

INTELLECTUAL PROPERTY RIGHTS: MISUSE OF INTELLECTUAL PROPERTY LAWS AND ITS COMPULSORY LICENSING

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ABSTRACT

Intellectual property means those properties which are governed by human beings. It refers to the creation of mind for which exclusive rights have been prescribed in the form of Intellectual Property Rights (IPRs). Intellectual Property Law safeguards the creation of human beings from infringement and counterfeiting. The main reason to bring IP laws is that all the innovation, research and developments couldn't be copied in an unethical manner. Without the IPR Laws, Others can easily able to have the right to use the invention or creation which is created or invented by the authorized person. Intellectual property laws give absolute rights to the inventor or creator of work which are the result of human artistry. The author considers that this may lead to unfair advantage to the Intellectual Property owners. The author tries to encapsulate various provisions in TRIPS to control the misuse of Intellectual Property Rights that help in controlling and governing the possible misuse or over-use of these rights.

INTRODUCTION – WHAT IS INTELLECTUAL PROPERTY?

"Intellectual property is the fuel that drives innovation & creativity, protect it fiercely."¹ Intellectual property means an invention, idea, design, etc. on which somebody is created and that the law prevents other people from copying². Intellectual property law is the area of law that deals with the legal rights of creative works and inventions. Rights under the Intellectual property laws are given to those who created or invented something that comes under the category of the prescribed rights. The Rights can be enforced by the lawsuit in the court. Intellectual Property is a class of property that includes intangible creation/invention of the human mind. Some Intellectual Property exists and some countries recognize IP more than others. The Well-Known Rights are – Trademark Rights, Copyrights, Patents, and Trade-secrets. The Concept of intellectual property developed in England in the 17th and 18th century. The usage of the term “Intellectual Property” began in the 19th century and successfully laid

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¹ Saying by the Prof. (Dr.) Unnat P. Pandit, CGPDTM in the IPR Newsletter of April-May 2023

² Intellectual Property defined by the Oxford Dictionary.

out the Intellectual Property Laws in the world by the 20th century. The execution of IP Laws has been recognized by various campaigns and awareness programs conducted by the government in various sections of society. The object of the IP Laws is to protect the author, inventor and creator of intellectual property. However, due to his monopolistic control over his invention could provide him an opportunity to tilt the market equilibrium, like price fixing, influencing and exploiting the market understanding.

Some of the supporters of IP Laws describe the main purpose of intellectual property as encouraging the creation or invention of a wide variety of intellectual goods. To achieve this, the intellectual property laws give certain rights to inventors or creators for the protection of their intellectual goods with a certain limit on those rights. Supporters argue that because IP Laws give protection to intellectual goods and allow people to use their creations or inventions will give greater economic benefit to the individual owner of those Intellectual Goods.

The Intangible Nature of intellectual property has some difficulties compared to traditional property like land and goods. Unlike Traditional Property, Intellectual Property is “invisible” in nature. “Intellectual property rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period³”.

“Prime Minister Narendra Modi envisions that India should possess the technology and knowledge for a growing economy in the next 25 years, with intellectual property playing a pivotal role in this initiative. The Intellectual Property Office in India is actively contributing to this objective.”⁴

HISTORICAL ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

The legislative and administrative line of action regarding IP Laws have their roots in Europe. The trend of allowing patents laid the foundations in the fourteenth century. In comparison to other European countries, in some matters, England was technologically advanced and used to attract artisans from elsewhere, on special terms. The first known copyrights appeared in Italy. Venice can be considered the cradle of the IP system as most legal thinking in this area was done here; laws and systems were made here for the first time in the world, and other countries

³ World Trade Organization

⁴ The statement can be found in the IPR Newsletter of month APRIL-MAY 2023 which is based upon the theme –“Women and IP: accelerating innovation and creativity”

followed in due course. The patent Act enacted in India has a history of more than 150 years, the first one was enacted in the year 1856 and based on the British patent system and it provided first time the limitation of 14 years which is being followed by various acts and amendments.

FRAMEWORK OF INTELLECTUAL PROPERTY IN INDIA

Accordingly, The UDHR (Universal Declaration of Human Rights) states that “Everyone has the right to participate freely in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” Further, it also states that “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”⁵

Intellectual Property includes all the rights regarding safety in the industrial, scientific, literary or artistic fields. The vital feature of the property is that the owner or proprietor may use his property in any lawful manner in whichever he wants to use and nobody else can interfere with those rights.

Intellectual Property is an invention, idea, product or good that has been registered with the Government and that grants the inventor exclusive rights to use the invention for a given period. It prevents others from using the rights and excludes them from making and selling the same within the boundary.

Intellectual Property is protected by various methods such as Copyright is given to protect original works like literary, artistic and musical works, and trademarks obtained by the manufacturers to have exclusive rights for the Name, Symbol or Mark. These rights are only valid in countries like India where Patent applications have been awarded. The lack of an international IPR system could hurt innovative activities.

In India, the Monopolies and Restrictive Trade Practices Act, 1969 has been replaced by the Competition Act, 2002 which clearly states that unfair trade practices would continue to be dealt with within the Consumer Protection Act of 1986. Unfair Trade Practices are defined under the Consumer Protection Act 1986 with certain exceptions.⁶

⁵ Article 27 of the UDHR (Universal Declaration of Human Rights)

⁶ Unfair Trade Practices defined Under Section 2(r) of the Consumer Protection Act, 1986

The Object of intellectual Property Laws is to protect the creator, inventor or author of an intellectual property.

Illustration – “If ‘X’ invents a new thing, the patent laws protect him from infringement of his right by any person. It provides a monopoly to ‘X’. Thus, the same right may have a negative impact on society. Due to Monopoly over the intellectual goods invented by ‘X’, he/she may fix abnormal prices for the goods he/she invented and can exploit society. This is an unfair trade practice in society by the Intellectual Property Owners.

In India, the problem given in the above illustration can be solved by two methods: -

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

The Union Parliament passed the Monopolies and Restrictive Trade Practices Act, 1969 which was replaced by the Competition Act, 2002. The provisions described under the Competition Act of 2002 are to prevent intellectual property owners from abusing a dominant position in society.⁷

- **Time Limit**

Intellectual Property Laws clearly state that every Intellectual property right comes with a time limit which prevents the owners of intangible goods from making such dominance or negative impact on the society.⁸

MISUSE OF INTELLECTUAL PROPERTY RIGHTS WITH SOME REFERENCE TO COMPULSORY LICENSING OF IPRS

Intellectual Property Rights can be transferred between two or more parties depending on mutual agreement and standard legal principles, unlike the transfer of rights. A compulsory license is non-voluntary and it is enforced on the owner of the intellectual property. The activity of compulsory licensing on intellectual goods is to prevent any activity that can be harmful towards competition and applies to all exclusive rights of IPR, i.e., copyright, trademark, patent, trade secret and design registration.

In case of Copyright misuse, occurs when a company or an individual makes unreasonable use of a copyright that is beyond its legal holdings and in violation of the Copyright Act of the

⁷ www.mca.gov.in

⁸ For the time limits of intellectual property, can visit the Lok Sabha document site i.e., https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/Intellectual%20Property%20Rights%20in%20India.pdf

concerned member state. An owner of the copyright could commit misuse by violating any public policy choices embodied in the Copyright Act, such as by using a license agreement to extend the length of its copyright monopoly. Copyright misuse can also occur when the assertion of copyright is aimed at suppressing speech.

It is believed that Copyright misuse derives its basis from patent misuse as, while patent abuse has been mentioned in various cases since the 19th century, copyright misuse found recognition in the legal fraternity only a few decades ago.

The need for compulsory licensing comes to light when problems occur with patent technology regarding purchase and sale in combination. In other words, if the license is forcefully used in the place of the licensor by using present and future technologies the practice is considered to be an unfair trade practice. This type of restriction may lead to a delay in the development of competition technologies.

Subsequently, Article 40 was added to the TRIPS Agreement to address the problems of IPR Misuse and solve them through necessary government intervention.

“Article 40”⁹

1. Members agree that some licensing practices or conditions about intellectual property rights that restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.
2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.
3. Each Member shall enter, upon request, into consultations with any other Member who has cause to believe that an intellectual property right owner that is a national or domiciliary of the

⁹ Article 40 clearly states in the section 8 (control of anti-competitive practices in contractual licenses) and for further reference, can visit on https://www.wto.org/english/docs_e/legal_e/27-trips_04d_e.htm

Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member

CRITIQUES OF IPRS COMPULSORY LICENSING

The Different provisions of compulsory licensing would be imposed on the right holders in case of inappropriate behaviour such as –

- Introducing new products and inharmonious without ameliorating the performance and minimizing the costs which can be illegal and inadequate.
- Restricting the licensing practices that can be harmful to competition or that can disrupt the market.
- Disagree with the Licensing Authority
- Non-working and insufficient production of the creation which is protected under the intellectual property rights.
- Also, Restrict the parties who try to develop a monopoly which is harmful to society.

The Provisions described under the legislation for compulsory licensing must not have any negative impact on the rights of IPR Holders. These provisions must be used very carefully. If not carefully using the rights, then it will have a negative impact on – Goodwill, the Introduction of new technologies, the establishment of new works and economic & social benefits to invest in R&D (Research and development), etc.

VARIOUS PROVISIONS IN TRIPS TO CONTROL MISUSE OF IPR

The Berne Convention discusses various TRIPS provisions that help control and govern the possible misuse of Intellectual Property Rights (IPRs). TRIPS has Special Provisions given under Article 73 which serve as ‘security exceptions’¹⁰. There are some of the purposes given regarding these special provisions are:

- To Protect and Maintain the various aspects of national security.
- To Stop members from carrying the actions to maintain international peace and security under the UN Charter.
- To prevent a member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

There are also some articles available for compulsory licensing such as articles 1, 7, 8, and 27.1.¹¹

ARTICLES¹² IN TRIPS AND SOME SPECIAL MEASURES

Article 13 states that members must restrict exceptions or limitations in case copyrights can be selected rights that will not be harmonious with normal misuse of work and will harm the interest of the right holder.

Article 17 states that in the case of trademarks given with certain restrictions and exceptions to all the exclusive rights guaranteed by the trademark, there’s a condition that such exceptions should lawfully be taken into consideration in the interest of the owner of the trademark.

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 the business to which the trademark-related compulsory licensing of the trademark is not allowed and the members can decide the terms and conditions of the licensing and assignment of trademarks.

Article 24 calls attention to the conditions for international negotiations and the exceptions concerning geographical indications

¹⁰ Security Exceptions given under Article 73 of Part VII under the TRIPS

¹¹ Article 1, 7, 8, 27.1 described under the TRIPS about Copyright, trade secrets, restrictive unfair trade practices and patents.

¹² All the articles referred from the TRIPS Agreement and for further reference visit https://www.wto.org/english/docs_e/legal_e/27-trips.pdf

Article 30 affirms that the member states can allow others to use their rights with limitations like “can do research and experiments”, “Can use for private and non-business purposes”, “can sell generic medicines with permission”, “pharmacies can make medicines with permission” – National Laws can be framed for these conditions.

Article 31 has some features – Use of rights must be authorized by the concerned person to supply the goods in the market. As the use of patents is not exclusive, so if anybody is using the rights of patent holders then patent holders must be compensated.

Article 37 highlights those conditions in which a compulsory license can be obtained as if anybody unknowingly uses the designs of integrated circuits and it will not be in the category of a lawful act. But if any person is knowingly using the rights of the owner of the intellectual good then the owner must be compensated.

Article 40 states that member states accept that few licensing practices related to intellectual property rights that control competition may have a negative impact on trade and may create a problem in transferring and promoting technology.

Article 40.2 elaborates on three non-limiting acts about abusive practices like coercive packaging licensing, conditions limiting challenging to validity and exclusive grant-back packaging.

Articles 40.3 and 40.4 specifically talk about provisions concerning the member states consultations on regulations and violations by the IP rights holders in their respective nations. Hence, Article 40 and its sub-section are mouldable and necessary elements in any national competition policy.

Article 44 is a necessary clause relating to directives. It states that in case of litigation involving third parties recognized by the government without the permission of the right holder.

THE DOCTRINE OF MISUSE OF INTELLECTUAL PROPERTY

The misuse doctrine comes out to describe such concern about “overreaching” by IP owners. First in patent law and then in copyright, courts developed the non-discriminatory doctrine of misuse to scrutinize owners’ practices that lean on to expand the scope of IP rights in anti-competitive or other problematic ways. Misuse wrangles are usually raised as an infringement defence, even though the defendant asserting it need not be the victim of the offensive practice.

The misuse doctrine protects against actions that improperly extend intellectual property rights beyond their lawful scope. The penalty for misuse is vigorous: the misusing owner cannot enforce the patent or copyright against anyone until the offending practice stops and “the consequences of the misuse have been decadent.” While copyright and patent misuse doctrines share these features, they have nonetheless forged different paths. In recent decades, the patent misuse doctrine has moved closer to antitrust principles, placing competition concerns at the forefront and embracing a “rule of reason” analysis. As a result, the patent misuse doctrine has become increasingly irrelevant outside a narrow sliver of cases where a patent owner with market power engages in licensing practices with demonstrable anticompetitive effects. By contrast, copyright misuse has abstained from antitrust laws restricted to considering broader IP policy concerns. To this end, courts have invoked copyright misuse to look over the licensing and enforcement practices that threaten not just competition, but also innovation and speech.

RECENT DEVELOPMENTS IN INTELLECTUAL PROPERTY LAWS IN INDIA

Some recent developments can be seen in regards to the patent laws and the patent (amendment) rules 2020 which came into force on the 20th of October 2020. The government of India undertook some measure steps to adopt international standards in the IP Legislation in India. By adapting the international standards, it will bring some changes towards a free market society, liberalizing international trade practices and demonstrating its commitments to the WTO (World Trade Organization) under the TRIPS Agreement.

Trademarks Laws: India Replace the trade and merchandise marks act 1958 with the Trademarks act 1999. The Trademark Act 1999 was passed by the Union parliament with some objectives:

- To merge the practice of trademark laws in India with international practices.
- To ensure the commitments regarding trademark laws in the TRIPS Agreement.

Some of the changes that came by enacting the Trademark Act 1999 are:

- The Term ‘Trademark’ is now defined in the Act of 1999 and also includes the definitions of shapes, packaging, a combination of colours, and graphical representations, it is for widening the protection of IPR.
- This act hastens the procedure for the registration of a trademark.

- The definition of ‘trademark infringement’ is also elaborated in this act to give protection beyond the use of identical or similar marks about goods for which they are registered.
- In case of infringement of Trademark Rights, then the action can be taken in the district court within whose jurisdiction either the trademark right holder resides or business carries on, unlike earlier law where the action can be filed only against the defendant.

Geographical Indications: Union Parliament enacted the Geographical Indications of Goods (Registration and Protection) Act, 1999. This Act provides for registration and better protection of geographical indications relating to goods in finding the place of origin of the goods and other characteristics of the goods. The Act protects Indian goods which is liked in some geographical areas such as basmati rice, Darjeeling tea, Alphonso mangoes, cardamom, and Hyderabad Grapes which also are well known in the international market. The act of 1999 protects the geographical goods so the goods will not lose their originality and quality of the goods from where the goods belong.

Copyrights Law: Copyright law amendment was done in the year 2012 to make Indian copyright law and regulations with the WIPO Copyright Treaty and WIPO Performance and Phonograms Treaty. Introduced technological measured protection which ensures that fair use of the goods will survive in the upcoming era by providing special fair use provisions, some amendments and special provisions for the disabled and access to works and other amendments to the copyright administration.

In one of the famous case laws regarding the misuse of copyright is “**Tekla Corporation v. Survo Ghosh**”, decided by the Delhi High Court on 16th May 2014, Justice Endlaw of the Delhi High Court held that “copyright misuse does not constitute a legitimate defence for copyright infringement in India.”¹³

Patents Laws: Some of the changes have occurred in the Indian patent laws under the TRIPS Agreements by enhancing the list of inventions not patentable, including many rights of the patentee, reversing the burden of proof in the suit filed in the district court in case of infringement and inserted the limitation period for obtaining the patents rights on the patentable products .i.e, 20 years.

¹³ Case law referred from <https://blog.ipleaders.in/abuse-of-intellectual-property-rights/#:~:text=In%20this%20case%20the%20Supreme,In%20Brulotte%20v.>

Plant Varieties and Rights of Farmers: The Union Parliament enacted the Protection of Plant Varieties and Farmers Rights Act 2001 to provide an effective establishment of a system to protect plant varieties and farmer's rights. Safeguards the plant varieties and farmers' rights for their contribution in conserving the plant varieties and conserving them for making new varieties of genetic resources. The Act of 2001 protects the plant varieties and rights and also the wines are limited to 18 years and 15 years for other plants.

New Design Laws: India enacted separate laws for the protection of copyrights in industrial design. The Design Act 1911 has been replaced by the new Design Act 2000. The Design Act 2000 gives protection to the owner and authors of novel or original designs and enforces those rights against the person who infringes the rights of the author given under the Design Act 2000. The act of 2000 has added the definition of 'original' to identify the design that can be registered under the act. Any design which is not published earlier neither in India nor outside India nor contrary to any public orders, is eligible to be registered under the Design Act 2000.

As per the TRIPS Agreement, India also enacted a new act which is the semiconductor integrated circuit layout-design Act 2000. Any misuse of the registered layout design can be prohibited under the act with the action of infringement can be taken against the infringer. Indian IP Laws are still in developing nature but India is a signatory to international treaties like the Paris Convention (for the protection of industrial property), the Berne Convention on copyrights and the TRIPS Agreement.

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MISUSE OF IPR WAS SEEN IN THE FOLLOWING CASES¹⁴ AND HAD BEEN ADJUDICATED

“BRULOTTE V. THYS CO.” – A patent license that required royalties to be paid beyond the expiration of the patents was considered patent misuse. As a result, the licensee had no obligation to continue making payments under the agreement after the expiration of the patents.

“ARONSON V. QUICK POINT PENCIL CO.” - The Supreme Court held that a license for a product that was pending remains enforceable, and royalties remain due, even if the patent application is abandoned and never issued. The contract provided for a reduced royalty in case the patent was not issued, and the Court found that enforcing the provisions of this contract did

¹⁴ <https://www.bitlaw.com/source/cases/patent/index.html>

not conflict with federal patent policy. Consequently, there was no preemption of contract law in this case.

“KEWANEE OIL CO. V. BICRON CORP.” – The Supreme Court analyzed the relationship between patent laws and trade secret laws, and determined that patent law does not preempt state trade secret protection.

CONCLUSION

Based on the above analysis, the compulsory licensing system has become an important characteristic of Intellectual Property Laws. Many Developed Nations have already adopted these licensing systems to limit exclusive rights and prevent or remedy abusive practices in several areas. There's a broad range of compulsory licensing which is being adopted by developed and developing nations. Compulsory licensing should be considered an essential element in patent laws and other intellectual property rights and laws in developing countries. The grounds and conditions for compulsory licenses should be carefully determined by national laws. Developing countries should preserve the maximum freedom under international rules to design their compulsory licensing system following their interests and necessity including such areas as transfer and promotion of local industrialization and technology.

A well-mannered intellectual property system can help all the member states to realize intellectual property's ability as an observer for economic development and social and cultural well-being. The compulsory licensing system helps the member state to maintain a balance between the interests of inventors and the public interest, encouraging an environment in which creations and inventions of the human being can flourish, for the benefit of all.

However, abuse of such rights may undermine the spirit and neglect the purpose of granting time. Their misuse causes nothing but speeds up the costs, mental stress, reputation risk, and diminished growth of the business. Each industry should evolve its IP Policies, management style, strategies, etc with the given or prescribed regulations along with the policies mentioned in the TRIPS Agreement.