LESSON 1 & 2

[BALLB 9th SEMESTER-KU-LAW-2016]

RATIONALE OF COPYRIGHT PROTECTION

What is copyright?

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, *inter alia,* rights of reproduction, communication to the public, adaptation and translation of the work. There could be slight variations in the composition of the rights depending on the work.

Why should copyright be protected?

Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity. Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same. Economic and social development of a society is dependent on creativity. The protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to create more and motivates others to create.

Is it not true that strict application of the principle of protection of copyright hampers economic and cultural development of the society?

Yes. If copyright protection is applied rigidly, it can hamper progress of the society. However, copyright laws are enacted with necessary exceptions and limitations to ensure that a balance is maintained between the interests of the creators and of the community.

To strike an appropriate and viable balance between the rights of the copyright owners and the interests of the society as a whole, there are exceptions in the law. Many types of exploitation of work which are for social purposes such as education, religious ceremonies, and so on are exempted from the operation of the rights granted in the Act. Copyright in a work is considered as infringed only if a substantial part is made use of unauthorizedly. What is 'substantial' varies from case to case. More often than not, it is a matter of quality rather than quantity. For example, if a lyricist copy a very catching phrase from another lyricist's song, there is likely to be infringement even if that phrase is very short.

Does the law allow any use of a work without permission of the owner of the copyright, and, if so, which are they?

Subject to certain conditions, a fair deal for research, study, criticism, review and news reporting, as well as use of works in library and schools and in the legislatures, is permitted without specific permission of the copyright owners. In order to protect the interests of users, some exemptions have been prescribed in respect of specific uses of works enjoying copyright. Some of the exemptions are the uses of the work

i. for the purpose of research or private study,

ii. for criticism or review,
iii. for reporting current events,
iv. in connection with judicial proceeding,
v. performance by an amateur club or society if the performance is given to a non-paying audience, and
vi. the making of sound recordings of literary, dramatic or musical works under certain conditions.

What is the scope of protection in the Copyright Act,1957 ?

The Copyright Act, 1957 protects original literary, dramatic, musical and artistic works and cinematograph films and sound recordings from unauthorized uses. Unlike the case with patents, copyright protects the expressions and not the ideas. There is no copyright in an idea.

Does copyright apply to titles and names ?

Copyright does not ordinarily protect titles by themselves or names, short word combinations, slogans, short phrases, methods, plots or factual information. Copyright does not protect ideas or concepts. To get the protection of copyright a work must be original.

WORK

What is a work?

A work means any of the following , namely, a literary, dramatic, musical or artistic work, a cinematograph film, or a sound recording.

What is a work of joint authorship?

"Work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

What are the classes of works for which copyrights protection is available in India?

Copyright subsists throughout India in the following classes of works:

- Original literary, dramatic, musical and artistic works;
- Cinematograph films; and
- Sound recordings.

What is an artistic work?

An artistic work means-

- a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
- a work of architecture; and

- any other work of artistic craftsmanship.

What is a musical work?

"Musical work" means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music. A musical work need not be written down to enjoy copyright protection.

What is a sound recording?

"Sound recording" means a recording of sounds from which sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. A phonogram and a CD-ROM are sound recordings.

What is a cinematograph film?

"Cinematograph film" means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films.

What is a government work?

"Government work" means a work which is made or published by or under the direction or control of

- the government or any department of the government
- any legislature in India, and
- any court, tribunal or other judicial authority in India.

What is an Indian work?

"Indian work" means a literary, dramatic or musical work,

- the author of which is a citizen of India; or
- which is first published in India; or
- the author of which, in the case of an unpublished work is, at the time of the making of the work, a citizen of India.

AUTHORSHIP AND OWNERSHIP

Whose rights are protected by copyright?

Copyright protects the rights of authors, i.e., creators of intellectual property in the form of literary, musical, dramatic and artistic works and cinematograph films and sound recordings.

Who is the first owner of copyright in a work?

Ordinarily the author is the first owner of copyright in a work.

Who is an author?

- In the case of a literary or dramatic work the author, i.e., the person who creates the work.
    - In the case of a musical work, the composer.
    - In the case of a cinematograph film, the producer.
    - In the case of a sound recording, the producer.
    - In the case of a photograph, the photographer.
    - In the case of a computer generated work, the person who causes the work to be created.

Who all have rights in a musical sound recording?

There are many right holders in a musical sound recording. For example, the lyricist who wrote the lyrics, the composer who set the music, the singer who sang the song, the musician (s) who performed the background music, and the person or company who produced the sound recording.

Is it necessary to obtain any licence or permission to use a musical sound recording for public performance?

A sound recording generally comprises various rights. It is necessary to obtain the licences from each and every right owner in the sound recording. This would ,*inter alia,* include the producer of the sound recording, the lyricist who wrote the lyrics, and the musician who composed the music.

Who is the owner of copyright in a government work?

In the case of a government work, government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

Who is the owner of copyright in the work of a public undertaking?

In the case of a work made or first published by or under the direction or control of any public undertaking, such public undertaking shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

Who is the owner of copyright in works by journalists during the course of their employment?

In the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work.

Who is the owner of a work produced during the course of the author's employment?

In the case of a work made in the course of the author's employment under a contract of service or apprenticeship, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

Who is the owner of the copyright in the case of a work produced for valuable consideration at the instance of another person?

In the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

Is copyright assignable?

Yes. The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof.

What is the mode of assigning copyright?

It shall be in writing signed by the assignor or by his duly authorised agent. It shall identify the specific works and specify the rights assigned and the duration and territorial extent of such assignment. It shall also specify the amount of royalty payable, if any, to the author or his legal heirs during the currency of the assignment and the assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties.

Does an assignment lapse automatically?

Where the assignee does not exercise the rights assigned to him within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment.

What will be the period of assignment if not specifically stated in the assignments?

If the period of assignment is not stated, it shall be deemed to be five years from the date of assignment.

What will be the territorial extent of the assignment if not specified in the assignment?

If the territorial extent of assignment of the rights is not specified, it shall be presumed to extend within the whole of India.

Can an author relinquish copyright and, if so, how?

The author of a work may relinquish all or any of the rights comprising the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights.

DIFFERENT RIGHTS

Are copyrights same for all classes of works?

No. The rights vary according to the class of work.

What are the rights in the case of a literary work?

In the case of a literary work (except computer programme), copyright means the exclusive right

- To reproduce the work

- To issue copies of the work to the public
- To perform the work in public
- To communicate the work to the public.
- To make cinematograph film or sound recording in respect of the work
- To make any translation of the work
- To make any adaptation of the work.

Is translation of an original work also protected by copyright?

Yes. All the rights of the original work apply to a translation also.

Are computer programmes protected under Copyright Act?

Yes. Computer programmes are protected under the Copyright Act. They are treated as literary works.

Are there any special rights in computer programmes?

Yes. In addition to all the rights applicable to a literary work, owner of the copyright in a computer programme enjoys the rights to sell or give on hire or offer for sale or hire, regardless of whether such a copy has been sold or given on hire on earlier occasion.

What are the rights in a dramatic work?

In the case of a dramatic work, copyright means the exclusive right

- To reproduce the work
- To communicate the work to the public or perform the work in public
- To issue copies of the work to the public
- To include the work in any cinematograph film
- To make any adaptation of the work
- To make translation of the work.

What are the rights in an artistic work?

In the case of an artistic work, copyright means the exclusive right

- To reproduce the work
- To communicate the work to the public
- To issue copies of the work to the public
- To include the work in any cinematograph film
- To make any adaptation of the work.

What are the rights in a musical work?

In the case of a musical work, copyright means the exclusive right

- To reproduce the work

- To issue copies of the work to the public
- To perform the work in public
- To communicate the work to the public
- To make cinematograph film or sound recording in respect of the work
- To make any translation of the work
- To make any adaptation of the work.

What are the rights in a cinematograph film?

In the case of a cinematograph film, copyright means the exclusive right

- To make a copy of the film including a photograph of any image forming part thereof
- To sell or give on hire or offer for sale or hire a copy of the film
- To communicate the cinematograph film to the public.

What are the rights in a sound recording?

- To make any other sound recording embodying it

- To sell or give on hire, or offer for sale or hire, any copy of the sound recording
- To communicate the sound recording to the public.

What is the right of reproduction?

The right of reproduction commonly means that no person shall make one or more copies of a work or of a substantial part of it in any material form including sound and film recording without the permission of the copyright owner. The most common kind of reproduction is printing an edition of a work. Reproduction occurs in storing of a work in the computer memory.

What is the right of communication to the public?

Communication to the public means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion. It is not necessary that any member of the public actually sees, hears or otherwise enjoys the work so made available. For example, a cable operator may transmit a cinematograph film, which no member of the public may see. Still it is a communication to the public. The fact that the work in question is accessible to the public is enough to say that the work is communicated to the public.

What is an adaptation?

Adaptation involves the preparation of a new work in the same or different form based upon an already existing work. The Copyright Act defines the following acts as adaptations:

a. Conversion of a dramatic work into a non dramatic work
b. Conversion of a literary or artistic work into a dramatic work
c. Re-arrangement of a literary or dramatic work
d. Depiction in a comic form or through pictures of a literary or dramatic work
e. Transcription of a musical work or any act involving re-arrangement or alteration of an existing work.

The making of a cinematograph film of a literary or dramatic or musical work is also an adaptation.

Can any person translate a work without the permission of the owner of the copyright in the work?

No. A person cannot translate a work enjoying copyright without the permission of the copyright owner.

Is there any copyright over news?

No. There is no copyright over news. However, there is copyright over the way in which a news item is reported.

REGISTRATION OF COPYRIGHT

Is it necessary to register a work to claim copyright?

No. Acquisition of copyright is automatic and it does not require any formality. However, certificate of registration of copyright and the entries made therein serve as *prima facie* evidence in a court of law with reference to dispute relating to ownership of copyright.

What is the procedure for registration of a work under the Copyright Act,1957?

Copyright comes into existence as soon as a work is created and no formality is required to be completed for acquiring copyright. However, facilities exist for having the work registered in the Register of Copyrights maintained in the Copyright Office of the Department of Education. The entries made in the Register of Copyrights serve as *prima-facie* evidence in the court of law. The Copyright Office has been set up to provide registration facilities to all types of works and is headed by a Registrar of Copyrights and is located at B.2/W.3, C.R. Barracks, Kasturba Gandhi Marg, New Delhi- 110 003, Tel: 338 4387

What are the guidelines regarding registration of a work under the Copyright Act?

Chapter VI of the Copyright Rules, 1956, as amended, sets out the procedure for the registration of a work. Copies of the Act and Rules can be obtained from the Manager of Publications, Publication Branch, Civil Lines, Delhi or his authorised dealers on payment. The procedure for registration is as follows:

a. Application for registration is to be made on Form IV (Including Statement of Particulars and Statement of Further Particulars) as prescribed in the first schedule to the Rules ;
b. Separate applications should be made for registration of each work;
c. Each application should be accompanied by the requisite fee prescribed in the second schedule to the Rules ; and
d. The applications should be signed by the applicant or the advocate in whose favour a Vakalatnama or Power of Attorney has been executed. The Power of Attorney signed by the party and accepted by the advocate should also be enclosed.

Each and every column of the Statement of Particulars and Statement of Further Particulars should be replied specifically.

Both published and unpublished works can be registered. Copyright in works published before 21stJanuary, 1958, i.e., before the Copyright Act, 1957 came in force, can also be registered, provided the works still enjoy copyright. Three copies of published work may be sent along with the application. If the work to be registered is unpublished, a copy of the manuscript has to be sent along with the application for affixing the stamp of the Copyright Office in proof of the work having been registered. In case two copies of the manuscript are sent, one copy of the same duly stamped will be returned, while the other will be retained, as far as possible, in the Copyright Office for record and will be kept confidential. It would also be open to the applicant to send only extracts from the unpublished work instead of the whole manuscript and ask for the return of the extracts after being stamped with the seal of the Copyright Office.

When a work has been registered as unpublished and subsequently it is published, the applicant may apply for changes in particulars entered in the Register of Copyright in Form V with prescribed fee.

Application for registration of copyright alongwith statement of particulars and instructions for filling up the statement of particulars are at **Appendix - I.**

TERM OF COPYRIGHT

Is copyright protected in perpetuity?

No. It is protected for a limited period of time.

What is the term of protection of copyright?

The general rule is that copyright lasts for 60 years. In the case of original literary, dramatic, musical and artistic works the 60-year period is counted from the year following the death of the author. In the case of cinematograph films, sound recordings, photographs, posthumous publications, anonymous and pseudonymous publications, works of government and works of international organisations, the 60-year period is counted from the date of publication.

ADMINISTRATION OF COPYRIGHT LAW

Is there any advisory body on copyright matters?

Yes. The government has set up a Copyright Enforcement Advisory Council (CEAC). The present composition of the CEAC is at **Appendix- II**.

Are there special courts for copyright?

No. There are no special courts for copyright cases. The regular courts try these cases. There is a Copyright Board to adjudicate certain cases pertaining to copyright.

What are the powers of Copyright Board?

The Copyright Act provides for a quasi-judicial body called the Copyright Board consisting of a Chairman and two or more, but not exceeding fourteen, other members for adjudicating certain kinds of copyright cases. The Chairman of the Board is of the level of a judge of a High Court. The Board has the power to:

i. hear appeals against the orders of the Registrar of Copyright;
ii. hear applications for rectification of entries in the Register of Copyrights;
iii. adjudicate upon disputes on assignment of copyright;
iv. grant compulsory licences to publish or republish works (in certain circumstances);
v. grant compulsory licence to produce and publish a translation of a literary or dramatic work in any language after a period of seven years from the first publication of the work;
vi. hear and decide disputes as to whether a work has been published or about the date of publication or about the term of copyright of a work in another country;

vii. fix rates of royalties in respect of sound recordings under the cover-version provision; and

viii. fix the resale share right in original copies of a painting, a sculpture or a drawing and of original manuscripts of a literary or dramatic or musical work.

The present composition of the Board is at **Appendix - III**.

Has the Registrar of Copyrights any judicial powers?

Yes. The Registrar of Copyrights has the powers of a civil court when trying a suit under the Code of Civil Procedure in respect of the following matters, namely,

a. summoning and enforcing the attendance of any person and examining him on oath;
b. requiring the discovery and production of any document;
c. receiving evidence on affidavit;
d. issuing commissions for the examination of witnesses or documents;
e. requisitioning any public record or copy thereof from any court or office;
f. any other matters which may be prescribed.

PERFORMER'S RIGHTS

Who is a performer?

As per the Indian Copyright Act, a "Performer" includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.

What is a performance?

"Performance" in relation to performer's right, means any visual or acoustic presentation made live by one or more performers.

What are the rights of a performer?

A performer has the following rights in his/her performance:

- Right to make a sound recording or visual recording of the performance;
- Right to reproduce the sound recording or visual recording of the performance;
- Right to broadcast the performance;
- Right to communicate the performance to the public otherwise than by broadcast.

What is the term of protection of performer's rights?

Performer's rights subsist for 25 years.

What are the rights of a performer in a cinematograph film?

Once a performer has consented for incorporation of his performance in a cinematograph film, he shall have no more performer's rights to that performance.

BROADCASTER'S RIGHTS

What is a broadcast?

"Broadcast" means communication to the public:

- by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or
- by wire.

What are the rights of a broadcasting organization?

The rights of a broadcasting organization with reference to a broadcast are :

- right to re-broadcast the broadcast;
- right to cause the broadcast to be heard or seen by the public on payment of any charges;
- right to make any sound recording or visual recording of the broadcast;
- right to make any reproduction of such sound recording or visual recording where such initial recording was done without licence or, where it was licensed, for any purpose not envisaged by such licence; and
- right to sell or hire to the public, or offer for such sale or hire, any sound recording or visual recording of the broadcast.

What is the term of protection of broadcaster's rights?

The term of protection for broadcaster's rights is 25 years.

FOREIGN WORKS

Is copyright of foreign works protected in India?

Yes. Copyrights of works of the countries mentioned in the International Copyright Order are protected in India, as if such works are Indian works.

Does copyright subsist in a foreign work?

Copyright of nationals of countries who are members of the Berne Convention for the Protection of Literary and Artistic Works, Universal Copyright Convention and the TRIPS Agreement are protected in India through the International Copyright Order. A list of such countries is at **Appendix- IV**.

Which are the international copyright conventions of which India is a member?

Copyright as provided by the Indian Copyright Act is valid only within the borders of the country. To secure protection to Indian works in foreign countries, India has become a member of the following international conventions on copyright and neighboring (related) rights:

i. Berne Convention for the Protection of Literary and Artistic works.
ii. Universal Copyright Convention.
iii. Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms.
iv. Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties.
v. Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

COLLECTIVE ADMINISTRATION OF COPYRIGHTS

What is collective administration of copyright?

Collective administration of copyright is a concept where management and protection of copyright in works are undertook by a society of owners of such works. Obviously no owner of copyright in any work can keep track of all the uses others make of his work. When he becomes a member of a national copyright society, that society, because of its organisational facilities and strength, is able to keep a better vigil over the uses made of that work throughout the country and collect due royalties from the users of those works. Because of the country's membership in international conventions, the copyright societies are able to have reciprocal agreements with similar societies in other countries for collecting royalties for the uses of Indian works in those countries. From this it can automatically be inferred that it will be in the interests of copyright owners to join a collective administration organisation to ensure better protection to the copyright in their works and for reaping optimum economic benefits from their creations. Users of different types of works also find it easy to obtain licences for legal exploitation of the works in question, though the collective administrative society.

What is a copyright society?

A copyright society is a registered collective administration society. Such a society is formed by copyright owners. The minimum membership required for registration of a society is seven. Ordinarily, only one society is registered to do business in respect of the same class of work. A copyright society can issue or grant licences in respect of any work in which copyright subsists or in respect of any other right given by the Copyright Act.

What are the functions of a copyright society?

A copyright society may:

i. Issue licences in respect of the rights administered by the society.
ii. Collect fees in pursuance of such licences.
iii. Distribute such fees among owners of copyright after making deductions for the administrative expenses.

Are there any registered copyright societies in India?

Yes. The following are the registered copyright societies in India:

i. Society for Copyright Regulation of Indian Producers for Film and Television (SCRIPT) 135 Continental Building, Dr. A.B. Road, Worli, Mumbai 400 018, (for cinematograph and television films).
ii. The Indian Performing Right Society Limited (IPRS), 208, Golden Chambers, 2nd Floor, New Andheri Link Road, Andheri (W), Mumbai- 400 058 (for musical works).

iii. Phonographic Performance Limited (PPL) Flame Proof Equipment Building, B.39, Off New Link Road, Andheri (West), Mumbai 400 053 (for sound recordings).

Is it necessary to obtain licences from more than one society for exploitation of a work?

In many cases, it is necessary to obtain licences from more than one society. For example, playing of the sound recording of music may involve obtaining a licence from the IPRS for the public performance of the music as well as a licence from the PPL for playing the records, if these societies have the particular work in their repertoire.

MORAL RIGHTS

What are the moral rights of an author?

The author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other acts in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation. Moral rights are available to the authors even after the economic rights are assigned.

Do the author's moral rights remain after assignment of copyright?

Yes. The moral rights are independent of the author's copyright and remains with him even after assignment of the copyright.

Will failure to display a work infringe the moral rights of an author?

No. Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the moral rights of the author.

COPYRIGHT INFRINGEMENTS

Which are the common copyright infringements?

The following are some of the commonly known acts involving infringement of copyright:

i. Making infringing copies for sale or hire or selling or letting them for hire;
ii. Permitting any place for the performance of works in public where such performance constitutes infringement of copyright;
iii. Distributing infringing copies for the purpose of trade or to such an extent so as to affect prejudicially the interest of the owner of copyright ;
iv. Public exhibition of infringing copies by way of trade; and
v. Importation of infringing copies into India.

Has the owner of an auditorium or a hall any liability while renting out the place for communication to the public of a copyrighted work?

Yes. If a person permits for profit any place to be used for the communication of a work to the public, where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright, he will be deemed to have committed an offence under the Copyright Act.

What are the civil remedies for copyright infringement?

A copyright owner can take legal action against any person who infringes the copyright in the work. The copyright owner is entitled to remedies by way of injunctions, damages and accounts.

Which is the court having jurisdiction over civil remedies in copyright cases?

The District Court concerned has the jurisdiction in civil suits regarding copyright infringement.

What is the proof of the authorship of a work?

Where, in the case of a literary, dramatic, musical or artistic work, a name purporting to be that of the author or the publisher appears on copies of the work as published, or, in the case of an artistic work appeared on the work where it was made, the person whose name so appears or appeared shall, in any proceeding in respect of copyright in such work, be presumed, unless the contrary is proved, to be the author or the publisher of the work, as the case may be.

What are the rights of owner over infringing copies and equipments used for making infringing copies?

All infringing copies of any work in which copyright subsists and all plates used or intended to be used for the production of such infringing copies shall be deemed to be the property of the owner of the copyright.

What are the remedies in the case of groundless threat to legal proceedings?

Where any person claiming to be the owner of copyright in any work, by circulars, advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of an alleged infringement of copyright, any person aggrieved thereby may institute a declaratory suit that the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats and may in any such suit –

a. obtain an injunction against the continuance of such threats; and
b. recover such damages, if any, as he has sustained by reason of such threats.

Is copyright infringement a criminal offence?

Yes. Any person who knowingly infringes or abets the infringement of the copyright in any work commits criminal offence under Section 63 of the Copyright Act.

What are the punishments for a criminal offence under the copyright law?

The minimum punishment for infringement of copyright is imprisonment for six months with the minimum fine of Rs. 50,000/-. In the case of a second and subsequent conviction the minimum punishment is imprisonment for one year and fine of Rs. one lakh.

Is copyright infringement a cognizable offence?

Any police officer, not below the rank of a sub inspector, may, if he is satisfied that an offence in respect of the infringement of copyright in any work has been, is being, or is likely to be committed, seize without warrant, all copies of the work and all plates used for the purpose of making infringing copies of the work, wherever found, and all copies and plates so seized shall, as soon as practicable be produced before a magistrate.

How are the seized infringing copies or plates disposed off?

The Court may order delivery to the owner of the copyright all such copies or plates.

Who is responsible for copyright offence committed by a company?

Every person who at the time the offence was committed was in charge of, and was responsible to the company for, the conduct of the business of the company, as well as the company shall be deemed to be guilty of such offence and shall be liable to be proceeded against.

Which court can try copyright offence cases?

No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under the Copyright Act.

Can a police officer seize infringing goods without warrant?

Yes. A police officer not below the rank of sub inspector can seize without warrant all infringing copies of the work.

REFERENCE AND ADDITIONAL MATERIAL

INTELLECTUAL PROPERTY

Various International Treaties

Various subject matters of Intellectual Property in India

1. **Copyrights**
2. **Patents**
3. **Trademarks**
4. **Designs**
5. **Geographical Indications**
6. **Plant Varieties**
7. **Superconductor Chips and Integrated Circuits**
8. **Traditional Knowledge**
9. **Biological Diversity**

Indo-US IPR problem

Conclusion

Modern world's economic order which runs on capitalistic line has power to commodify almost anything. Clean air has been commodified by Kyoto protocol. Water is chargeable at most locations. One can also get Himalayan glacial water by paying much more. Electromagnetic waves are auctioned by government. In similar fashion, it is possible to buy and sell intellect, thanks to IPR regime.

While it may be true that knowledge blossoms when shared, yet in certain circumstances such benevolent sharing is not desirable. When one invests lot of time, energy, money and other resources on cultivation of his knowledge towards a specific goal, he has legitimate right to fruits of his labor. Any creation of someone's mind should be used under his authorization. This, apart from moral, also makes socio-economic sense.

Upto couple of years back, any Hepatitis C patient had to undergo a harrowing ordeal of intoxicating drugs for years. This however has changed now, thanks to invention Sofosbuvir by Gilead. This drug is taken orally and much easy for body to tolerate. It's unlikely that without IPR protection this drug would have been invented.

IPR provides a secure environment for investors, scientists, artists, designers, traders etc. to foster innovation and scientific temper. This innovation often has potential to yield astronomical returns and rewards to creators and users. Obviously, original inventors shall have rights to such profits. However it is imperative that society at large should also be benefited by such outcomes. Thus, IPR regime aims to strike balance between public and private rights.

Patents are granted for 20 years on any new product or process to original creator. After expiry of 20 years such patents expire and generic industry can exploit what was once patented. When we say Indian pharmaceutical industry is world leader in generic drugs, it means that they manufacture mostly those drugs whose patents have been expired. In other words, for 20 years law guards private rights and then they make sure that innovation is thrown open to public, hence striking a balance.

Intervention of state in guarding tangible property of citizens like immovable property, cash, jewelry etc seems more obvious. These things can be enclosed in a limited space and protected. In these things title of ownership can be made clear by invoices and payments. State's law and order machineries have been protecting citizens' right to these properties from the times immemorial. However, ideas, intellect, art, programming codes and designs etc. have only recently come under definition of property. As article 300A provides right to own property to citizens, it becomes duty of state to protect intellectual property too.

If these things are to be stolen, physical custody is not required. It means that state can't prevent proliferation of an innovative idea. Hence, it shall strive to provide exclusive right to creator to exploit its creation. Even when everyone knows the idea, secret or key, all except inventor are forbidden by law to exploit it. These things can only be used after due authorization from creator or on expiry of protection.

Not everyone is in favor of this IPR protection provided by state. Some people claim that no innovation is done in isolation. They are result of incremental innovations which are on from times immemorial. So any innovation, rather than individual asset is a social asset. Further, it is argued that most new patents are result of serendipity. There is no co-relation between effort, outcomes and rewards.

Notwithstanding strength of these criticisms, it should be realised that over the years IPR protections have encouraged tremendous investments and efforts in areas of applied science. We have overcome numerous challenges in various fields of medicine, communication, agriculture, communication, transport etc.

As already said, knowledge knows no boundaries. It is hence not enough to provide protection to a creation in domestic laws. In globalized world economy it is imperative that a universal protection is accorded. For this we have robust international system of treaty instruments and enforcement organizations.

Various International Treaties

There are different subject matters of intellectual property like Patents, Copyright, Trademarks, Industrial design, Plant Varieties etc. Need for protection in these different subjects arose in different periods. These are reflected in different treaties. Agreement on TRIPS, under aegis of WTO, remains most influential, comprehensive and inclusive of all. Other treaties are covered here for background information.

There are two main bodies – World Intellectual Property Organization (WIPO) under UN which administers 1-7 treaties mentioned below. 8th treaty is independent of any organization. Another relevant body is World Trading Organization. 9th (or TRIPS) is administered by WTO. 10th treaty comes under UNESCO.

1. **Paris Convention for Industrial Property, 1883 –** Since it deals only with Industrial property, it covered only Patents and Trademarks. It was among first treaties to recognize various principles of international trade like National Treatment, Right of Priority, Common rules etc.
2. **Bern convention for literary and artistic works, 1886 –** It provided for copyright system. It doesn't provide for any formality to claim protection. Protection is automatically accorded to any creation, provided work is original and other conditions under the treaty are fulfilled. It means that your work, if original, is already protected. You can claim that you have copyright.
3. **Madrid Agreement, 1881 –** Governs the international recognition of trademarks. Made international fillings easy and cheap.
4. **Patent co-operation treaty, 1970** – It was earlier not possible for an entity to claim protection in different countries by single application. This was made possible as it aimed for co-operation and it was open for all parties to Paris convention.

5. **Budapest Treaty of 1980 –** It made possible patenting for micro-organisms. Claimant is required to deposit his invention on micro-organisms with an Authority – 'International depository of Micro-Organisms' under WIPO. He shall make all the adequate disclosures.

6. **Trademark Law Treaty, 1994 –** Harmonized administrative procedures and introduced 'service marks' in ambit of trade marks. Earlier trademarks were accorded only to goods.

~~1.~~7. **The Hague agreement concerning the International Deposit of 'Industrial Design' 1925 – It**created International Design Bureau of WIPO.

~~2.~~8. **International Union for protection of new varieties of plants, 1961 – This provides** breeders and farmers right to new plant varieties.

9. **Agreement on Trade Related Aspects of Intellectual Property – It** is a landmark and most comprehensive treaty on Intellectual property. While earlier treaties' subject matters were specific, TRIPS deal with 8 kinds of property rights – Patents, Trademarks, trade dress, Copyrights, Industrial Designs, Plant Varieties, Integrated Circuits and layouts, and Geographical Indication. Further, almost all countries are party to TRIP. In earlier treaties only limited countries participated. It also provides enforcement mechanism which was not available in WIPO treaties. It mandated all member countries to make their domestic laws complaint to TRIPS. India passed certain laws and amended others. India's IPR regime now stands fully complaint to TRIPS. For E.g. India amended patent law in 2005 to provide 'product' patent protection. Earlier protection was available only to 'processes'.

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

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

1. National Treatment – No foreign products, once they enter domestic territories, shall be discriminated in any manner. This also applies to intellectual property. Members must accord similar treatment to foreign creations, as they do to domestic ones.

2. Most Favored Nation – If a member provides some privilege, favorable treatment or exemption to another country or group, then other members must get similar favorable treatment.

3. Right to priority treatment – If a similar patent application has been filed in two different countries, then prior applicant has right to the patent.

4. Concept of Minimum Standards – This treaty provides for minimum level of protection that every member should provide to intellectual property. Members have discretion to provide more protection than minimum standards.

5. **Universal Copyright Convention, 1952 – This** convention is administered by UNESCO. This exists simultaneously with Bern Convention. This treaty provides for procedural formalities for filing and recognition of copyright. As Bern convention provides for automatic route to copyright, this treaty has lost its relevance.

Various subject matters of Intellectual Property in India

1. **Copyrights**

Law – Copyrights Act 1957, amended in 2012

Ministry – Copyright Office, Ministry of Human Recourse Development

Copyright is a bundle of rights given by the law to the creators of literary, dramatic, musical and artistic works and the producers of cinematograph films and sound recordings. The rights provided under Copyright law include the rights of reproduction of the work, communication of the work to the public, adaptation of the work and translation of the work.

Copyrights of works of the countries mentioned in the International Copyright Order are protected in India, as if such works are Indian works. The term of copyright in a work shall not exceed that which is enjoyed by it in its country of origin.

Acquisition of copyright is automatic and it does not require any formality. Copyright comes into existence as soon as a work is created and no formality is required to be completed for acquiring copyright. However, certificate of registration of copyright and the entries made therein serve as prima facie evidence in a court of law with reference to dispute relating to ownership of copyright. Application for copyright can be filed in Copyright office.

Computer Software or programme can also be registered as a 'literary work'. As per Copyright Act, 1957 "literary work" includes computer programmes, tables and compilations, including computer databases. 'Source Code' has also to be supplied along with the application for registration of copyright for software products.

The 2012 amendments make Indian Copyright Law compliant with the Internet Treaties – the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

▪ Literary ▪ dramatic, ▪ musical and ▪ artistic works	Lifetime of the author + sixty years from the beginning of the calendar year next following the year in which the author

	dies.
▪ Anonymous and pseudonymous works ▪ Posthumous work ▪ Cinematograph films ▪ Sound records ▪ Government work ▪ Public undertakings ▪ International Agencies ▪ photographs	Until sixty years from the beginning of the calendar years next following the year in which the work is first publish

India has a very large copyright-based creative industry. The Copyright Act is comprehensive and with the recent amendments, the rights of creators have been strengthened. India was the first country to ratify the Marrakesh Treaty 2013 for Access to copyright works for visually impaired persons. Enforcement in copyright has been significant and will be further reinforced. Judgments of Indian courts have adequately balanced the rights of copyright owners with the rights of public. Moral rights are fully recognized.

The challenge in the future is the enforcement of copyright in digital platforms for which the statute has adequate provisions. Indian copyright owners are also victims of copyright violations and piracy. Apart from Copyrights Act, Information Technology Act, 2000 too has certain relevant provisions for copyright in electronics and digital field.

There have been disagreements over the question whether Softwares are eligible for copyrights or for patents. Copyright Office recently held that softwares, if are not in conjuncture with novel hardware should be protected by copyright. This is relief for software industry as Copyrights are cheap, automatically recognised and protects for 60 years while patents are only for 20 years.

2. **Patents**

Law – Patents Act, 1970, amended in 2006

Ministry – DIPP, Ministry of Commerce and industry

The object of patent law is to encourage scientific research, new technology and industrial progress. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period (20 years) of the monopoly, passes into the public domain. The fundamental

principle of Patent law is that a patent is granted only for an invention which must have novelty and utility. It is essential for the validity of a patent that it must be the inventor's own discovery as opposed to mere verification of what was, already known before the date of the patent. A patentable invention, apart from being a new manufacture, must also be useful.

Evergreening of patent is not allowed: In order to be patentable, an improvement on something known before or a combination of different matters already known, should be something more than a mere workshop improvement, and must independently satisfy the test of invention or an inventive step. It must produce a new result, or a new article or a better or cheaper article than before. The new subject matter must involve "invention" over what is old.

It allows Compulsory Licensing: This strikes balance between two objectives – Rewarding patentees for innovation and to make sure that patented products, particularly Pharmaceutical ones, are available to public in developing and underdeveloped countries at affordable prices.

In March 2012, India granted its first compulsory license ever. The license was granted to Indian generic drug manufacturer Natco Pharma Ltd for Sorafenib tosylate, a cancer drug patented by Bayer. Non-governmental groups reportedly welcomed the decision.

TRIPS also allows for compulsory licensing under certain circumstances. The principal requirement for the issue of a compulsory license is that attempts to obtain a license under reasonable commercial terms must have failed over a reasonable period of time. Specific situations in which compulsory licenses may be issued are set out in the legislation of each patent system and vary between systems. Some examples are – Unaffordable prices of particular drug for masses or inability of patentee to fulfill demand in markets. Further, TRIPs also provides that the requirements for a compulsory license may be waived in certain situations, in particular cases of national emergency or extreme urgency or in cases of public non-commercial use.

It allows both Product and Process patent: Prior to 2006 amendment, only process was allowed to be patented. It means that if same product is manufactured using some process different than that was patented, there shall be no infringement.

System of pre-grant and post-grant oppositions: Introduced in 2005, ensures that only deserving patents are granted. It is now possible to raise objection both before and after the patent has been granted.

Data exclusivity: Indian Patent Act doesn't specifically provide for data exclusivity. Companies spend significant time, energy and money on research and clinical trials. During all this they gather large amount of useful data. While obtaining permission for launch of product in markets or while applying for patents, these companies have to provide data to authorities. By provision of data exclusivity, companies want authorities to not to share such data with any third party for certain period.

Article 39(3) of the TRIPS states that that "Members when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities,

the submission of undisclosed test or data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that data are protected against unfair commercial use"

But it should be remembered that Article 39(3) does not talk about "Data Exclusivity" but only about "unfair commercial use" and it is this phrase that is interpreted by Multi-national companies as containing "Data Exclusivity" provision and thus demanding data exclusivity law.

Data exclusivity however, is opposed on following grounds –

1. If generic drugs manufacturers are denied access to such data then they will have to do separate clinical trials which will increase costs.
2. Further, there are ethical issues with clinical trials as it involves experimentation on animals or humans.
3. TRIPS agreement not at all mentions 'data exclusivity'. It is just creative interpretation of MNCs.
4. It can become an alternative to patentability and can be used for evergreening. Data exclusivity concept is different from patent. If a company manages to protect data, then it may continue to maintain its monopoly by incremental improvement in products and generation of new data.

There is no need of a "further protection" to pharmaceuticals in the form of "Data Exclusivity" as the protection under the Patents Act, 1970 is not only sufficient but also in conformity with the TRIPS Agreement. The protection in the form of "Data Exclusivity" is a "TRIPS plus" provision to which Indian does not owe any obligation.

The Health Ministry has said that India already has necessary legal provisions to protect data and hence there is no need for any further protection, while Satwant Reddy committee was of the view that there is no legal provision to protect test data. It is alleged by the Health and Human right activist that government is under pressure from Multi-National Companies and western countries to enact law on data exclusivity.

India has adopted a balanced approach towards patent law. It is committed to protect innovation while promoting the larger goal of welfare of its citizens. Courts and tribunals have upheld key provisions of India's patent law by their authoritative pronouncements. The system of pre-grant and post-grant oppositions introduced in 2005 ensures that only deserving patents are granted.

It is expected that there would be a steady evolution of patent jurisprudence in India. Patent filings too have gone up by 10.56% from 2008-2009 to 2013-2014. Over 75% of patent filings are by foreign entities and so there is a need for concerted action to be taken to increase filings by Indians.

3. Trademarks

Law – Trademark Act 1999

Ministry – DIPP, Ministry of Commerce and industry

A trademark is typically a name, word, phrase, logo, symbol, design, image, or a combination of these elements. There is also a range of non-conventional trademarks comprising marks which do not fall into these standard categories, such as those based on color, smell, or sound (like jingles). A trademark cannot be offensive

India joins Madrid Protocol, 2013

The Madrid System for the International Registration of Marks offers trademark owners a cost effective, user friendly and streamlined means of protecting and managing their trademark portfolio internationally.

4. Designs

Law – Designs Act, 2000

Ministry – DIPP, Ministry of Commerce and industry

Apple iPhones are manufactured in China. But, China is able to capture paltry 2-5% of its value while overwhelming part is cornered by USA. This is mainly attributed to value added by Designing and Research, which is based in USA. Thus, importance of design protection can't be overstressed.

As per WIPO – 'In a legal sense, an industrial design constitutes the ornamental or aesthetic aspect of an article.'

'An industrial design may consist of three dimensional features, such as the shape of an article, or two dimensional features, such as patterns, lines or color.'

Industrial designs refer to creative activity which results in the ornamental or formal appearance of a product and 'design right' refers to a novel or original design that is accorded to the proprietor of a validly registered design. Industrial designs are an element of intellectual property.

In principle, the owner of a registered industrial design or of a design patent has the right to prevent third parties from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes. Such rights are perpetual.

Under the TRIPS Agreement, minimum standards of protection of industrial designs have been provided for. As a developing country, India has already amended its national legislation to provide for these minimal standards.

The existing legislation on industrial designs in India is contained in the New Designs Act, 2000 and this Act will serve its purpose well in the rapid changes in technology and international developments. India has also achieved a mature status in the field of industrial designs and in view of globalization of the economy, the present legislation is aligned with the changed technical and commercial scenario and made to conform to international trends in design administration.

Overall, the law of industrial designs and enforcement thereof has been quite positive. At present, approximately 8000 applications are filed annually. This is much below India's potential and there is scope for considerable improvement. Concerted steps shall be taken particularly to increase sensitization to this law especially in the MSMEs and the informal sector.

5. Geographical Indications

Law – Geographical Indications of Goods Act, 1999

Ministry – DIPP, Ministry of Commerce and industry

A geographical indication (GI) is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a GI, a sign must identify a product as originating in a given place. In addition, the qualities, characteristics or reputation of the product should be essentially due to the place of origin. Since the qualities depend on the geographical place of production, there is a clear link between the product and its original place of production.

A geographical indication right enables those who have the right to use the indication to prevent its use by a third party whose product does not conform to the applicable standards. For example, in the jurisdictions in which the Darjeeling geographical indication is protected, producers of Darjeeling tea can exclude use of the term "Darjeeling" for tea not grown in their tea gardens or not produced according to the standards set out in the code of practice for the geographical indication.

However, a protected geographical indication does not enable the holder to prevent someone from making a product using the same techniques as those set out in the standards for that indication. Protection for a geographical indication is usually obtained by acquiring a right over the sign that constitutes the indication.

Geographical indications are typically used for agricultural products, foodstuffs, wine and spirit drinks, handicrafts, and industrial products.

How are geographical indications protected?

Broadly speaking geographical indications are protected in different countries and regional systems through a wide variety of approaches and often using a combination of two or more of the approaches outlined above. These approaches have been developed in accordance with different legal traditions and within a framework of individual historical and economic conditions.

There are three main ways to protect a geographical indication:

- so-called *sui generis* systems (i.e. special regimes of protection);
- using collective or certification marks; and
- methods focusing on business practices, including administrative product approval schemes.

These approaches involve differences with respect to important questions, such as the conditions for protection or the scope of protection. On the other hand, two of the modes of protection — namely *sui generis* systems and collective or certification mark systems — share some common features, such as the fact that they set up rights for collective use by those who comply with defined standards.

6. **Plant Varieties**

Law – Protection of Plant varieties and farmers' right Act, 2001

Ministry – Department of Agriculture and Cooperation, Ministry of Agriculture

With the advent hybrid and genetically modified plants, it is possible to create different quality of plants of same genus or species. There have been unending quest of developing plant varieties that are more productive, more fortified with nutrients, more resistant to vagaries of nature and are reasonably priced. Such development demands lot of expenditure and time just like any other patentable invention. TRIPS agreement says that either a member should cover plant variety in domestic patent law or it should be provided a sui- generis protection. Accordingly, India's patent law doesn't cover plant varieties and POPVFR act provides a sui-generis protection.

"*In order to provide for the establishment of an effective system for the protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants it has been considered necessary to recognize and to protect the rights of the farmers in respect of their contributions made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties. The Govt. of India enacted "The Protection of Plant Varieties and Farmers' Rights (PPV&FR) Act, 2001" adopting sui generis system. Indian legislation is not only in conformity with International Union for the Protection of New Varieties of Plants (UPOV), 1978, but also have sufficient provisions to protect the interests of public/private sector breeding institutions and the farmers. The legislation recognizes the contributions of both commercial plant breeders and farmers in plant breeding activity and also provides to implement TRIPs in a way that*

supports the specific socio-economic interests of all the stakeholders including private, public sectors and research institutions, as well as resource-constrained farmers."

'Protection of Plant Varieties and Farmers Right Authority' has been created under the act. Application can be made (by farmer, breeders) to authority to claim protection on a particular plant variety.

Indian law, not only provides for right of breeders' and researchers', but it also provide right to seed to farmers and village community. Registering the variety under the authority offers certain protection to its growers under the law. Notable among them is that if any breeder, including seed companies, use this variety for producing hybrid varieties, its growers are entitled for a royalty from the breeder.

As such, plant varieties present in wilderness cannot be registered, under PPV&FR Authority. However, any traditionally cultivated plant variety which has undergone the process of domestication /improvement through human interventions can be registered and protected subjected to fulfilment of the eligible criteria.

The Central Government has notified 57 crops with their genera and species eligible for registration as new varieties.

7. **Semi-conductors and integrated Layouts**

Law – Semi-conductors and integrated Layout design Act, 2000

Ministry – Department of Electronics and I.T, Ministry of Communication and I.T.

A semiconductor layout design means a layout of transistors and other circuitry elements and includes lead wires connecting such elements and expressed in any manner in semiconductor integrated circuits.

The first registration under the Semiconductor Integrated Circuits Layout-Design Act, 2000 was granted in October 2014. It is expected that the industry will make increased use of this right to protect integrated circuit layout designs.

Under this, a SICLD registry has been created where layout designs of integrated circuit chips can be registered. The Registrar will determine the originality of the design based on the information available with him as also through the mechanism of advertisement of the application for registration of the layout-design and or any input he may receive. On registration, protection is granted for 10 years.

8. **Traditional Knowledge**

Traditional Knowledge Digital Library

A collaboration – between the Council of Scientific and Industrial Research (CSIR) and theDepartment of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (Dept. of AYUSH), Ministry of Health & Family Welfare, Government of India.

There is considerable unexplored potential for developing, promoting and utilizing traditional knowledge, which is a unique endowment of India. Create a sui generis system for protection of traditional knowledge which will safeguard misappropriation of traditional knowledge as well as promote further research and development in products and services based on traditional knowledge.

The creation of the Traditional Knowledge Digital Library (TKDL) has been a major achievement for India which has a vast pool of traditional knowledge. India has been able to thwart attempts to misappropriate its traditional knowledge. The next challenge is to use India's strength in traditional knowledge for its effective promotion, development and utilization.

It manages a database of knowledge that exists in various local languages such as Sanskrit, Urdu, Arabic, Persian and Tamil. TKDL has also converted the database into five international languages in patent application formats.

So far, over 2 lakh medicinal formulations have been transcribed and the database is present in 30 million A4-size pages.

It has been observed that in the past years patents have been wrongly granted to traditional knowledge related inventions which do not fulfill the requirement of novelty and inventive step, particularly due to existence of relevant prior art. For instance, this has happened in the case of Turmeric, Neem, Basmati etc.

The practical obstacle underlying the issue was that patent examiners could not search relevant traditional knowledge as prior art, because they did not have access to traditional knowledge information in their classified non-patent literature. The reasons for this non-accessibility were that the Indian traditional knowledge exists in local languages such as Sanskrit, Urdu, Arabic, Persian, Tamil, etc. which either was not available or not understood by patent examiners. TKDL breaks the language and format barrier and makes available this information in English, French, Spanish, German and Japanese in patent application format, which is easily understandable by patent examiners. TKDL is thus a tool providing defensive protection to the rich traditional knowledge of India.

A research council of AYUSH ministry has been implementing a Tribal Health Care Research Programme (THCRP) which aims at collecting information on folk medicines / traditional practices prevalent in different parts of the country besides extending health care services to tribal population.

Some success stories of TKDL –

1. **India Foils Colgate-Palmolive Bid to Patent Nutmeg Mouthwash**

In 2010, a Patent application was filed by Colgate-Palmolive Company titled "Oral compositions containing extracts of myristica fragrans and related methods". The company claimed an oral composition comprising a combination of extracts including an extract from *Myristica fragrans* and a natural extract other than the extract from *Myristica fragrans*.

The prime issue with this application by Colgate-Palmolive is that *Myristica fragrans* (nutmeg) has been traditionally used in the Indian system of medicines and is used almost every single day by an average Indian, especially those residing in the country side. The Patent application by Colgate-Palmolive itself describes that*Myristica fragrans* (nutmeg) is known as a headache cure and a gastrointestinal drug in the Indian ancient Ayurveda, and has been used in the treatment of dyspepsia, bellyache, diarrhea and vomiting in the traditional Chinese medicine. *Myristica fragrans* has reportedly been used as a fruit paste and applied to teeth. An important claim of this application is "A composition according to any preceding claim, wherein the composition is a dentifrice in a form selected from the group consisting of: powder; toothpaste or dental gel; a periodontal gel; a liquid suitable for painting a dental surface; a chewing gum; a dissolvable, partially dissolvable or non-dissolvable film or strip; a bead, a wafer; a wipe or towelette; an implant; a mouthrinse, a foam, and dental floss."

CSIR-TKDL submitted proof in the form of references from an ancient book, which said that the herb and its extracts were used for oral diseases in Indian systems of medicine. In addition, other third party observations also made submissions against the claims and the Patent application was shot down. The status of the applicationEP2689806 now stands cancelled.

2. **India wins Patent war on hair loss formula**

Pangaea Laboratories Limited, a UK based company had filed a Patent application in February, 2011 titled "Hair building solid agent" (EP2361602). On a close reading of the application, they come across two important pieces of information viz, the description section of the application which reads:

"The hair building solid spray agent may include one or more pharmacologically active ingredient for treating one or more of hair loss, thinning hair and skin conditions.

The pharmacologically active ingredient may be one or more of finasteride, dutasteride, spironolactone, minoxidil, nitric oxide donators, Beta-glucan, saw palmetto, resveratrol, curcumin, marine extracts, polycyanidins, superoxide dismutase, superoxide dismutase mimetics, taurine, plant sterols, pine bark extract, melatonin, green tea, caffeine, copper peptides, copper PCA, EUK-134, copper(II) 3,5-dispropylsalicylate, dimethoxy chromanol, catalase, catalase mimetics and hydrolysed lupine protein."

As can be observed from a reading of the paragraph, there is clearly a mention of use of curcumin, pine bark and green tea among others as a pharmacologically active ingredient in the preparation of the hair loss formula.

Thus CSIR filed an objection to the application by providing the EPO with evidence from the TKDL citing the traditionla use of curcumin, pine bark and green tea in the treatment of hair loss. The third party observations submitted by CSIR can be accessed here.

Based on India's evidence, the Patent application was finally "deemed to be withdrawn" by the applicant on 29 June 2015.

3. **"Over 1500 yoga asanas shortlisted to thwart patenting by foreign parties**"

Another news piece making rounds these days is that TKDL is in the process of documenting over 1500 yoga postures in order to stop patenting of these postures by foreign parties. TKDL is said to believe that as many as 2,000 applications were being made internationally every year for patents on Indian systems of medicine including yoga postures, which was nothing but misappropriation of traditional Indian knowledge. But with India providing evidence to the contrary, Patent applications have had to be withdrawn in countries as varied as USA, Japan, UK, Italy, Germany, Australia, China, Cyprus, Kenya, Spain, South Korea, Bulgaria, the Netherlands and New Zealand.

It is estimated that up to 300 million people practice yoga across the globe, with the US being the world's largest yoga industry worth over $27 billion. Yet more than half of global yoga enthusiasts are Indians, in a country that until now lacked any organizational approach to the $80bn global industry. Lacking brand names, yoga training in India is mainly run through small independent businesses.

News sources indicate that a mind-boggling 249 patents were taken on yoga in 2004 and 2,300 in 2005 at various international Patent offices, thus implying the urgent need to incorporate these yoga aasanas into TKDL.

The above three instances are only some of the success stories of TKDL. As published by the Press Information Bureau of India, CSIR-TKDL unit till date has achieved success in about 200 cases and more, like the ones listed here, without any cost.

Besides major companies like Colgate-Palmolive and Pangaea, the other big players who have been hit by the TKDL include Nestle, L'Oreal, Avasthagen, Ranbaxy, BASF and Unilever.

9. Biological Diversity

Law –Biological Diversity Act, 2002 in pursuance of Convention on Biological Diversity, 1993

The Convention on Biological Diversity (CBD) is a legally binding multilateral environmental agreement that has 194 contracting Parties (Countries) as its members with three objectives –

1. Conservation of biological diversity,
2. Sustainable use of the diversity and
3. **Ensuring fair and equitable sharing of benefits of such use.**

It has entered into force on 29th December 1993.

3rd point is particularly relevant here. To check misappropriation of Indian biological resources or biopiracy, the Act provides that access to Indian biological resources and associated knowledge are subject to terms and conditions, **which secure equitable sharing of benefits**. Further, it would be required to obtain the approval of the National Biodiversity Authority before seeking any IPR based on biological material and associated knowledge obtained from India.

It is a bit similar to PPVFR Act we just read. What PPVFR Act protects in plant varieties,

Biological Diversity Act, 2002 aims to accord similar protection to general biodiversity. There is no overlap between Biological Diversity Act and Protection of Plant Varieties and Farmer's Rights Act (PPV&FRA). The scope and objectives of these two legislations are different. In order to harmonise both the legislations, an exemption has been provided under Section 6 (3) of the Biodiversity Act for applicants seeking protection under the PPV&FRA.

The purport of Section 6(3) is to ensure that before grant of IPRs, it becomes possible to realize equitable sharing of benefits arising out of the use of biological resources and knowledge. As the PPV&FRA also has a provision for benefit sharing, an exemption has been provided in the Biological Diversity Act for applicants seeking protection under the PPV&FRA.

The patent applicant should disclose the source and geographical origin of the biological material when used in an invention. Further, non-disclosure or wrongful disclosure of source of biological material and any associated knowledge will result in opposition to the grant of patent or revocation of the patent.

Section 6(1) provides that prior approval of NBA is necessary before applying for any kind of IPRs in India and outside based on any research or information on a biological resource obtained from India.

However, in case of patents, permission of the NBA may be obtained after application is made but before sealing of the patent.

Indo-US IPR problem

The U.S. Chamber of Commerce in its **International Intellectual Property Index** has placed India at 37thposition out of 38 countries. This report comes at a time when the government is close to finalizing a National Intellectual Property policy to improve the IP regime, increase IP awareness and strengthen enforcement of rules.

The list is topped by the US, which is followed by the UK, Germany, France and Sweden. India's peers in the BRICS grouping were all ranked ahead with Russia ranked 20th, China (22nd), South Africa (26th) and Brazil (29th). Venezuela occupies the last position in the index.

Main complaint is that, Brazil, China, India, Indonesia, and Russia introduced or maintained **policies that tie market access to sharing of IP and technology**. Such forced-localization policies tend to undermine the overall innovation ecosystem and deter investment from foreign IP-intensive entities. U.S and allies want laws which protect intellectual property even when lack of market access in such innovations is against public interest.

India remains at the bottom of the Index for the fourth year in a row. The report notes that India's score would have increased if the government had not suspended implementation of Final Guidelines for Computer Related Inventions (CRI). The report notes the following reasons for India's low rank:

- Patent protection in India remains outside of international best practices.
- Indian law does not provide adequate enforcement mechanisms to effectively combat online piracy.
- Among India's key areas of weakness was the use of compulsory licensing (CL) for commercial and non-emergency situations, and the expanded use of CL being considered by the Indian government.
- Another area of weakness was poor application and enforcement of civil remedies and criminal penalties.
- The fact that India was not party to major international treaties, like the Trans-Pacific Partnership agreement, was also a consideration.

In backdrop of these concerns India has been placed under 'Priority watch list' in USA. If India is put under 'priority nations list' then US will impose trade sanctions on INDIA. But this is unlikely because **India, so far, has not violated any of the clauses of TRIPS.** That's why US has negotiated 'Trans – Pacific/Atlantic' trade partnerships, which

are expected to be 'WTO+'. It will include stringent provisions guarding intellectual property by diluting flexibilities allowed by current TRIPS agreement, among other things.

Conclusion

As said earlier, India's IPR regime stands fully complaint to Agreement on TRIPS. However, implementation of various laws has been lax. Patent or copyright infringement and piracy in India is not uncommon. It is also the fact that India has poor performance in R&D, where it accounts for meagre 2.7% of global expenditure. Poor IPR protection regime plays some part in this. Government is about to launch a New IPR policy. It is expected that it will reassert its commitment to TRIPS and promise that measures like compulsory licence will be resorted to in rarest of rare case. It will also consider need and measures to ramp up implementation by building infrastructural and human resource capacities. It is like to give a significant impetus to expansion of copyright and patent offices all over India.

As we have seen that various subject matters in IPR are dealt by different departments and ministries, there needs to be some integration among these arms. This integration is prerequisite for formulating an integral IPR policy and taking stand at various international forums. Having said this, legal setup in India nicely tries to balance Public rights with Private rights. This system provides adequate incentives for entrepreneurs to innovate. We just need strict implementation. This way we will able to make innovation a change agent of Indian economy

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