the business information hidden from others. With the increase in globalization, the large number of MNCs are growing and thus there is a need to keep the trade secrets as a part of intellectual property so that it would contribute to the business ethics with the main purpose of fair dealing and would help in encouraging creativity and innovation. There is no effective legislation for trade secrets in India. The member countries of TRIPS except India have already made laws related to the trade protection in their country. Trade secrets in India are governed under the Indian Contract Act 1872 under section 27 that provides remedies and also restricts the person from disclosing information that he acquires in the course of employment or through any kind of contract. There is no criminal remedy provided. Only civil remedies have been provided.

In 2008 an attempt was made by India for the protection of trade secrets by passing a National Innovation Act, 2008. The draft of this act was based on the American Competes Act. The main motive was to codify the law and attempt to protect confidential information, innovation and trade secrets.

There is a need to protect trade secret law. A proper legislation must be made for its protection under intellectual property rights.

GEOGRAPHICAL INDICATIONS

Geographical indications under article 22(1) of the TRIPS agreement is defined as “indications which identify a good as originating in the territory of a member, or a region or locality in that

territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographic origin.”

The geographical indication has assisted in the non-monetary benefits and protection of the community including knowledge or protection of the community rights. It also allowed the producers to make market recognition and also a premium price. The main purpose of the geographical indication is to identify a regional origin of a particular product in particular that the good derive its particular characteristics from a particular geographical location. Geographical Indication confers a legal protection to a product. This right also prevents unauthorized use of the registered geographical indication. They are a marketing tool and help in to command higher prices. It helps in making a good market reputation. It is a matter exclusively for the right to trade to the use of a name. The concept of the geographical indications has been developed by considering various legal traditions, local and economic systems of a particular region. Some countries provide geographical indication protection under laws that are targeted at preventing unlawful commercial acts from business competitors such as unfair competition and passing off. Both unfair competition and passing off are common law torts.¹⁹ Use for certain good and services which may not be originating from a particular area, it may mislead the customers. Being a member of the WTO India enacted The Geographical Indications of Goods (Registration and Protection) Act in 1999 and came into force from 2003. The government of India established the geographical Indication Registry with all India jurisdiction. It was enforced with the main objective of providing a geographical indication to the manufacturing goods, agriculture product etc. It confers right to the registered proprietor and to the authorized users. The Geographical system was first used in France in the 20th century.

INDUSTRIAL DESIGN

“When companies are competing at equal price and functionality, design is the only differential that matters “- Mark Dziersk

¹⁹ Marcus Hopperger, Introduction to Geographical Indications and Recent Developments in the World Intellectual Property Organization (WIPO) at <http://www.wipo.int/meetings/2003/geog-ind/en/documents> (June 13, 2003), Marcus Hopperger is the Head of Information and Training Section, Trademarks, Industrial Designs and Geographical Indications Department, WIPO.

A design is an aesthetic of product or we can say the physical appearance of a product. It is protected under Design Act 2000 and Design Protection Act 2001. The term design is defined under section 2(d) of the act is defined as feature of shape, configuration, pattern, ornament or composition of line or colors that are applied to any article by any industrial process or means. It deals with the birth – industrial product and the consumer product. A design must not include any artistic work as mentioned in the copyright Act. This design act is applicable all over India. A design is protected for 10 years from the date of the registration and can be extended for the period of other 5 years by the payment of the renewal fees of Rs 2000. A company manufactures its product to attract the buyers, to extend the demand of a product; the product needs to look attractive.

Therefore there developed a need for the protection of such designs. Legal protection to a product design helps in creation of new designs and promotes creativity. Protection of the product design enhances the innovation and the creator gains the confidence that his design is protected by the law and no other person can copy his design. There was a huge need to protect these designs and for the first time the legislation enacted the Patterns and Designs Protection Act, 1872. This act privileged the new inventors and the creators to use their creation in India. The act was followed by the Invention and the Design Act 1888 which amended the law relating to the protection and the invention and contained a provision relating to design. This act has been replaced by the British

Patent and Design Act 1907 which became the basis of Indian Patent and Design Act 1911. The Patent and Design Act 2000 repealed the act of 1911. The act came into force on 11 May 2001. The main intent of the Design Act 2000 was to protect the design of the product, not its function.

With the advent of Universal Declaration of the human rights (UDHR) the intellectual property rights has gained a greater significance. It can be said that the evolution of the intellectual properties can be traced from the past when there was a need required to protect the innovational ideas of a person from the others. Intellectual Property Rights is a strong tool that helps in protecting the investments, time, money efforts and creativity of the inventors of the intellectual property. The main purpose was to initiate creativity among the people who can come up with their ideas thoughts and valuable innovation without and fear. Along with this a due credit of any invention or innovation motivates a person to showcase their talent to the world. The intellectual property rights have gained popularity not only in India only but

across the world as well. The world is changing fast and the society is becoming a material based society. Intellectual properties are becoming an important part in the society. It had been realized to protect the interest of the mercantile community and is only possible through the intellectual property rights. It is all about the enrichment of the creator with the innovative idea.