IP Regime: Nuances & Nitty-Gritty of Intellectual Property Rights

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I sincerely feel that, in order to fully comprehend the IP regime, there is dire need for analysing the nuances or finer manifestations and nitty-gritty or situational realities of Intellectual Property (IP) vis-a-vis IP rights. This article gives insights into such nuances and nitty-gritty.

IP REGIME IN THE NEW ECONOMIC ORDER

IP is a knowledge-based valuable intangible property or digital asset and a driving force in the global economy in the new economic order. Justice Houlden of Canada Supreme Court made a cogent observation that information in the digital form having commercial and intrinsic value is regarded as intellectual property since it involves investment of money and time by the commercial enterprises for the purpose of e-business.[2] IP not only ensures market liquidity but also earns Foreign Exchange (FOREX) for a country, while IP monetization and securitization derives revenue. Undoubtedly, IP plays a vital role in the growth of nation's economy in the present millennium. In the present millennium, many IT-based Multi-National Companies (MNCs) and Trans-National Companies (TNCs) are thriving on IP products.[3] IP has been defined differently by the jurists and authors. John Lock said, "...every man has property in his own person which no body has a right but to himself." Emmanuel Kant opined that, "IP is ineliable right of a person." Bharthruhari[4] defined IP as "hidden wealth of a person which nobody else can part with it." Salmond said, "IP is a proprietary right arising out of one's own achievement." Kevin Rivette defined IP as, "hot currency in the new economic order." Justice Charles

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[2] R v. Stuart (1988) 1 SCR 693.

[3] The music industry, film industry, IT industry, R&D industry and others are thriving mainly on IP.

[4] Neethishathaka (Treatise of Morals) by Bharthruhari.

Woodbury said, "Only this way can be protect Intellectual Property, the labours of the mind productions and interests as much as man's own."[5] Article 27(2) of the UDHR defines IP rights as, "Everyone has right to protect the moral and material interests resulting from any scientific, literary and artistic productions of which he is an author." It is amply evident from these definitions that IP is an intangible property arising out of 'human endeavour' or 'human intellect'[6] and IP rights owe to original author, creator and inventor.

The Internet Policy of 1997 facilitates Internet Service Providers (ISPs) to avail multi-gateways and to ensure e-commerce activities in compliance with Article 19(1)(g) of the constitution of India. The policy requires the Department of Telecommunication (DoT) and Videsh Sanchar Nigam Limited (VSNL) to provide Internet services at the national and international levels. The policy permits the transmission of electronic data over Very Small Aperture Service (VSAT) but restricts the transmission of 'voice services' by the Internet Service Providers (ISPs) or intermediaries.[7] The Implementation Committee constituted under the Internet Policy is the nodal and monitoring authority, while the Advisory Committee advises the National Critical Information Infrastructure Protection Centre (NCIIPC) on policy matters and measures to be adopted for protection of electronic data. The latter is constituted under the Chairmanship of the National Technical Research Organization (NTRO) Chairman, assisted by the Member-Secretary and 17 members. The United Nations Economic Commission for Europe (UNECE) framed rules for electronic data interchange (EDI) based on internationally accepted standards. Article 7 of the UNECE provides for maintaining the confidentiality of e-data and protecting the personal e-data. The Organization for Economic Cooperation & Development (OECD) and the European Council (EC) also issued guidelines and directives in 1981 and 1988 respectively. On April 11, 2011 the Ministry of Communications and Technology in the Government of India published the rules regarding the protection of proprietary e-data.

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[5] Dovoll et al v. Brown, Cir. Court, D Massachusetts, 151 Merw, Pat. Inv. 414.

[6] Mac Milan v. Cooper, AIR 1924 P, .875: Agarwal Publishing House Board of H.S. & Intermediate Education, U.P. 1967 AIR 91.

[7] The Government of India permitted the ISPs to offer Internet Telephony Services from April 2002 for transmitting voice services over Pocket Switched Internet Protocol-based Network. Internet Telephony is based on Pocket Switching Technology for transmission of live voice or audio from one computer to another.

It is rather incumbent to appreciate different forms of IP, such as; copyrights, patents, trademarks[8], industrial designs and geographical indication of goods. These rights are governed, assured and protected under different international conventions and IP laws and provide protection and remedies for infringements. It may be noted that inventions, designs, copyrights, trademarks are included in Entry-49 of the Union List (List-I).

PATENTS

The patent[9] is granted for an invention fulfilling the standards of 'novelty', 'non-obviousness (inventive step) and 'utility' laid down under the TRIPS[10] Agreement, 1994 . The objective of the patent law is to encourage scientific research, development of new technology towards achieving industrial progress.[11] It also implies 'fuelling the fuel' concept. Letters Patent were issued to the craftsmen as 'royal decree' by the kings and queens of the United Kingdom in the 13th Century A.D, followed by the grant of 10 years monopoly rights for silk weaving process. The first patent was granted by the King Utyman in 1447 A.D. for glass manufacturing process for 20 years. Based on Justice Rajagopala Iyengar committee (1969) recommendations, the Patent Act of 1970 was enacted in India. In compliance with the TRIPS Agreement, the Act was amended in 2005 after allowing 'exclusive marketing rights' for 5 years period. A new invention under the Patent Act means any invention or innovation resulting in a new product or technology which has not been anticipated earlier.[12] The discovery is not an invention as it already exists within the human knowledge.[13] Idea, theme or subject-matter gives rise to inventions or innovations owing to the human intellect or endeavour. It is incumbent that an invention must be a 'patentable invention' which must result in a new

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[8] Trademarks are not IP in a true sense as they lack subject-matter or theme for any kind of innovation but creates good will for a particular brand of manufactured product .

[9] The term 'patent' is derived from the Latin word 'patere' meaning 'to lay open'

[10] TRIPS is an abbreviated form of Trade Related Aspects of Intellectual Property.

[11] Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries, AIR 1982 SCC 1444.

[12] Section 2(1)(l) of the Patent (Amendment) Act, 2005.

[13] Reynolds v. Herbert Smith & Co. Ltd., (1903) 20 RPC 123 at 126.

product.[14] The novel features of a new invention imply the state-of-the-art that are capable of producing a new product.[15] Novelty is the key factor for grant of patent. Invariably, an invention should be non-obviousness to a skilled person in the state-of-the-art. Inventive step rests on the proposition; "what is obvious to a layman can be non-obvious to a skilled person." Priority claim is ensured in inventions.[16] David Bainbridge said, "Patents are the oldest and strongest form of IP and consequently strict formalities have to be observed". A new dimension is added to inventions in the 'process patenting' with the grant of patents to microorganisms[17] to the exclusion of 'life forms' which helps to cure diseases. In western countries, 'gene silencing' and 'gene therapy' are in vogue. Non-disclosure of 'prior art' not point out an invention in progress will entail limited protection. The 'priority date' is the filing date of an application along with the provisional specification[18] to the Patent Office. The complete specification must possess both novel and patentable features and it should be filed within 12 months or else it will be deemed as abandoned. The House of Lords observed that, "the specification must be a positive construction containing novel features...it is non-obvious to a person skilled in the state-of-the-art."[19] Any amendment made to the complete specification should not relate to different invention.[20] Section 25(1) and (2) of the Patent Act of 1970 makes a provision to file objections before and after the grant of patent respectively.[21] The grant of patent in India takes nearly 3 years from the date of filing an application. The patent granted may be revoked by the Controller, Appellate Board or the High Court.[22]

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[14] GEC's Application (1961) RPC 21.

[15] GEC's Application (1961) RPC 21 and Section 3 of the Patent (Amendment) Act, 2003.

[16] Paris Convention, 1998.

[17] Dimond v. Dr. Ananda Chakraborty (1980) was the first case on microorganism in India, decided on June 16, 1980.

[18] Section 9 of the Patent Act, 1970

[19] Catnic v. Hill (1982) RPC 183 at 243 (HL).

[20] Edward v. Acme Signs (1990) RPC 621 at 640.

[21] Also read Mitra & Co. Ltd., v. Assistant Controller of Patents & Designs, 2008(ii) SCALE 524.

[22] Section 64 of the Patent Act, 1970

COPYRIGHT

Ideas expressed in the material form or synthesis of facts or author's interpretation, which gives rise to copyright protection in literary, artistic, musical, design and cinematograph film. Copyright involves 'Idea-Expression Dichotomy'[23] and 'Idea-Expression Merger'[24]. The copyright being an integral part or one of the main branches of Intellectual Property, authorship of literary work or creativity of a work involving the finer manifestation of the human intellect are protected. "Whatever that is worth copying deserves copyright".[25] All forms of copyrights are protected under copyright laws and international conventions[26] including the satellite signal transmitters' rights.[27] Copyright in literary works not only enhanced the knowledge domain of the public, but also revolutionalized the printing, publishing and broadcasting industries. In the absence of these parameters, the use of proprietary data amounts to infringement[28] of proprietary right of the owner. John Oswald rightly said, "If creativity is the field, copyright is the fence." The Copyright Act of 1957 confers an 'exclusive right' to an author or a creator to do or authorise to do certain acts in respect of the original work. "Copyright is a bundle of rights and bundle of exceptions too". Fair Use doctrine[29] permits certain users to use the copyrighted work without licence or permission and it involves (a) the purpose for which the proprietary data is used (b) substantiality of the proprietary data is used and (c) effect on the rights of the proprietor. The original proprietor of the work reserves the right to copy, distribute, sell, licence or assign to others as part of his 'disposition rights' for others to exploit the work. Furthermore, the Act protects the writers, artists, designers, dramatists, musicians, producers of cinematograph film, sound

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[23] R.G. Anand v. Delux Films, AIR 1978 SC 1613

[24] Q. Company Industries, Inc. v. Hoffman, 625 F. Supp. 608 (S.D.N.Y) 1985.

[25] Halsbury's Laws of England, 4th Edition, Vol. 9, Page-533, Para-836.

[26] Universal Copyright Convention (UCC) of 1952, World Intellectual Property Organization (WIPO), Universal Declaration of Rights (UDHR) etc.

[27] Geneva Convention, 1974.

[28] Section 51 of the Copyright Act, 1957

[29] Section 52 of the Copyright Act, 1957

recordings, computer program[30] and such other original works. Criminal[31], civil[32] and administrative remedies[33] are assured to the copyright owners for infringement of their rights in various works and Internet piracy. Enhanced punishments for the first and subsequent offences are provisioned under the Act[34] for first and subsequent offences. The literary merit in a copyright appears to be subjective, except the computer program which is expressed through the machine language.[35] Both the source code[36] and the object code[37] of the computer program are protected under copyright.[38] Copyright is an 'automatic right' since the registration is not compulsory.[39] WIPO[40] by its Article 10 added a new dimension by recognized the Internet as 'new platform' for publishing or storing the digitized works. The moving images and sound are recorded in a digital medium. The software piracy is punishable under Section 63(B) of the Copyright (Amendment) Act, 1994. In 1998, the Police in Baldwin Park, California confiscated 17,000 counterfeit copies of Microsoft Office-97 software and Microsoft Windows-95 software valued 5.6 million dollars. The 'golden arcade' in Hong Kong is the biggest international shopping place for pirated software. The U.S. Federal Court issued injunction against the Napster, Inc. on March 5, 2001 in Record Industry of American Association (RIAA) v. Napster, Inc[41] for providing Internet platform to copy

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[30] Section 2(ffc) of the Copyright Act, 1957 defines the computer program.

[31] For criminal remedy, both mens rea and knowledge are essential.

[32] Civil damages include the grant of Injunction, award of damages and delivery up.

[33] Administrative remedy relates to the making of representation to the Registrar of Copyrights for banning infringed copies.

[34] Sections 63 63A of the Copyright (Amendment) Act, 1984.

[35] Machine Language means the High Level Language (HLL) which is machine readable launguage.

[36] Source Code being an input is a syntactical instruction of High Level Language.

[37] Object Code being an output is the resultant of compilation of the source code.

[38] Apple v. Franklin, 714 F. 3d 1240 (1984)

[39] Nav Sahitya Prakashan v. Anand Kumar. V, AIR 181 (Al) 200.

[40] Abbreviation of WIPO is World Intellectual Property Organization.

[41] (1999) 49 F 34, 807 (1st Cir. 1995).

musical works. The court prescribed 'Triple Test' of Abstraction, Filtration and Comparison for software infringement.[42]

DESIGN

A design owes to aesthetic sense which is judged by the eye, apart from the required features of shape, configuration and ornamental patterns. The Design Act of 2000 promotes inspirational creative activity. Locarno Agreement of 1968 as revised in 1978 classifies industrial designs. A design must be 'novel' & 'original' and possess the local novel features[43] as against international novelty. A mode, principle of construction and substance are excluded[44] from the purview of the Designs Act, 2000. Any artistic work is also excluded[45] from the protection under the Act. The Controller of Designs grants certification of registration for all registered designs as registration of a design is compulsory. He can cancel and revoke the certification of registration[46] after causing inquiry through the 'examiners'. WIPO assures design rights in multi-jurisdiction if the design is registered with it. The novel features of a design lies in 2D features of pattern and 3D features of shape or combination of both.[47] European Commission assured protection to 'community designs' by its Directive No. 98/71/EC//2003. A design can be protected under both Copyright Act of 1957 and Designs Act of 2000, provided the design does not involve mechanical, chemical or manual processes. Infringement occurs with the similarity[48] of visual features of the shape, configuration and pattern. Ad interim injunction can be granted for infringement of a registered design.[49]

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[42] Computer Associates v. Altai, Inc. 982 F. 2d. 293 (2nd Cir. 1992).

[43] Paris Convention, 1998.

[44] Landor & Hawa International Limited, v. Azure Designs Limited, 2006 EWCA Civ. 1285

[45] Microfilms, Inc. v. Giridhar & Company, 2006 SCC Online Del 50: (2006) 32 PTC 157, per Mukul Mudgal.

[46] B.K. Plastic Industries & Ors. v. Jayanthilal Kalidas Sayami, AIR 1973 AP 17.

[47] For instance; combination of Jamdani technique and the Dye Printing technique on a Saree.

[48] Kemp & Co. v. Prima Plastics Limited, 1998 SCC Online Bom. 437: (1999) 1 Bom. CR 239.

[49] Ampro Food Products v. Ashoka Biscuit works & Ors., AIR 1973 17.

GEOGRAPHICAL INDICATION

GI identifies the source of origin of goods or products. Exclusive right is assured to the Geographical Indication (GI) of goods in relation to a specific region of their origin since they owe to the unique characteristics, quality and reputation. The GI of goods are governed under the Geographical Indication of Goods (Registration & Protection) Act, 2000. The object of the Act is to give protection[50] and to prevent unauthorised persons misusing the GI status of goods. The Geographical Indication Registry and Appellate Board regulates the GI of goods. The registration certificate is the prima-facie evidence of the proof of validity to enforce GI rights. The deceptive or similarity[51] of goods cannot be registered. Sui-generis protection is given to the GI of goods.[52] The TRIPS Agreement of 1994 by its Article 22 defines GI of goods as, "an exclusionary right for the indicator which identifies the goods originated within the Member-Nations or area, or region of that territory where the reputation or other attributes to the goods is essentially related to geographic origin of the place." It also obligates the sovereign governments to safeguard the GI of goods and preventing misappropriation by others. Unfair competition with unconnected GI of goods of another territory or area is an infringement of the rights of a genuine owner and misleading of the concept of 'natural origin' also amounts to infringement. The fake GI of goods are liable to be forfeited and award of damages on 'account of profit' under civil remedy, while criminal remedy lies in penalties for the first and subsequent offences.

TRADEMARKS

Trademark is a commercial certificate issued by the Trade Mark Registry[53] which cannot be transferred to others, but can be assigned other than a disputed trademark. A trademark performs the 'origin function' of goods.

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[50] The protection is extended to natural produces, foodstuffs, beverages, agricultural produces and manufactured goods.

[51] Standard Woven Fabric Company's Application (1918) RPC 53

[52] After the approval given by both the houses of the Parliament on December 23, 1999.

[53] Section 13(3) of the Trade Mark Act, 1999.

An 'inventive word'[54] not found in the dictionary is protected[55] under the Trade Mark Act, 1999. A 'distinctive word' is known for the distinctiveness that owes to the quality of a product in comparison with another product.[56] A 'well known trademark' includes an invented, non-descriptive and distinctive words.[57] A trademark[58] could be a name or abbreviation of name[59], container[60], smell, colour or combination of colours[61] or a phrase[62]. For instance; 'Coffee Bean & Tea Leaf'. Wherever a particular trademark is concurrently used by two traders, the first user of the trademark is legally entitled for it.[63] The purpose of the trademark is to enable the consumer to confirm the quality of goods of a particular brand[64] as 'goodwill' is attached to the reputation of the brand name[65]. Descriptive word[66] is prohibited as it describes a product. For instance; the word 'Bright' cannot go with the detergent cake or powder. The registered trademark gets protection under the Act in perpetuity, subject to its renewal once in 10 years. Certain category of trademarks are prohibited for registration within the scope of Sections 11(a) to (e), 12, 13 and 14 of the Act. The trademark is essential in the competitive market since it ensures statutory recognition of ownership. The proprietors of trademark need to

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[54] Phillipart v. William Whitely Ltd., (1908) RPC 565.

[55] Lisbon Agreement, 1958.

[56] Imperial Tobacco v. Registrar of Trade Marks, AIR 1977 (Cal) 413.

[57] Section 2(1) (zg) r/w Section 11 of the Trade Mark Act, 1999.

[58] Trade Mark is defined under Section 2(1)(zb) of the Trade Mark Act, 1999.

[59] Lakshmikanth V Patel v. Chetan Bhat Shah, AIR 2002 SC 275.

[60] Coca Cola Co. v. Gemini Rising, Inc, 346 F. Supp. 1183 (E.N.D.Y) 1972.

[61] Smith Kline Application (1974) 1 All E.R. 529 at 534.

[62] International Coffee & Tea, LLC v. Sanjay L Mansukhani (2008) 152 PLR 66.

[63] Dhanwal Industries Ltd., & Another, v. MSS Food Products, AIR 2005 SC 1999.

[64] Boots Pure Drug Company Application (1973 RPC 327.

[65] Commissioner of Inland v. Muller (1901) AC 217 at 223, 224.

[66] Fair & Lovely is a descriptive word for cosmetics as held in Aruna Cosmetics v. Hindustan Lever Limited, 1998 PTC 31.

exercise due care and caution to prevent others from using MetaTags[67] embedded into the trademark to cause confusion. Cyber squatting[68] occurs when the distinct trademark is used as domain name for dissimilar goods like; Glucovita and Gluvita.[69] The cyber squatters intentionally register third party's trademark as domain name to extract money by availing the world wide web (www). Once the domain name is translated into IP address of the computer, it forms part of the website. For example; http://www.cms.co.in/news, e-mail ID is user@msn.co.in. ICANN[70] administers Top Level Domain(TLD) names. The National Informatics Centre (NIC) exclusively registers gov.in domain names. The 'passing off'[71] of identical goods amounts to infringement of unregistered trademark where the onus of proof lies on the plaint to prove the infringement. Domain Names cannot be used by others unauthorizedly.[72] Even the unregistered proprietor or trader of a trademark is entitled to remedial relief for 'colourable imitation'. The proprietor or trader of a trademark with 'prior use' can sue the infringer, in which case the burden of proof lies on the defendant. An infringed trademark with labels must be delivered as delivery-up' remedy to the proprietor of the trademark upon Court's order. Pharming which is an act of exploiting the Domain Name Service (DNS) server by acquiring the domain name of a website and re-directing the traffic from that website to another website is a serious type of violation under the Act. The deceptive similarity implying close resemblance amounts to infringement.[73]

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[67] Metatags are invisible codes embedded into the html to create websites.

[68] Delhi High Court held that cyber squatting is an offence in Times Internet v. Belize Domain Whois Services Ltd,. & Ors. CS (OS) No. 1289 of 2009, decided on November 10, 2010.

[69] Glucovita v. Gluvita, AIR 1960 SC 142.

[70] ICANN stands for Internet Corporation for Assigned Names & Numbers.

[71] Passing off means "My product as your product" as observed by the Supreme Court of India in Durga Dutt Sharma v. N.P. Laboratories, 1965 AIR 980: (1965) SCR (1) 737

[72] Teletech Customer Care Management, Inc. v. Teletech Company, Inc, Case No. 96-8377 MRP (RC).

[73] Section 12 of the Trade Mark Act, 1999. Also Surjit Singh v. Alembic Glass Industries Ltd., AIR 1987 Del 319.

NUANCES OF IP REGIME

The 'conceptual clarity' is all the more significant for law students, lawyers and Judicial Magistrates to fully comprehend the meaning and definition of the concept under IP laws. Where the legal definition is not available, one must look for judicial definition given by the judges in their judgments. Sometimes, the conceptual clarity may be available under the Act and in the meantime, judiciary may define the same concept to give better scope of the concept. Cyberspace[74] is an invisible networking grid in which the movement of electronic data in the form of packets[75] takes place. Cyberspace is an imaginary location, but a virtual reality where electronic activity is carried out in a borderless situation by transcending the geographical boundaries of sovereign States.

The 'eminent domain concept' that implies ensuring protection to IP rights at the same time afford to provide access to the 'knowledge domain' of the public under the right to know, thereby constituting as a 'balancing factor'. This concept strikes a balance between the societal need for knowledge enhancement and the need for rewarding authors, creators and inventors. Copyrighted works acts as a beacon of light in as much as acquiring the knowledge by the people. As such, the monopoly right under IP regime has a limited scope as IP right is confined to 'exclusionary right'. It is said that, "copyright work is like a lighting lamp that can light other lamps without darkening it." The grant of compulsory licencing[76] of a proprietary work without the consent of its owner is a proposition under the eminent domain concept. It may be recalled that M.F. Hussain was granted compulsory licence by the Government of India when the Vishwabharti Trust with which all copyrighted works of Rabindranath Tagore were vested when the Trust refused to grant licence. M.F. Hussain sought to feature a song written by Rabindranath Tagore for the cinematograph film; 'Gajagamini'. The term of the copyright vested with the Trust subsists as long as the Trust exists, otherwise the term of the copyright expires 60 years after the demise of the copyright owner from

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[74] J Justice Bedlam in R v. Governor of Brixton Prison, ex p Levin, 1997 3 All E.R. P.289 defined the cyberspace as "The operation of the keyboard by a computer operator produces a virtually instantaneous result on the magnetic disk of the computer even though it may be ten thousand miles away. It seems to us artificial to regard the act as having been done in one rather than the other place."

[75]Information or e-data gets divided into packets and move via telecommunication network or satellite network and assemble at the place of destination

[76] Section 31 of the Copyright Act, 1957 and Section 84 of the Patent Act, 1970

the date of his death. The fair use doctrine also facilitates access to proprietary works for limited purpose. After the expiry of the term of proprietary work or invention, the work goes into the 'public domain' unless further improvements are made to the existing invention of new editions or versions are brought about to the literary, dramatic, musical and artistic works.

IP relates to 'labour-skills-capital' concept as it is a special kind of intangible property or digital asset.[77] This concept relates to the fruits of brain labour or skills of the body towards achieving the resultant tangible or intangible product or work. It also involves the 'doctrine of sweat and brow'.[78] The capital implies investment of time, money, skills and brain effort of a person. Bharthruhari described intangible property as hidden wealth of a person, which no one can part with it. John Locke said, "Though the earth and all inferior creatures be common to all men, yet every man has property in his own person which no one has a right but to himself." In other words, IP is self-created property of a person which owes to his human intellect and skills in the body. The modern concept is flexible to the extent that creativity, hidden talents or potentials shall be available in public for economic growth of the country under the 'disclosure theory' as it results in the global competitiveness. Article 300A of the constitution of India provides that, "No person shall be deprived save by authority of law." After the Forty Fourth amendment to the constitution of India in 1978, property is no more a fundamental right but a constitutional right to the extent of claiming compensation. Article 300A can be challenged only on the ground of payment of compensation.[79]

'Idea-Expression Dichotomy'[80] and 'Idea-Expression Dichotomy'[81] concepts aptly apply to the copyright works. Idea, subject-matter theme are not protected under IP laws, other than the original expression in material form or synthesis of facts and patentable features of a patent. An

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[77] Jayalakshmi v. Meta Musicals, AIR 2000 Mad. 454.

[78] Satsang v. Kiron, AIR 1972 Cal 533, Para-11.

[79] Bishamar v. State of U.P. AIR 1982 SC 33.

[80] R.G. Anand v. Delux Films, AIR 1978 SC 1613

[81] Q-Co. Industries, Inc. v. Hoffman, 625 F. Supp. 608 (S.D.N.Y 1985)

expression must be original.[82] Artistic quality and craftsmanship qualifies the originality in artistic works, except paintings and drawings.[83] Inventive steps need to be complied scrupulously in the case of patents.

The 'de-minimis' concept requires the minimum standard of intellectual creativity in the original work or new invention. This concept relates to (a) literary merit in the literary works[84] (b) artistic quality or craftsmanship in the artistic work[85] and (c) novelty, non-obviousness & utility in patentable inventions.

The 'concept of royalty' is an essential requirement of the IP regime. Article-25 of the UDHR assures 'standard of living' and well-being of authors, creators and inventors inclusive of their family members. Based on the incentive theory, the 'royalty concept' was. According to Lockean theory on intellectual property, an author, artist and creator of original work is entitled to acquire 'fair value' for his/her brain effort. The fair value shall be interpreted as including the cost of R&D, investment of time, brain effort & money spent and the livelihood for himself/herself and his/her family members for a comfortable living. 'Incentive Theory' ensures payment of royalty to authors, creators and inventors as a reward for their brain effort or human endeavour under IP laws and right to livelihood within the expanded scope of Article 21 of the constitution of India. It is incumbent to realize that the concept of royalty to the proprietors of IP rights need to be evaluated based on the investment and profit margin, which may be termed as ‘realistic value’. Contrary to the 'disclosure theory' of pursuing patentable inventions or copyrightable literary or creative works, the 'incentive theory' mandates that an inventor, author or creator shall be entitled for 'royalty' for his/her brain effort and investment of money and time in the R&D under the 'Doctrine of Sweat & Brow'. The royalty concept is required to be viewed in its broader sense so as to include investment cost + profit margin = realistic value, which is considered as 'fair value'. The fair value should be equitable to both proprietors of IP as well as authorized users like; licencee, assignee or franchisee against payment of

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[82] Jagadish Prasad v. Parameshwar Prasad, AIR 1996 Pat. 33.

[83] Robert v. O. Cormer, 1982, FSR 317 and Kernick & Co. v. Lawrence !890) 25 QBD 99.

[84] C. Cunnian & Co. v. Balraj & Co. AIR 1961 (Mad). 111.

[85] George Hansher v. Restawille Upholstery, 1975 RPC 31.

royalty. This proposition was first laid down in Berne Convention under the principle of 'Droit De Suite'.

IP owes to 'economic concept' in the new economic order. Undoubtedly, IP is a valuable asset for authors, creators, inventors and the manufacturing companies which can be exploited in a number of ways. It forms the foundation for the 'knowledge-based economy' that pervades all sectors of the economy. The valuation of IP arising out of human intellect or human endeavour lies in its ability to generate a new resultant product or a work. Even the protection of IP depends on its value in the new economic order. The concept of value depends on the market value and equitable value.[86] The brand value assumes significance as far as the trademark is concerned. Conspicuously, the 'patented products' assure higher value in the domestic and international market. The value of copyright works lies in the content of the print product, electronic database, digital works, artistic creations, computer software etc. IP generates income through the exploitation of a proprietary work or the patented product. It is imperative that IP can be exploited in a number of ways like; outright sale, licencing, assignment, franchising, passing off of goods, monetization and securitization[87] and internationalization of IP assets.[88] IP valuation, specifically in respect of patents is a significant for exploitation of inventions for the benefit of the society. For a patent holder, it is important from the viewpoint of pricing it for licencing purpose, calculating royalties and securing effective returns during the 'grant period'. The proprietors of IP assets receive payment on the discounted present value of the transferred assets, while the investors derive returns on their investment.

Intellectual Property acts as a catalyst medium for a vital economic growth of the country. In fact, IP regime protects economic and intellectual wealth. The TRIPS lays down two broad principles namely: National Treatment and Most Favoured Nation Treatment. The former assures favourable treatment to all sovereign Nations with regard to IP protection, while the latter affords protection to promote technological transfer unconditionally. Intellectual property plays a vital role in the nation's

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[86] Equitable value must be equitable to both proprietary owners and the licencees, assignees and franchisees.

[87] Securitization means turning the illiquid assets into liquid assets

[88] Centrafarm v. Sterling drug (1974) ECR 487 Case at P-784

economy since it earns foreign exchange (FOREX). IP owes to economic significance and commercial value under economic approach. Therefore, intellectual property rights foster the competitive markets. IP has evolved relationship between electronic commerce and intellectual property owing to the convergence of technologies like the ICT and IWT.

IP is a 'moral right' of the owner since it prevents authorized persons like; licencee, assignee and franchisee from changing the structure of its original form. The Court in Amar Nath Sehgal v. Union of India[89] awarded damage to the tune of Rs. 5 Lakh to be paid by the defendant within a month from the date of passing the order or to pay simple interest @ 9% per annum till the amount is paid and also directed the defendant to return the remnants of the murals within 2 weeks.

The constitution of India prescribes the duty on every citizen under Article 51(A) (h) to develop scientific temper and spirit of inquiry, while the 'Disclosure Theory' mandates to disclose the outcome of the scientific or technological research for industrial growth and the benefit of the society at large. The philosophy behind this doctrine is to ensure 'fuelling the fuel' or encouraging further inventions or improvements over the existing state-of-the-art and 'animus furandi'90 in IP works. There is dire need for the government to create proper infrastructural facilities to pursue R&D to fulfil this constitutional obligation.

IP laws in India derives their structural base from the international conventions or covenants. Articles 51(c) and 253 provides for incorporation of the decisions taken in the such international conventions into the national law under the 'doctrine of incorporation', provided they do not contradict with the national policy or ordre public since the present millennium is characterised as an 'era of international legislations'. The present millennium is termed as "an era of international codes" since many legislations descend from the decisions of the international conventions or covenants. The decisions arrived at such international conventions on IP are binding on the Member-Nations in as much as incorporating them into the National Laws, provided they are not contrary to the national policy or order public of a sovereign State.

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[89] 117 (2005) DLT 717: (2005) (30) PTC 253 (Del), February 21, 2005.

[90] Animus Furandi refers to the lack of mental labour on the part of the defendant.

With the growth and development of digital technology, the digital-based IP works are stored in the computer network system in the cyberspace.[91] In simple words, cyberspace may be defined as "an imaginary location but a virtual reality where electronic activity is carried out in a borderless situation." Internet[92] is the largest manifestation of the cyberspace which is a global medium and user friendly.[93] The Personal Computers (PCs) have been connected to the Internet in 1990 with the help of landline telephone and a modem. Now-a-days, the Cell phones have Wi-Fi connection. Electronic data or information in the form of text, graphics, images or audio-visual pictures can be disseminated instantaneously with unprecedented speed and precision. The proprietary electronic data or e-files can be stored in the Hard Disk Drive (HDD) or Floppy Disk Drive (FDD) of the computer system by ensuring 'system hardening measures'. Website is another significant outcome of the technological development in 1992 wherein the 'layering security measures' have been adopted to protect the IP assets in the Internet scenario. Dr. Arun Mehta filed a writ petition (civil) under Article 226 of the constitution before the Delhi High Court contending that blocking of website access by the VSNL is violation of Article 19(g) of the constitution. As a further safety measure, the Stand-Alone Computers are used in the corporate Companies as external storage device to store intangible IP assets. Internet being the global medium, it provides as a platform for storage of IP assets or the proprietary data.

In addition to the remedies available for various kinds of infringements of IP rights, two special remedies assume greater significance. Since 2000, Indian courts have played a pro-active role in granting the John Doe Order or Ashok Kumar Order to deter the infringers of IP rights. Under Order 39

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[91] Cyberspace is not defined under IP laws or the Information Technology, 2000. However, judicial definition is by Bedlam LJ in R v. Governor of Brixton Prison, ex P. Levin (1997) 3 All E.R. P.289 as "The operation of the keyboard by a computer operator produces a virtually instantaneous result on the magnetic disk of the computer even though it may be ten thousand miles away. It seems to us artificial to regard the act as having been done in one rather than the other place." W William Gibson in his science fiction "Neuromancer" (1984) defined the cyberspace as "A place without physical walls or even physical dimensions has connected he globe in the shortest span of time to the extent no technology has done before."

[92] In 1969, Internet was accidentally developed when a computer was connected a switch or route of another computer by the department of defence, Advanced Research Project Agency Network (ARPANET) was developed which connected only military and government computers. In 1983 ARPANET became INTERNET.

[93] Anyone can use it including the cyber perpetrators.

Rules 1 & 2 of the Code of Civil Procedure of 1908, the civil courts are vested with powers to grant interim orders to protect the interest of proprietors of IP in civil suits. The principle applicable for grant of 'interim relief' relates to John Doe Order/Jane Doe Order against unknown defendant(s), wherein the plaintiff is required to prove the existence of a prima-facie of the case if the balance of convenience is tilting in his favour and irreparable loss likely to be caused in the event of non-grant of the relief. For the first time, the scope of John Doe Order or Ashok Kumar Order was explained by the High Court of Delhi[94], also referred in ESPN Software India Private Ltd., v. Tudo Enterprise[95], wherein the Court passed an order against unidentified defendants. In the instant case, cable operators illegally broadcasted Soccer World Cup in India without obtaining licence. The Delhi High Court observed that, "The act of naming a party is considered a mere misnomer and as long as the litigating finger is pointed at particular person then the misnomer is not fatal". The same Delhi High Court also observed that, "Vague injunction can be an abuse of the process of the court and such a vague and general injunction of anticipatory nature can never be granted".[96] In Anton Pillar v. Manufacturing Process[97], the court authorized the plaintiff to inspect the defendant's premises and to seize all incriminating materials used for copying the proprietary work , obtain photos and videos of the premises and adduce them to the court as evidence. Before issue of Anton Pillar Order, the plaint must establish the prima-facie of the case. In India, courts pass ex-parte order permitting the plaintiff to enter the suspected premises and seize all incriminating evidence including the apparatus used for copying in presence of the Court Commission as appointed by the court.

NITTY-GRITTY OF IP REGIME

A critical view of Article 51(A) (h) of the constitution of India in the perspective of IP rights clearly rises a cogent doubt as to whether or not

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[94] Taj Television Ltd., & Ors. v. Rajan Mandal & Ors. CS (OS) 1072/2002

[95] CS (OS) 384/2011

[96] The Indian Performing Right v. Badal Dhar Choudhry CS (OS) 1014/2004

[97] (1976 Ch. 55: (1976) RPC 719.

the Government of India is facilitating the citizens of India towards fostering scientific temper and technological growth & development in letter and spirit. The lack of proper infrastructure for Research & Development (R&D) within our country or the non-accessibility to such infrastructural facilities drive the genius brains to pursue inventions or innovations in the developed countries abroad by seeking recourse under the Multi-National Company (MNC) or Trans-National Company (TNCs) which are exploiting them to their economic advantage with the support of governments. The duty sans opportunities is like a mirage. In my considered opinion, there is an absolutely need for a 'dedicated telephone line' for the citizens of India to register their ideas or themes with the research institutes for pursuing research. Once his/her idea or theme is approved by the experts, Appropriate Government shall provide an opportunity for them to pursue their invention for grant of patent.

Conspicuously, the Multi-National or Trans-National Companies are gaining advantage in perpetuity in respect of the IP works or products created by their employees on the ground that they have availed the infrastructure of the Company to produce such works.[98] Strictly speaking, intangible property purely relates to the human intellect or brain labour of an employee. Some time ago, employees were given the 'sweat shares' by the Companies. Conspicuously, a Company continues to use the IP created by an employee even after he/she leaves the job or fired by the management. When such be the case, on what moral grounds a Company continues to avail his/her work for its growth? Article 23(2) of the constitution of India prohibits the forced labour which may be interpreted as 'forced brain labour' in this context. The concept of 'exclusive right' has no meaning here. Supposing, an employee is not availing the infrastructure of the Company he/she is working for, then he/she is eligible for royalty on par with other authors, creators and inventors. The next cogent query that may be posed could be whether IP is an investment for MNCs and TNCs. It is indeed a fact of truth to a large extent. Any prudent person may perceive the intentions of developed countries exploit IP rights through their MNCs or TNCs. It is worth reminding that intellectual property alone constituted 25% of the 'corporate value' in 2008 itself. THE FORTUNE conducted a survey of 500 MNCs and TNCs and found that the intellectual

[98] Thames Thames v. Manorama, AIR 1989 Ker. 49

property value ranged between 45% and 75% of their business. Further, IP monetization and securitization facilitated the Companies to derive revenue directly from intangible or digital assets. The Securitization of IP[99] also creates liquidity for corporate Companies.

'Information Laundering' is a new emerging common trend in the present day context which implies plagiarism, data leaks, data spills and data breaches of electronic information in the cyberspace. It is contrary to ethical factor. The 'Counter-Information Laundering' measures lies in the 'SMART' concept. The letter 'S' stands for 'Safety' for personal or proprietary information or e-data, 'M' for 'Moral' obligation against misusing information, 'A' for 'Accountability' to the proprietors or owners of information, 'R' for 'Responsiveness' to IP Laws and 'T' for 'Transparent' dealings in licensed, assigned and franchised proprietary works. The Cross-Border Data Flows into 'Data Havens' where the Shell Companies are operating is a cause of real concern. The data havens are posing threat to proprietary and personal information or e-data. The Data Council of India (DCI) and the Department of Information & Technology need to adopt effective measures to check the menace of cross-border e-data flows and processing of personal information or e-data. The data leaks, data spills and data breaches are intentionally done by the Black Hats, Organized Crime Gangs, Top Political Leaders, Sovereign Governments and Shell Companies. Panama Papers and WikiLeaks are the best instances. The data breaches comprising of the breaches of - (a) trade secrets or formula process and design (b) intellectual property and (c) personal information or e-data. The whistle blowers of Panama papers invoked the 'John Doe Order' and made the information about Panama Papers data leak available to a German journalist Mr. Bastin Obernayer. The founders of Panama Papers Law Firm were arrested on the charge of money laundering also. The dealings of the 'Secret Offshore Companies' resulted in the deprivation of billions of dollars in African Natural Resources. The Panama Papers Leak had a linkage to the 'cartels'. The 'data breach' occurred in September 2014 resulted in hacking of 500 million Yahoo accounts and stealing of huge data comprising of names, phone numbers, passwords

[99] The term 'securitization' implies converting illiquid assets into liquid assets by creating the Special Purpose Vehicle for IP assets to enhance liquidity of corporate Companies

and e-mail addresses. Yahoo informed its client-subscribers to change their personal information. The problem arose with the Platform as a Service (PaaS) when the Napster, Inc. (supra) facilitated its 70 million subscribers to download the proprietary music by providing the platform. Unauthorised abstraction and sale of information or e-data was held to be an offence of plagiarism.[100] The Personal Data Protection Bill of 2006 has since been lapsed in India.

The 'fair use' implying the privilege of others to use the copyrighted material in a reasonable manner[101] is often misused. Any modification of expression or re-arrangement of synthesised facts of the original author while producing a literary work by another author with extensive quotes for commercial gain should be made as infringement of the copyrighted work. In the said landmark case, 'four-fold test' has been laid down, which includes - (a) unfair use of copyrighted material for commercial purpose (b) volume of quotes or substantial copying (c) nature of the copyrighted material used [In biographies, subsequent author has a right to use the previous biography] and (d) effect on the potential market. The 'briteline test' prescribes 'de-minimis' or minimal use of the copyrighted material as against substantial slicing. Strictly speaking, fair use is available for research & education purpose, commentary & criticism, review & abridgment and libraries.[102] If the copyrighted material is transformed new expression, it is excluded under fair use.[103] The 'thumb rule' is that the copyrighted material must be used for fair use 'as is necessary'. When a computer software is licenced by the software developer, copies are made and shared with friends or sold to others at lower prices. Misuse of 'fair use' doctrine resulting in plagiarism needs to be prevented protect exclusive IP rights of the proprietors. Therefore, fair use calls for qualitative as well as quantitative assessment.

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[100] U.S. . Lambert, 445 F. Supp. 890 (1978)

[101] Maxtone Grasham v. Burtchael (1986) U.S. CA 2nd Cir. 803 F. 2d 1253 U.S. PQR 534

[102] Section ection 52(1)(a) to (za) of the Copyright (Amendment) Act, 1994 provides the exception list

[103] Campbell v. AcuffRose Music, 510 U.S. 569 (1994)

Owing to the weak IP laws in the United States of America, the developing and under developed countries are driven to courts for revocation of patents granted by the U.S. Government in a hurry. In India, the grant of patent takes nearly 3 years time. When the United States of America patented the Turmeric, Basmati rice and Neem Products, the Council of Scientific & Industrial Research (CSIR) challenged it in the court of law on the ground that the use of Turmeric and Neem products was within the knowledge of the people since ancient times in India and got the patent revoked. At this juncture, the U.S. patent authorities grumbled saying that, "Indians are the big manipulators" without appreciating the concept of 'prior use'. Article 88 of the European Patent Commission also provides an express provision about the priority date, prior knowledge and prior use. A patentable invention requires international standards to be fulfilled. The TRIPS Agreement of 1994 prescribes Novelty, Non-obviousness (Inventive step) and Utility as international standards criteria for the grant of patent. The United States of America is all set out to patent insignificant and trivial products. India follows international standards scrupulously by amending the Patent Act in 2005 in compliance with the directives of the TRIPS directives.[104] 'Novelty' is the key factor for grant of patent and it is judged by the superior level of skill sets or high standard of the 'state-of-the-art.[105] It is incumbent to realize that, "not everything that is novel be the non-obviousness, but everything which is non-obvious is novel". What is non-obvious to a common man is non-obviousness to a skilled person or a person having expertise in the field concerned. Furthermore, the 'Gillette Defence' emphasizes that, "There is no infringement of the IP right where there is no novelty." The United States of America by its 'Super-301 Plan', 1999 empowered its Trade Commissioner[106] to visit developing countries including the under developed countries for the purpose of reviewing IP laws. The Trade Commissioner reportedly held threats of stopping the U.S

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[104] In Windsurfing International v. Tabur Marine (1985) RPC 59, the court measured four stages of inventive steps, such as; (1) Identifying an inventive concept embodied in the proposed invention (2) Identifying the 'prior art which is already known or used (3) Ascertaining whether the proposed invention is non-obvious to a skilled person requiring the standard degree of invention and (4) Focusing on superior technical features.

[105] Article-52 of the European Patent Convention also prescribes the standard criteria for novelty, while Article-56 requires that inventive step must be free from the 'taint of obviousness'

[106] The Trade Commissioner appointed under America Trade Act, 1974

aid and severe trade connections if the IP laws are not enacted by any country. The TRIPS being an organ of the WTO, it assures 'National Treatment' and the 'Most Favoured National Treatment' to the developing and under developed countries. Unfortunately, the WTO is favouring the United States of America owing to its dominant position to create 'neo-colonialism' in the IP regime. In fact, advanced countries are suppose to lend technology to the developing and under developed countries free of cost as per the provisions contained in the preamble of the WTO for the growth of their economies, but in vain. The developing and Least Developing Countries will have to be satisfied with the Foreign Direct Investment (FDI) with some employment opportunities and enhanced per capita income. The growth and development of new technologies like; Information Communication Technology (ICT) and Internet Wireless Technology (IWT) together with the convergence of other technologies paved the way for growth of technology and opened up new vistas of economies at the global level. Conspicuously, most of the developed countries gained economic advantage under the IP regime, which has created relationship between electronic commerce and IP as an integral factor. For these reasons, European Union (EU) created its own Unitary Intellectual Property Regime (UIPR) for European countries which comprises of Community Patent Rights (CPRs), European Patent Office (EPO), Community Plant Variety Rights (CPVRs), Community Registered Designs (CDRs) and Community Trade Marks (CTMs).

After overruling the judgment[107] which has subrogated the 'Rule of Public Policy' on point of jurisdiction, the U.K. Supreme Court in Lucashim Limited v. Ainsworth & Another[108] dismissed the Mocambique Rule. In all pending intellectual property litigations, the domicile of any one of the defendants or the place where infringement has taken place shall be the jurisdiction. in the Internet scenario, the jurisdictional issue has been settled in Zippo Mfg. Co. v. Zippo.com, Inc.[109] Article-245(2) of the Constitution of India reads as, "No law made by the Parliament shall be

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[107] British South Africa Company v. Companhia De Mocambique, (1893) A.C, 602

[108] (2011) U.K. SC 39.

[109] 952 F Supp. 1119, 1124 (WD Pa) 1996.

deemed to be invalid on the ground that it would have extra-territorial operation." it is evident that extra-territorial jurisdiction can be exercised in respect of IP matters. Section 1(2) read with Section 75 of the Information Technology Act, 2000[110] also provides for extra-territorial jurisdiction.

Electronic Bulletin Board Services (EBBS), a networked computers and News Groups or Use Net are misused for downloading the proprietary data and exchange of graphic files containing proprietary data respectively. The computer networked system requires encryption by the application of two sister technologies of cryptography and steganography to prevent Internet piracy or downloading intangible proprietary data unauthorisedly. The copyrights comprising of multi-media works like; the digitised data text (data messages), audio text (songs and speeches), video (cinematograph films & video files), graphics (cartoons), sound tracks and Images are vulnerable to Internet piracy. In India, Government of India is yet to adopt 'zero piracy'. IP laws and the Information Technology Act, 2000 prescribes penalties for infringement of IP rights. There is no proper implementation of penal provisions to protect IP rights. The WCT[111], 1996 and WPPT[112], 1996 requires the Member-States to provide adequate legal protection and remedies against circumvention of technical measures adopted by the proprietors of IPRs in the digital scenario. Though the WIPO[113] assured the rights of performers, broadcasters and proprietors of database content, the scope of the database protection under IP laws is too narrow owing to the unprecedented grown of Internet technology. I feel that the responsibility lies on the Department of Industrial Policy & Promotion since it a nodal agency in the Government of India on all related matters.

The developed countries have adopted the pressure tactics to compel the developing or least developed countries to go for patenting in plant and seed varieties including the food items. India and other developing countries have resisted the move made by the developed countries for

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[110] As amended in 2008 with effect from 2009

[111] WCT stand for 'WIPO Copyright Treaty'.

[112] WPPT stand for 'WIPO Performers & Phonograms Treaty'.

[113] WIPO stand for 'World Intellectual Property Organization'.

patenting of life forms. Sui-generis, meaning 'of its own kind without counterpart equal or unique' protection is available to plant varieties. The Union Internationale Pour la Protection des Obtentious Vegetales (UPOV), an international organization assures plant breeders' rights. India being a member country to UPOV is free to adopt sui-generis system on the basis of the guidelines of the UPOV. Article-5 of UPOV prescribes the criteria like distinctiveness, uniformity and stability (DUS). European Patent Convention (EPC), 1973 prohibits patenting of plant varieties, but permits patenting of micro-biological processes. Russian Patent Law of 1992 allows patenting in cell cultures and microorganisms for a period of 20 years. It is only the USA which provides patents in plant varieties for 20 years. The hybrid verities of Cargill or Monsanto seed companies have replaced the traditional seed varieties in India. The terminator gene has led to controversy in India and the Indian peasants revolted against the Cargill and Monsanto Multi-national Seed Companies for claiming monopoly rights in the sale of BT Cotton seeds. The Protection of Plant Varieties & Farmers Rights Act of 2001 was enacted in India to protect plant breeders' rights for generating new plant varieties by encouraging the R&D. The Act also established the Protection of Plant Variety Authority (PPVA) to promote and encourage development of new varieties of plants and protecting the rights of the plant breeders and registration of extant new varieties under Section-5 of the Act. The rights of the breeders include the right to produce, sell, market, export or distribute the plant varieties. Authorities under this Act are entitled to issue compulsory licence after three years of exclusive rights to the plant breeders.

CONCLUSION

The enforcement machinery must be strong enough to protect IP rights by implementing IP laws in letter and spirit, to give impetus to the growth of our economy and to contest the genuine litigations coming up before the courts even at the international level.