
**TRIPS AGREEMENT THE BALANCE BETWEEN INTELLECTUAL PROPERTY
RIGHT AND PUBLIC RIGHT**

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ABSTRACT

Intellectual Properties are the driving factors that lift the world to the next level. Intellectual Property Rights ensures the constant creative output and set world to march towards development. While, it is also vital to shape a welfare state. The research focuses on the objectives of the Trade Related Aspects of Intellectual Property Rights Agreement and its role in balancing the creators' rights and the public rights. The study aims to understand the stand of India in IPR and the steps taken to establish the balance. India being a member of World Trade Organizations and adhering to the provisions of TRIPS Agreement, its governing over IPR is highly influenced by the minimum standards set by TRIPS Agreement. The methodology used for this research is Doctrinal research with descriptive approach. The research involves the study of theories that supports the balance between IPR and Public Rights. The research is taken on the ground of reality basis and from legal perspective with the incorporation of case laws at significant points.

The findings provides that the limitations for IPR framed by the TRIPS Agreement guarantees the fairness in balancing. The study of the Hegelian philosophy induces us to focus more on this stabilization. The attention of India in IPR has significantly increased from the Basmati Rice Patent Case. Alongside, the timely amendments made in Indian Patent Act 1970 to ensure the conformity with TRIPS Agreement provisions, signifies India's inclination in the foresaid matter. The research paper is also provided with suggestions to tackle the issues arising from the imbalance of IPR and

¹Intern, Lex Lumen Research Journal.

Public Rights. Thus, the research paper enlightens us about the initiatives that needed to be taken to brace ourselves in this world of fast-growing intellectual properties.

KEY WORDS: TRIPS Agreement, Limitations of IPR, Hegelian Philosophy, Indian Patent Act.

INTRODUCTION:

Intellectual Properties is widely emerging concept all over the world. The idea of protecting the unique and worthy creation of human kind arose with the development of scientific knowledge. Mankind always aims at development and its ever evolving in nature. The start of inventions in order to make significant developments in technology has paved way for the protection of such inventions. Incentive to the creative ideas is indeed of great importance as it encourages further new inventions and ceaseless growth in this scientific world. Such incentive is guarded by the Intellectual Property Rights. It is a legal right provided to the inventor or creator or manufacturer to protect his or her invention or creation or manufactured product. The Intellectual Property Rights is not given to all kind of ideas; it is only to those such ideas which is unique and deserves to be protected by all means. Intellectual property rights is usually provided to the creator only for a specified period of time. The creator enjoys great scope by this intellectual property rights as he or she is provided with an exclusive right over his creation. This Intellectual property right has provided with both positive and negative aspect. The positive right is that the owner of the idea can prevent others from misusing his creation while the negative right is that the owner can exploit his own creation and make huge profit by building monopoly². Once the time period of Intellectual Property Rights is completed, the creation goes for the public usage in its public domain. This Intellectual Property Rights prevents others from using the intellectual property for commercial

² ELIZABETH VERKEY & JITHIN SAJI ISSAC, INTELLECTUAL PROPERTY 01 (EBC 2021)

benefits without prior assent from the owner of the intellectual property and this legal right expires after a period of time and may be for few it may last indefinitely³.

Bringing a balance between in this positive and negative aspect of the Intellectual Property Rights to consider the public rights is of the main subject of this research paper. The prior steps taken by India in respect to the intellectual properties and the TRIPS Agreement are the main components to be discussed with references to the case laws.

REVIEW OF LITERATURE:

Intellectual Properties has become a point of discussion over years due to its fast-growing importance. Einfole, an international patent analytics and market research company, conducted a study and in which it found that design, patents, geographical indication and trade secrets need more awareness among people who are less aware of the benefits out of it⁴.

The standing committee on commerce in Indian parliament submitted the 161st report on 'Review of the Intellectual Property Rights Regime in India' which reported the promoting innovation and entrepreneurship in India⁵.

INTELLECTUAL PROPERTY RIGHTS IN INDIA

³ Shubangi Sharma, Origin, Scope, Need, Types of Intellectual Properties Rights, blog.ipleaders.in (October 17, 2019) <https://blog.ipleaders.in/ipr-description/>

⁴ Neetu Chandra Sharma, Study shows low IPR awareness in India, livemint (September 08, 2018, 03.24 PM IST) <https://www.livemint.com/Politics/Rap1LeEuftJTfEhNt00gTJ/Study-shows-low-IPR-awareness-in-India.html>

⁵ Isheta T Batra, Radhika Bhusari, Analysis: Parliamentary Standing Committee's 161st Report on 'IPR Regime in India', Trail Blazer Advocates (November 11, 2021)

<https://www.tbalaw.in/parliamentary-committee-161-ipr-analysis>

The start of Intellectual Property Rights dates back to the medieval Europe. An article which was published in the year of 1979 is the first to use the term 'Intellectual Property'. The idea of patents begun from 1331. The monarch played crucial role in the matters of patent. It was used by the crown to raise its revenue and to exploit also. The rise of monopolies and the restriction placed to them by the crown were all a part of the Intellectual Properties gradual development. The first legislation made for patent in India is the Act VI of 1856, which is based on the protection of British inventions legislation the British Patent Law 1852. Subsequently many amendments were made during the British rule and finally The Indian Patents and Design Act replaced all the previous legislations. The Indian Patent Act 1970 was passed by recommendation of committees which were formed for the examination of the same. The Indian Patent Act 1970 is still used in India.

Copyright emerged in India during the period of British rule in 1847. India came up with the Copyright act in the year 1957, amended many times, which was recently amended in 2012. Trademark Act 1940 was also first enacted in India based on the British Trademark Act 1938. Being independent India Trademark Act 1999 was enacted to put in practice⁶.

India being a member of the World Trade Organization, it has signed to the agreement of Trade Related Aspects of Intellectual Property (TRIPS). Apart from it India is also a member of the World Intellectual Property Organization (WIPO), whose objective is to promote the protection of Intellectual Property Rights throughout the world. As a member of WIPO, India is signed to many treaties administered by WIPO namely Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure, Paris Convention for the Protection of Industrial Property etc... India comes up with the national policy 'The National Intellectual Property Rights Policy 2016. The notion of India in this regard is 'Creative India,

⁶ Yashjain, IPR-Law History, Legal Service India E-Journal

<https://www.legalserviceindia.com/legal/article-3581-ipr-law-history.html>

Innovative India'. As per the Global Innovation Index (GII) which is calculated by WIPO, India stands in 52nd position in 2019 which is a improvement from its position in 81st position in the year 2015⁷.

India's concern on Intellectual Property Rights inclined only after the 1990s, as the trade activities and economic status of Indian economy increased with the New Economic Policy 1991. As the 21st century is going to be influenced by knowledge and new information, India has started its run for it by signing the TRIPS Agreement in the year 1994⁸. Registration of the Intellectual Properties in India would lead to access for patents, trademarks, copyright. The enforcement of the IP rights is done by both civil and criminal procedure. However, as per the Competition Act, patents and designs do not include the criminal proceedings. Mediation also acts as a effective means in negotiation with the infringer. The formal mediation process is provided in the The Civil Procedure Code⁹.

PROBLEMS FACED IN INDIA ON IMBALANCE BETWEEN IPR AND PUBLIC RIGHTS

Like many other countries, India also faces a lot of challenges in regard to the imbalance between Intellectual Property Rights and Public Rights. Strict limitations in Intellectual Property Rights in the field of medicine, software, digital content, agricultural sector, in use of traditional knowledge altogether led to many problems.

⁷ Intellectual Property Rights, Drishtias, (August 02, 2019)

<https://www.drishtias.com/to-the-points/paper3/intellectual-property-rights>

⁸ DR. G.B. REDDY, INTELLECTUAL PROPERTY RIGHTS AND THE LAW, PREFACE (Gogia Law Publications 2020)

⁹ Intellectual Property Office, Intellectual Property Rights in India 3, April 2017

https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/Intellectual%20Property%20Rights%20in%20India.pdf

Strict enforcement of Intellectual Property Rights in medical field especially in pharmaceutical sector, can abstain from the access of affordable medicines by general public. This can even lead to health complications of the general public. While pharmaceutical industry also comes up with evolving Intellectual Properties strategies. There are many chances for some Intellectual Property Rights to be invalid, antitrust law and thus it is necessary for us to make enough steps to prevent these invalid rights from being used unlawfully and create monopolies within the pharmaceutical industry¹⁰.

When digital area is enforced with strict Intellectual Property Rights law, these restrictions of software and entertainment would lead to delay the process of sharing and access to information which limits the public rights to gain knowledge and to get entertained. By the advent of internet, it has become difficult to bring a balance in protecting the content creators and the public rights to access it¹¹.

Seeds patent and genetically modified organisms' patents can affect farmers' easy access of such products to increase their production of agricultural resources. There is a continuance of constraint between the policy makers and general public¹².

¹⁰ Chandra Nath Saha, Sanjib Bhattacharya, Intellectual Properties Rights: An overview and implications in pharmaceutical, National Institution of Health (April 2011)

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3217699/>

¹¹ Nicola Lucchi, Intellectual Property Rights in Digital Media 4 (2005)

<https://law.bepress.com/cgi/viewcontent.cgi?article=3040&context=expresso>

¹² M. Babu Rao, Issues and challenges of Intellectual Property Rights in Indian Agriculture 94 (January 01, 1970)

<https://www.journalijar.com/article/31483/issues-and-challenges-of-intellectual-property-rights-in-indian-agriculture/>

There is a huge challenge in balancing Intellectual Properties Rights with the preservation of traditional knowledge and indigenous practices as it raises the obstacle in cultural heritage and collective rights¹³.

TRIPS AGREEMENT

The member nations of the World Trade Organizations have signed an international legal trade agreement called, Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Multi-lateral trade was made to include TRIPS for the first time. It necessitates the member nations to establish a minimum level of IPR protection in their national laws. If any member nation fails to fulfill the minimum requirements will be considering to be violating the agreement. The objectives of the TRIPS Agreement are as follows;

- i. To decrease distortions and impediments to global change with the aid of taking into account the requirement to promote effective and adequate safety of IPR and to make sure that measures and approaches to implement IPR do not themselves end up obstacles to reputable exchange.
- ii. To grant multilateral framework of principles, rules and disciplines dealing with international exchange in counterfeit goods.
- iii. To provide the distinct wants of the least-developed international locations in respect of most flexibility in the domestic implementation of laws and guidelines in order to allow them to create a sound and viable technological base.
- iv. To provide with solutions to the issues on trade-related Intellectual property problems thru multilateral procedures.

¹³ Amay, Impact of IPR on the protection of traditional knowledge through the Biodiversity Act, ipleaders (September 18, 2021)

<https://blog.ipleaders.in/impact-of-ipr-on-protection-of-traditional-knowledge-through-the-biodiversity-act/>

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- v. To establish a collectively supportive relationship between the WTO and the WIPO along with other relevant organizations.
 - vi. To grant for enough standards and principles concerning the availability, scope and use of trade in relation to the Intellectual Property Rights.
 - vii. To grant efficient and expeditious procedure for the multilateral prevention and settlement of issues between governments, and
 - viii. To cater effective and respective means for the enforcement of trade-related Intellectual Property Rights, taking into consideration of differences in national legal system.

TRIPS Agreement has Seven parts and covers 73 articles. Part I deals with the general principles and objectives of TRIPS. Part II deals with the minimum standards that each country must compile themselves in various forms of Intellectual Property. Part III ensures that IPR is enforced within the territorial borders of the country. The acquisition of IPR and its maintenance, related inter-parties' procedures are given in Part IV. Part V is provided with the dispute prevent and settlement of disputes by WTO¹⁴.

BALANCE BETWEEN IPR AND PUBLIC RIGHTS

Standards on the availability, scope and use of IPR more specifically copyright and related rights that is Trademarks, Geographical indications, Industrial designs, Patents, Layout-designs of Integrated circuits, Protection of undisclosed Information and control of Anti-competitive practices in contractual licenses are the vital objectives of TRIPS. National Treatment and Most-Favored Nation Treatment are the principles taken by the TRIPS.

¹⁴ DR. G.B. REDDY, INTELLECTUAL PROPERTY RIGHTS AND THE LAW, PREFACE (Gogia Law Publications 2020)

As for concerning copyrights, the protection was made to extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. It was also held that only those limitations that are applicable to literary works may be applied to computer programs. The computer software and cinematographic works were also provided with exclusive rental rights in specific circumstances. Articles 9 to 14 of the TRIPS further guaranteed to prevent unauthorized fixation, broadcast or reproduction of live performances and sound recordings were provided with 50 years of copyrights in minimum.

In respect to Trademark, the member nations must grant trademarks primarily not less than 7 years and registration of the same should be renewable. It is further required that use of the trademark in the path of alternate shall not be unjustifiably encumbered with the aid of one-of-a-kind requirements, such as use with any other trademark, use in a distinct form, or use in a manner unsafe to its capability to distinguish the goods or services, which is covered in Articles 15 to 21 of the TRIPS¹⁵.

It was also provided in the Geographical Indications that respective member nations much take steps to prevent the use of product descriptions that mislead the public about geographic origins of goods, and must invalidate trademark registrations that contain false indication for geographic origin. Certain exceptions are given in the Articles 20 to 23 of TRIPS.

New, original Industrial Design must be provided by the member states which is of at least 10years of protection, as given in the Articles 25 and 26 of TRIPS.

The patent protection was made to extend to all fields of technology, industrial applications, this right excludes others from commercial use of the creation without the consent of the owner. It must be of at least 20 years as given in Article 33.

¹⁵ Agreement on Trade Related Aspects of Intellectual Property Rights 324 to 328

https://www.wto.org/english/docs_e/legal_e/27-trips.pdf

It is also provided with provisions for integrated circuits, trade secrets and prohibition of licensing by member nations if situation of adverse anti-competition arises¹⁶.

HEGELIAN PHILOSOPHY

Kant and Hegel provided the Hegelian approach. Hegel's perspective was sometime new to the mankind as of then. His theory is based on two factors that is property and ownership, some of the basic human needs are satisfied by the private property rights. Intellectual Property Rights enables creative intellectual activity which is conducted by the social and economic conditions that in turn is vital for human flourishing. The existence of an individual is valued on the basis of an individual's will. According to Hegel, the person's ability decides the individual will. Personality Theory is another name given for the Hegelian Theory.

The personality of an individual is personified by the Intellectual property. The way how a person expresses his idea, the novel invention of a person is all those personifications. Personality of an individual is the basic presumption that the theory supports here. This theory is very much applicable in the matter of copyrights¹⁷.

This Hegelian theory emphasis on the importance of the private property as it will only motivate a person for further development. This theory also creates a protection to the private property from the potential attacks of the utilitarian. There are also certain guidelines that provides the cordial performance of utilitarian. The Intellectual Property Rights is supported by the Helegian Theory and the Utilitarian guidelines will bring the balance to ensure the public rights being placed

¹⁶ Overview: the TRIPS Agreement, World Trade Organization

https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

¹⁷ ELIZABETH VERKEY & JITHIN SAJI ISSAC, INTELLECTUAL PROPERTY 01 (EBC 2021)

correctly. This provides the stabilization between the Intellectual Property Rights and Public Rights¹⁸.

INDIAN PATENT ACT 2005

The TRIPS Agreement has put many challenges for India, which had to make strong policies for pharmaceutical enterprise and a large populace in need of low-cost medicine. The provisions of Indian Patent Act 1970, had facilitated India production of generic drugs and import of patented drugs at minimal prices. These provisions included Section 3(d), where the new form of already known products would not be given with patent unless it has improvised efficacy. Section 84, also provided the government to issue compulsory licenses in few matters.

The Indian Patent Act was amended in the year 2005 to comply with the TRIPS agreement signed by India. Many provisions were removed enabling to import more of cheaper generic drugs, while new provisions were added that facilitated the patents for pharmaceuticals, the prevent others from misusing, selling it without the consent of the inventor for 20 years.

The impact of TRIPS Agreement in Indian Patent Act has bought huge changes in the access of the medicine in the country. Section 3(d) was removed from the Indian Patent Act, this made easier for the pharmaceuticals companies to get patents for their new forms of substances. These new form of substances included incremental innovations and modifications made to the existing products. On one side this led to increased prices of the product and the Indian population found it difficult to afford for medicines as they were in higher rates.

After the amendment made, it was hard for the government to issue compulsory licenses. It enabled the government to issue compulsory licenses to produce patented drug even without the consent

¹⁸ Kanu Priya, Intellectual Property and Hegelian Justification 362, CommonLII (2008)

<http://www.commonlii.org/in/journals/NUJSLawRw/2008/23.pdf>

of the patent holder. The TRIPS Agreement has also provided with provisions for certain circumstances where the government can issue compulsory licensing. Especially in the matters of public health emergencies. But the criteria provided in the TRIPS Agreement was narrow and it was in nature of restricting. The Hon'ble Supreme Court judgment in the case of Novartis, made it even more hard for the production of generic drugs in cheaper versions of the patented drugs¹⁹.

Section 48, previously provided the exclusive right for the owners to prevent others from making, using, selling, processing it in India, but after amendment it also included the prevention of import of owners' product. On the other hand, Section 107A(b) states that if the patent holder himself allows the sale of his product for lower price in other countries, and the import of the same would not amount to infringement of patent rights²⁰.

CASE LAWS

Emergence of new problems finds the new solution. Study of laws enables us to understand how problems evolved with changing period of time and it enables to understand the importance of the judgments given then. It is such landmark cases which would lead to major change in the whole approach of the system. Such case laws are as follows:

Basmati Rice Patent Case:

An American company Rice Tec was given patent for Basmati rice on its aroma, elongated rice production. The Indian Government filed case against the patent given to the Rice Tech company. India submitted all the scientific records proving that the Basmati rice was originally developed

¹⁹ Mayank Rai, The Impact of the TRIPS Agreement on Indian IP Laws and Their Implementation, Legal Services India

<https://legalserviceindia.com/legal/article-10867-the-impact-of-the-trips-agreement-on-indian-ip-laws-and-their-implementation.html>

²⁰ Sudip Chaudhuri, TRIPS Agreement and Amendment of Patents Act in India, JSTOR (August 10 to 16, 2002)

<https://www.jstor.org/stable/4412467>

by the Indian farmers for years together. Providing such patent would affect the export of India. Finally, the case was held in favor of India. The patent on Basmati Rice to the Rice Tech company was distorted²¹.

Novartis v. Union of India:

The company Novartis applied for patent for its drug called Gleevec by under the Section 3 of the Indian Patent Act 1970, specifically under the word invention. It was found that there was no new invention of any drug, instead it's a mere discovery of an already existing drug. The drug Gleevec failed to prove its efficacy. The hon'ble Supreme Court held that since the application made is invalid, the patent will not be provided. The SC also stated that it was just a mean by such companies to evergreen their products and raise their nominal price²².

Bayer Corporation v. Union of India:

Government issued compulsory license of the cancer medicine 'Nexavar' to Natco which was patented by Bayer Corporation. Government directed the Natco to pay royalties to Bayer and produce 6000 free medicines. Bayer which sold 'Nexavar' at higher price. Since it affected the business of Bayer, it filed a case in Intellectual Property Appellate Board, where it was rejected. The Bombay High Court held that compulsory licensing of life-saving drugs falls under the rights of the Indian Patents office and it is vested with rights to make the medicine available to general public at affordable price as under Section 82(1)(b). The same was held by the Supreme Court later²³.

Marico Limited v. Abhijeet Bhansali:

²¹ Basmati rice and patent battle: When indigenous knowledge is patented for profit, ipleaders (September 27, 2020)
<https://blog.iplayers.in/basmati-rice-patent-battle-indigenous-knowledge-patented-profit/>

²² Sakshi Sharda, Landmark Judgments on IPR Law in India, Corpbiz (June 12, 2020)
<https://corpbiz.io/learning/landmark-judgments-on-ipr-law-in-india/>

²³ Naman, 10 Landmark cases on Intellectual Property Rights, Lexpeeps (2021)
<https://lexpeeps.in/10-landmark-cases-on-intellectual-property-rights/>

The defendant Abhijeet was a youtuber and social media influencer, who has made a video in which he criticized the Parachute hair oil saying that its of no use and passed objectionable comments on it. The plaintiff Marico Limited is the owner of the Parachute hair oil and filed the case to remove the scene from the video wherein the Parachute oil was displayed. The plaintiff said that the Youtube video has not only affected the goodwill of the business but also violated the trademark 'Parachute'. The Bombay High Court held that it was violation of Section 29 of the Trademarks Act, 1999, thus the defendant violated the exclusive rights of the trademark of the owner by not seeking prior permission before its portrayal²⁴.

SUGGESTIONS

- Establish clear and fair Intellectual property laws and guidelines that shield creators' rights while also thinking about public access.
- Implement honest use of dealing with provisions in copyright law, permitting confined use of copyrighted material for functions like education, criticism, and information reporting besides permission. This promotes both creativity and access to knowledge.
- Review patent legal guidelines to prevent the abuse of patent monopolies and make certain that they don't avert innovation or get admission to to imperative technologies.
- Use compulsory licensing for patents in vital areas like healthcare, making sure that life-saving pills or medical applied sciences stay accessible to the public at life like prices.
- Encourage the launch of works into the public domain after a life like period, allowing the public to freely use and construct upon innovative and modern works.

²⁴ Naman, 10 Landmark cases on Intellectual Property Rights, Lexpeeeps (2021)

<https://lexpeeeps.in/10-landmark-cases-on-intellectual-property-rights/>

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- Creating awareness about Intellectual Property Rights and the make people aware of their public rights well.

CONCLUSION:

Intellectual Properties are of great importance in this present day to foster a scientific and creative world. Such Intellectual Properties would be created only when there is Intellectual Property Rights. It is this Intellectual Properties Rights that gives the creator with incentive and encourages more new ideas to come.

While it is also equally important to ensure that the public rights are also safeguarded to great extent. A nation which ensures both will only have a sustainable development. In this matter of Intellectual Properties Rights, nations all together come and work together the interest of both creator and public. The TRIPS Agreement has facilitated in certain approaches of the IPR and at the same time it has also led to few flaws that affects the public rights.

The position of Intellectual Properties in India, the problems faced by it, India being a member of WTO and signing the TRIPS Agreement, its positive impact in balancing the IPR and Public Rights, while its certain negative impact on Indian Patent Act led to amendments in the year 2005, the study of Hegelian Philosophy and Case laws altogether would make us to have an extensive understanding upon which the research paper was held.