

INTELLECTUAL PROPERTY RIGHTS IN INDIA: TIME FOR RECOGNITION AS AN ESTABLISHED RIGHT UNDER THE CONSTITUTION

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Abstract

21st century is the era of knowledge and technology as new ideas and innovations have led to the advancement of the entire human race. There should be protection of the rights made available to the owners and authors of intellectual works that are a result of human ingenuity and creativity as such protections help in giving official recognition to the creators and contributes towards the building of repositories of vital information, which further facilitates the growth of both the domestic industry or culture, along with the international trade that may take place with respect to such creative works through signing of the treaties that end up offering multi-lateral protection of such creative rights, also known as Intellectual Property Rights (IPR). Intellectual Property Rights covers patents, copyright, trademark, industrial designs, geographical indications, protection of layout design of integrated circuits and protection of undisclosed information (trade secrets) etc. Many products and technologies are simultaneously marketed and utilized in many countries. With the opening up of trade in goods and services, intellectual property rights have become more susceptible to infringement leading to an inadequate return to the creators of knowledge. Every country either has legislation or had been coming up with, in order to protect these rights of the citizens and facilitate further growth of science and technology. Countries like the United States of America have already incorporated intellectual property rights in their Constitution, making it a constitutional right and just not a legal right. In this note, the authors notice how intellectual property has changed the sphere of technology and how it affects the growth of a nation. After that, the authors discuss as to whether we have intellectual property rights in our Constitution. Furthermore, what is the need for inclusion of these intellectual property rights in the Constitution or why we are concerned about making it a constitutional right?

Introduction

In this era of globalization, especially after the establishment of the World Trade Organisation (WTO), advanced industrial societies underwent a fundamental transformation from either capital or labour based economies to progressing towards knowledge-based economies, which is argued to be an aftermath of the information technology revolution.¹ History books which discussed the evolution of property responsible for shaping the legal orders in the developed countries, mention that the term 'property' until the late 20th century did not have the siren's call of words like 'freedom', 'equality', or 'rights'. The US Declaration of Independence² spoke boldly of liberty, but only obliquely of property - through the imagery of the 'pursuit of happiness.' Not so frequently discussed in the same discussion as that pursuit of happiness was an increasingly important and atypical form of the property i.e. intellectual property (IP). Intellectual property is a broad concept which within itself covers several types of legally recognised rights arising from some intellectual creativity, or that are otherwise related to ideas. These rights concern intangible things³ from ideas as expressed (copyrights) to innovation as embodied in practical implementation (patents). If intellect is a kind of personal characteristic or property, then anything that is the outcome of this application of intellect is equally owned by the creator of that work. This provides the law to give a person the right to own what he has created or produced, and this proprietor right over a product produced out of his intellect is called as an intellectual property right (IPR).⁴

In today's time, intellectual property generally includes, "*literary artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and "all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."*⁵ The rise in the technological developments cemented the way for demand to intensify and enforce IP protection. The proponents of the argument that stronger IP rights are inevitable for the industrial and economic development of a nation⁶ rely upon

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¹ CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES (2nd ed Routledge, 2010)

² *The Declaration of Independence*, para 1 (U.S. 1776)

³ *De La Vergne Refrigerating Mach. Co. v Featherstone*, (1893) [147 U.S. 209, 222]

⁴ Saurabh Saini, *Protecting your Intellectual Property in India*, MIGHTY LAWS (May. 1, 2011, 12:44 PM)

⁵ Convention establishing the World Intellectual Property Organization, July 14, 1967, Art. 2.

⁶ WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* (American Enterprise Institute Press 2004)

the commonly accepted belief that adequate IP protection is essential for promoting confidence amongst investors in research and development.⁷ With the enforcement of these rights, the creator of an intellectual creation would firstly, get some benefit from his work. Secondly, if protection is given to these intellectual property rights, then it would help in the enhancement and further development of industries and companies which deal with these kinds of work(s). There is also a view that developed countries could reap the benefits of increased intellectual property rights as it attracts more foreign direct investment and accelerates the transfer of technology between countries, ensuring that all countries enjoy the benefit.⁸ Therefore, this creates a need for national legislations and treaties (whether regional or international) to provide an incentive towards various creative endeavors of the mind by offering protections.

Role of Legislation in Protection of Intellectual Property

Most of the nation-states have their domestic acts or regulations to protect and enforce the IPRs, but what remains the issue for this article is to determine the degree of such enforceability. Does the person whose right of intellectual property has been infringed have the same recourse available as it is available in case of violation of a fundamental right like Freedom of Speech and Expression or that of Freedom of Religion? The constitutionality of Intellectual Property Rights has been one of the significant concerns and demands of citizens since the economies have become more technology-reliant. The United States is the country which leads with an example in this case as well. The Constitution of the United States (Article I, Section 8, Clause 8) grants to Congress the powers to promote "the progress of science and useful arts" by providing inventors with the limited but exclusive right to their discoveries. This applies to copyrights and patents, with trademarks similarly protected by Congress under the Commerce Clause (Article I, Section 8, and Clause 3). Together, they are all protected under the umbrella of intellectual property. The fundamental concept behind protecting intellectual property is that inventors, innovators, artists and others should be able to enjoy the fruits of their creativity and labour for a specified time period, after which the material becomes available for public use. Society benefits from it because this incentive to create will yield a rich and varied cultural menu for its citizens. Indeed, one can successfully argue that copyright protection is a necessary ingredient for ensuring cultural wealth in our societies. In societies, such as developing countries, where intellectual property is not protected,

⁷ Roberto Mazzoleni & Richard R. Nelson, *The Benefits and Costs of Strong Patent Protection: A contribution to the Current Debate* 27 RES. POLICY 273, 284 (1998).

⁸ Lee G. Branstetter, *Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical Evidence from US Firm-Level Panel Data* 121 Q. J. ECON. 321, 349 (2006).

ingenuity is stifled, and progress stymied.⁹ The practicality of enforcing this as a constitutionally protected right becomes clear when actual cases are examined. One of the landmark cases in this context was Amazon's 1-Click case or also known as one-click buying, where Amazon was granted a patent for the 1-click technology on September 28, 1999. This technology allowed the customers to make an online purchase with a single click without having to manually input billing and shipping information every time they purchase a product. The 1-click also allowed the usage of a billing address and credit card or other payment info that is kept on file in the user's account. This technology led to several patent disputes where constitutional provisions were cited, including a patent infringement lawsuit filed against Barnes & Noble in 1999 only a month after Amazon's patent was issued. Barnes & Noble offered a checkout option called "Express Lane," which also enabled shoppers to make a purchase with one click. The lawsuit was settled in 2002; however, the terms were not disclosed.¹⁰ Furthermore, even the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which was multilaterally negotiated between the WTO Members incorporates provisions from many existing IP international agreements such as the Paris and Berne Conventions administered by the World Intellectual Property Organisation (WIPO).¹¹ These international conventions and treaties were formed after multilateral negotiations with an aim to strengthen the protection mechanisms for the IPRs, and this should be an indication of the importance of incorporating similar protections at the national levels.

One sector where the authors believe that there is a lot of work to be done on the protection of IPRs with respect to the Indian context is in the Small and Medium Entrepreneurs (SMEs) sector which are a significant source of innovation and employment. In general, innovative SMEs exhibit a higher degree of flexibility than larger firms, which allows them to respond more nimbly to signals from the market.¹² India, a developing country, is home to numerous SMEs, which contribute up to 45% of the industrial output, 40% of India's exports, employing up to 60 million people, and creates 1.3 million jobs with every passing year. With approximately 30 million SMEs in India, this sector seems to be growing at a rate of 8% per year.¹³ The authors note that amongst the 5 legislations which are governing the SMEs

⁹ E. Anthony Wayne, *Focus on: Intellectual Property Rights*, U.S. DEPARTMENT OF STATE BUREAU OF INTERNATIONAL INFORMATION PROGRAMS (2018) <https://uk.usembassy.gov/tag/anthony-wayne/>.

¹⁰ William Gindlesperger, *Why Intellectual Property Is Protected by The U.S. Constitution*, MANUFACTURING.NET (Jun. 13, 2011, 09:00 PM) <https://www.manufacturing.net/home/article/13056051/why-intellectual-property-is-protected-by-the-us-constitution>.

¹¹ INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY, http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf (last visited Sept. 2018).

¹² ENHANCING INTELLECTUAL PROPERTY MANAGEMENT AND APPROPRIATION BY INNOVATIVE SMES, <https://iccwbo.org/publication/enhancing-intellectual-property-management-appropriation-innovative-smes/>. (last visited Sept. 2018).

¹³ EUROPE-INDIA SME BUSINESS COUNCIL, DEFINITION OF INDIAN SMES, http://www.eisbc.org/Definition_of_Indian_SMEs.aspx (last visited Sept. 2018).

in India having several rules and notifications for every branch and functionality of an SME,¹⁴ the provisions of these domestic legislations are not only deficient in the protection of IPR, but can be argued to be completely ignoring them. Thus, it is seen that the potential of these SMEs remains untapped as the difficulty in obtaining easy protection for their innovation creates a considerable barrier which in turn affects the growth of the GDP of the country. There is a strong need for the existing domestic legislation to come at par with the innovative trend in the country.

Intellectual Property Rights in India and Their Constitutionality

In India, intellectual property has gained significant interest in just the last three decades - considering the fact that now downloading a song or a movie using the internet is just a matter of minutes and you have a lot of jobs which are reliant on the sharing of intellectual property content. It is interesting to note that the Indian Constitution mentioned the 'right to property' until it was deleted, but whether it recognized the right to intellectual property is a point on which the Indian constitution is diabolic. In Entry 49 of the List I or the Union List provided in the Constitution of India, giving the central government the power to legislate on the subjects of that list, deals with the matters relating to intellectual property rights. The entry 49 states the subject as: "*49. Patents; inventions and designs; Copyright; trade-marks and merchandise mark.*" The authors note that except this provision, there is no other mention of the intellectual property rights in the Constitution of India, which is a major reason why we face the trouble in determining the constitutionality of IPRs in the Indian context.

Furthermore, if we look at Section 48 of The Patents Act, 1970 of India, it states that:

"48. Rights of patentees:

(1) Subject to the other provisions contained in this Act, a patent granted before the commencement of this Act, shall confer on the patentee the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute the invention in India.

(2) Subject to the other provisions contained in this Act and the conditions specified in section 47, a patent granted after the commencement of this Act shall confer upon the patentee

(a) where the patent is for an article or substance, the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute such article or substance in India;

(b) Where a patent is for a method or process of manufacturing an article or substance, the exclusive right by himself, his agents or licensees to use or exercise the method or process in India."

¹⁴Acts, Rules, Notification & Reports on SME, MIN. OF MSME (Oct. 2, 2015) <https://msme.gov.in/>.

The language of this section somewhat hints towards providing IPRs with a strong protection similar to the fundamental rights that are protected in the Constitution of India. As per the authors, this aforementioned Section 48¹⁵ is undoubtedly subject to the exceptions under Section 47¹⁶ along with the experimental usage exception. However, the nature of this seemingly ‘absolute duty’ is reminiscent of the rationale behind the Directive Principles of State Policy enshrined in our Constitution. The authors believe that the right to a creator is the most natural aspect of the right to freedom. In the constitution, Article 19 guarantees six fundamental rights in the nature of freedoms. Article 19(1) protects these rights as follows:

“... (1) *All citizens shall have the right:*

(a) To freedom of speech and expression;

(b) To assemble peaceably and without arms;

(c) To form associations or unions;

(d) To move freely throughout the territory of India;

(e) To reside and settle in any part of the territory of India; and

(f) Omitted

(g) To practice any profession, or to carry on any occupation, trade or business.”

The right to property, which was provided for in art 19(1)(f), was deleted by the forty-fourth amendment. However, it was retained as a constitutional right under art 300-A of the Constitution of India. It is easy to understand that there has been an obvious transition in the nature of such a right, i.e. from a fundamental right, which could have had a constitutional remedy available in the cases of state interference or infringement by any private party, it is now only recognized as a mere constitutional right. We noticed that the restrictions on the patents such as providing monopoly only for a specified term can be justified by taking recourse to the provisions of Article 19(6) of the Constitution of India, but Article 19(2) applies certain restrictions on the enjoyment of this right, and thus poses problems in the full enjoyment of this right. The story with the copyrights is similar. Copyright, which is one of the most reasonable restrictions on the freedom of speech and expression, can be argued to have helped in the protection of literary and artistic works. A citizen cannot take up a book written by another author and in the exercise of freedom of speech and expression, publish it in his name. Note that copyright protects works, i.e. the expression of thoughts, and not ideas. Different writers may build stories based on a similar plot. However, when one expresses it in a synopsis or in, say, a short story, or a play, the expression of

¹⁵ The Copyright Act, 1957, No. 14, Acts of Parliament, 1957.

¹⁶ *Ibid.*

the plot in that story will be protected. The Copyright Act of India does restrict the exercise of such freedom of speech and expression. Article 19(2) of the Constitution of India, however, does not provide for copyright as being a reasonable restriction¹⁷ on the freedom of speech and expression. Copyright, in fact, is all about the expression and protection of such expression. The question as to whether copyright can be read as an implied subject amongst the various subjects provided in Art 19(2) enables the legislature to enact a law for restricting the freedom of speech and expression. Such an interpretation would amount to saying that the list of restrictions provided in Art 19(2) is only illustrative and not exhaustive. Such an interpretation, however, would open floodgates for laws curbing freedom granted under art 19(1)(a).

In *Sakal Newspapers (P) Ltd. V Union of India*,¹⁸ the Supreme Court has held that restrictions cannot be imposed on the freedom of speech in 'public interest', which is not specifically mentioned in Art 19(2). The Supreme Court also observed in that decision that, "... *the freedom of speech can be restricted only in the interest of the security of State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. It cannot be justified on the ground that it is reasonable under clause (3) to (6).*" Thus, the Supreme Court has clearly interpreted the list of subjects in Article 19(2) as being exhaustive with respect to restrictions which can be imposed on the freedom granted by Art. 19 (1) (a). In other words, as the constitution stands today, Article 19(2) has to be interpreted as being exhaustive in listing the purposes for which restrictions can be imposed on freedom of speech and expression.

The fact that the government via legislations, has reserved certain exceptions/leeway (compulsory licensing in patents for instance) to itself, is reflective of its recognition of intellectual property as a form of real property.¹⁹ The next appropriate yet the obvious question is as to whether or not 'intellectual property' would fall within the definition of 'property' as understood in Article 300-A. There seems to be enough authority to support the proposition that 'property' as understood in Article 300-A is more comprehensive than just 'immovable property'. One such authority in the context of 'intellectual property rights' is the judgment of the Supreme Court in the case of *M/S. Entertainment Network India Ltd. (ENIL) v. Super Cassette Industries Ltd. (SCIL)*.²⁰ In pertinent part, the Court held the following: The ownership of any copyright-like ownership of any other property must be considered having regard to the principles

¹⁷ INDIA CONST. Art. 1, § 9, CL. 2.

¹⁸ *Sakal Papers (P) Ltd., and Others v. The Union of India*, AIR 1962 SC 305.

¹⁹ Divya Subramaniam, *A Constitutional Approach to Intellectual Property*, THE DEMANDING MISTRESS (Feb. 6, 2011) <http://thedemandingmistress.blogspot.com/2011/02/guest-post-constitutional-approach-to.html>.

²⁰ *United India Insurance Company Limited v. Manubhai Dharamsinhbbhai Gajera and Ors*, 2008 (9) SCR 778.

contained in Article 19(1)(g) read with Article 300-A of the Constitution, besides, the human rights on the property. In the judgment, it is further mentioned that the right of property is no longer a fundamental right. It will be subject to reasonable restrictions. In terms of Article 300-A of the Constitution, it may be subject to the conditions laid down therein; namely, it may be wholly or in part acquired in public interest and on payment of reasonable compensation. The fact that the Supreme Court recognizes 'copyright' to fall within Article 300-A is indicative that even 'clinical trial data', collected after extensive experimenting, should in all likelihood fall within the definition of 'property' as understood in Article 300-A. The term 'law' as defined in Article 300-A, is understood to mean only legislation or a statutory rule or order. The term 'law' as understood by Article 300-A, will not include executive fiats. The source of the law which deprives a person of his property has to be traced, through a statute, to the legislature. Therefore, intellectual property can be inserted within Article 300-A as a form of property and can be enforceable as a legal right. Any rights (monopolies) that undermine the right to freedom of speech and expression may face a challenge. However, such a challenge has not yet been mounted. Hence, we see that the Indian Constitution does not expressly mention IPRs as constitutional.

Conclusion

Thus, it is submitted that the inclusion or introduction of IPRs expressly in the Constitution would grant several benefits to not just the IPR holder but also the general public. Firstly, if IPRs are given the status of a fundamental right, then the holder of the IPR can have a constitutional remedy in case of State interference. Secondly, this would lead to intellectual property awareness and enforcement movement in the respective country and would further contribute to healthy IPR litigation in the country. Lastly, it would lay a solid basis for the extent of IP protection in the country. The intellectual property rights for their effectiveness depend upon the speed with which they can be enforced by the courts.²¹ The current trend in the protection of IPR is not only underdeveloped but highly deficient and lacking. Even today in cases of violation of IPRs, the police officers are also suffering due to lack of awareness and/or training. This makes it essential to impart protection to IP and its holders and means of a speedy recourse, and it can be afforded to them if IPR is a constitutionally guaranteed right.

²¹*Role of Judiciary in the Effective Protection of Intellectual Property Right*, HIGH COURT OF GUJARAT (Oct. 2, 2015) <https://gujarathighcourt.nic.in/>.