INTELLECTUAL PROPERTY RIGHTS COMMITTEE | SCHOOL OF LAW, CHRIST(DEEMED TO BE UNIVERSITY) |
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INTELLECTUALIS

Stock Taking: IPR Law & Policy Reforms

INDEX

EDITORS' NOTE

Dear Readers,

We proudly present Volume 3, Edition 5 of Intellectualis with the theme 'Stock-taking: IPR Law & Policy Reforms'. In this issue, we look at pertinent issues in the IPR regime across the globe in the law and policy arena. Given the dynamic effects of change in an innovation-driven world and as universal citizens, such discourse at this juncture is necessary. This issue is enriched by a conversation with Ms. Mira Swaminathan, where we explore career opportunities in public policy and understand the heightened challenges that researchers face in the pandemic. Ms. Mira Swaminathan is a Public Policy associate and has published her research in various reputed publications, both national and international.

We hope that you take the time to read what our e-newsletter has to offer. We would like to extend our gratitude to the student body of School of Law, CHRIST (Deemed to be University) for their overwhelming response to the newsletter. We would also like to thank our Chairpersons, Dr. Avishek Chakraborty and Dr. Aradhana Satish Nair for constantly supporting us and guiding us through the drafting of this newsletter.

We hope you enjoy reading this Edition!

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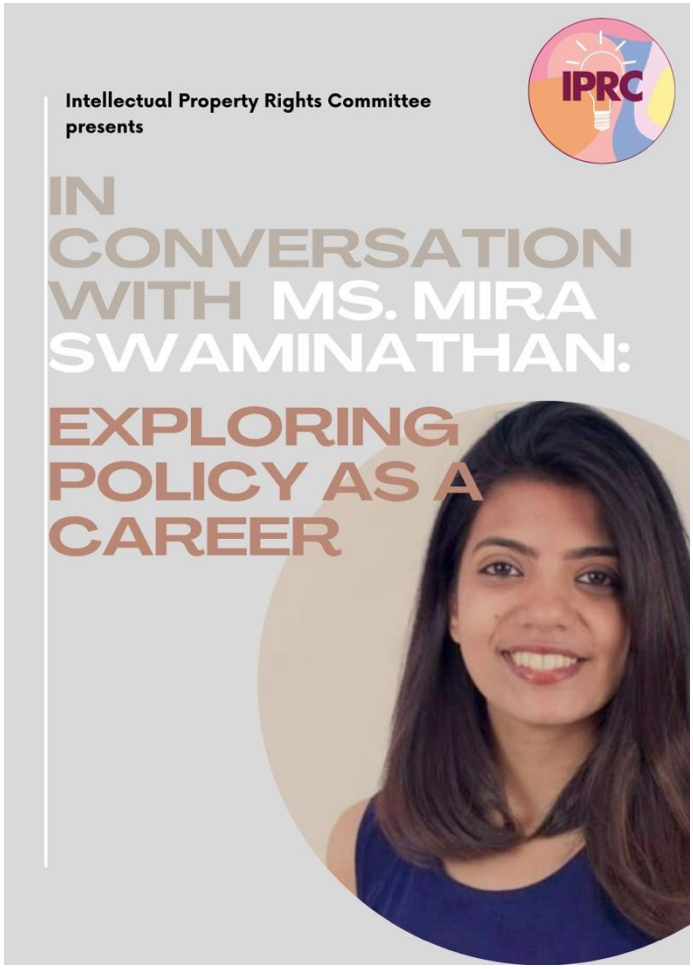
IN CONVERSATION WITH MS. MIRA SWAMINATHAN: EXPLORING POLICY AS A CAREER

-conducted by Ankita Malik & Maria Grisha Borges

Speaker Profile: Ms. Mira Swaminathan is a Public Policy and Regulatory Affairs Associate in a law firm based in Delhi. Ms. Mira has research experience at several reputed research centres and firms including the European Centre for Press and Media Freedom, Centre for Internet and Society and public policy team of Aam Aadmi Party among many others. Ms. Mira has also published with the Deccan Herald, Quint, The Wire, Gender IT.org, Centre for Internet and Society among others.



1. **Could you tell us about your area of specialization and how it garnered your interest?**

Mira: My area of interest is technically public policy and research. My interest in this arose when I joined the public policy committee in my second year, after which I started interning in think tanks and research organisations. My first ever internship was at PRS Legislative Research in Delhi where I provided research assistance to legislative departments, MLA's etc. My tasks included a close interaction with day-to-day bills that were passed. I realised that your research, be it desktop research or an empirical study, could really matter in the law that will be passed. The whole experience was very interesting, wherein I even had the opportunity to go to the Lok Sabha once. Thereafter I interned only in places which were research organizations to work on my research and drafting skills.

A lot of times we see the advice floating around that it's either litigation or corporate and the choice seems to be a binary, but I believe that public policy is the field which gives me the way out. It shows how research can be used and how it can directly impact the legislative process. This dynamism was what

garnered my interest and currently, I am working in the public policy team of a firm in Delhi. Prior to that I was working in the Centre for Internet and Society.

2. Could you tell us a little about the point where tech and policy converge?

Mira: Towards my fourth-year I went to the Annenberg-Oxford Media Policy Institute, which was a two-week summer school on the intersection of media law and policy. The program was structured in a way where we had to go and study the various ways in which media policy generally converges with other disciplines. It was a fantastic course, spanned over two weeks and it included everything from a detailed study of intermediary laws to policies pertaining to emerging technology. There were people coming from diverse fields, there were journalists, government regulators, teachers, academicians, litigators working in the field of media law and policy, which was enriching in terms of the discourse which took place. However, I would recommend that anyone who wants to pursue this course should go when they are a little more experienced as it allows on to contribute effectively towards the course as well. Since I went in my fourth year, that was a challenge I faced, because everybody else who was learning with me had experience, so while I was learning with them, I had to still catch up with certain aspects that were taught in the course.

I also had the opportunity to intern in the technology law team of Nishith Desai Associates. This was a time when the petition against the RBI circular that prohibited cryptocurrency in India in 2018. These were my first interactions with tech law and policy and thereafter, all that I did in law school was tech policy oriented. I worked part-time at the Centre for Internet & Society in my fifth year and through there I could take it forward to be a policy associate.

During that time as well as now, with the emerging technologies, tech law is of so much importance. So, I'm glad I entered this field because there is nothing static here, everyday there's something new, a new law that comes into the picture which provides a lot of scope for research. The fact that the literature is not static and keeps on evolving was what interested me the most, leading me to pursue this field.

3. How can a student pursue a career in policy, with special focus on Intellectual Property Rights?

Mira: You can pursue a career in public policy by interning in research organizations/think tanks or interning in the policy teams of law firms. Many universities also have centres that have focused research on a particular field which is also a great place to start. In my fourth-year I had the opportunity to intern in the public policy team of Aam Aadmi Party in Delhi, so I would also recommend applying to political parties, local MLA's etc who need research assistance.

For students wanting to pursue a career in policy with a focus on IPR, I would suggest to start writing, for example, in this newsletter, and to move further, various blogs like Spicy IP, or intellectual property law journals. I would also recommend research centres in universities that have a focused study on IP such as The Centre for Innovation, Intellectual Property and Competition in NLU Delhi. If you're in your fifth-year, I'd also recommend you apply for the position of research assistant to professors where you get the opportunity to teach, assist them in research etc. In terms of the corporate side of IP, you can also apply to law firms that have a specific focus on IP, like Anand and Anand, Sai Krishna Associates etc. which you could pursue during your internship breaks.

4. How do you enjoy your work? Are there certain personal attributes that are required to successfully work in this field?

Mira: Much like every other field, patience and openness to critical feedback are extremely essential for this field. With research, you need to take your time to understand the area of research and form well-founded speculations. I co-authored a research paper with Shubhika Saluja, an alumnus of SLCU on Lateral Surveillance. I remember we started thinking about the project at the beginning of February 2020 and we published it by January 2021. Research can be time-consuming and you don't get quick deliverables. Another challenge as a researcher is to battle the appetite to derail as the legal nuances get interesting.

5. As a researcher, what are the challenges you face in the pandemic?

Mira: I acknowledge the fact being a desktop researcher during the pandemic and reading/writing during these times is an extreme privilege, and during the lockdown in 2020, I had the time and opportunity to do the same. However, the pandemic did pose a lot of challenges for empirical researchers who had to go to the field and collect their data. Mental health was definitely compromised during this period. The pandemic heightened the already existing social issues and created new ones. Internet connectivity and access to resources is a huge privilege, and we understood the same even better during the pandemic.

6. What advice would you give to the current and future batches that are graduating in the midst of a pandemic?

Mira: There is no straight jacket advice per se, but I would definitely advice my juniors to read. To subscribe to the daily newspapers and magazines like EPW that helps you become more aware of the ongoing political affairs. Do not get disheartened if you don't get the internship you wanted, take time off to make a reading list/watching list even, and stick to it. I used to write a lot during college, and I'd recommend the same, it could be on any topic, but do inculcate a daily consistent habit of reading and at least attempting to write.

KEEPING UP WITH THE DSM DIRECTIVE IN THE EU COPYRIGHT REGIME

-Amala G

Introduction

The European Parliament and the European Council adopted the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (hereinafter referred to as the "DSM Directive"), and this directive came into force on 6th June 2019. The provisions of the DSM Directive have [i] Several provisions of the DSM Directive have been perceived as controversial, owing to their potential of bringing about sweeping changes in the copyright regime in the digital space. However, Article 17 of the DSM Directive seems to arguably be the most controversial provision.

In general, Article 17 imposes new stringent obligations upon Online Content Sharing Platforms been the subject of intense debate, lobbying, and scrutiny by all relevant stakeholders since the release of the original proposal back in 2016. Member states of the European Union have until 7th June 2021 to implement the provisions of the DSM Directive into their national legal frameworks.

(hereinafter referred to as "OCSPs"). This Article holds OSCPs *directly* liable for the unauthorized copyrighted material posted by their users online. If the OCSPs want to avoid this liability, they have to comply with certain best practices laid down by Article 17 and other related provisions such as receiving the permission of the copyright holders, and expeditiously removing any infringing content.[ii] The intent of the European Parliament behind Article 17

is to "give artists a stronger position in invoking their rights for fair compensation when their work is used and distributed online by others".[iii]

The question arises as to why Article 17 is considered to be so controversial. After all, the imposition of liability upon OCSPs is not new and is done across jurisdictions worldwide. The European Union developed its intermediary liability mechanism vis-à-vis copyright infringement in the Infosoc Directive.[iv] Its controversial nature is owing to the fact that it results in a shift in liability. Under Article 17, OCSPs (such as YouTube for example) can be taken to court and sued for making copyright-infringing material available to the public at large. Previously, under an older E-Commerce Directive, OCSPs could not be normally sued for the display of infringing content. They were defined as "mere conduits" who received information from their users and made the same accessible to the public. Direct liability was solely directed at the users themselves who could be sued in court. All OCSPs could escape liability by adhering to safe harbor provisions. The requirement for this safe harbor was for the OCSPs to take down the infringing content *after* receiving a notice from the copyright holders, and for this removal to be done in an expeditious manner. This regime is referred to as the "notice and takedown mechanism", which is prevalent not only in the European Union but also in other jurisdictions like the United States and India. Member States of the European Union have incorporated this mechanism into their national laws inconsistently with significant variations in implementation.[v]

"Due to the manner in which certain Member States of the European Union have chosen to implement the DSM Directive in their national laws, a debate about whether Article 17 of the DSM Directive contradicts Article 3 and Article 5 of the InfoSoc Directive, has arisen.

Is there a conflict between the DSM Directive and Infosoc Directive?

Due to the manner in which certain Member States of the European Union have chosen to implement the DSM Directive in their national laws, a debate about whether Article 17 of the DSM Directive contradicts Article 3 and Article 5 of the InfoSoc Directive has arisen. Article 3 confers the right of communication to the public. The argument made was that Article 17 would give a special right to Member States in such a way that they will not be bound by the InfoSoc Directive and will be able to include their own exceptions and limitations to Article 17. This would further increase the inconsistency among the countries that constitute the European Union. This matter is being deliberated upon by the Court of Justice of the European Union (hereinafter referred to as the "CJEU") in the YouTube/Cyando cases where the judgment is pending.[vi] During the proceedings, Advocate General Saugmandsgaard Øe put forth the view that OCSPs which did not have a license from the copyright

holders would be liable under Article 17, but would not be liable under Article 3 of the InfoSoc Directive.[vii] What the CJEU decides in this case is pertinent to the way in which the copyright regime in the digital arena will move forward.

Stakeholders such as copyright holders and artists have argued that Article 17 has only altered the limits of the liability/obligations of the OCSPs to avail the safe harbor, and has thereby strengthened the rights of users by the inclusion of compulsory exceptions and safeguards to prevent the blocking of legitimate content uploaded by users.[viii]

Challenge by Poland

Further complicating matters for the effective and uniform implementation of the DSM Directive across the Member States of the European Union, is the legal challenge launched by Poland before the CJEU against Article 17 of the Directive. However, the challenge relates to the practical application of the provision and is not challenging the validity of the existence of such a provision. Resolution of such concerns is critical nonetheless. Concerns have also been raised about whether the DSM Directive curtails the rights of the Member States under the European Union Charter.[ix]

Conclusion

As stated earlier, the date for the Member States to implement the provisions of the DSM Directive in their national regimes is fast approaching. It is also imperative that such implementation is uniform across the European Union, and there is a smooth transition from the old rules to the new. It seems that the ongoing COVID-19 pandemic has also complicated such implementation. Guidance to be given with respect to the implementation of Article 17 has been postponed, acting as another impediment. The development and reform of this copyright regime in the European Union is crucial not only to the Member States themselves, but may also have lasting impact in shaping the legal frameworks of other jurisdictions which are influenced by the European Union mode.

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[i] *The DSM Directive: One Year On*, SIMMONS+SIMMONS (3 August 2020) https://www.simmons-simmons.com/en/publications/ckbkrnywk0g9j0979illi68kb/the-dsm-directive-one-year-on

[iii] Dr. João Pedro Quintais, SJD Giancarlo Frosio, Dr. Stef van Gompel, Prof. Dr. P. Bernt Hugenholtz PhD, Martin Husovec, Dr. Bernd Justin Jütte, and Prof. Dr. Martin Senftleben, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics*, JOURNAL OF INTELLECTUAL PROPERTY, INFORMATION TECHNOLOGY AND E-COMMERCE LAW https://www.jipitec.eu/issues/jipitec-10-3-2019/5042

[iii] *Questions and Answers on issues about the digital copyright directive*, EUROPEAN PARLIAMENT (27 March 2019) https://www.europarl.europa.eu/news/en/press-room/20190111IPR23225/questions-and-answers-on-issues-about-the-digital-copyright-directive

[iv] Péter Mezei, *A comprehensive guide to the InfoSoc Directive*,15 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE 70, 71 https://academic.oup.com/jiplp/article-abstract/15/1/70/5628307?redirectedFrom=fulltext

[v] *Complying With Article 17 of the EU Copyright Directive*, TERMS FEED (23 December 2020)

https://www.termsfeed.com/blog/eu-copyright-directive-article-17/

[vi] Joined cases YouTube C-682/18 and Cyando C-683/18

[vii] Eleonora Rosati, *Five considerations for the transposition and application of Article 17 of the DSM Directive*, THE IP KAT (16 February 2021) https://ipkitten.blogspot.com/2021/02/five-considerations-for-transposition.html

[viii] Julia Reda, *Article 17: What is it really good for? Rewriting the history of the DSM Directive – Part 1*, KLUWER COPYRIGHT BLOG (28 September 2020) http://copyrightblog.kluweriplaw.com/2020/09/28/article-17-what-is-it-really-good-for-rewriting-the-history-of-the-dsm-directive-part-1/

[ix] Eleonora Rosati, *The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States, and why the German implementation proposal is not compatible with EU law*, THE IP KAT (31 August 2020) https://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html

PROTECTING FILMS FROM PIRACY: A POLICY OVERVIEW

- **Sahana R**

Introduction

Film piracy has been an age-old problem for the Indian film industry as well as the intellectual property holders of the film. In India, even before digitalization, film piracy was a threat to the economic interests of the film industry as movies were recorded and sold in the black market with the help of DVDs and CDs. This incentivized consumers to buy DVDs or CDs instead of a cinema hall ticket for the main reason that it was cost-effective. With the advent of technology, the online era gave rise to various websites and applications that uploaded these movies free of cost and made them available to the consumers at their convenience. This discouraged consumers from spending any money for entertainment through movies. The main question that arose was whether our Indian Law was strong enough to protect the IP holders.

"A regulatory body must be set up that keeps a check on the digital content uploaded on various rogue websites and alarms the consumers from using such websites. The policy must also enhance the use of technology to mitigate film piracy."

Film Piracy and the Law

In 2020, the annual global loss to the movie industry due to the piracy was estimated between $40 Billion and $97 Billion.[i] India was the third-highest piracy site visitor with 9.589 Billion visits in 2018.[ii] It can be said that there has been a surge in the number of visits on rogue websites in India over the years with the advance in technology. However,

various policy changes over the years have emerged to strengthen the IP laws and to protect IP holders from piracy and other forms of infringement. Back in 1996, the Supreme court in the case *State of A.P. vs. Nagoti Venkataramana*,[iii] held that hiring or selling of film cassettes to the public in a Video city amounted to infringement of copyright and therefore was film piracy. The Indian Copyright Act 1957 allows civil remedies for infringement of copyright such as injunction, damages.[iv] However, the Copyright act does not explicitly mention any provision in the case of film piracy. The Cinematograph Act of 1952 is a specific Act that deals with films and its certification and regulation. However, prior to the 2019 Amendment, the Act did not deal with any provision relating to film piracy. Section 7 of the Cinematograph Act of 1952 deals with authority to exhibit films in a public place or unrestricted place and states that the punishment may be imprisonment of 3 years or fine extending to one lakh rupees or both. However, it does not mention the term piracy or any form of online uploading of films by the offenders.[v]

The Cinematograph Amendment Bill, 2019 was introduced in the Parliament of India, to include penal provisions in the Act to reduce film piracy in India. The Bill introduced imprisonment of three years or a fine of 10lakh rupees for any form of film piracy. The amendment introduced section 6AA which clearly states that any person, who without the written authorization of the copyright owner, uses any recording device to make or transmit a copy of a film, or attempts to do so, or abet the making or transmission of such a copy, will be liable for such a punishment.[vi] Therefore, the unauthorized users of any film will attract punishments. This policy change in including film piracy under the purview of the Cinematograph Act acts as a deterrence to all those persons involved in film piracy. Furthermore, section 7 of the Act is to be amended to punish anyone who contravenes

Section 6AA of the Act with a punishment of three years or 10 Lakhs fine. The courts have also been vigilant in dealing with piracy cases and have granted injunction to stop the film piracy menace. In 2019, the Ernakulam police filed an FIR under the Cinematograph (Amendment) Act, 2019. The pirated copies of a Malayalam film *Moothon* starring Nivin Pauly which was directed by Geethu Mohandas and produced by Vinod Kumar had appeared on the Internet within a week of its release in theatres.[vii] The Policy change in the Cinematograph (Amendment) Act, 2019 will not only deter the people from uploading pirated content but at the same time it will also increase innovation.

Conclusion

The policy change will deter many people from viewing and uploading pirated content, but this would not stop the film piracy issue. A regulatory body must

be set up that keeps a check on the digital content uploaded on various rogue websites and alarms the consumers from using such websites. The policy must also enhance the use of technology to mitigate film piracy. Technical intervention would play an important role in identifying pirated websites and will be able to monitor the activity of such rogue websites. Furthermore, as a developing country, India must invest in protecting owners of IP rights. One such initiative was taken by the US and 40 other countries who came up with the Anti-Counterfeiting Trade Agreement. Each country also will have to provide judicial procedures in which content owners could assert their rights and be paid fair and equitable payment for violations.[viii]

Commenting on the Anti-counterfeiting Agreement Neil Turkewitz, executive vice president of EVP International Ltd. stated that "While Anti-Counterfeiting Trade Agreement does not provide all of the answers about how governments will move forward to tackle online piracy, it is a very important multilateral statement concerning the importance of finding solutions to online theft."[ix] Therefore, the law must include certain provisions to improve the procedures and enforce measures to regulate the illegal activity. At the same time, the Government plays a pertinent role in actively monitoring such websites with the help of technology.

[i] Letić J, Budanović N and Jovanović B, "Piracy Statistics for 2020 - People Would Still Download a Car" (*DataProt*September 29, 2020) <https://dataprot.net/statistics/piracy-statistics/> accessed February 17, 2021

[ii] Letić J, Budanović N and Jovanović B, "Piracy Statistics for 2020 - People Would Still Download a Car" (*DataProt*September 29, 2020) <https://dataprot.net/statistics/piracy-statistics/> accessed February 17, 2021

[iii] State of A.P. vs. NagotiVenkataramana [1996]Supp4SCR812

[iv] The Indian Copyright Act 1957, s. 55

[v] The Cinematograph(Amendment)Act,2019, s.7

[vi] The Cinematograph(Amendment)Act,2019, s.6AA

[vii] "Case Registered against Film Piracy" (*The Hindu*November 28, 2019) <https://www.thehindu.com/news/cities/Kochi/case-registered-against-film-piracy/article30110651.ece> accessed February 18, 2021

[viii] "40 Countries Agree on Anti-Piracy Plan" (*Global Innovation Policy Center 40 Countries Agree on AntiPiracy Plan Comments*) <https://www.theglobalipcenter.com/40-countries-agree-anti-piracy-plan/> accessed February 19, 2021

[ix] 40 Countries Agree on Anti-Piracy Plan" (*Global Innovation Policy Center 40 Countries Agree on AntiPiracy Plan Comments*) <https://www.theglobalipcenter.com/40-countries-agree-anti-piracy-plan/> accessed February 19, 2021.

CASE INGOTS

Jagran Prakashan Ltd. vs. Telegram FZ LLC & Ors, CS(COMM) 146/2020 & I.A. 4073/2020

Recently a Single Judge of the Delhi High Court, while passing an interim injunction in a suit for copyright and trademark infringement, directed the messaging app, telegram to disclose the identity of users who were running channels on its platform to illegally share e-newspaper of Jagaran Prakashan Limited ("JPL") on a daily basis. It directed Telegram to take down the channels which were indulging in similar infringement activities against JPL's newspaper, within 48 hours of passing of the order.

Sameer Wadekar & Anr. v. Netflix Entertainment Services Pvt. Ltd and Ors., LD-VC-70 OF 2020.

In a suit filed by a writer claiming copyrights over the story of web-series BETAAL that was originally created for exclusive telecast on Netflix Entertainment Services Pvt. Ltd. ("Netflix"), the Bombay High Court (the "Court") refused to grant interim injunction to stay the release of the web-series BETAAL which was to happen shortly.

International Society for Krishna Consciousness (ISKCON) vs. Iskcon Apparel Pvt. Ltd and Ors, COMMERCIAL IP SUIT (L) NO. 235 OF 2020

The High Court of Bombay declared ISKCON the registered trademark of International Society for Krishna Consciousness a "well-known trademark" in India. The matter pertained to a trademark infringement and passing off suit against a certain Iskcon Apparel, an apparel company, selling products using the brand name ISKCON.

PATENT AMENDMENT ACT, 2020 THE IDEAL WAY FORWARD?

- Lian Cicily Joseph

The Ministry for Commerce and Industry published the Patent (Amendment) Rules, 2020 which have come in to force since 19th October, 2020. These were initially published in the year 2019 and was open for public consultation prior to being enacted. The amendments brought in a host of changes specifically related to Form 27.[i] Other essential changes include the removal of requiring the submission of information related to the licensees and sub-licensees granted in a year and requirement to provide the approximate revenue/ value accrued.

Form 27 under the Patent Rules, 2003 refers to the prescribed form that requires patentees and licensees to furnish details regarding the working of their patents in India. The law imposes on holders the duty to work the invention and ensure that it is also accessible. The failure to meet these requirements will result in a host of consequences such as compulsory licensing, etc. Section 146(2) read with rule 131 of the Patent Rules require every patentee to submit an annual statement disclosing the extent to which they have commercially worked the invention to the Patent Office in the manner prescribed under Form 27. In 2015, a public interest litigation was filed by Prof. Shamnad Basheer and others that noted that the compliance with regards to the working statement filling was not appropriately dealt with. In response to the same, the Delhi High Court directed the government to make the necessary changes to the Form in order to make it clearer and more effective. The PIL argued that the provision was worded in a manner that was unclear and made compliance harder. Additionally, there was also an absence of any guidance to check whether the requirements were duly met.[ii]

"Many have noted that these amendments streamline and make the process more friendly and easy for business while others have argued that the amendments do away with certain essential requirements and water down or make ineffective the existing provisions."

The previously announced amendments did away with the requirement of stating the reasons for not working of the patent which has been undone in the present scenario. The amendments have prescribed a maximum word limit of 500 words and requires stating the justifications for

such failure. The form also did away with a lot of the earlier requirements such as (a) the quantum of the product manufactured or imported into India, (b) statement on whether public requirement is met at a reasonable price, etc.[iii] The new form also allows for a single form to be filed in respect of all related patents where the revenue/value accrued from a particular patented invention cannot be derived separately from the revenue/value accrued from related patents.[iv]

Another major change that has occurred is that the time period under section 131 (2) has been altered to mean 'financial year' instead of 'calendar year.' No explanation has been provided but it is suggested that this change is to bring the time period in line with the patterns followed by firms and companies while preparing their financial statement. The law is however not clear on what is to be followed during the transition period drawing serious consequences in terms of the potential consequences of failing to comply with the requirement.[v] As per the new timeline, the statements will have to be filed within six months (earlier three months) from the expiry of the financial year i.e., the 30th September of each year.

Indian patent law recognizes that patents play an essential public function and that the purpose of certain requirements especially Form 27 aid in realizing the same. Many have noted that these amendments streamline and make the process more friendly and easy for business while others have argued that the amendments do away with certain essential requirements and water down or make ineffective the existing provisions. The government passed these amendments after inordinate delay and while they have improved on some fronts, certain questionable changes have been made the effects of which can be adequately assessed in the coming days.

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[i] 'Patents (Amendment) Rules, 2020- Streamlining of The Requirements Related to Filing of Form 27 And Submission of Verified English Translation of Priority Documents' (*Pib.gov.in*, 2020) <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1668081#:~:text=The%20Patents%20(Amendment)%20Rules%2C,is%20not%20in%20English%20language.> accessed 23 February 2021.

[ii] Agarwal P, 'Indian Government Significantly Dilutes Patent Working Disclosure Norms' (*SpicyIP*, 2020) <https://spicyip.com/2020/11/indian-government-significantly-dilutes-patent-working-disclosure-norms.html> accessed 23 February 2021.

[iii] Supra note 2.

[iv] 'Patent Amendment Rules, 2020' (*Khuranaandkhurana.com*, 2020) <https://www.khuranaandkhurana.com/2020/10/28/patent-amendment-rules-2020/> accessed 23 February 2021.

[v] Samal A, 'The Amended Form 27 And Uncertainty in Timelines for Filing' (*SpicyIP*, 2021) <https://spicyip.com/2021/02/the-amended-form-27-and-uncertainty-in-timelines.html> accessed 23 February 2021

COPYRIGHT PROTECTION FOR APPLICATION PROGRAMMING INTERFACES: MAPPING POLICY REFORM

-Sanjana Rebecca

Introduction

With the onset of the *Oracle v Google* lawsuit, the question of copyright protection for Application Programming Interfaces (API) has been subject to a controversial discourse in the field of copyright and software development alike. An API can be defined as a way to programmatically interact with a separate software component[i]. In laymen's terms, unless one were to write every single line of code from scratch, it is necessary to interact with external software components and their APIs to understand the list of functions the software component is able to perform. Drawing into perspective the scenario in the instant case, in 2005, Google had gone ahead and rejected Sun Microsystem's business model of licensing the Java system in the making of Android. The Java software program was made accessible conditional on the term that the modifications made were compatible with Java. However, Google had deliberately chosen not to utilize the Java system in developing the source code for Android.

In 2010, after the acquisition of Sun by Oracle, Oracle brought a copyright and patent infringement suit against Google for copying the structure of 37 packages, declaring code (9000 lines of source code) and the implementing code for 9 functions with those packages. Google was struck with copyright infringement under 17 USC. 107(1) and the same stated that the doctrine of fair use will not be applicable. In the first trial, the Court had ruled that Google had copied portions of Java, but the portions copied by Google were APIs which were not subject to copyright protection. This decision was later reversed by the Appeals Court which stated that the "structure, sequence and organization" of API is subject to copyright. Afterwards, it was returned to the trial court again and in the second trial court in San Francisco, the jury had found that Google's use of API was protected as fair use. In 2014, the federal circuit overturned the jury's decision on fair use and convened another trial on specifically fair use in 2016 after which in 2016, the Court of Appeals Federal Circuit ruled that the decision was to be set aside and the jury's decision on fair use was to be set aside in favor of Oracle. In 2019, the case was moved to the Supreme Court and is awaiting the final verdict on the years-long battle.[ii] Although the case was ruled in favor of Oracle by the Court of Appeals Federal

Circuit, Google had claimed a plethora of defenses which becomes pertinent in deciding the soundness of the API copyright protection policy.

The Idea/Expression Dichotomy

The first trial in the *Google v Oracle* case had discussed the implications of permitting APIs to be copyrightable in the light of 17 USC 102(b) which covers the non-applicability of copyright for ideas and methods of operation. The Court had ruled that the declaring code is not a protected expression but is merely an idea and that APIs fall under the classification of a method of operation. The doctrine of merger also becomes applicable in solving the dichotomy when there are only limited ways of expression of an idea. The functional/expressive duality also makes it difficult to implement copyright for software, while the source code can be perceived as creative expression, APIs can only be understood as functional. On that note, awarding copyright protection to APIs and related software components would devastate the software industry as the task of writing a unique code altogether becomes impossible. The *Computer Associates v Altai*[iii] case was in consensus with the general judicial climate of awarding copyright protection only to the literal source code. The differentiation between the interconnected idea and expression into protected and unprotected bits was also further reiterated in the Altai principle. [iv]

"While merely granting protection to the source code seems unproblematic in the long run, the web becomes more tangled with the entry of APIs."

Fair Use Doctrine and Interoperability

The Second Trial Court jury had declared that Google's use of API fell under the doctrine of fair use even in the case of non-interoperability. However, the District Court noted that Oracle in essence was arguing that Google's interoperability argument would have been stronger if Google copied the structure of all 166 Java API packages rather than just 37. On the basis of this statement, the Court of Appeals of the Federal Circuit (CAFC) held that program elements were necessary for interoperability and that it had no impact on the determination of their protectability. It noted instead that interoperability was relevant to assessing the applicability of the fair use defense. With reference to the Senate Judiciary Committee Report which states that 17 USC 1201(f) is "intended to allow legitimate software developers to continue engaging in certain activities for the purpose of achieving interoperability", the CAFC noted that the District's Court analysis of the degree of interoperability by Google in disallowing Java apps to run in Android fostered a lack of interest in interoperability.[v] Furthermore, as per the *Sega v Accolade*[vi]case the purpose of this section has been understood to foster competition and innovation in the computer and

software industry and that Google's claim to fair use cannot be met due to its lack of interest in interoperability.

What happens if Copyright Protection is granted to APIs?

On one side, it is believed that granting of copyright protection to APIs becomes bad law because it tampers with the freedom of re-implementation in the field of software development. Excluding APIs from copyright protection has been essential for the development of modern computers and the internet wherein the uncopyrightable nature of APIs births software that otherwise would not have been created.

The API is posed with the idea/expression dichotomy, while functional needs can constrain the limits of copyright, it nevertheless does not exclude creativity in re-implementation. The other end of the spectrum is of the opinion that making APIs copyrightable will not disadvantage software developers as use without reimplementation of code is possible considering many companies and open-source projects form libraries for the usage of API and the developers can use those without reimplementing the same. The inter-connectivity of API cannot be ignored as most of the time one or more APIs have been derived from others. The assertion of copyright protection over APIs will not ultimately hinder the primary usage of API which is taking advantage of a pre-existing implementation in creating more APIs that will also allow for further implementation in its cycle. Software will continue to survive even in the backdrop of copyright protection because of the need to meet interoperability requirements for availing the fair use defense. Therefore, software developers will now be required to meet standards of interoperability when creating APIs because of the difficulty in developing good APIs and copying without compatibility in platforms would not attract the fair use doctrine.[vii] The best example of this would be the Microsoft case against Sun for not meeting the interoperability requirements in the creation of Java.

Conclusion

While merely granting protection to the source code seems unproblematic in the long run, the web becomes more tangled with the entry of APIs. It has already been established through the case of *Sun v Microsoft*[viii] that a unique code without elements of the other is almost impossible to produce. Thereby, every idea of code that becomes protected as expression owes its origins to a pre-existing code and use without re-implementation is only possible if the interoperability standards for availing the fair use doctrine are met. In my opinion, copyright protection might be the best out of all the other tools to protect software for the time being but at what cost? The idea/expression dichotomy, the applicability of interoperability for the fair use doctrine, the problem of re-implementation and mounting litigation

overcomplicates the realm of copyright protection. Alternatively, since software is 'expressively and functionally different' from literary works, it should be removed from the purview of copyright law. The US Supreme Court (SCOTUS) is yet to clarify its position on the same in the final verdict of the *Oracle v Google* case and only then will the debate on copyright protection for APIs reach its much-awaited verdict.

[i] Jonathan Freeman <What is an API? Application programming interfaces explained> (Info World, August 8th, 2019) https://www.infoworld.com/article/3269878/what-is-an-api-application-programming-interfaces-explained.html, Accessed 20th February, 2021.

[ii] <Oracle v Google> (Scotus Blog, 7 Oct 2020) https://www.scotusblog.com/case-files/cases/google-llc-v-oracle-america-inc/ Accessed 20th February, 2021.

[iii] *Computer Associates International, Inc. v. Altai, Inc.*, (1992) 2nd Circuit, 982 F.2d 693 (1992).

[iv] ARS STAFF <The Google/Oracle decision was bad for copyright and bad for software> (Ars TECHNICA, 6th March 2016) https://arstechnica.com/information-technology/2016/06/the-googleoracle-decision-was-bad-for-copyright-and-bad-for-software/ Accessed 20th February, 2021.

[v] Sue Ghosh Strickett, <*Google v. Oracle*: An Expansive Fair Use Defense Deters Investment In Original Content> (IP WATCHDOG, 19th Jan 2020) https://www.ipwatchdog.com/2020/01/19/google-v-oracle-expansive-fair-use-defense-deters-investment-original-content/id=117951/ Accessed 20th February, 2021.

[vi] Sega Enters. Ltd. v. Accolade, Inc., (1992) 9th Circuit, 977 F.2d 1510

[vii] Uri Sarid, <A Non-Apocalypse: APIs, Copyright, and Fair Use> (WIRED, 25th May 2018) https://www.wired.com/insights/2014/05/non-apocalypse-apis-copyright-fair-use/ Accessed 20th February, 2021.

[viii] Sun Microsystems Inc. v Microsoft Corp. (2000) N.D. Cal., 87 F. Supp. 2d 992.

IPR AWARENESS AND THE NATIONAL IPR POLICY

- **Joanna L. Mathias**

Introduction

The 21st century belongs to the knowledge era and is driven by the knowledge economy. The term "Knowledge-based economy" defines the current economic system in which knowledge generation and management play a predominant role in the development of wealth compared to conventional production factors, namely land, labor and capital.[i] Intellectual property (IP) is a strategy to secure this information or intellectual activity legally. A study by Einfolge, an international patent analytics and market research firm, found that more than 35 percent of individuals are unaware of intellectual property rights (IPR).[ii]. The 'Intellectual Property: Rights, Need & Awareness' conceptual study revealed that the majority of respondents from 203 educational institutions in Karnataka, Tamil Nadu,

Kerala and Telangana, were not fully aware of the benefits of IP and other related issues.[iii]

The National Intellectual Property Rights (IPR) Policy

The National Intellectual Property Rights (IPR) Policy was approved on May 12, 2016 by the Union Cabinet. This Policy recognizes the abundance of creative and innovative energies flowing in India, and the need for a better and brighter future for all to tap into and channel these energies. A vision document that encompasses and brings all IPRs to a single platform is the National IPR Policy.[iv] It takes a holistic view of IPRs, taking into account all interconnections, and thus aims to generate and exploit synergies between all forms of intellectual property (IP) and the laws and agencies concerned. It also establishes an institutional implementation, monitoring and review mechanism by incorporating and adapting the Indian scenario with global best practices. It is imperative to harness IP in order to take forward the National IPR Policy and to enhance India's creativity, innovation, competitiveness and economic growth. With the Indian economy's phenomenal growth, it is vital that IPRs are generated in India and then protected and exploited legally. Inadequate knowledge of people's rights to protect their ideas and innovations and low awareness of the processes involved in obtaining an IPR have hindered the growth of Intellectual Property in India.

One of the objectives of this IPR policy is to achieve greater IPR awareness in India. To quote the policy, "To create public awareness among all sections of society of the economic, social and cultural benefits of IPRs."[v] In order to increase awareness of the benefits of IPRs and their value to rights-holders and the public, a nationwide promotion program should be launched. Such a program will create an atmosphere where creativity and innovation in the public and private sectors, R&D centers, industry and academia are encouraged, leading to the generation of marketable protective IPs. It is also necessary to reach out to less visible IP generators and holders, particularly in rural and remote areas." As stated in the National IPR Policy, this is the first object."

"It is crucial that IPR is made available to all those who need it, from India's dynamic software industry to its diverse craft and textile industry."

It is crucial that IPR is made available to all those who need it, from India's dynamic software industry to its diverse craft and textile industry. Much of the intellectual property created in India remains unprotected because of the lack of resources to disseminate IPR data and its many uses. Apart from this lack of resources, the other issue lies in the fact that the popular perception in India is that obtaining IP protection is a long and cumbersome process.

The rationale for the National IPR Policy lies in the need to raise awareness of the importance, as a marketable financial asset or an economic tool, of intellectual property rights (IPRs).

The policy states that, traditionally, knowledge monetization has never been the norm in India. This does not fit with the global regime of zealously protected IPRs, even though it is laudable and altruistic. Hence, the value of transforming knowledge into IP assets needs to be propagated. This requires a significant change in the paradigm of how knowledge is viewed and valued - not for what it is, but for what it can become. Many IP holders are unaware of the advantages of IP rights or the value of their ideas or their own capacity to create IP assets. As stated earlier, the complexities of the process of creating defensible IP rights often discourage them. In contrast, they may be unaware of the value of the IP rights of others and the need to respect the same. Through outreach and promotion programs, the National IPR policy proposes tackling both perspectives.

Emphasis should also be placed on raising awareness in terms of our geographical indications, traditional knowledge, genetic resources, traditional cultural expressions and folklore of India's rich heritage. The immediate economic rationale for individuals and the community should be effectively conveyed to the public, as well as the benefits of being innovative. "Creative India; Innovative India" is the holistic slogan for the program. The implementation of this slogan can be seen through the initiatives under the objective of the policy.

Initiatives and Schemes that further IPR awareness:

- **The Cell for IPR Promotion and Management (CIPAM)[vi]**

  It is an initiative under the National IPR Policy that is working towards the goal of greater IPR awareness. The goal of this cell is to pursue the National IPR Policy and to strengthen India's creativity, innovation, competitiveness and economic growth. It is crucial to generate IPRs and then legally protect them in order to meet the requirements of India's economic growth. This scheme will help to achieve the objectives of the National IPR Policy. The cell's function is to carry out various awareness workshops and seminars along with training programs, each of which is targeted at different sectors and institutions.

- **Scheme for Facilitating Start-Ups Intellectual Property Protection (SIPP)[vii]**

  SIPP is aimed at promoting awareness among start-ups and protecting intellectual property rights. The scheme is designed to provide start-ups with quality IP services to encourage them to innovate and commercialize their intellectual property. IP services are provided under this scheme by

facilitators operated by the Controller General of Patents, Designs and Trademarks (CGPDTM). Initially, the scheme was run on a trial basis, but has now been extended until March 31, 2023.

- **IPR Facilitation Services by the Confederation of Indian Industry**[viii]

  The Confederation of Indian Industry (CII), a non-profit industry association in India, has been at the forefront of promoting awareness among the industrial community and providing facilities for IPR protection.

- **Patent Facilitation Centers by Department of Science and Technology (DST)**[ix]

  The Patent Facilitation Centre (PFC) was established by the Department of Science and Technology (DST) in 1995 as a unit of the Technology, Forecasting, and Assessment Council (TIFAC) and subsequently 24 other Patent Information Centers under the PFP in order to raise awareness and provide assistance in protecting IPRs. On behalf of academic institutions and government R&D institutes, the PFC assists in filing and prosecuting patent applications in India and overseas. The PFC also helped set up IPR cells in several universities to give academics a helping hand in conducting patent searches, drafting patent applications, etc.

- **IPR division of DeitY**[x]

  With the aim of creating and promoting IPR awareness in the field of information and communication technology, the Department of Electronics and Information Technology (DeitY) has a dedicated IPR division. DeitY provides its R&D societies and institutions that have executed R&D projects using DeitY grants with facilitation support for filing patents, copyrights, trademarks and design applications. DeitY assisted in the filing of 248 patent applications, of which 65 patent applications were granted, and 168 trademark applications were filed, of which 117 were registered. In conclusion, The National IPR policy has the power to change where India stands in the world and foster innovation to a great extent. However, it is pertinent to note that the same greatly depends on adequate implementation and enforcement of the objectives set out in the Policy.

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[i] Indian' (December 1996), Volume 15, IOSR Journal of Business and Management (IOSR-JBM) http://www.iosrjournals.org/iosr-jbm/papers/Vol15-issue2/C01521321.pdf , accessed 21st February 2021

[ii] Neetu Chandra Sharma, 'Study shows low IPR awareness in India', (Livemint, 8th September 2018) https://www.livemint.com/Politics/Rap1LeEuftJTFehNt00gTJ/Study-shows-low-IPR-awareness-in-India.html , Accessed 20th February 2021

[iii] Id.

[iv] National Intellectual Property Rights Policy, 12th May 2016, Government of India, Ministry of Commerce and Industry Department for Promotion of Industry and Internal Trade, https://dipp.gov.in/sites/default/files/national-IPR-Policy2016-14October2020.pdf Accessed 20th February 2021

[v] Id.

[vi] 'IPR Awareness - Creative India, Innovative India!', (Scheme for IPR Awareness | CIPAM), https://dipp.gov.in/sites/default/files/Scheme%20IPR%20Awareness.pdf Accessed 21st February 2021

[vii] Neetika Gandhi, 'IP facilitation programmes, schemes, and policies in India', (Lexology, 20th September 2020) https://www.lexology.com/library/detail.aspx?g=23422523-fcff-4e2e-882e-f7201b13fb76 Accessed 20th February 2021

[viii] Id.

[ix] Id.

SHUTTING DOWN OF THE IPAB: A BRIEF ANALYSIS

-Ishwarya Singh

On 11 February 2021, the Union Finance Minister, Ms. Nirmala Sitharaman, introduced a Bill in the Lower House of the Parliament, entitled "The Tribunals Reforms (Rationalization and Conditions of Service) Bill, 2021", only a few days after she had announced in her 2021 Union Budget speech that the government was seeking to "reform the tribunal system to ensure speedy justice."[i] The Bill has received some mixed and conflicted reactions from IP practitioners in India. Some say that it is the need of the hour, while some believe that abolishing the IPAB is a "regressive step".[ii]

What is the IPAB?

The IPAB was established on 15 September, 2003[iii] through an amendment to the Trade Marks Act, 1999, which provides for its establishment.[iv] The IPAB was established to hear the appeals lying from the decisions of the Registrar of trademarks[v], geographical indication[vi], copyright[vii], patents[viii] and plant varieties[ix]. The Board was established to direct trade mark appeals filed before the High Courts to a specialized body to ease the High Court's off the burden of appeals.

"It is known that Tribunals are established with the purpose of providing speedy and cost-effective dispute resolution. However, this is absent in the case of the IPAB where it takes years for a suit to reach its finality..."

Analysis

The draft Bill seeks to abolish five tribunals, including the Intellectual Property Appellate Board (IPAB), and instill an appeal system directly with the Commercial Courts and High Courts. Although no particular reason was disclosed behind the introduction of the Bill, for now, we can rely on the Finance Minister's speech in this regard, wherein she mentioned that reforms would be made to the tribunals to ensure "speedy justice".

If we are to rely on the Union Budget speech, it can be deciphered that the Central Government is of the view that the IPAB, among other Tribunals, is coming in the way of an efficient justice system. In its eighteen years of existence, the IPAB did not have a chairperson for almost two years between 2016 and 2018 and was practically non-functional for 19 months. This led to an immense backlog of cases. As of October 2017, the IPAB had 2,610 pending trademark cases and 546 patent cases.[x]

[x] Id.

From what it looks like, this move is an attempt of the government to remedy its own failure to ensure that a tribunal such as the IPAB is functional. Nevertheless, the IPAB has not been given sufficient time to prove itself and fulfill the expectation to accelerate the disposal of IP cases, given that after Justice Manmohan Singh was appointed as the Chairman of the Board in 2018, the IPAB has been busy clearing the backlog of two years.[xi]

Further, unlike the Courts, appointments in a tribunal are made by the executive. High Courts have the power to make appointments in District and Subordinate Courts, in consultation with the Governor of the respective State. Thus, High Courts are able to exercise a certain degree of control over Subordinate Courts and have power over the appointments, transfers, and promotion of judges. This ensures the quality of judicial appointments. However, the High Court or Supreme Court has no such control over Tribunals.[xii]

In addition to chairperson or president, Tribunals also comprise of technical members who render their technical expertise in a particular field to ensure that the issues are well understood, and judgments are delivered accordingly. Thus, it can be concluded that how well a Tribunal performs is highly dependent on qualified members presiding over the cases that come to the Tribunal.[xiii] While the Draft Bill proposes to constitute a Search-cum-Selection Committee, chaired by either the Chief Justice of India or a Supreme Court judge, for the appointment of Chairperson and Members of tribunals[xiv], this has no effect on the IPAB, since it is proposed to be abolished, and rightly so. As remarked by Justice Prabha Sridevan, who was has been the Chairperson of the IPAB between 2011 and 2013, there is no requirement for a judge to possess technical expertise to decide IP cases, and that "an idea of justice and law" is enough to decide IP questions.[xv]

A lot of appeals are made to the High Court against the decision of the IPAB. This obsolete layer of litigation can be done away with, and the Bill is a right step in this direction. It is known that Tribunals are established with the purpose of providing speedy and cost-effective dispute resolution.[xvi] However, this is absent in the case of the IPAB where it takes years for a suit to reach its finality. Furthermore, while the IPAB can only deal with matters pertaining to IP rights, High Courts being constitutional courts, can also decide on constitutional matters. The need for speedy disposal of cases is especially important in IP cases, as IP rights are highly time sensitive. The more delay caused in deciding the matter, the less time an owner has to benefit from his IP.

It is common practice to file a case before the IPAB and simultaneously file a writ petition before the High Court. The cost and time of litigation as well justice delivery can be substantially reduced if an

appeal can be directly made before a constitutional court. Lastly, it may be argued that matters of patent and plant varieties may require qualified members with the appropriate technical expertise, which the Tribunals provide for. However, High Courts can establish an IP bench, to resolve this issue, thereby balancing the need for speedy and technically-sound decisions.

Conclusion

It is quite likely that we may witness the Parliament passing this Draft Bill towards the latter half of the year. However, once it is passed, it would be interesting to see how the High Courts deal with the sudden insurgence of appeals of IP matters while they still struggle to cope with the existing immense backlog of pending suits. The present decision may prove to be a tricky one if justice is further delayed rather than being sped up with the removal of the IPAB, putting matters in a vicious cycle of delayed justice.

[i] Praharsh Gour, Breaking: Finance Minister Proposes a Draft Bill in Lok Sabha to Shut Down IPAB, (*Spicy IP*, 13 February 2021) < https://spicyip.com/2021/02/breaking-finance-minister-proposes-a-draft-bill-in-the-lower-house-to-shut-ipab.html> accessed 21 February 2021
[ii] "A regressive step" – outcry at new Indian government bill to abolish IP Appellate Board (*World Trademark Review*, 19 February 2021) < https://www.worldtrademarkreview.com/enforcement-and-litigation/regressive-step-outcry-new-indian-government-bill-abolish-ip-appellate-board> accessed 21 February 2021
[iii] <https://ipab.gov.in/about.php> accessed 21 February 2021
[iv] Trade Marks Act 1999, s. 83
[v] ibid
[vi] Geographical Indication Act 1999, s. 31
[vii] Copyright Act 1957, s. 11; Finance Act 2017, s. 160(a) and 160(c)
[viii] Patents Act 1970, s. 116
[ix] Protection of Plant Varieties and Farmers Act 2011, s. 59
[x] Karry Lai, 'IPAB Back in Business (Almost)' (2018) 275 Managing Intell Prop 10
[xi] ibid
[xii] Arvind P Datar, 'The Tribunalisation of Justice in India' (2006) 2006 Acta Juridica 288
[xiii] ibid
[xiv] Tribunals Reforms (Rationalisation and Conditions of Service) Act 2021, s. 12(3)
[xv] "Justice Prabha Sridevan on Govt's Proposal to Shut Down IPAB and the Way Forward" (*SpicyIP*, 18 February 2021) <https://spicyip.com/2021/02/justice-prabha-sridevan-on-proposal-to-shut-down-ipab-and-the-way-forward.html> accessed 22 February 2021
[xvi] ibid (n xii)

'MAKE IN INDIA' POLICY AND ITS EFFECT ON IPR IN THE POST PANDEMIC WORLD

- Ruthu Shivani

The 2016 National Intellectual Property Rights (IPR) Policy was introduced in May 2016 as an action plan to direct the future growth of IPRs in the nation. It aimed at incorporating and connecting all the Intellectual Property Rights to a holistic framework by reflecting all the interdependencies thereby seeking to build and leverage growth opportunities between all types of intellectual property (IP), the

related laws and organizations. The Make in India campaign is a national initiative that was implemented on 25th September, 2014 by Prime Minister Narendra Modi with the intention of transforming the nation into a global manufacturing hub by promoting both domestic and international corporations to produce their goods within the country. This article aims to understand how intellectual property rights plays a central role for the 'Make in India' campaign in a post pandemic world.

The global picture of India, marked by harmony, optimism and collaboration, offers a unique benefit. As multinational transnational companies (TNCs) such as Apple are required to contribute transformative goods every few years, rapid advanced innovation is a necessity for going up a production supply chain. If the value chain does not innovate at the speed of the TNC, the TNC will not be able to produce a successful product launch. Typically, TNC, strong in expertise and experience, will collaborate close with the production chain to maintain the pace of development in the value chain. So, in nations with a knowledgeable, equal and efficient IPR ecosystem, TNCs might tend to work effectively. [i]

Data reveals that India is now one of the most competitive IPR nations in the world with the 2016 IPR strategy consistent with the WTO TRIPS agreement[ii]. It required the Indian Patent Office roughly six years to issue a patent in India prior to 2016, compared to 22 months in China, 3-5 years in the EU and 2-5 years in the US[iii]. Now that the time in India has reduced to 2 to 3 years. In a landmark move, the regulation shortened the time of registration and review of the trademark to 1 month from 13 months. The expense of filing an IP in India is definitely not a detriment because it costs around Rs.1600 for individuals, Rs. 4000 for start-ups and Rs.8000 for small companies and large entrants, accordingly.[iv]

"Taking into account the unequal benefit to the country, more idealistic investment for increase in capacity at Intellectual Property Rights Owners Association (IPO) will help supply the outlined targets."

Setting a ground-breaking example to the world, women innovator's patent reviews are conducted in fast-track fashion encouraged by a 2019 amendment. The legislation allowed digitizing IP procedures and implemented proceedings by videoconferencing. In a radical move, the strategy also recommended additional privileges to Micro, Small and Medium Enterprises (MSMEs) and start-ups and microenterprises to use IP as a collateral toward capital injection. The strategy has placed all the parts of IP i.e., copyright, industrial designs, circuit designs and arts under a single ministry.

The 2020 pandemic could be a milestone year for India's transition into not just a market friendly

country but also an innovation friendly country. India must aspire to go from the most advanced IPR nations to the Best IPR country offering the most efficient, most externally validated, and equal IP grants. For any global deep-tech start-up, India must aspire to become the fastest and best path to the international economy through rapid and friendlier IP regime.

Recommendations that may result in supercharging the 'Make in India' campaign

1. **Awareness incentives:**

Indian IP benefits should be positioned best as part of many other big scale national projects like the 'Make in India', 'Start-up India' and 'Smart Cities'. Like developed countries, selected Indian administrations will accommodate an IPR official to handhold the potential innovator to enter India or vice-versa. Indian student organizations and public communities overseas can be utilized to promote Indian IPR landscape as being one of the greatest in the game. Targeted social media network ads driven by the 'Incredible India' initiative can be discussed, to draw the attention of TNC's who are aiming for diversification.

2. **Institutional incentives:**

The growth of domestic filing to the total share of patent applications in India continues to be negligible. Enterprises and MSMEs find it difficult to implement IPR's effect in business and profit estimations.[v] Thus the, in-house institutions like Cell for IPR Promotion and Management (CIPAM) can be enhanced to enable undertake analysis to evaluate the contribution of IP subject matter on behalf of some sub-sector business groups and companies. Encouraging local innovation has been one of the primary goals of the policy in which more research needs to be done. Though India provides rapid funds, a few international entities are concerned regarding scrutiny of evaluation. Taking into account the unequal benefit to the country, more idealistic investment for increase in capacity at Intellectual Property Rights Owners Association (IPO) will help supply the outlined targets. The current collaboration with WIPO and European Patent Office (EPO) must be utilized for infrastructure development. Omni network educational programs for patent drafting specialization must be introduced to increase the pool of patent lawyers eligible for both big and small inventors to develop internationally non-circumventable patents at rate. NITI Aayog's Growth Monitoring and Evaluation Office which electronically audits all of the nationwide strategies can be utilized for tracking the status of IP funds, and industrial IP agreements.

3. **Promoting local intellectual property rights:**

Vast numbers of Indian public and private institutions may be organized for IP filings in India. The government's esteemed National Institutional Ranking System (NIRF) formula comprises a minute weighting of IP applications. This offers a measurable metric to measure and award the success

of small businesses as honeycomb inventions. In addition to standard R&D, the Indian Government and IPO must put an aggressive emphasis on the development and defense of technology innovation, as industrial innovation enabled India to control markets such as pharmaceuticals. Close to the NIRF, the branches between small and big industries delivering of rich IP holdings must be awarded on a national level.

Conclusion

The IPR policy is recognized as a multifaceted strategy which aims at developing the nation's innovation and creativity. The policy plays an integral role in encouraging global firms to invest and develop manufacturing, R&D and outsourcing bases in India. Even though Indian government has undertaken significant measures to fix or deter further degradation of the IPR regime, it is yet to seize the opportunity to resolve lengthy and structural flaws in the IPR regime. India's domestic policy objectives of growing, spending and promoting progress must be through, not at the cost of, IPR protection and enforcement. Indian government and IPO should lay an ambitious focus on Industrial Innovation promotion and protection in addition to basic R&D, as industrial innovation helped India dominate in sectors like Pharma manufacturing.[vi] The internationally reputable IP ecosystem in India does have the ability to bring tremendous tangible and intangible benefit to the 'Made in India' program, which in turn will enable Indian businesses to meet their international goals. [vii]

[i] Sheth, 'Apple details safety changes due to Covid-19 in latest report',<https://www.thehindubusinessline.com/info-tech/apple-details-safety-changes-due-to-covid-19-in-latest-report/article31588978.ece> last accessed on 20th February, 2021.

[ii] World Trade Organization, <https://www.wto.org/english/news_e/archive_e/trips_arc_e.htm > last accessed on 20th February 2021.

[iii] 'US elevates status of IP attaches in India, China, EU, Mexico'*(The Economic Times)*, Pti,<https://economictimes.indiatimes.com/news/international/business/us-elevates-status-of-ip-attaches-in-india-china-eu-mexico/articleshow/79673371.cms > last accessed on 20th February, 2021.

[iv] 'Govt proposes to reduce IPR fees for MSMEs and startups' *(The Economic Times)*, Pti < https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/govt-proposes-to-significantly-reduce-fees-for-iprs-for-msmes-startups/articleshow/71152612.cms?from=mdr > last accessed on 20th February, 2021.

[v] Amitabh Kant, Aishwarya Joshi and Kowthamraj VS, 'Building IPR policy to supercharge 'Make in India' in post-pandemic world' (*ET Government*) www.ETGovernment.com, <https://government.economictimes.indiatimes.com/news/policy/building-ipr-policy-to-supercharge-make-in-india-in-post-pandemic-world/75697164> last accessed on 20th February, 2021.

[vi] Amitabh Kant, Aishwarya Joshi and Kowthamraj VS, 'Building IPR policy to supercharge 'Make in India' in post-pandemic world' (*ET Government*) www.ETGovernment.com, <https://government.economictimes.indiatimes.com/news/policy/building-ipr-policy-to-supercharge-make-in-india-in-post-pandemic-world/75697164 > last accessed on 20th February, 2021.

[vii] 'IPR integral part of flagship Indian projects like Make in India, Digital India', (*The Economic Times*), Pti, < https://economictimes.indiatimes.com/news/economy/policy/ipr-integral-part-of-flagship-indian-projects-like-make-in-india-digital-india/articleshow/51151587.cms?from=mdr > last accessed on 20th February, 2021.

IPR REWIND: February 2021

- **19 Feb 2021: Webinar on Role of Intellectual Property in Career Building** – Intellectual Property Talent S Examination organized this webinar to discuss the prospects of Intellectual Property and career building.
- **8-19 Feb 2021: WIPO-India Summer School on Intellectual Property** – The WIPO Academy, the RGN Nagpur, and the Maharashtra National Law University, Nagpur hosted the WIPO-India Summer School fr 19 February, 2021. The summer school was conducted in online format.

REALITY OR PRESENT: ARTIFICIAL INTELLIGENCE AND IPR POLICY FROM A COMPARATIVE LENS

-Shefali Fernandes

Introduction

Though, it has been a while since Artificial Intelligence has been gradually incorporated in almost every sphere of life in many advanced countries, most countries in the world have still not made the best possible use of it. This is as a result of not having enough resources or as for reasons of being cautious of new technology. In advanced countries, it has already been making waves in the fields of healthcare, farming, security and so on. Additionally, it also helps in self-driving cars, ride-sharing apps, determination of credit worthiness of persons, assessing of defendants of criminal sentences[i] and the like. It has resulted in a better world in countries where there has been reliance placed on it in sectors such as social media[ii], education, business, tourism.

Artificial intelligence has a close relationship with Intellectual Property, and hence it is imperative that countries that use it extensively provide for IP Laws that integrate Artificial Intelligence in a progressive manner. Policies, if present in such countries in this regard must be reviewed periodically, by taking into consideration, opinions of the public.

Status of AI & IP Policy in USA

The USPTO report on Public Views on Artificial Intelligence and Intellectual Property Policy[iii] sheds light on the interconnection between Intellectual Property Law and Artificial Intelligence. The report mainly focused on learning the views of the commentators on the topic. While broadly, the majority took the stance that the present laws were enough to deal with AI, in particular, the report dealt with copyright law, as well as patent law and their relationship with Artificial Intelligence. The objective of the report was to emphasize on the need to keep up with the rapid pace of changing technology, and to do this with the assistance of those who are involved in the innovation community.[iv] This report especially really beneficial as it helped to understand the current situation of AI and to evaluate the requirements of future.

Copyright and its relationship with AI

With reference to copyright, it was the opinion of the majority that while a non-human cannot be treated as an author of a work under the existing framework of copyright law, it should also not be permitted in the future, by creating a tailor-made law for the same.[v] This is on the basis of the assumption, that AI cannot create an invention on its own,[vi] as it is believed that AI does not have the ability to think and create on its own. This was a view also seconded in regard to patents, wherein, it was stated that ownership of inventions and machines should ideally not be extended to machines.[vii]

Patent Law and its overlaps with Artificial Intelligence

For patent law, most felt that the laws with regard to inventorship that were present were more than sufficient.[viii] The report discussed the various elements of Artificial Intelligence Inventions, and how they can be categorized as those inventions that advance AI, such as algorithms. Next, those that apply AI to any other field such as AI in healthcare, hotel industry, chatbots, automobiles etc., and lastly those that are produced by AI such as the DABUS (Device for Autonomous Bootstrapping of Unified Sentience), a machine that has the ability to create inventions.[ix]

The position of AI and IPR policy in the European Union.

In a similar manner, the UK also had citizens and stakeholders give their opinions and views on the artificial intelligence policy and regulatory steps.[x] In lieu of this, the European Commission proposed a white paper, in order to provide for a proper regulatory framework for Artificial Intelligence, for providing specific steps in order the support AI in the economy, additionally, it also discussed the safety and liability aspects of the AI.[xi] The paper also laid down policy options for a prospective regulatory framework in the European Union.

AI in India and the way ahead for developed countries.

On its part, the government in India, released a discussion paper on the National Strategy for Artificial Intelligence in 2018 documenting the vision for AI in the future in India, and also the role of the government in the same.[xii] In furtherance to this, NITI Aayog, released a working document on the theme, 'Towards Responsible AI for all which was released for the purpose of public consultations.[xiii] Also, an approach paper titled Airawat, with regard to establishing an AI specific cloud computing infrastructure in India, was also released by NITI Aayog in January 2020.[xiv]

In my opinion, it is a wise decision to involve stakeholders who are ultimately going to be affected by the policy, by means of taking their suggestions and giving importance to their views. These include the Government, citizens that are influenced by AI systems, either directly/indirectly, regulators that are in charge of making rules/regulations that are sector specific. Additionally, other groups that influence such policies include the private sector that is involved in creating and using AI products, the research community and lastly standard setting bodies.[xv] In this manner, the needs of the public who are impacted by this are taken into due consideration. If other countries decide to create a separate policy for Intellectual Property and AI in the future, it can consider the examples of developed regions like the USA and the EU.

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[ii] Jack M. Balkin, Free speech in the algorithmic society: big data, private governance, and new school speech regulation. U.C. Davis L. Review, 2017. https://papers.ssrn.com/sol3/paperscfm?abstract_id=3038939.

[iii] https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf

[iv] <https://www.uspto.gov/about-us/news-updates/uspto-releases-report-artificial-intelligence-and-intellectual-property> accessed 24th February 2021.

[v] < https://www.jonesday.com/en/insights/2020/11/uspto-reports-highlight-importance-of-ai-to-us-invention-and-innovation>accessed 18th February 2021.

[vi] USPTO, Public Views on Artificial Intelligence and Intellectual Property Policy, (October 7, 2020)

[vii] Ibid.

[viii] Supra (n 3)

[ix] < https://www.whitecase.com/publications/alert/uspto-publishes-report-public-views-artificial-intelligence-and-ip-policy-us-ip>accessed 19th February 2021.

[x] <https://ec.europa.eu/digital-single-market/en/news/white-paper-artificial-intelligence-public-consultation-towards-european-approach-excellence>accessed 19th February 2021.

[xi]<https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf> accessed 18th February 2021.

[xii] NITI Aayog, 2018 National strategy for artificial intelligence, http://www.niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AIDiscussion-Paper.pdf.

[xiii] NITI Aayog, 'Working Document: Towards Responsible AI for All', <https://niti.gov.in/sites/default/files/NITIAyog_Presentation.pdf>accessed 24th February 2021.

[xiv]< https://niti.gov.in/sites/default/files/2020-01/AIRAWAT_Approach_Paper.pdf> accessed 24th February 2021.

[xv] Ibid.

BLOCKCHAIN AND IPR: A CRYPTO HAVEN CONCEPT

-Anjali Saran

Introduction

Blockchain or Distributed Ledger Technology[i] (DLT) refers to a system wherein the transactions are recorded and made using cryptocurrency (or secret currency), across several computers, connected directly to one another, and in the absence of the main server computer. Satoshi Nakamoto conceptualized the first blockchain in 2008 from where the technology has evolved and found its way into many applications beyond cryptocurrencies. This form of a network, formed between computers, may also be referred to as *'Peer to Peer Network'*, wherein all the stakeholders involved in the transaction are directly connected to one another. And because of the absence of a server computer which stores all the data, this system becomes nearly *'unhackable'*, as a hacker will need to hack all computers to access data. It is also argued that this system is transparent and immutable in nature, which ensures greater accuracy of data. In the present-day scenario, when cryptocurrencies like Bitcoin, Libra or Ethereum are becoming popular, who use Blockchain as their technology, India too is planning to introduce its own digital currency, mainly influenced by its demand within the population of the country and also in the world. The Budget Session of 2021 saw the Cryptocurrency Regulation Bill 2021 being introduced in the Parliament. While the Bill is still waiting to be discussed, it seems to do away with all private cryptocurrency operations in India. However, it has allowed Blockchain technology to be used for other uses and research purposes. This is not the only field where Blockchain can be used. *D-Stream* is a video sharing web application powered by Blockchain. It allows users to upload, view and contribute to the creator.[ii] Another example can be *Guard time*, which secures its data using Blockchain. It is due to this interconnectedness between Blockchain and rights of the user or creator that IPR comes into play here.

"Since the blockchain technology offers enjoy the benefits of IPR cost-effectively, many people choose this method rather than the traditional method for registering for any IP rights. Therefore, there is a need to regulate this sector with suitable changes to present IPR laws."

This article aims to analyse and highlight the relationship between Blockchain Technology and IPR, and the need for IPR reforms in this sector. The writer here, by scrutinising various articles and regulations concerning Blockchain, in various countries, try to fructify the above arguments. The end result of this article will be to make readers aware of Blockchain, in light of IPR, and to give fecund suggestions to make Blockchain a safe haven for its users, thereby ending government ambiguity on its operations.

Relationship between Blockchain and Intellectual Property

A big advantage of using blockchain technology is that the user can upload data in an encrypted format (or a hash, which refers to a unique combination of numbers and letters of fixed length, generated from a string of text), for protection against hacking.[iii] Therefore, when a user uploads data using this mechanism, then the date, time and name of the user gets recorded along with the encrypted data. This can help in the protection of the work against piracy or freebooting. Due to this feature of blockchain, many users are uploading their creation without getting registered IP rights, leading to an unbridled increase in unregistered IP rights in this sector. And it is here that IPR laws require reformation.

Need for Reforms

Since the blockchain technology offers enjoy the benefits of IPR cost-effectively, many people choose this method rather than the traditional method for registering for any IP rights. Therefore, there is a need to regulate this sector with suitable changes to present IPR laws. One way could be by allowing independent 3rd parties to monitor the unregistered IP rights of parties using the platform, and systematically review it, to avoid any conflict in the future as well as to furnish any proof required immediately. Such a *'Registry'* or Collective Management Organisation will also increase its goodwill or trustworthiness in the eyes of the users by being impartial and accurate in dealing with and keeping a systematic and organised record of the transactions. However, its full potential can only be realized when all the stakeholders involved in this field take part in the process. Hence, the Registry should also try to facilitate the promotion of IP Rights on the platform. The creation of an *Asset Registry* can also help in keeping track of all the assets in the platform and put a check on fraudulent activities.[iv]

Also, another important thing to note is that although blockchains are extremely difficult to hack, yet they are not completely un-hackable. One example of Hacking can be the *51% Rule*, wherein, if a domain owns or controls more than 51% of the computing of the technology, then it becomes really easy for that domain or company to create fake data on the network.[v] Therein, a user who uploaded his creation

on the technology becomes vulnerable to such plagiarism attacks. Hence, there is an increasing need for IPR laws specifically for Blockchain.

Conclusion

The proof of creatorship verification, enrolling and clearing of IP rights in this network includes giving proof of veritable as well as first use in exchange and additionally trade, building up and authorizing IP arrangements, licenses or selective dissemination networks through brilliant agreements; and communicating instalments progressively to IP proprietors. Blockchain might be likewise utilized for verification and provenance purposes in the discovery of potential recovery of fake, taken and equal imported products.

While some countries like Canada, China, Australia, Japan, Switzerland and the United States of America have accepted[vi] blockchain technology, some anachronistic countries like Egypt, El Salvador, Austria, and till recent times, even India, considered this technology as a threat to users and their data, due to lack of regulation and decentralisation. However, there is, as of now, no proper legislation governing this field. As evident from legislative history, each government takes its own time to bring a new law. Over time[vii], India hopefully adopts a peaceful way of embracing this new technology, along with necessary reforms.

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[ii] Anonymous, The State of Blockchain-Based Image-Sharing Platforms, NASDAQ, https://www.nasdaq.com/articles/state-blockchain-based-image-sharing-platforms-2018-04-04

[iii] Birgit Clark, Blockchain and IP Law: A Match Made in Crypto Heaven?, WIPO MAGAZINE, https://www.wipo.int/wipo_magazine/en/2018/01/article_0005.html

[iv] *Supra* Note 1.

[v] Anonymous, How Blockchain Can be Hacked, INSIGHTS BLOG, https://cipher.com/blog/how-blockchain-can-be-hacked-the-51-rule-and-more/#:~:text=51%25%20Attacks,worth%20of%20cryptocurrency%20since%202017.

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PROTECTION OF TRADITIONAL KNOWLEDGE UNDER INDIAN COPYRIGHT LAWS

-Aleena Anabelly

Introduction

Traditional knowledge is a sacred combination of the sagacity that nature provides abundantly, and the

intrinsic creativity and intelligence that humans preserve respectfully. Indigenous communities and cultural minorities often regard this peculiar knowledge as a significant element of their cultural and spiritual identity. In a multicultural state, the national identity is cumulative of the Individual cultural identities, though the degree of their representation differs according to the hierarchy of cultures. The cultural hegemony found in multicultural states like India has espoused an elite-dominated value system that blatantly disregards the cultural exclusivity of marginalized indigenous communities and ethnic minorities.

This unfair domination impelled the policymakers to categorically recognize the demographic rights of these minorities. But the prevailing laws have failed to effectively protect the traditional cultural expressions (TCE) of these secluded communities through intellectual property mechanisms.[i] Though an attempt has been made to preserve TCE through the application of sections 25 and 64 of the Indian Patent Act and the establishment of Geographical Indication tags, the state was not successful in extending the same through copyright laws.

"The adoption of incentive-based intellectual property legislations, that encourages private actors to innovate, along with provisions for the protection of cultural expression from unethical commercialization by such private actors is the only sustainable goal ahead."

Conceptualization of 'Authorship' and its alternative interpretations

The conventional romanticization of Authorship over artistic, literary, and dramatic works has bestowed unprecedented power on the creators.[ii] The exclusive legal entitlement and control that are given to private creative actors (authors) under this formulation, theoretically conform to the traditional conception of property and ownership. Therefore, modern copyright laws provide the author, the undivided right to morally and economically claim their artistic work for a limited time period. However, the boundary-less, supranational flow of information has added a multi-dimensional connotation to the word 'Authorship' and thereby calls for a flexible revision of its existing proprietary sovereignty.[iii] Keith Aoki suggested that – *"Author-based intellectual property regimes provide rights in information, they undermine traditional, territorial, and political notion of sovereignty".*[iv] This novel approach rejects absolute, private entitlement given to 'authors' on social and cultural items under current IP laws that conveniently overlook the territorial and traditional sovereignty claims that Indigenous groups have on such items. The transnational demand to balance public and private interests in copyright laws, that emerged after the popularization of this approach, is incentivizing state and international organizations to perceive copyright creation as a collectively imagined activity.

Unfortunately, in this 'Information age', a major part of intellectual property is already controlled and distributed by private entities and multi-national companies, therefore expanding the proprietary sovereignty of copyrights to encompass public rights can be construed as a far-fetched dream. The conflict between the definitions of 'authorship' specified under statutes and the general meaning associated with it in discourses on traditional cultural expressions further complicates the situation. Therefore, any economic actor with higher social and economic capital can appropriate traditional cultural expressions and unfairly benefit from them.

Conclusion

Legitimate and stringent protection of TCE is not possible as statutes protect artistic works for a limited and pre-determined period, hence the same cannot be made applicable to traditional expressions that exist since time immemorial and whose origin is non-identifiable. This might be the reason why the Indian Copyright Act does not explicitly include provisions for the protection of TCE, though sections 38 and 57 impliedly protect them by safeguarding performance rights and author's moral rights respectively. The adoption of incentive-based intellectual property legislations, that encourages private actors to innovate, along with provisions for the protection of cultural expression from unethical commercialization by such private actors is the only sustainable goal ahead. Therefore, the state should actively try to stabilize the conflict between the private and public interest in the intellectual property regime through various reformative policies.

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[iii] Aoki K, "(Intellectual) Property and Sovereignty: Notes toward a Cultural Geography of Authorship" (1996) 48 Stanford Law Review 1293.

[iv] Zemer L, *The Idea of Authorship in Copyright* (Taylor & Francis Ltd 2007) .

Watch out for these events!

28 Feb 2021 – 6 Mar 2021: Online Workshop Course on International Trade and WTO @ 25

Indian Forum for Public Diplomacy (IFPD) in collaboration with Global Policy Insights (GPI) is organizing an online workshop course on International Trade and WTO @ 25. The objective of this workshop is to explore the tenets of India's trade policy in the post-pandemic world and, to encourage dialogue, debate, and discourse on International Trade.

1 Mar 2021: Intellectual Property Talent Search Examination (IPTSE)

It is an annual IP Olympiad that certifies students' IPR knowledge. This exam was initiated on July 2018 with the objective to promote IPR awareness amongst school and college students across the country.

2 Mar 2021: 'Protection of Semi-Conductor Integrated Circuit Layout Designs'

The DIPP-CIPAM IPR Chair at National Law University and Judicial Academy, Assam will be hosting a webinar on 'Protection of Semi-Conductor Integrated Circuit Layout Designs' with Ms. Ojeswini Bondalapati as the Speaker.

5 Mar 2021: NLSIU's International Roundtable on Plant Variety Protection [PVP] in Support of Food Security.

The Department for Promotion of Industry and Internal Trade (Ministry of Commerce and Industry, GOI) is organizing this roundtable that includes a line-up of renowned speakers and is accepting original contributions for the event.

PLANT VARIETY PROTECTION: INDIA'S PROGRESS FROM AN INTERNATIONAL PERSPECTIVE

-Sanjana Santhosh

The role of the agricultural sector towards the growth of the Indian economy can be traced back to the Indus Valley civilization era, with current contribution of 20% to the GDP. The Public sector played a significant role in developing new plant varieties through various plant breeding researches, thus leading to the Green Revolution. Although the private sector established its presence in the agro-industry, it did not play much of a role in plant breeding until the mid-1980s. Due to this dominant role of the State over the private sector in the agro-industry, an attempt to introduce a Plant Variety protection legislation was not made.

The dependence on agriculture was ever growing due to the increasing population and fragmentation of land for inheritance. Due to this, unless an alternative employment was not available, the pressure on the agricultural sector for a livelihood would keep on increasing. It was thus necessary to enhance agricultural production, for which the potential lies with Intellectual Property Rights. While IPR establishes a nexus between agriculture and, genetic and biological resources, it is necessary to examine whether there has been a development of plant varieties and their delivery to farmers after the new IPRs regime.[i]

The TRIPS Agreement

Proprietary claims to plant varieties have arisen all around the globe for which, the expansion of IPR in plant varieties is being regulated by the TRIPS Agreement. The expansion of IPR throughout the field is occurring in the form of mergers among biotech and agro-chemical companies, development in agricultural research, and the growth of the biotech industry, all of which are headquartered in developed countries, having their own strong Plant Variety Protection (PVP) systems. As their operations expand globally, even towards the developing countries, Multinational Companies aspire for minimum standards of IPR protection to reduce the risks associated with research and development.[ii]

Although the TRIPS Agreement demarcates the obligations of WTO members with respect to plant variety protection, there has been an ambiguity with the meaning of an 'effective *sui generis* system' for plant variety protection. Despite this vagueness, the International Union for the Protection of New

Varieties of Plants (UPOV) system is considered as an 'effective *sui generis* system'. The UPOV is an international organization that provides for a *sui generis* system for the protection of plant varieties without having to rely on patents on every new development of plant varieties.

The significance of UPOV increased with the introduction of the TRIPS Agreement, as it provided a ready-made option to countries to develop domestic plant variety protection regimes, as opposed to the TRIPS Agreement which only mandated a legal regime for the protection of plant varieties. One lacuna in the *sui generis* model is that, it suits the interests of only plant breeders and do not have provisions for the protection of farmer's rights.[iii] Thus, with the ambiguous definition of an 'effective sui generis system', and the unsecured farmer's rights, gives rise to the subsequent issue of whether the lack of elaborate provisions will give freedom to developing countries to fabricate a law to suit their convenience? However, developing countries such as India, did not include the UPOV system for strategic reasons. So, what ensured protection to plant varieties and farmer's rights in such countries?

"The major implication of India becoming a member of the UPOV, would be to model its system in accordance to the UPOV system, which poses a conflict between Indian system which provides farmer's rights in contrast to the UPOV which does not provide the same."

Protection of Plant Varieties and Rights Legislation in India

Although India is not a member of the UPOV, it had to enact a PVP law, as part of complying with the TRIPS Agreement. The process of drafting began in 1993, after which the Protection of Plant Varieties and Farmers Rights (PPVFR) Bill was introduced in the Lok Sabha in 1999, and passed in 2001 as an Act. The Act brought about a revolutionary change in the Indian system of protecting plant varieties by addressing major issues of farmers rights, registration of new plant varieties that fulfil the conditions of novelty, distinctiveness, uniformity and stability, right to save, use, sow, resow, exchange, share or sell farm produce including seeds.[iv]

The Act provides for registration of plant varieties based on its novelty and distinctiveness by at least one essential characteristic from any other variety which is in existence in any other country. The Act further addresses the main issue of Farmer's Rights which has not even been addressed in the UPOV. Although other international Instruments recognizes concerns of plant breeders, their rights are narrowly defined. The PPVFR Act, however, recognizes the proprietary rights of farmers, allows farmers to

develop and register their own varieties, and also allows farmers to register under extant varieties.

Another notable feature of the Act is the provision of 'disclosure requirement' which puts the breeder under an obligation to disclose the genetic resources used in developing the new variety. Failure to do the same will result in the rejection of application. This provision marks a great development with regards to farmers rights in protection of their plant varieties, as it prevents the misappropriation of genetic resources available in the farming community, thus ensuring that the efforts of the farming community in the newly developed varieties do not go in vain.[v] With the advent of the PPVFR Act, private investment in plant varieties have boosted, which was usually undertaken by the public bodies. The Act stands as a supportive pillar to the Indian seed industry, making the industry realize that an alternative of Intellectual Property Protection was in fact the concept of farmer's rights, which reinforced their position on IPR, thus gaining Plant Breeder Rights in India.

India's UPOV Membership

The major implication of India becoming a member of the UPOV, would be to model its system in accordance to the UPOV system, which poses a conflict between Indian system which provides farmer's rights in contrast to the UPOV which does not provide the same. However, on 22nd April 1998, India deposited its instrument of accession to the UPOV 1978 Convention. It is important to note that even though the PPVFR Bill was claimed to have introduced as a result of the TRIPS Agreement, it is pertinent to mark that, the Bill was introduced also to fulfil the UPOV membership condition. India brought up the Bill to be compatible with the UPOV Convention, thus in a way providing strong plant breeder rights and recognizing narrow farmer's rights as a result of UPOV's membership obligation. However, the bill was passed only after including a chapter on Farmer's rights thus coming in conflict with the provisions of the UPOV Convention.[vi]

India's attempts to attain membership in UPOV will only hinder its growth rather than developing, considering that the PPVFR Act went beyond the UPOV Convention. The PPVFR allows for extant varieties registration, which does not conform with the novelty provision of the UPOV Convention. The Act further allows for Compulsory Licensing which is not provided under the UPOV Convention. These differences portray that, if India becomes a member of the UPOV, it will not only have to amend the entire legislation, but will also hinder and demean the standard and progress that India has been able to achieve in the Protection of Plant Varieties.[vii]

Conclusion

India successfully explored the *sui generis* option given under the TRIPS Agreement, thus enabling it to come up with its own Plant Variety protection laws

ensuring farmers rights. Each policy development has strengthened the Indian PVP system, fostering private sector research activity, thus enhancing agricultural production. However, despite touching the sky, it should ensure not to stumble and fall down by becoming a part of the UPOV Convention. In other words, if India becomes a member of UPOV, it might still retain its provisions for farmers, but its implementation will be difficult, which will pose a risky situation for farmers, with major population relying on agriculture.

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[iv] Ramanna, Anitha (2003), 'India's Plant Variety and Farmer's Rights Legislation: Potential Impact on Stakeholder Access to Genetic Resources', ETPD Discussion Paper No 96. International Food Policy Research Institute, Washington, DC, <https://www.ifpri.org/publication/indias-plant-variety-and-farmers%E2%80%99-rights-legislation> accessed 21 February 2021

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Watch out for these events!

26-27 Mar 2021: National Seminar on Law and Technology

Dr. Ram Manohar Lohiya National Law University, Lucknow is organizing a national seminar on Law and Technology on 26th and 27th March, 2021. The last date for abstract submissions is 1st March, 2021.

1 Mar 2021: NLU Jodhpur's Journal of Intellectual Property Studies Vol. 4, Issue 2 (Call for Papers)

NLU Jodhpur's Journal of Intellectual Property Studies (JIPS) is inviting original, unpublished manuscripts for publication in the Summer 2021 Issue (Volume IV, Issue II) of the Journal. The last date for submissions is 21st March, 2021.

ROLE OF IP IN MAKING INDIA AN INNOVATION ECONOMY

-Abhisvara K.

Introduction

The growth of the economy in the earlier years was determined by the market's response to price signals on the supply and demand curves and the efficient allocation of resources. The term 'innovation economy' refers to the economic growth facilitated by knowledge, entrepreneurship, innovation, technology and collaboration. Hence, innovation has become a central tenet to be encouraged by the government with suitable economic policies, along with developing effective private-public partnerships for boosting productivity. The U.S. economy of recent years serves as an example of the innovation economy. Though capital was needed to propel the economy forward, it was not the driver as capital was not utilized to build a greater number of mills, production plants or factories. The primary use of capital was to invest heavily in research and development for the creation of better products and services as well as the introduction of new ones.

Innovation is broadly defined to include 'new to the world' knowledge creation and commercialization as well as 'new to the market' knowledge diffusion and absorption.[i] Intellectual property (IP) is the unique, value-adding creations of the human intellect that results from human ingenuity, creativity and inventiveness.[ii] An IP right is a legal right that is based on the relevant national law encompassing that particular type of intellectual property right (IPR). The IP system has a significant part in propelling the business to gain and retain its innovation-based advantage. IP also facilitates the process of taking innovative technology to the market and the risk is minimized for the innovators involved in the business. Patents are an integral part of IP protection. They frequently play a significant role in providing access to business angels, providers of early-stage capital, including seed capital, venture capitalists, financial institutions, and all others involved in assisting an invention to reach its final destination of the marketplace. The number of patents is used as a

metric for measuring innovation in an economy, although the broad notion of IP includes trademarks, copyright, geographical indications (GIs), designs, the topography of integrated circuits and undisclosed information.[iii]

Loopholes in the Law

All the IPR laws in India comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) with a robust legal framework. However, some gaps need to be bridged as the technology is growing at a faster clip than the legal developments in sectors like information, communication and technology.[iv] For example, there is a great need to increase the recruitment of manpower and also bolstering the infrastructure of the Indian Patent Office. Such measures at a quick pace will decrease the pendency rate leading to better efficiency. IPRs are not only serving as a strategic business tool, but they will improve industrial competitiveness, resulting in a boost to the nation's economy.

"Since IPR will fast track the process of the development into an innovation economy, the country's IPR-related policies should be dovetailed to make them appealing to both the holders of the Standard Essential Patents (SEP) and the implementers of SEP."

IPR and its Economic Potential

IPRs have been widely reckoned to be an essential tool for leveraging the economic potential that patents hold. For example, a long-term study by Kayalvizhi and Thenmozhi[v] using panel data from 1996 till 2004 of 22 emerging economies, including India, has shown that the number of patents registered, amongst other factors, can lead to greater FDI inflows. The statistical analysis further revealed that increased technology absorption and innovation capacity increases inward FDI. Various government departments in India and policymakers like NITI Aayog recognized the crucial importance of a robust IP ecosystem. Similarly, the Department of Industrial Policy & Promotion (DIPP), the nodal department for IPRs, has designed a National IPR Policy, which was adopted on 12 May 2016 by the Union Cabinet.

Policy Initiatives

The Indian Government is taking a proactive role through the initiatives and programs like Make in India, Digital India and Startup India. All these programs are interlinked with the vision of the IPR Policy. Successful implementation of the flagship programs like 'Make in India' will transform India into a global design and manufacturing hub.[vi] For the success of Digital India and Startup India, the nation's sound IPR regime is vital as they are designed to propel India towards a global scale by enhancing India's conduciveness for doing business with, and also, for improved digital cum entrepreneurial infrastructure

coupled with the innovation capabilities across the country.

A Futuristic Perspective

An empirical study by Kumar[vii] showed that certain Asian countries that used to be developing economies, for instance, Japan, initially had a weak IPR regime and, therefore, adopted a culture of incremental innovation through the utility model system in order to foster local innovation. Once Japan's domestic industry matured, the IPR regime was strengthened, leading to more invention patents.

As India is striving to become an innovation economy, the few roadblocks in the furtherance of this goal, as described above, can be resolved through appropriate policies and initiatives. The government can create an Innovation Economy-Task Force to include policymakers, investment agencies, NGOs, academics, experts and sectoral committees of Indian and foreign companies.[viii] The short-term and long-term proposals and strategies for moving towards an innovation economy can be laid out by this task force. In addition to addressing the concerns posed in this report, the Task Force would also discuss wider issues, such as the future of employment and how skills need to be shaped to meet future needs.

While funds are underused, there are gaps in facilities and infrastructure too. Problems with the standard of services are also prevalent. Funds need to be carefully distributed and tasks need to be tracked with specific schedules to meet their goals for projects. There have to be more synergies across various government policies and initiatives. The Make in India initiative, for example, can be correlated to the initiative of Startup India, and the latter can have provisions/revised guidelines for attracting international startups.

The main drivers of the innovation economy would be start-ups and innovation in Information and Communications Technology (ICT). The government should, therefore, encourage both Indian and foreign startups' growth. For example, several Member States of the EU have drawn up policies to incentivize foreign start-ups and innovators and India could explore such best practices. Certain projects like Startup Europe India in the background of the 2060 Agenda[ix], can be pivotal to overcoming policy shortcomings and co-creating an environment that helps both Indian and European startups in their ICT businesses development, investment, expansion and innovation.

Since IPR will fast track the process of the development into an innovation economy, the country's IPR-related policies should be dovetailed to make them appealing to both the holders of the Standard Essential Patents (SEP) and the implementers of SEP. This will be imperative, too, because it will promote local investment in the

production of emerging technologies and therefore in the accomplishment of objectives of significant government programs such as Make in India. Accordingly, licensing models can be decided as per 'fair, reasonable and non-discriminatory' (FRAND) terms without any intervention from the legislations. Only when patent development, which is crucial for standards is financially feasible, a mechanism of incremental innovation can succeed. The latter must be available to the smaller enterprises too in order to diversify the competitive market in landscapes in a fast-growing industry such as the ICT sector.

[i] "Dutz, Mark A, 'Unleashing India's Innovation: Toward Sustainable and Inclusive Growth' (Open Knowledge Repository, World Bank, 2007) < https://openknowledge.worldbank.org/handle/10986/6856 License: CC BY 3.0 IGO> accessed 22 February 2021.

[ii] **Rakesh Tiwari and Jennifer Vimal,** 'Role of IPR in Innovation and New Product Development' (Lawyered, 13 June 2019) < https://www.lawyered.in/legal-disrupt/articles/role-ipr-innovation-and-new-product-development/#:~:text=The%20term%20'Intellectual%20Property'%20(,type%20of%20intellectual%20property%20right.> accessed 22 February 2021.

[iii] Walter W. Powell and Kaisa Snellman, 'The knowledge economy' (2004) Annual Review of Sociology, Vol. 30:199-220 <https://doi.org/10.1146/annurev.soc.29.010202.100037> accessed 22 February 2021.

[iv] Dr. Arpita Mukherjee, Dr. Alka Chawla, 'India as an innovation economy: The role of IP and ICT' (2018) ICRIER-EBTC, < https://icrier.org/pdf/ICRIER-EBTC_White_paper_IP-ICT.pdf> accessed 22 February 2021.

[v] Kayalvizhi, P.N. & Thenmozhi, M., 'Does quality of innovation, culture and governance drive FDI?: Evidence from emerging markets' (2008) Emerging Markets Review, Elsevier, vol. 34(C), pages 175-191, < https://ideas.repec.org/a/eee/ememar/v34y2018icp175-191.html> accessed 22 February 2021.

[vi] Dr. Arpita Mukherjee, Dr. Alka Chawla, 'India as an innovation economy: The role of IP and ICT' (2018) ICRIER-EBTC, < https://icrier.org/pdf/ICRIER-EBTC_White_paper_IP-ICT.pdf> accessed 22 February 2021.

[vii] Nagesh Kumar, 'Intellectual Property Rights, Technology and Economic Development Experiences of Asian Countries' (2011) Economic and Political Weekly, Vol. 38, No. 3 (Jan. 18-24, 2003), pp. 209-215+217-226 < http://www.jstor.org/stable/4413100?origin=JSTOR-pdf> accessed 22 February 2021.

[viii] Dr. Arpita Mukherjee, Dr. Alka Chawla, 'India as an innovation economy: The role of IP and ICT' (2018) ICRIER-EBTC, < https://icrier.org/pdf/ICRIER-EBTC_White_paper_IP-ICT.pdf> accessed 22 February 2021.

[ix] Zingales, N. and Kanevskaia, 'The IEEE-SA patent policy update under the lens of EU competition law' (2016) European Competition Journal, 12(2-3), pp. 195-235, <https://www.tandfonline.com/doi/pdf/10.1080/17441056.2016.125448 2> accessed 22 February 2021.

CASE INGOTS

M/s ITC Limited vs. Nestle India Limited, O.S.A.No.170 of 2020

In the year 2010, ITC had launched their Sunfeast Yippee! Noodles in two varieties and one of them was "Magic Masala". Subsequently, Nestle India Limited ("Nestle") in 2013, adopted the expression "Magical Masala" in relation to their instant noodles and marketed the same under the label "Maggi xtra-delicious Magical Masala". ITC claimed that "Magic Masala" formed an essential feature of their composite trademark "Sunfeast Yippee! Noodles Magic Masala" and that Nestle had copied their brand "Magic Masala" and were selling their instant noodles under the slightly modified brand "Magical Masala". The Madras High Court ("the Court") in a suit of passing off, rejected M/s ITC Limited's ("ITC") claim over their used trademark "Magic Masala" and held that no party can claim monopoly over laudatory terms or terms which are common to trade.

Bajaj Auto Limited Vs. TVS Motor Company Limited JT 2009 (12) SC 103

The Supreme Court of India had directed all the courts in India for speedy trial and disposal of intellectual property related cases in the courts in India. In two-year-old dispute involving two companies, the Supreme Court observed that suits relating to the matters of patents, trademarks and copyrights are pending for years is mainly fought between the parties about the temporary injunction. The Supreme Court directed that hearing in the intellectual property matters should proceed on day-to-day basis and the final judgment should be given normally within four months from the date of the filing of the suit. The Supreme Court further directed to all the courts and tribunals in the country to punctually and faithfully carry out the aforesaid orders.

Interdigital Technology v. Xiaomi corporation & ors., I.A. 8772/2020 in CS(COMM) 295/2020

In this case involving Standard Essential Patents pertaining to 3G and 4G technologies, the Delhi High Court granted an ad interim injunction against the order of a Wuhan Court with respect to an Anti-Suit Injunction Application filed by Xiaomi. The Court held that the Wuhan Court's order cannot interfere with the enforcement of patent rights pertaining to Indian patents, which can be done only before Indian Courts. While granting the ad interim injunction, the Court also stated that the Wuhan Court does not have the jurisdiction to proscribe infringement suits in India, and that the proceedings before the Courts are different from each other.

UNINTENTIONAL ABANDONMENT OF PATENT: THE NEED FOR INCLUSION IN INDIAN LAW

- Sravanti Pemmaraju

The patent laws in India have been designed to act as an incentive for innovation and enable the owner to prevent others from utilizing and selling the item in question. While examining the benefits, it is essential to evaluate the costs of pursuing a patent application and the chances of getting approved. Such costs are not merely those monetary ones but must include the probability of rejection; or abandonment. While the former is often added to the costs, the latter is deemed a highly improbable event, and yet, it happens.

Practice in India

Patent laws in India seek to harmonize with the TRIPS Agreement and the rest of the international community and WTO. The Indian patent laws and rules seek to prescribe a rigid time frame within which the owner must respond to all correspondence from the patent office, failing to do which the patent is deemed to be abandoned. In Section 21 of The Patents Act,1970[i], the legislature has provided a prescribed time limit for the owner's response, with a possible time extension (which has to be applied for before the expiry of such prescribed time). Rule 24B (5) of the rules provide for six months as the prescribed time limit, and Rule 138 provide for the extension of time.[ii] While this seems to be a fair provision, it is prejudicial against those applicants who have been unable to observe the time limit for bonafide reasons.

In *Nokia Corporation v. Deputy Controller of Patents and Designs*[iii], the High Court examined applying the prescribed time limit. The court adopted a stance favoring the applicants, seeking to allow an opportunity to those who intend their applications upon their unintentional abandonment. The court noted that the prescribed period under Rule 138(2) must include a one-month extension period. In another case of *Sphaera Pharma, Pte. Ltd. and Anr. v. Union of India*[iv], the Delhi High court took a contrary stance that those who fail to respond to the First Examination Report within the set prescribed period cannot have recourse under Rule 138 to condone the delay. This seems to be a dichotomy between the law and the understanding of the law by the judiciary which has not been dealt with by the legislation effectively. To understand how the interests can be effectively met, the United States patent law seeks to balance the options available.

"An applicant-friendly approach model allows grating protection and increasing the patent filings in the national index."

Unintentional Abandonment in the United States

Upon filing the patent application, USPTO sends notices (Office Action) that must be responded to by the individual before the set deadline[v]. Failing to respond leads to the application deemed to be abandoned. The Manual of the Patent Examining Procedure[vi] provides for payment of fees to revive

applications that have been unintentionally abandoned.

Section 1.137 provides the procedure in cases of unintentional abandonment where the applicant can apply to revive an abandoned application or re-examination procedure (abandoned by unintentional delay). A petition fee has been set. The application must contain a statement that the delay was unintentional. The section also provides a request for reconsideration or a review of a decision refusing to revive an abandoned application, even after a petition has been filed for the same. There is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional; the Director may require additional information.

Conclusion

Since United Kingdom and United States influence the Indian patent law, the legislators must choose whether to leave the procedural obstacles as they are or to amend the law to protect the interests of the inventors in the cases of unintentional abandonment. An applicant-friendly approach model allows grating protection and increasing the patent filings in the national index. Currently, India has condoned delay in filings due to COVID, but can increase the situation of the economy when calculated based on intellectual property grants.

[i] Indian Patent Act, Acts of Parliament 39 of 1970, India
[ii] Indian Patent Act, Rules, 2003.
[iii] W.P. No.2057 of 2010 and M.P.No.1 of 2010
[iv] W.P.(C) 1469/2018
[v] (§ 1.134 and § 1.136 of Rules of Practice in Patent Case
[vi] 35 U.S.C. 27'