

Intellectual Property as a Human Right: In the prospects of Indian law

Anjali Dixit*

Abstract

Intellectual property rights (IPR) have been described as ideas, inventions, and creative expressions primarily based on which there is a public willingness to bestow the popularity of property. IPR supply positive different rights to the inventors or creators of that property, in order to allow them to reap commercial benefits from their creative efforts or reputation. There are various sorts of intellectual property protection like patent, copyright, trademark, etc. Patent is cognizance for an invention, which satisfies the criteria of global novelty, non-obviousness, and industrial application. India has a well-established legislative, administrative and judicial framework to safeguard Intellectual Property Rights (IPRs), which meets its global obligations whilst utilizing the flexibilities furnished in the global regime to tackle its developmental concerns. India has a Trade Related Aspects of Intellectual Property Rights (TRIPS) compliant, robust, equitable and dynamic IPR regime. The Indian IP system continues a great balance between private rights through IPRs on one hand, and rights of the society as public interest on the different hand. two TRIPS Agreement has allowed coverage area to countries to evolve a regime that fine suits its condition. This policy house is a sine qua non for sustainable development of the country. In latest decades, the relationship between intellectual property and necessary human rights has attracted growing scrutiny. While the proper to safety of the "moral and material interests" of an individual's intellectual product is enshrined in the canon of international human rights, with express inclusion in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the dominant regime of intellectual property rights has traditionally come into hostilities with other critical human rights.

Keywords: Intellectual property, TRIPS Agreement, Universal Declaration of Human Rights, Conventions.

*Assistant Professor, Shaheed Bhagat Singh Law College, Bithoor, Kanpur Nagar, Uttar-Pradesh, India. **Email:** anjalidixitlexamicus@gmail.com.

INTRODUCTION

Intellectual Property is a central asset in an information or knowledge-based economy. Intellectual property is a generic term that refers to intangible objects, such as literary works, artistic productions, scientific discoveries, and plans for inventions and designs, which acquire their value primarily from creative efforts. Information has been recognized as an organization's most significant asset, a definitive substitute for crude materials, work, capital, and sources of info. In the new worldwide economy of thoughts, possession, control, and access to inventive works and logical learning have impressive monetary import, offering ascend to furious rivalry over scholarly and imaginative works, or what one examiner portrays as the 'information wars.' The way in which innovative works, social legacy, and logical learning are transformed into property has critical human-rights suggestions. Starting with the arrangements of the American Declaration on the Rights and Duties of Man, key universal human-rights instruments have recognized that scholarly items have an inherent incentive as an outflow of human inventiveness and pride. A few list the privilege of creators, makers, and designers to some type of acknowledgment and advantage from their scholarly items.

UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

Article 27 of the Universal Declaration of Human Rights (UDHR), 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'. This right is linked to another provision of Article 27: 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.' Building on Article 27 of the UDHR, the International Covenant on Economic, Social and Cultural Rights (hitherto ICESCR or the Covenant) has similar provisions. Article 15 (1) (c) requires States parties, the countries which have ratified this instrument, to recognize the right of everyone 'to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' Also like the UDHR, other components of Article 15 link this obligation to the rights 'to take part in cultural life' and 'to enjoy the benefits of scientific progress and its applications.' To achieve these goals, the Covenant mandates that States parties undertake a series of steps. These include 'those necessary for the conservation, development, and diffusion of science and culture'. States parties are also directed to 'undertake to respect the freedom indispensable for scientific research and creative activity.'¹ The centrality of licensed innovation to pretty much every circle of financial life implies that

¹Universal Declaration of Human Rights, General Assembly of the United Nations

global bargains, national lawful codes, and legal choices about protected innovation can have critical consequences for the assurance and advancement of human rights. This is especially the situation for the financial, social, and social rights counted in the Covenant. Along these lines, as different monetary performing artists hurry to stake asserts over innovative works and types of information, human rights are being trampled. Makers hazard losing control of their works. The free exchange of information so vital to scientific discovery is being constrained, and publicly held resources, including the cultural and biological heritage of groups, privatized. In recent years, industrialized countries, led by the United States, have pushed for increased global protection of intellectual property. The establishment of the World Trade Organization in 1994 and the coming into force of the international Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995 have strengthened the global character of intellectual property regimes. In the years ahead the provisions of TRIPS are likely to reshape intellectual property law and economic relationships within and across countries. Except if human-rights advocates give a compelling scholarly and authoritative stabilizer to monetary interests, the protected innovation scene will be reshaped in the years ahead without sufficient thought of the effect on human rights. The advancement of a worldwide economy in which protected innovation assumes a focal job underscores the requirement for the human-rights network to guarantee the privileges of the creator, maker and designer, regardless of whether an individual, a gathering, or a network, as a human right. It is similarly critical for human-rights backers to ensure the ethical interests and privileges of the network as sections. Besides, it makes various suggestions, among them that the World Trade Organization and especially its Council on TRIPS consider existing state commitments under universal human-rights instruments completely amid its progressing survey of the TRIPS Agreement. The goals additionally asks for governments to ensure the social capacity of protected innovation as per worldwide human-rights commitments when molding national and nearby enactment. Development of intellectual property regimes Efforts to protect intellectual property have a long history. Some analysts date the origins of intellectual property as far back as the fourth century B.C. to Aristotle;² others to ninth-century China.³ Still others trace laws dealing with intellectual property to the system of royal privilege giving that operated in medieval Europe. The Venetians are credited with instituting the first properly developed patent laws in 1474, and their model spread to many other European states in the next 100years. Modern copyright law began in England with the 1709 Statute of Anne.⁴ The

²Geoff Tansey, *Trade, Intellectual Property, Food and Biodiversity: A Discussion Paper*, p. 3, London, Quaker Peace and Service, 1999

³Robert L. Ostergard Jr, 'Intellectual Property: A Universal Human Right?' *Human Rights Quarterly*, No.21, 1999, p. 157

⁴Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Development', *Intellectual Property and Human Rights*, Geneva, World Intellectual Property

United States Constitution, drafted in 1787, vests the Congress with power ‘to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respectful Writings and Discoveries.’⁵

HISTORICAL BACKGROUND OF INTELLECTUAL PROPERTY LAWS

Historically, countries have adopted laws to protect intellectual property for several reasons. According to the World Intellectual Property Organization (WIPO), an independent specialized agency within the United Nations family of organizations,⁶ intellectual property regimes give statutory expression to the moral and economic rights of creators in their creations and define the rights of the public to access to such creations. Except if human-rights advocates give a compelling scholarly and authoritative stabilizer to monetary interests, the protected innovation scene will be reshaped in the years ahead without sufficient thought of the effect on human rights. The advancement of a worldwide economy in which protected innovation assumes a focal job underscores the requirement for the human-rights network to guarantee the privileges of the creator, maker and designer, regardless of whether an individual, a gathering, or a network, as a human right. It is similarly critical for human-rights backers to ensure the ethical interests and privileges of the network d assentions. Besides, it makes various suggestions, among them that the World Trade Organization and especially its Council on TRIPS consider existing state commitments under universal human-rights instruments completely amid its progressing survey of the TRIPS Agreement. The goals additionally asks for governments to ensure the social capacity of protected innovation as per worldwide human-rights commitments when molding national and nearby enactment.⁷ Generally laws require that, in order to be eligible for patent protection, an invention must meet several criteria:⁸ (a) the invention must be new or novel; (b) it must be non-obvious (or involve an inventive step);and (c) it must be useful or industrially applicable. Patenting regimes also generally exclude certain specific kinds of inventions from the possibility of patenting.⁹ This may be

Organization 1999, p. 15 (WIPO Publication No. 762 (E))

⁵Art. 1, para. 8, Section 8, The Constitution of the United States, adopted 1787, Washington D.C.

⁶The World Intellectual Property Organization (WIPO) is responsible for the promotion of intellectual property worldwide. It acts as the secretariat for the negotiation of treaties that establish new norms in the field of intellectual property, and administers several treaties. It also conducts extensive programmes for training and technical assistance for developing countries.

⁷Ibid., p. 129

⁸Ibid., p. 129

⁹World Intellectual Property Organization, op. cit., p. 9

because certain types of objects are considered inappropriate for private ownership or for ethical reasons. For example, TRIPS, building on the precedent of the European Patent Convention Agreement, allows members to exclude subject-matter from patenting ‘to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment’.¹⁰ A trademark is a sign or name that individualizes the goods of a given enterprise so as to identify the source and thereby distinguish the items from the goods of competitors.¹¹ Like patents, a trademark can be registered with the competent government authority, which in most countries is the same as the authority that processes patent applications. Intellectual property law was developed on a national basis, with considerable diversity in the nature and stringency of protections. As international commerce increased during the nineteenth century, however, States became interested in developing some forms of international collaboration and harmonization. At first, countries concluded a series of bilateral agreements, but this was cumbersome and often ineffective. The next step was the formulation of two major agreements that provided international standards. These were the Paris Convention of 1883 for industrial property (patents and trademarks) and the Berne Convention of 1886 for the protection of literary and artistic works (copyright or author’s rights), both of which were subsequently revised several times. Nevertheless, many countries chose not to abide by these agreements and suffered few ill consequences. The United States only ratified the Berne Convention in 1989. Although international secretariats were established for both the Paris and the Berne conventions and then merged to form a United International Bureau for the Protection of Intellectual Property (eventually to be superseded by the World Intellectual Property Organization), the enforcement mechanisms were very weak. In contrast, the TRIPS Agreement, which was a product of the Uruguay Round of trade talks, is binding in to all members of the World Trade Organization. It sets mandatory minimum standards for national protection of intellectual property that require States to implement a common and often expanded set of intellectual property protections. It also imposes enforcement measures, including potential trade sanctions against nations that do not comply with these standards. Not only have intellectual property regimes become globalized, the scope of the subject-matter has also been expanded. This has occurred in several ways. First, restrictions and limitations that previously excluded specific types of subject-matter from patenting have been eliminated. The patenting of biological entities constitutes one example. Prior to 1980, some 200 years of legal doctrine conceptualized life-forms as ‘products of nature’ rather than as a human invention and therefore unable to meet the three criteria for patents: novelty, utility and non-obviousness. These standards were overturned by a landmark US Supreme Court decision, *Diamond v.*

¹⁰Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994), Section 5

¹¹World Intellectual Property Organization, *op. cit.*, pp. 191–2

Chakrabarty, which ruled that a genetically modified strain of bacteria capable of degrading components of crude oil was patentable as a new and useful manufacture or composition of matter.¹² Subsequently, the US Patent and Trademarks Office, followed by the European and Japanese patent offices, began to grant biotechnology patents on new plant varieties, non-naturally occurring non-human multi cellular living organisms, including animals, and discoveries of naturally occurring human gene sequences.¹³ Other extensions of protected subject-matter have resulted from adapting legal instruments to fit new situations and technologies, as for instance, efforts to extend copyright print protections into the digital domain. A third trajectory is the expansion of private intellectual property claims into areas that formerly were part of the public domain, such as the privatization of works of cultural heritage and the biological and ecological knowledge of traditional peoples. Drafting of the intellectual property provisions of UDHR and ICESCR The drafters of the UDHR and ICESCR decided to recognize the intellectual property claims of authors, creators, and inventors as a human right. Why did they decide to do so? How did they conceptualize this right? And was it just accidental that drafters of both documents link the intellectual property claims of authors and creators with the rights to participate in cultural life and to enjoy the benefits of scientific progress and its applications, or did they understand the three to be intrinsically inter connected? According to Johannes Morsink's account of the drafting history of Article 27 of the UDHR, there was not much disagreement over the notion of the right of everyone to enjoy the benefits of scientific advances and to participate in cultural life. In contrast, the discussion of intellectual property issues evoked considerably more controversy.¹⁴ This pattern was to reoccur when the United Nations Economic and Social Council (ECOSOC) took up the drafting of a covenant on human rights based on the UDHR. A review of the travaux préparatoire of the drafting committee for the UDHR operating under the aegis of the United Nations Commission on Human Rights indicates that the initial discussions of author's rights introduced by the French delegation were concerned primarily with two issues. The first was the moral right of an author to control alteration and other misuses of the creation. The second was the right of authors and creators to remuneration for their labour. Important factor influencing the inclusion of author's rights as a basic human right was that the American Declaration on the Rights and Duties of Man adopted earlier in the year (1948) contained a provision on intellectual property. Article 13 of the American Declaration states that: every person has the right to take part in the cultural life of the community, to enjoy the arts, and

¹²Diamond v Chakrabarty 477 US 303 (1980)

¹³For a discussion of this development and its ethical implications see Audrey R. Chapman, 'Background and Overview,' in Audrey R. Chapman, (ed.), Perspectives on Gene Patenting: Religion, Science, and Industry in Dialogue, pp. 13–17.

¹⁴Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting and Intent, Chapter 6.3

to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author. Mexican and Cuban members of the UDHR drafting committee, supported by the French delegation, introduced language on author's rights so as to harmonize the Universal Declaration with the American Declaration. The Mexican representative argued that the United Nations needed the moral authority to protect all forms of work, intellectual as well as manual, so as to safeguard intellectual production on an equal basis with material property. (Provisions of the draft of the UDHR already recognized the right to work.) The provision on intellectual property was rejected in the Commission on Human Rights but passed in the Third Committee. It survived objections that intellectual property was not properly speaking a basic human right. Others also argued that intellectual property needed no special protection beyond that afforded generally by property rights (already in Article 17 of the Universal Declaration), as well as claims by other members of the drafting committee that special protection for intellectual property entailed an elitist perspective.¹⁵ Apparently the motives of those who voted for adoption of the intellectual property provision were mixed. Some voted for the provision on the 'moral rights' issue. Others sought to support efforts to internationalize copyright law, already given a boost by the Berne International Copyright Convention, adopted earlier that year. The text of Article 15 of the ICESCR closely resembles Article 27 of the UDHR. Like the UDHR it has three components dealing with right to culture, scientific advancement, and intellectual property. However, there was nothing automatic about carrying over the three provisions of the UDHR. The drafting of the Covenant involved heated debate about whether to include the intellectual property provision. In 1951, when the Commission was beginning to consider the inclusion of economic, social and cultural rights provisions into a single planned draft covenant on human rights, UNESCO presented the Commission with draft language of a proposed provision on cultural rights. UNESCO provided two different versions of the proposed article, one longer and more comprehensive than the other. Both the longer and shorter drafts contained language about rights to culture, scientific advancement, and intellectual property. A year later, in May 1952, the Commission took up this provision again, this time in the context of a separate Covenant on Economic, Social and Cultural Rights. The French delegation resubmitted a provision containing intellectual-property protection. But the American delegation, still represented by Eleanor Roosevelt, argued that the issue was too complex to be dealt with in the Covenant. Her position was supported by the United Kingdom and Yugoslavia. The UNESCO representative again advocated for including an intellectual property provision in the Covenant. In the discussion, the Chilean

¹⁵Official Records of the Third Session of the General Assembly, Part I, 'Social and Humanitarian and Cultural Questions,' Third Committee, Summary of Records of Meetings, 21 September to 8 December 1948

delegation raised the issue of the disadvantage of underdeveloped countries stemming from their inability to take out patents and thereby compete in scientific research. The Australian representative argued that it was inadvisable to provide for the protection of the author without also considering the rights of the community. At this stage, the provision on author's rights was rejected. Thus the draft Covenant submitted to the twelfth session of the Third Committee of the General Assembly by the Commission on Human Rights in the autumn of 1957 lacked the language of what was to become 15 (1) (c) recognizing the rights of authors and creators. In the initial discussions, there was strong support for the provisions related to the right to take part in cultural life and to enjoy the benefits of scientific progress, but not for author's rights. The French delegation again argued in favour of the inclusion of an intellectual property provision. The representative of UNESCO advised that intellectual property rights be restored.³⁸ Statements of support also came from a variety of delegations on the grounds of encouraging culture and science and not dropping a principle already recognized in the Universal Declaration. The USSR and the socialist bloc, reflecting their socialist interests and the dynamics of the Cold War, however, strongly objected to incorporating the provision on intellectual property. They argued that the people's right to benefit from science should not become intermixed with property rights. The representative of the Soviet Union claimed that author's rights were too complicated and varied to draw up a clause that would be valid for all States. The socialist bloc's opposition to property rights had already played a major role in the decision of the Covenant's drafting committee to drop the text of Article 17 of the UDHR recognizing the right to tangible forms of property in the Covenant.¹⁶ The Uruguayan and Costa Rican delegates co-sponsored an amendment reinserting the intellectual property provision arguing for it on several grounds: the UDHR already recognized this right; by incorporating the provision the work of UNESCO in this area would be given new impetus and prestige; the right of the author and the right of the public were complementary, not opposed; and respect for the right of the author would assure the public of the authenticity of works presented to it.⁴⁰ A statement by the Israeli delegate went further. He argued that 'it would be impossible to give effective encouragement to the development of culture unless the rights of authors and scientists were protected'. In the end, of course, the arguments of those defending author's rights won the day. The final vote on the provision was 39 to 9 with 24 delegations abstaining. This history underscores four points. The first is the relatively weak claims of intellectual property as a human right. The provision on author's rights was included in the UDHR and the Covenant only after considerable discussion and controversy. In both cases the intellectual property components of articles were supported primarily because of their instrumental character in realizing other rights, which were seen as having a stronger moral basis. The second point is that the three

¹⁶UN Commission on Human Rights, 'Report of the Eighth Session', 14 April to 14 June, 1952, ECOSOC Records, supplement No. 4

provisions of Article 15 in the ICESCR were viewed by drafters as intrinsically interrelated to one another. Three major human-rights instruments – the American Declaration, the UDHR, and the Covenant – enumerate these rights as components of a single article. The rights of authors and creators are not just good in themselves but were understood as essential preconditions for cultural freedom and participation and access to the benefits of scientific progress. The third point is that human-rights considerations impose conditions on the manner in which author's rights are protected in intellectual property regimes. To be consistent with the provisions of Article 15, intellectual property law must assure that intellectual property protections complement, fully respect, and promote other components of Article 15. Put another way, the rights of authors and creators should facilitate rather than constrain cultural participation on the one side and broad access to the benefits of scientific progress on the other. And fourthly, the discussion of the intellectual property provisions did not provide a conceptual foundation for interpreting this right. To put the matter another way, the drafters did not delineate the scope and limits of author's rights. Considerations at all levels of drafting focused primarily on whether an intellectual property provision should be included and not its substance and implications.

A HUMAN-RIGHTS APPROACH TO INTELLECTUAL PROPERTY

Very little attention has been paid to the interpretation of intellectual property as a human right. The human-rights community has neglected Article 27 of the UDHR and Article 15 of the Covenant. Indigenous-rights advocates have constituted the major exception. There is very little literature conceptualizing the scope of Article 15 of the Covenant and the concomitant obligations of States parties. The Committee on Economic, Social and Cultural Rights, the United Nations bargain observing body directing ICESCR, once in a while manages protected innovation issues. It held its first audit of licensed innovation in multi day of general discussion dedicated to this subject in November 2000. Despite the fact that there is an impressive assemblage of lawful specialists managing licensed innovation, they conflicting with ensuring human respect. The European Union gives one potential model of a push to accommodate patent law with standards of human poise and the moral standards of the general public. Article 53(a) of the European Patent Convention explicitly stipulates that licenses ought not to be allowed for creations 'the production or abuse of which would be in opposition to arrange open or ethical quality'. A few arrangements of an ongoing Directive of the European Parliament and of the Council on the lawful security of biotechnological innovations emphasize this rule. The Directive also excludes inventions from patentability that offend against human dignity and ethical and moral principles recognized in member states. Intellectual property law should incorporate explicit human rights and ethical provisions as criteria for the evaluation of applications for patents and trademarks and develop an institutional mechanism capable of making these determinations. In most cases patent and trademark offices are not competent to undertake

such a review and are inclined to subordinate human-rights considerations to an economic calculus. Therefore a meaningful human-rights input requires some the establishment of a body competent to review patent and trademark decisions on human-rights grounds and/or the ability to appeal decisions to a court or tribunal able to make a determination of the human-rights implications. This body should have the jurisdiction to invalidate an existing or pending patent by virtue of a ruling that it would infringe on human rights or be inconsistent with ethical principles or the cultural norms of major groups in the society. The nature of the intellectual property regimes adopted must reflect the country's development requirements and be consistent with the cultural orientations of major groups. Even the TRIPS Agreement offers some flexibility to countries bound by its provisions. Article 27.3(b), for example, allows members to exclude plants and animals from patentability. There is also a provision in TRIPS (Article 27.2), based on the European Patent Convention, which enables members to 'exclude from patentability inventions, the prevention within their commercial exploitation of which is necessary to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to then environment.'¹⁷

INTELLECTUAL PROPERTY RIGHTS – SYSTEMS IN INDIA

Copyright

India is a signatory to the Berne Convention on copyright. Be that as it may, it might be a smart thought to enroll your copyright as doing as such may demonstrate possession if there are criminal procedures against infringers. Much of the time however, enlistment isn't important to keep up a copyright encroachment guarantee in India. Enlistment is made, face to face or by means of a delegate, with the Copyright Office. Since 2016, copyright approach was moved to India's Ministry of Commerce and Industry. All IPRs are presently directed by the Department for Industrial Property and Promotion (DIPP).

Web robbery of movies, music, diversions and programming is an issue in India, as is unapproved duplicating of physical books.

Patents

India's Patents Act of 1970, 2003 Patent Rules and the 2016 Patent Amendment Rules set out the law concerning patents. As in the UK, there is no provision for utility model patents. The regulatory authority for patents is the Patent Registrar under the office of the Controller General of Patents, Designs and Trade Marks, which is part of India's

¹⁷TRIPS Agreement (1994), Section 5

Ministry of Commerce and Industry. Patents are valid for 20 years from the date of filing an application, subject to an annual renewal fee. India's patent law operates under the 'first to file' principle – that is, if two people apply for a patent on an identical invention, the first one to file the application will be awarded the patent.

Designs

The laws governing designs are the Designs Act 2000 and the Designs Rules 2001. Designs are valid for a maximum of ten years, renewable for a further five years.

Trade marks

India's trade mark laws consist of the 1999 Trade Marks Act and the Trade Marks Rules of 2002 and 2017. The administrative expert for licenses is the Controller General of Patents, Designs and Trade Marks under the Department of Industrial Policy and Promotion. The police currently have increasingly vigorous powers in implementing exchange check law, including the capacity to seek premises and seize products associated with being fake without a warrant. Be that as it may, these forces are tempered by the necessity for the police to look for the Trade Mark Registrar's assessment on the enlistment of the check before making a move. This adds to the deferral and may result in fake products being evacuated or sold.

Exchange names likewise comprise a type of exchange stamp in India, with assurance, regardless of existing exchange names, for those wishing to exchange under their own surname.

In view of the far reaching routine with regards to 'cybersquatting' – the enrollment in dishonesty of imprints by outsiders enlisting space names for certain outstanding imprints so as to pitch them to the first rights proprietors – it is fitting for rights proprietors to enlist their area names in India as exchange stamps as quickly as time permits. Enlistment takes up to two years. An exchange check in India is substantial for a long time and can be recharged from that point uncertainly for further ten-year durations.

VARIOUS INTERNATIONAL TREATIES

There are different subject matters of intellectual property like Patents, Copyright, Trademarks, Industrial design, Plant Varieties etc. Need for protection in these different subjects arose in different periods. These are reflected in different treaties. Agreement on TRIPS, under aegis of WTO, remains most influential, comprehensive and inclusive of all. Other treaties are covered here for background information. There are two main bodies – World Intellectual Property Organization (WIPO) under UN which administers 1-7 treaties mentioned below. 8th treaty is independent of any organization. Another

relevant body is World Trading Organization. 9th (or TRIPS) is administered by WTO. 10th treaty comes under UNESCO.

1. Paris Convention for Industrial Property, 1883 – Since it deals only with Industrial property, it covered only Patents and Trademarks. It was among first treaties to recognize various principles of international trade like National Treatment, Right of Priority, Common rules etc.
2. Bern convention for literary and artistic works, 1886 – It provided for copyright system. It doesn't provide for any formality to claim protection. Protection is automatically accorded to any creation, provided work is original and other conditions under the treaty are fulfilled. It means that your work, if original, is already protected. You can claim that you have copyright.
3. Madrid Agreement, 1881 – Governs the international recognition of trademarks. Made international filings easy and cheap.
4. Patent co-operation treaty, 1970 – It was earlier not possible for an entity to claim protection in different countries by single application. This was made possible as it aimed for co-operation and it was open for all parties to Paris convention.
5. Budapest Treaty of 1980 – It made possible patenting for micro-organisms. Claimant is required to deposit his invention on micro-organisms with an Authority – 'International depository of Micro-Organisms' under WIPO. He shall make all the adequate disclosures.
6. Trademark Law Treaty, 1994 – Harmonized administrative procedures and introduced 'service marks' in ambit of trade marks. Earlier trademarks were accorded only to goods.
7. The Hague agreement concerning the International Deposit of 'Industrial Design' 1925 – It created International Design Bureau of WIPO.
8. International Union for protection of new varieties of plants, 1961 – This provides breeders and farmers right to new plant varieties.
9. Agreement on Trade Related Aspects of Intellectual Property – It is a landmark and most comprehensive treaty on Intellectual property. While earlier treaties' subject matters were specific, TRIPS deal with 8 kinds of property rights – Patents, Trademarks, trade dress, Copyrights, Industrial Designs, Plant Varieties, Integrated Circuits and layouts, and Geographical Indication. Further, almost all countries are party to TRIP. In earlier treaties only limited countries participated. It also provides enforcement mechanism which was not available in WIPO treaties. It mandated all member countries to make their domestic laws complaint to TRIPS. India passed

certain laws and amended others. India's IPR regime now stands fully compliant to TRIPS. For E.g. India amended patent law in 2005 to provide 'product' patent protection. Earlier protection was available only to 'processes'.

TRIPS was results of discussions held in Uruguay round which led to formation of WTO. This treaty is an offshoot of General Agreement on Trade in Goods (GATT). This treaty provided a robust Dispute Resolution Mechanism and stringent penal provisions under auspices of WTO.

Further, every treaty under WTO is based some principle which are:

1. National Treatment – No foreign products, once they enter domestic territories, shall be discriminated in any manner. This also applies to intellectual property. Members must accord similar treatment to foreign creations, as they do to domestic ones.
2. Most Favored Nation – If a member provides some privilege, favorable treatment or exemption to another country or group, then other members must get similar favorable treatment.
3. Right to priority treatment – If a similar patent application has been filed in two different countries, then prior applicant has right to the patent.
4. Concept of Minimum Standards – This treaty provides for minimum level of protection that every member should provide to intellectual property. Members have discretion to provide more protection than minimum standards.
5. Universal Copyright Convention, 1952 – This convention is administered by UNESCO. This exists simultaneously with Bern Convention. This treaty provides for procedural formalities for filing and recognition of copyright. As Bern convention provides for automatic route to copyright, this treaty has lost its relevance.

REGISTERING AND ENFORCING INTELLECTUAL PROPERTY RIGHTS IN INDIA

To appreciate most sorts of licensed innovation (IP) rights in India, you should enlist them. For licenses, singular enlistments must be made in India, yet for rights other than mechanical structures you can apply under the terms of the Patent Cooperation Treaty, which is normally simpler and snappier.

For exchange marks, you should enroll them inside India, either through the local exchange stamp framework or under the Madrid framework.

For copyright, no enrollment is required yet enlisting copyrights with the copyright experts is prudent. 'Priority rights' under the Paris Convention can help in the local registration of trade marks, designs and patents by allowing rights previously registered elsewhere to become effective in India, if filed within a time limit.

Enforcing IP rights in India

IP rights can be authorized by conveying activities to the common courts or through criminal arraignment. India's IP laws set out methodology for both common and criminal procedures, as does the Competition Act. Criminal procedures don't have any significant bearing to patent and plan encroachments.

A weakness of common suit is that you are probably not going to recuperate expansive harms, and correctional harms against an infringer are uncommon. Be that as it may, in the event that you have a recognized infringer, it might be fitting to dispatch common prosecution, provided that a break directive is conceded the encroachment can be ended pending the result of the case. Harms are routinely granted in instances of copyright robbery and exchange stamp encroachment (which go under criminal case); less so in patent cases. Throughout the years, in any case, rulings for remote organizations against neighborhood infringers have exhibited the legal executive's fair-minded methodology.

As in different nations, the Indian Government acquires activities criminal cases, in spite of the fact that by and large activities pursue protestations to justices or police specialists by rights proprietors. Criminal procedures against infringers convey the possibility of a lot harsher cures, including fines and detainment.

Intervention or arrangement with an infringer can likewise be viable as an elective type of question goals. The Civil Procedure Code accommodates a formal intervention process.

Refinement among IPRs and Human Rights

It is obvious that the drafters fathom the strain between the examination they put forth and the central human rights framework, which fills in as a sort of viewpoint point. From one point of view, the draft gets planners inside the degree of Article 15(1) c.

On the other hand, the draft is trying to try a capability between the rights apparent under the Covenant and existing authorized advancement rights. The draft hopes to underline the capability between human rights and ensured advancement rights schedules.

Human rights are regarded significant, normal, general benefits while authorized development rights are statutory rights permitted by the state which are brief, can be traded, and whose joy can be lessened. The draft General Comment further exhibits that while authorized development rights in like manner guarantee business interests, human rights do basically guarantee business interests.

This builds up an undertaking to isolate the overwhelming plan of action rights gave through academic property rights from the security open under the Covenant.

This is definitely not a satisfactory insightful response in light of the fact that for all intents and purposes it is difficult to perceive the material favorable circumstances of individuals having added to a progression from those of an association manhandling the headway. The refinement among IPRs and human rights is better understood by making

TABLE 1 *Relationship between IPR and Human Right*

Point of Distinction	IPR	Property Rights in general	Human Rights
Nature and form of right	Privileged claims	Claims, immunities, and powers are associated	Every forms of right
Subject matter	Inventions, expressions, etc.	Created or discovered	Humanity and human dignity
Right holders	Corporations and individuals	Individuals and Corporations	Individuals, communities and even groups
Duty holders	The world at large or all those who do not have this right	The world at large or all those who do not have this right	States, governments and even corporations
Duration	Limited	Unlimited	Unlimited
Mode of assertion	Acquired, enjoyed and exercised	Enjoyed exercised	Recognised, Exercised and enforced

a parallel examination with property rights all things considered. It is showed up in the going with table 1.

HUMAN RIGHTS REALIZATION IN THE INTELLECTUAL PROPERTY REGIME: THE INDIAN EXPERIENCE

India and some creating nations are endeavoring to join their individual sacred communism with the free market belief system at various purposes of time and in various ways. India started this nexus in 1991 when the administration embraced the New Economic Policy (NEP) of privatization, progression, disinvestment and deregulation. Eventually the Supreme Court settled the issue by maintaining established legitimacy of privatization and disinvestment in explicit occurrences.

Human rights theory gives a basic base through which human needs are changed into lawful privileges. The profound estimation of human rights requests activity from state establishments and specialists. Human rights in this manner not just hold the possibility to modify the conduct motivators as of now driving the framework be that as it may, as law personally connected to social plan, may give a component fit for changing the framework itself. Access to basic meds is a central human rights guarantee under the rights to wellbeing and life.

In *State of Punjab v. Devans Modern Breweries Ltd.*, Indian Supreme Court has gone to the degree of watched, "Communism may have been a watchword from our history.

It might be available in the Preamble of our Constitution. Nonetheless, because of the advancement approach embraced by the Central Government from the mid nineties, this view the Indian culture is basically married to communism is unquestionably shriveling without end." Despite this improvement, any reasonable person would agree that the Indian government knows about developing monetary dissimilarity and has not completely overlooked its social welfare duties under the Constitution. This demonstrates the marriage between a communist constitution and the free market philosophy is loaded with a few strains.

NOVARTIS: CASE COMMENT

A Switzerland based pharmaceutical company; Novartis AG filed a patent application in the Chennai (Madras) Patent Controller's office for the beta-crystalline of imatinib mesylate, brand name Glivec (Gleevec).¹⁸ The claim was based on the ground that it invented the beta crystalline salt form (imatinib desolate) of the free base, imatinib to produce leukemia drug. This application was kept in the mailbox and not opened until 2005 as the TRIPS Agreement permitted developing countries such as India not to provide product patent protection to pharmaceuticals and agrochemicals until 1 January 2005.

In the meantime, Novartis had obtained Exclusive Marketing Rights (EMR) for marketing Gleevec in India. On the basis of this, it obtained orders preventing some of the generic manufacturers from manufacturing and selling generic versions of the medicine. At that time, Novartis was selling Gleevec at USD 2666 per patient per month. Generic companies were selling their generic versions at USD 177 to 266 per patient per month.

In 2005, India went for patent law amendment to comply with its obligations under the TRIPS Agreement. By virtue of this process and product patent protection in all fields of technology, including pharmaceuticals and agrochemicals has been introduced. A significant and important provision to prevent ever greening and granting of frivolous patents is introduced thereby.¹⁹ Consequent to this some of the generic companies filed pre-grant oppositions against Novartis' patent application for imatinib mesylate, claiming, among other things, that Novartis' alleged "invention" lacked novelty, was obvious to a person skilled in the art, and that it was merely a "new form" of a "known substance" that did not enhance the substance's efficacy, and was thus not patentable under section

¹⁸Application No. 1602/MAS/1998 ,dated July 17th 1998

¹⁹Sec.3 (d) of the Patents Act.

3(d).²⁰ It was contended that the patent issued in 1993²¹ effectively disclosed both the free base, imatinib, and the acid-addition salt, imatinib mesylate. Further, CPAA and generic companies argued that different crystalline forms of imatinib mesylate did not differ in properties with respect to efficacy, and thus the various forms of imatinib mesylate must be considered the “same substance” under section 3(d).

NOVARTIS’ PATENT APPLICATION REJECTED BY PATENT CONTROLLER [JANUARY 2006]

The Patent Controller declined to concede Novartis a patent, by holding that development needed curiosity and was self-evident, and subsequently was not patentable under segment 3(d). Nonexclusive organizations could make and market their conventional variants of the medication, both in India and abroad, and make accessible the conventional imatinib mesylate evaluated at short of what one-tenth of Novartis’ cost after this choice.

In June 2006, Novartis AG and its Indian auxiliary, Novartis India, documented a progression of writ petitions against the Government of India, CPAA, and four Indian nonexclusive producers (Natco, Cipla, Hetero and Ranbaxy), under the watchful eye of the Madras High Court. The choice of the Patent Controller to decline Novartis a patent for the beta-crystalline type of its anticancer medication, imatinib mesylate, and in addition the legitimacy of area 3(d) that gave one of a few grounds to dismissing its patent application as tested in these suits.

With the end goal of legal accommodation, the writ petitions testing the choice of the Patent Controller were changed over into statutory interests. In April 2007, the Government of India told that the IPAB motivated locale to hear claims identifying with licenses. Thus, Novartis’ interests were exchanged to the IPAB, an expert court on issues identifying with licensed innovation. Sacred legitimacy of segment 3(d) maintained by Madras High Court [August 2007] Meanwhile, in August 2007, the Madras High Court dismissed Novartis’ writ appeal to testing the legitimacy of segment 3(d). The Madras High Court declined to look at whether area 3(d) was in consistence with the TRIPS Agreement. The Court held that segment 3(d) was not unclear or discretionary and in this manner did not disregard the Indian Constitution. It held that the expression “adequacy” was known in

²⁰The opposition was based on the fact that Novartis had already been granted a patent in 1993 in the United States and other jurisdictions for the active molecule, imatinib, and that the present application only concerned a specific crystalline form of the salt form of that compound.

²¹US Patent Application No. 08/042,322). This application was abandoned and another continuation-inpart application was then filed on April 28, 1994 (US Patent Application No. 5,521,184).

the pharmaceutical field to signify "restorative viability". The court watched: "We have borne as a primary concern the item which the Amending Act needed to accomplish to be specific, to avoid evergreening; to give simple access to the nationals of this nation to life sparing medications and to release their Constitutional commitment of giving great medicinal services to its natives." The litigation before the IPAB After a series of litigation in which Novartis contested the constitution of the IPAB, Novartis' appeal challenging the Patent Controller's order was finally heard by a specially constituted Bench of the IPAB, comprising Justice Negi (Chairperson) and Dr PC Chakraborty (Technical Member) in November and December 2008. The IPAB overturned the Patent Controller's findings on novelty and inventive step, held that the beta-crystalline form of imatinib mesylate was new, and involved an inventive step. However, the IPAB held that Novartis' alleged invention did not satisfy the test of section 3(d) in as much as Novartis did not provide data to show that the beta crystalline form of imatinib mesylate exhibited significantly enhanced therapeutic efficacy over imatinib mesylate, the known substance. Hence, the appeal was rejected and the beta-crystalline form of imitanib mesylate was again rejected. Proceedings before the Supreme Court Novartis approached the Supreme Court directly by filing a special leave petition challenging the IPAB's interpretation and application of section 3(d) to its patent application. Subsequently, CPAA and Natco filed cross-petitions challenging the IPAB's findings on other issues including novelty and inventive step.²² The Supreme Court of India on April 1, 2013 rejected Novartis' appeal for patent protection for its blood-cancer treatment drug "Glivec", which was held an "incremental innovation" not liable for protection. The Supreme Court confirmed that the beta crystalline form of imatinib mesylate failed the test of Section 3(d). The Court clarified that efficacy as contemplated under Section 3(d) is therapeutic efficacy. The judgment has received severe criticism from a number of originator pharmaceutical companies, including Novartis, and from the US Chamber of Commerce. The case involves a many complex technical issues. They are discussed as under:

1. The Patents Act as amended in 2005 is reflected in this considered Parliament sought to limit practices that might result in the grant of patents for insubstantial technological contributions. Section 3(d) along with its explanation require that patents for new forms of known substances should only be granted on the showing of a significant enhancement in known efficacy.
2. The WTO TRIPs Agreement, provide sufficient leeway or flexibility in the adoption of patenting standards to allow the approach adopted by the Indian Parliament.
3. The facts of this case involved certain transitional arrangements between the pre-2005 Indian patent system, which did not allow patents for pharmaceutical products, and

²²CIVIL APPEAL No. 2728 OF 2013.

the post-2005 regime under which such patents are permitted. For patent applications filed (with priority date) before 1 January 1995, a patent could not be secured in the India for a pharmaceutical product. From 1995 to 2005, pharmaceutical product patent applications could be filed and held in a “mailbox”. A patent could be granted and become effective after 1 January 2005, based on “mailbox application”.

4. The Court considered the fact that Novartis had already secured its patent in US and this makes the invention concerned obvious. This is a warning that Indian law provided for patenting of only genuine inventions and has provisions for discouraging repetitive patenting, generally known as ‘evergreening’ in the industry.²³
5. In 1998, Novartis filed as application in India for this beta crystalline form. The application did not disclose any improvement in efficacy. However, when India adopted section 3(d) in 2005, Novartis undertook some studies to meet the statutory requirement to show enhanced efficacy.
6. The Supreme Court concluded that it was a publicly known product. The mesylate salt was the form in which the drug was marketed. To satisfy the requirement of “enhanced efficacy” in section 3(d), comparison of the beta crystalline form had to be made with the already known mesylate salt. In light of this, the Indian Supreme Court found the efficacy studies reported by Novartis very odd. Novartis alleged that the beta crystalline form showed a 30% increase in “bio-availability” (based on tests in rats). But this 30% increase in bio-availability was not in comparison to the known and previously marketed mesylate salt form of the drug, which would ordinarily be soluble, but rather in comparison to the “free base” form of the imatinib drug that was not marketed because it was not soluble. So, Novartis did not compare its “new” form of salt to its “old” marketed form of salt, but rather to what it knew would be a much less bio-available form. There was no evidence in the record as to how the new salt compared to the old salt even in terms of bio-availability.
7. The term “efficacy” in Section 3(d) requires that the new form of a drug must demonstrate an improvement in its therapeutic effect or curative property as compared to the old form in order to secure a patent. The Court held that these properties may be important from storage point of view, but would not be relevant to showing “enhanced therapeutic efficacy”.
8. As previously noted in this chapter, Novartis also presented evidence regarding increased “bio-availability”. The Court observed that “bio-availability” measures the level at which the drug is made available in the human body. The level of

²³See more at: <http://www.witnesslive.in/in-depth/65-the-conclusion-of-novartis-sagasthash.QruaAQie.dpuf>

bio-availability may or may not have an influence on the therapeutic or curative effect of the drug.

9. At the very end of the decisions, in requiring Novartis to pay the costs of the challengers, the Court said that it appeared that Novartis was in fact marketing an older form of the drug and not the beta crystalline version, and that it appeared that Novartis may have been trying to use a patent in India to cover a drug that it was not actually selling. The Novartis threatened to withdraw its investment from India. But such threats or actions cannot make big impact. Such threats have been scoffed at as the RD expenditure of Novartis India in 2012 constituted roughly 0.03 percent of its entire expenditure in India.²⁴ Novartis itself has said that it will now “cautiously” invest in India.

The common accusation is that the Indian Judiciary takes an activist approach when it comes to pharma patents. But this accusation is baseless as the Supreme Court as the custodian of law of land stands for rule of law. Hon’ble Supreme Court has applied the law to the facts of the case and decided it on merits. The judgment seems to be the consequence of a judicial process, and not an arbitrary executive action. India, a developing country, has a substantial portion of its population below the poverty line, their per capita income not being sufficient to attain the basic amenities of food, clothing, shelter and medication. The patents in India, under the Act, are granted for genuine and innovative drugs only. The Act provides for a high standard of an inventive step, especially with reference to newer and updated version of already known products.

Thus, ever-greening and repetitive patenting is prohibited and is not encouraged under the provisions of the Indian law pertaining to patents. Therefore, in so far as this case is concerned, the rule of law has been certainly adhered to. Consequently, the judgment certainly cannot be the basis for any unwarranted generalization that India does not respect the Intellectual Property Rights of foreign investors.

WHERE TO GET INTELLECTUAL PROPERTY HELP IN INDIA

Whether you’re resident in and doing business in India, or trading internationally with the country, there are a number of professional organisations that can offer you advice and support:

- The British High Commission, New Delhi offers advice on working with India, including details of cultural relations. It provides a full range of diplomatic, consular and business-related services: <https://www.gov.uk/government/world/organisations/british-high-commission-new-delhi>.

²⁴Sakthivel Selvaraj, “Patent justice”, The Hindu, 7 April 2013.

- The UK India Business Council (UKIBC) helps and supports British businesses with regard to trade with India: <http://www.ukibc.com>.
- The Department for International Trade (DIT) India has a range of online information on doing business in India: <https://www.gov.uk/government/world/organisations/department-for-international-trade-india>.
- Local law firms in India can offer you legal advice and services specific to your business. The Chambers and Partners website offers a search facility listing Indian local law firms: <http://www.chambersandpartners.com/Asia/Search/Location/110>.

CONCLUSION AND SUGGESTIONS

The excessive standards for intellectual property safety and enforcement included into a number International and Regional Agreements on human rights have raised giant anxiety between the mental property and human rights systems. The influence of human rights on Intellectual property rights and whether mental property rights are human rights have in no way been addressed directly. With the changing generation and want for protection of both the intellectual rights and human rights for my part as well as their inter connectivity, a number covenants and adoption of treaties have tried and solved these precise difficulties of the have an effect on of mental property rights and human rights. The adoption of TRIPS Agreement in a number growing is yet going through specific difficulties, mainly when it comes to scientific drugs and the integral right to health. It can as a consequence conclude that the innovative strengthening of intellectual property rights if limits the get admission to to pills it will immediately go towards the agreements made by means of the states under ICESCR, which aims at retaining and protecting the fundamental human right to health. To reap the aim of obtaining social dimensions of intellectual property, in accordance with international human rights, commitment of all the member states of ICESCR is an utmost essential step.