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Intellectual Property Rights Vis-a -Vis Constitutional Rights With Special Reference to Copyright

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ABSTRACT: Intellectual Property is the creation of mind, human and intellect and hence called 'Intellectual Property'. With the establishment of the World Trade Organization (WTO) Intellectual Property Rights (IPR) attracted the attention of international community. The Indian Constitution enumerated various rights including fundamental rights, freedom and also laid down economic, social, and political justice to every citizen in the country. The intellectual property right is not expressly recognized as property right by the Indian Constitution but at the same time under Indian Constitution does not expressly exclude the Intellectual property Rights. The individuals are granted the liberty to write a book and publishing the same is now protected under the Indian Constitution. Any copyright infringement comes within the purview of the restriction under morality as laid down under Article 19(2) of the Constitution. This article proposes to deal with some aspects of the laws relating to the Intellectual Property especially law relating to copyright and its relation with the Constitutional Rights.

Keywords: IPR, Fundamental Rights, Copyright, IPR laws.

1.0 Introduction

Intellectual Property includes Patents, Designs, Trademarks, Copyright confidential information and Trade Secrets. It plays crucial role in the development of industry; regime of Intellectual Property has come to a full circle. Intellectual Property Rights (IPR) system has many different forms commerce and trade and in the growth of creative effort in almost every field of human Endeavour¹. Beginning with the Paris Convention on Intellectual Property 1833 and with the conclusion of TRIPS (Trade Related Intellectual Property Rights) agreement of World Trade Organization, the legal of protection of IPR are independent of each other and are governed by separate laws. This law is incorporated in the Patent Act, Trade Mark Act and Copy Right Act.

Present era is an era of knowledge, knowledge is inherently non rivalries. That means one person's possession use and enjoyment of the good. The importance of

Intellectual Property in India is well established at all levels be it at statutory, administrative and judiciary. After the entry into force of TRIPS agreement, India has given effect to its different provisions through emending the existing intellectual property laws or legislation new ones. In this process the present topic Intellectual Property Rights Vis-à-vis Constitutional Rights chosen by the Scholar is of contemporary significance and relevance. Having decided that, I wanted to share my thoughts with you all on a contemporary issues relating to Intellectual Property Rights under Part-I. It includes the concept of Property, Concept of Intellectual Property, kinds of Intellectual Property, Nature and Scope of Intellectual Property. Under Part II includes the Copy Right Law in general and its relevance under Constitution of India.

1.1.Part one of the Article Intellectual Property Rights

In today's world the international

¹*Pratibha M. Singh & Sunil B.Krishna(Ed.), The value of Intellectual Property, A Journal of Manupatra Intellectual Property Reports, Vol.1, Part-2, January 2007, p.S-29.*

dimension of intellectual property is of ever increasing importance for three compelling reasons². First, the composition of world trade is changing. Currently, Commerce in intellectual property has become an even greater component of trade between nations. The value of information products has been enhanced greatly the new technologies of the semi-conductor chip, computer software and biotechnology. Second, the world commerce has become even more interdependent, establishing a need for international cooperation. No longer can a single country impose its economic will on the rest of the world. Accordingly, countries have recognized this interdependence and have called for a broadcasting of international agreements/arrangements involving intellectual property. Third, a third new reprographic and information storage technologies permit unauthorized copying takes place in the third world due to the relaxation of legal standards. All these factors have prompted the international community as a whole to accord due recognition to intellectual property regime. Thus the above reasons widen the scope of intellectual property rights.

2.0 Concept of Intellectual Property

Properties are two types, either tangible or intangible i.e., touchable or non-touchable. Land, house, jeweler, cash etc., are some examples of the tangible property that can be seen and touched. But there is a kind of property that cannot be touched. Intellectual property is one of them. It is more precious than the tangible ones. In *R.C. Cooper Vs Union of India*³ the Supreme Court has very rightly described the definition of property in a very compendious form;

“Property means the highest right, a man can have to anything, being that which one has to land or tenements, goods or chattels which does not depend on another’s courtesy: it

includes ownership, estates and interests in corporeal things, and also rights such as trademarks, copyrights, patents and even rights in personam capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer of succession, and to their capacity of being injured”.

Intellectual property is the creation of human mind, human intellect and hence called “Intellectual Property”. Intellectual Property, although a hidden property, is an important means of accumulating tangible wealth. Intellectual properties and intangible assets jointly form the most important driving force of the world economy. That is why, multinational companies and international corporations have invested enormous amount for the enrichment of their intellectual property.

It is remarkable that with every property comes the question of its protection and security. The intellectual properties have different kinds of dangers. If a tangible property can be stolen, an intellectual property has the fear of being pirated. Piracy or illegal copying is the most serious concern of the intellectual property protection because it gives a jolt to the originality of the intellectual product and its creator.

The term intellectual property indicates a specific legal term, now-a-days ‘IP’ or ‘IPR’ has become the fashionable name of intellectual property. Random House Webster’s Unabridged Dictionary defines the term ‘Intellectual Property’ that results from original creative thought as patents, copyright material and trademarks.

In very general terms intellectual property can be defined as a right in a property created by expending intellectual efforts. Of late for reaching and all pervasive amendments have

² <https://www.abyshtinalaw.com>, written by Balew Mersha, *ABYSSINIA Law*, 2nd April, 2012.

³ *AIR 1970, SC 564: (1970) 3 SCR 530.*

been carried out in these laws in order to ensure that these laws are accordance with India's obligations as a signatory of the Trade Related Intellectual Property Rights (TRIPS). Instead of speaking in general terms about intellectual property it would be better to focus on particular aspects of intellectual property law and discuss them context of the far reaching changes that the law of intellectual property is experiencing. Being an emergent player in the world polity and economy in India cannot choose to be oblivious of these changes.

The Convention establishing the World Property Organization (WIPO) concluded in Stockholm on July 14, 1967 Art.2 (vii) provides that 'Intellectual property shall include rights relating to:

1. Literary, artistic and scientific works;
2. Performances of performing artists, phonograms and broadcasts;
3. Inventions in all fields of human behavior;
4. Scientific discoveries;
5. Trademarks, service marks, and commercial names and designations;
6. Protection against unfair completion and all other rights resulting from intellectual activity in industrial scientific, literary or artistic fields.

2.1 There are two opinions about Intellectual Properties

The Concept of Intellectual Property contains two important jurisprudential opinions. Salmond in his classic work on Jurisprudence said that in modern law "every man owns that which he creates". The immaterial product of a msn's brains may be as valuable as his land or his goods. The law therefore gives him a proprietary right in it, and the unauthorized use of it by other persons is a violation of his ownership⁴. He also enumerates some traditional intellectual properties, Patents, Copyright, Trademarks and Trade names.

Jeremy Phillips in his opinion Copyright, Trademarks, Designs and Patents are intangible personal properties whereas land, buildings are tangible immovable properties. Intellectual Property is property in legal sense, it is something that can be owned and dealt with.

The rights of intellectual property are created and protected by statutes. An invention may relate to a new product or an improvement of an existing product or a new process of manufacturing or existing or new product. These immaterial products arise out of human brain and they must be treated as valuable as his lands or goods. It includes anything that would result from the human intellect⁵.

Generally speaking Intellectual Property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. These rights do not apply to the physical object in which the creation may be embodied but instead to the intellectual creation as such, Intellectual Property is traditionally divided into two branches

- i. Industrial Property
- ii. Copyrights and Neighboring Rights.

The Industrial Properties are Patents, Trademarks, Industrial designs, Layout design and Geographical indications etc. whereas the Copyright and Neighboring rights are Writings, Musical works, Dramatic works, Audio-visual works, Paintings and drawings, Sculptures, Photographic works, Architectural works, Sound recordings, Performance of musicians, actors and singers, and broadcasts etc.

Intellectual Property is an intangible right exercisable and asserted in respect of a material or tangible work. In Gramophone Company India Ltd. Vs Birendra Bahadur Pandey,⁶ the Supreme Court has observed that intellectual properties are brainchild of the authors, the fruits of labor and therefore considered to be their property.

⁴Salmond on Jurisprudence, 12th Edition, Pp.422-423.

⁵Jeremy Phillips, Introduction to Intellectual Property Law, London; Butterworths, 1986, p.3.

3.0 Nature of Intellectual Property:

Intellectual Properties have their own peculiar features. These features of Intellectual Properties may serve to identify intellectual properties from other types of properties⁷. Thus, we will discuss them in brief.

1. Territorial: Any intellectual property issued should be resolved by national laws. Why it is an issue? Because intellectual property rights have one characteristic which other national rights do not have. In ownership of intellectual property of immovable properties, issues of cross borders are not probable. But in intellectual properties, it is common. A film made in Hollywood can be seen in other countries. The market is not only the local one but also international. If a design in China is imitated by another person in France which law would be applicable?

2. Giving an exclusive right to the owner: It means others, who are not owners, are prohibited from using right. Most intellectual property rights cannot be implemented in practice as soon as the owner got exclusive rights. Most of them need to be tested by some public laws. The creator or author of an intellectual property enjoys rights inherent in his work to the exclusion of anybody else.

3. Assignable: Since they are rights, they can obviously be assigned (licensed). It is possible to put a dichotomy between intellectual property rights and the material object in which the work is embodied. Intellectual property can be bought, sold, or licensed or hired or attached.

4. Independence: Different intellectual property rights subsists the same kind of object. Most intellectual property rights are likely to be embodied in objects.

5. Subject to public policy: They are vulnerable to the deep embodiment of public policy. Intellectual property attempts to preserve and find adequate reconciliation between two competing interests. On the one hand, the intellectual property rights holders

require adequate remuneration and on the other hand, consumers try to consume works without much inconvenience. Is limitation unique for intellectual property?

6. Divisible (Fragmentation): Several persons have legally protected interests evolved from a single original work without affecting the interest of other right holders on that same item. Because of the nature of indivisibility, intellectual property is an inexhaustible resource. This nature of intellectual property derives from intellectual property's territorial nature. For example, an inventor who registered his invention in Ethiopia can use the patent himself in Ethiopic and License it in Germany and assign it in France. Also, copyright is made up of different rights. Those rights may be divided into different persons: publishers, adaptors, translators, etc.

4.0 Scope of Intellectual Property Rights

The scope of Intellectual Property Rights is broad, consisting of many aspects. It covers the following various Intellectual Properties.

Patents: A Patent is a type of intellectual property right which allows the holder of the right to exclusively make use of and sale an invention when one develops an invention. Invention is a new process, machine, manufacture, composition of matter. It is not an obvious derivation of the prior art (It should involve an inventive step). A person who has got a patent right has an exclusive right. The exclusive right is a true monopoly but its grant involves an administrative process.

Copyright: It is an intellectual property which does not essentially grant an exclusive right over an idea but the expressions of ideas which makes it different from patent law. Patent is related with invention, technical solution to technical problems. Copyright is a field which has gone with artistic, literary creativity, creativity in scientific works, audio-visual works, musical works, software and others. There are neighboring rights. These are

⁶*AIR 1984 SC 667: (1984) 2 SCC 534.*

⁷*Dr.S.R.Myneni, Law of Intellectual Property, Asia Law House, Hyderabad, 9th Edition, 2019, p.2-3.*

different from copyright but related with it—performers in a theatre, dancers, actors, broadcasters, producers of sound recorders, etc. It protects not ideas but expressions of ideas as opposed to patent.

Copyright protects original expression of ideas, the ways he works are done; the language used, etc. It applies for all copyrightable works. Copyright lasts for a longer period of time. The practice is life of author plus 50 years after his/her life. Administrative procedures are not required, unlike patent laws, in most laws but in America depositing the work was necessary and was certified thereon but now is abolished.

Industrial Design Law: Some call this design right (European) and some call it patentable design, industrial design (WIPO and other international organization). A design is a kind of intellectual property which gives an exclusive right to a person who has created a novel appearance of a product. It deals with appearance: how they look like. Appearance is important because consumers are interested in the outer appearance of a product. It is exclusively concerned with appearance, not quality.

The principles which have been utilized in developing industrial design law in developing industrial design law are from experiences of patent and copyright laws. It shares copyright laws because the design is artistic. It shares patent law because there are scientific considerations. Design law subsists in a work upon registration and communication. It makes them close to patent law since they are also founded in patent law. Duration is most of the time 20 years like the patent law trademark rights law.

Trademarks Rights Law: It is a regime of the law giving protection to graphic representation to work or logos or depending on the jurisdiction question such as sound or smells which are distinctive in nature and serve as source identification. There is also a recent phenomenon which is representing goods in their smell and sound. It is to be found on the goods associated with them. It enables the

customer to identify the goods from others. They serve as a source identifier. Trademarks perform communication function. Once there is a valid presentation, it gives the mark owner an exclusive right. It begins with registration and publication of the mark. But there are exceptions which serve what trademarks registered serve which are not registered. They exist forever so long as the good with which they are associated continue to be sold. But they require renewal.

Right of Publicity: It protects the right to use one's own name or likeness for commercial purposes.

Geographic Indication: It is indications on products of the geographic origin of the goods. It indicates the general source. The indication relates to the quality or reputation or other characteristics of the good. For example, "made in Ethiopia" is not influenced by the geographical indication. Geographical indications are sometimes called appellations of origin. For example, "Sheno lega" "champagne" (name of a region in France) are geographical indications.

Trade Secrets: It gives the owner of commercial information that provides a competitive edge the right to keep others from using such information if the information was properly disclosed to or acquired by a competitor and the owner of the information took reasonable precautions to keep it secret. It protects confidential secrets of some commercial value. The holder of the secret wants this information to be protected; some protect the holder from an unauthorized disclosure of the information. A tort law, unfair competition or contract law can protect such information which is secret /confidential information. The holder (owner) has to do his/her best to keep the information secret. Trade secrets exists without registration as it is to make the information public, for example, the formula of Coco Cola. Information that are protected in trade secrets can be patentable if they are novel and non obvious. But it is, most of the time, not to make the secret public.

However, their full-fledged IP rights are contestable.

5.0 Law of Intellectual Property Rights

Intellectual Property protects applications of ideas and information that are of commercial value. The subject is growing in importance, in the advanced industrial countries is particular, as the fund of exploitable ideas becomes more sophisticated and as their hopes for a successful economic future come to depend conceits. There has recently been a great deal of political and legal activity designed to assert and strengthen the various types of protection for ideas.

The various types of intellectual property as envisaged by World Intellectual Property Organization (WIPO) and Trade Related aspect of Intellectual Property Rights (TRIPs) have specific aims and objects. The protection of Intellectual Property provided the following various enactments.

1. The Copyright Act, 1957 (amended in 1999)
2. The Patents Act, 1970 (amended in 1999, 2002 and 2005)
3. The Trademarks Act, 1999
4. The Geographical Indications of Goods (Registration and Protection) Act, 1999
5. The Designs Act, 2000
6. The Semiconductor Integrated Circuits Layout Designs Act, 2000
7. The Protection of Plant Varieties and Farmers' Rights Act, 2001
8. The Biological Diversity Act, 2002.

6.0 Copyright Law and its relevance under Indian Constitution

The next issue relates to Copyrights, its relevance in the Indian Constitution. Copy right is an exclusive intellectual property right. Copyright is a right given to the owner or to the licensee against the copying of original work of cultural information and entertainment production. Thus it protects the expression not the idea itself but in a tangible form.

Copy right means the exclusive right to copy or reproduce a work in which the copyright subsist wholly or in part in any material form. In India copyright is recognized, granted and enforced by the Indian Copyright Act, 1957 under the present frame of laws there is no uniform law of copyright. The Act contains total 79 sections and 15 chapters. The Copyright [Amendment] Act, 2012 has a long history behind it. It was introduced into the Parliament as the Copyright [Amendment] Bill 2010 after the Report of the Standing Committee on Human Resource Development. This Act received the assent of the President on June 7, 2012 and through notification and shall come into force⁸.

The Copyright Act, 1957 which was amended in the year 2012 contains the following sections in outline. Chapter 1. Preliminary [Sections 1-8], chapter 2. Copyright Office & Appellate Board [Section 9-12], Chapter 3 Copyright [Sections-16], Chapter 4 Ownership of Copyright and Rights of the Owner [Sections 17-21], Chapter 5 Term of the Copyright [Sections 22-29], Chapter 6 Licenses [Sections 30-32B], Chapter 7 Copyright Societies [Sections 33-36A], Chapter 8 Rights of Broadcasting Organization and of performers [Sections 37-39A], Chapter 9 International Copyright [Sections 40-43], Chapter 10 Registration of Copyright [Sections 44- 50A], Chapter 11 Infringement of Copyright [Sections 51-53A], Chapter 12 Civil Remedies [sections 54-62], Chapter 13 Offences [Sections 63-70], Chapter 14 Appeals [Sections 71-73], Chapter 15 Miscellaneous [Sections 74-79].

6.1.1. Preamble of Indian Constitution:

The preamble of our constitution envisages the liberty of thought and expression. Every citizen of India enjoys full liberty to express himself or their self. The preamble of our constitution plays a vital role in determining the purview of fundamental rights guaranteed to the people which is enshrined in Part III of the

⁸T.Ramappa, *Intellectual Property Rights Law in India*, Asia Law House, Hyderabad, 2nd Edition, P.11.

constitution. The conceptual dimension of fundamental rights or human rights is contained in the preamble of constitution itself.

6.1.2. Freedom of Speech under Fundamental Rights

Article 19(1) (a) Freedom of speech and expression

Article 19 (1) (f) the right to acquire, hold and dispose of property which was specified as a fundamental right in article 19(1) (f) and it has been deleted by the Constitution 44th amendment Act, 1978. Articles 20, 21 and 22 listed under the reading Right to Freedom while Article 20 and 22 confer protection in respect of trial of and conviction for offences and provide certain safeguards in respect of arrest and detention, including preventive detention, the other two articles 19 and 21 cover between themselves all other freedoms and liberties and while of such freedoms or liberties have been distinctly and separately dealt with in article 19 (1) and Article 21 takes in Comprises and residue. It is also said that copyright is a property then the mandate in Article 300 A to the effect that no person shall be deprived of his property save of authority of law.

Under the Copyright Act, 1957 a Copyright is the instrument used to protect the rights of authors of literary and artistic works such as books and other writings, musical compositions, paintings, sculpture, computer programs and films for a minimum period which is the life of the author plus 60 years after his death. Sometimes in addition to these rights the copyright also seeks to protect other related rights such as the right of performer such as actors, singers and musicians, producers of phonograms (sound recordings) and broad casting organizations⁹.

After the decision of Supreme Court in Secretary, Ministry of Information Broadcasting Vs Cricket Association of Bengal¹⁰ it is well established that the right to freedom of speech and expression as provided

under Article 19 (1) (a) includes within its fold the right to be educated, informed and entertained. This has off late led to the controversy regarding whether the concept of copyright in literary, musical and artistic works being vested in a particular person is in effect a violation of the fundamental right to other citizens to have access to the same creative works for the purposes of education, information and/or entertainment.

Article 21 of the Constitution of India

The right or liberty to write a book, to publish some and sell copies thereof, are also freedom protected as fundamental right under Article 21 of Constitution of India. In later decision in Francis Caralie Mullin¹¹ Justice Bhagwati who delivered the leading judgment in Maneka Gandhi¹² has observed that “reading and expressing oneself in diverse form” are fully covered by and guaranteed under life/liberty clause in Article 21. It is also said that ‘copyright’ is a ‘property’, then the mandate in Article 300A to the effect that ‘no person shall be deprived of his property save of authority of law’.

In this regard there are various national laws and international conventions providing protection to these rights usually expressly otherwise under the subject ‘freedom of speech and expression’.

Universal Declaration of Human Rights (UDHR) under its Article 19 gives everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Article 10 of the European Convention on Human Rights (ECHR) provides for freedom to receive and impart information. Also Article 19 of International Convention on Civil and Political Rights provides every one shall have the right to freedom of expression; this right shall include

⁹Justice N. Santosh Hegde, *Intellectual Property Rights vis-s-vis Constitutional Rights*, NYAYA DEEP, The Official Journal of NALSA, Vol.VI, Issue 1, January, 2005, P.51.

¹⁰(1995) 2 SCC 16. ¹¹AIR 1981 SC 746 ¹²AIR 1978 SC 597

freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Apart from the above Article 13 of American Convention on Human Rights, Article IV of the American Declaration of Rights and Duties of man, Article 9 of the Charter of Human Rights and Peoples rights, Article 5 of the International Convention on Elimination of Racial Discrimination and Article 2, 12, and 13 of the Convention on the Rights of the Child provides for the protection of freedom of speech and expression through press. One of the most important components of freedom of speech and expression is free and unhindered use of the appropriate language. A society cannot effectively communicate if a restriction of sanction is imposed on it in any manner whatsoever. A copyright would confer an indirect copyright in the language itself, which cannot be justified in any circumstance. Such a claim would definitely be violative of Article 19(1)(a) of the Constitution of India.

7.0 Conclusion

From the above discussion it may be concluded that the Intellectual Property Rights which effectively protects the entire field of individual interest of personality and individual interest of substance. The scope of IPR laws are fundamentally to protect the subject matters of creation of product of mind, to lay the qualifications for protection, procedure for claiming to determine the Substantive criteria, to set exclusive rights. The Constitution of India is supreme contained certain important intellectual rights which should not be infringed.

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