




CRITICAL REVIEW OF INTELLECTUAL PROPERTY OF ITS ISSUE AND CHALLENGE



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ABSTRACT

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Intellectual Property ordinarily includes patent, design, trademark and copyright. Due to the technological growth and globalization. Intellectual Property (IP) has acquired an international character. The greater importance on Intellectual Property all over the world can be traced from the concern of different international organization. WIPO and WTO are playing the leading role jointly for the protection of Intellectual property. Under the WTO agreement developing countries and transition economies were given use years to ensure that their laws and practices conform to the TRIPS agreement (1995 to 2000). Least-developed countries had 11 years, until 2006 conform to the TRIPS agreement. This paper described about the critical review of Intellectual property and its issue, challenge and opportunity.

1. INTRODUCTION

Intellectual Property (IP) refers the creation of human mind or intellect which ordinarily includes invention, design, and trademark. Service mark etc. these properties are defined by the laws of respective countries. Intellectual Property lets people on the work they create. It results from the expression of an idea, which can be owned, bought and sold. So IP might be a brand, an invention, a design, a song or other intellectual creation (Merges *et al.*, 2003). The protection is availed through the national law and the international cooperation and protection respecting the IP is maintained by the World Intellectual Property Organization. IP protection, as has been framed by laws, is directly connected with the trade and commerce. Today within the capitalist form of society, the IP is closely linked with the trade and commerce and this can easily be identified from the concern of the WTO for the protection of IP (Cornish *et al.*, 2003). Great IP as property is not very old one in a feeling that it is recognition and protection was not organized until nineteenth century. But the concept's origins can potentially be traced back further. Jewish law includes several factors whose effects are similar to those of modern intellectual property laws (David, 1993). IP has got an organized shape and structure during the last 3 decades of 19th century. IP law has developed and shaped mainly in European continent. Perhaps the Italian Renaissance and industrial revolution has greatly influenced IP to be developed within and has acted as the key factor of development or the IP and its protection. IP law has expanded in the other region of the world by the colonial powers England and France played important role in caring the IP law into their colonies. During the medieval period the IP was located within

patent monopoly for invention, trademark and copyright. Patent might be the oldest form of IP among these three and copyright is the last one. The reason act behind may be that the patent pave the way for expanding business , which lead the necessity for trademark for different manufacturer

The copyright as IP evolved with invention and growth of printing machine (Ray, 1998). However, some scattered historical instances can be identified to, explore the growth and development of IP all over the word. Primarily the IP has been developed within the patent, trademark and copyright.

2. LITERATURE REVIEW

Some instances of grant of patent monopoly can be found in England, France and Italy, which led the early development of patent law such as-

The Florentine architect Filippo Brunelleschi received a three-year patent for a barge with hoisting gear, that carried marble along the Arno River in 1421. In France, King Henry II introduced the concept of publishing the description of an invention in a patent in 1555. In 1449, King Henry VI of UK granted the first patent with a license of 20 years to John of Utynam for introducing the making of colored glass to England (Jaffe *et al.*, 1993). As a matter of fact Patents were systematically granted in Venice as of 1450. These were mostly in the field of glass making. Royal grants for monopoly privileges by Queen Elizabeth I (1558. 1603). So when Patents in the modern sense originated in 1474. Then the Republic of Venice enacted a decree that new and inventive devices, once put into practice, had to be communicated to the Republic to obtain the right to prevent others from using them (Griliches, 1998). Then in England followed with the Statute of Monopolies in 1623 under King James I. which declared that patents could only be granted for -projects of new invention. During the reign of Queen Anne (1702-1741). The lawyers of the English Court developed the requirement that a written description of the invention must be submitted. However in France, patents were Fantod by the monarchy and by other institutions like the “Mason du Rol” and the Parliament of Paris. Therefore the Patents were Fantod without examination since inventor’s right was considered as a natural one. The modern French patent system was created during the Revolution in 1791. The Colonial power had brought the patent laws into their colonies. And most of states as emerged after the decolonialisation had the origin of ascent from their colonial ruler (Cohen *et al.*, 2000). Although in presence of several scattered instances of grant of patent monopoly, the patent protection has got a spirit in a true sense by the adoption of Paris Convention in 1883. After the industrial revolution, the communications between different regions of the world become more flexible and accessible. This led to a practical problem of the protection of patent rights. This problem became apparent when the government of Empire of Austria-Hungary invited the other countries to participate in an international exhibition of inventions that held a Vienna. The visitors’ countries were unwilling to participate and’ exhibit their inventions due to the inadequate protection (Hagen *et al.*, 1984).

As a matter of fact trademarks that have been used for a long time include Lowenbrau, which claims use since 1383, and Stella Artois, which claims use since 1366. As of its origin it was used by the maker of the bricks. Leather, books, weapons, cooking-ware and other things in the ancient times. These were usually letters, initials or other symbolic signs attached to indicate the maker of the product. Guilds also used to affix marks to their products in order to exercise control over their production. It may refer here that the first trademark registered in U.K. under no. I of 1876 consisting of a red equilateral triangle in respect of alcoholic beverages is still in force. The English word brand was used synonymously with trademark. Even today this word is used to reflect the mark placed by the farmers with hot iron on the cattle (Landes and Posner, 1987). Trademark protection is developed by the court practice in England. The British law was in force in their colonial regions. Together with the British contribution, law of trademark has developed mainly within the European continent. The France and Germany had great contribution towards the development of trademark law. France adopted a comprehensive law on trademark in 1857 that was in force for more than 100 years. Germany allowed protection for the registered trademark by legislative means in 1874 with the adoption of Prussian Ordinance. United States of America also showed separate

legal development into their continent after their independence. The development of trademark law owes its significance not only to the legislature but also the court decisions. These separate and individual developments of trademark laws were combined and oriented into a common shape after the adoption of the Paris convention in 1883 (Jain and Vailaya, 1998).

In ancient lime creative writers, musicians, and artists wrote, composed or made their works mainly for fame and recognition rather than to earn profits. The importance of copyright protection was recognized only after the invention of the printing press in the 15th century which enabled the reproduction of books in large number practicable. The invention of printing press led to a new business or trade. The printers or booksellers as known as stationeries in England invested a large sum of money in this sector. But there were no set of rules in printing and selling of the works and no protection was available for the unauthorized copying of books. In such a hazardous situation many entrepreneurs ruined. Pressures begun to be increased for some form of protection and it come in a form of privileges granted by various authorities e.g. in England and France by the King, in Germany by the Princes of various states (Koch and Zhao, 1995). The Statue of Anne as the first copyright statute was enacted in 1709 in England. But there was a continuous dispute and litigation between the copyright granted under the common law and copyright under the Statute of Anne, which was finally decided by the House of Lords in the case of Donaldson v. Beckett in 1774. It was ruled in this case that at common law the author had sole right of printing and publishing his books, but that once a book was published the rights were exclusively regulated by the statute. Today copyright subsist only by the statute in most of the countries (Petitcolas *et al.*, 1998).

Intellectual property has great contribution towards the economic. Granting of patent monopoly in the field of product or process facilitate to manufacture new and improved products or to effect the improvement of existing process of manufacture. Patent specifications save the invention from being lost. A patent system provides new technology and encourage flows of foreign investment (Olwan, 2012). Industrial design encourage talented people to use their skill and energy in making new designs for product to make the product appealable in the eye of consumers particularly in garment, furniture toy and many others field of business. A trademark allows the consumers to test the qualities of concerned product. The market position of the manufacturer is improved and the possibility of export is increased by the balanced system of trademark protection. Trademark system protects the market from being flooded with inferior and bogus goods. A country's development is largely depends upon the cultural advancement of that nation. A useful copyright protection encourages national creativity and promotes the cultural development of a nation. Besides the cultural development the copyright system is improving the printing, publishing and entertainment industries (Maskus and Fink, 2005).

3. CRITICISM OF IP LAW AND THE TERM ITSELF

Besides the advantages of IP and the IP law, these are not beyond any criticism. It has been criticized from different point of view, sometimes from the view of the term itself and sometimes from view of the law itself (Coombe, 1990). The criticism of IP can he headed out as follows:

1. Invention cannot be in nature be a subject of property of economic value.
2. Protection of IP systematically promotes those who gain from confusion.
3. It is also argued that the public interest is harmed by ever expansive monopolies.
4. Trends towards larger copyright protection raising the fear that it may some day be eternal.
5. Granting of patent for living organism have deprived developing and under developed countries from the benefit.
6. Instead of viewing IP as one of many tools for development and focus more on the needs of developing countries, it is being acted as an end itself.
7. The term itself misleading in a sense that the term property referred is the rights, not the intellectual work itself, which eliminates the traditional property presumption.

8. The word IP implies scarcity, which may not be applicable to ideas (Landes and Posner, 2009).

The enormous technological progress of transport and communication has resulted globalization of trade and commerce. This globalization has resulted the international character of the IP. Due to the impact of globalization IP can pass through from one country to another without any restriction. The technological development makes the piracy of IP an easier one. IP differs from the other form of property in a sense that it can be stolen easily than that of other property and its movement becomes very flexible by the technological development than that of other property. These factors make the international character of the IP which has been recognized by different International Conventions (May and Sell, 2006).

Intellectual property rights are a bundle of exclusive rights over creations of the mind, both artistic and commercial. Therefore, IP denotes the specific legal rights which authors, inventors and other IP holders may hold and exercise not the intellectual work itself (Edvinsson and Sullivan, 1996). IP relates to the pieces of information which can be incorporated into tangible objects at the same time in an unlimited number of copies at different locations anywhere in the world. The property is not in those copies but in the information reflected in those copies (Drahoš, 2016). Since, it is an intangible object, so it must be expressed in some distinguishable way to be protected. The convention establishing the World Intellectual Property Organization (WIPO), concluded In Stockholm on July 14th. 1967. Provides that. 'Intellectual property' shall include rights relating to:

1. Literary, artistic and scientific works,
2. Phonograms and broadcasts.
3. Inventions in all fields of human endeavor,
4. Scientific discoveries,
5. Industrial designs.
6. Trademarks, service marks and commercial names and designations,
7. Protection against unfair competition and all other.

Rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. (Article 2/V III) World Intellectual Property organization (WIPO) has recognized the above mentioned citation of human mind as eligible to be protected under the law of Intellectual Property. All the works mentioned above, except scientific discoveries, are protected at national and international levels (Singh, 2004). No national law or international treaties gives any property rights in scientific discovery (Treaty, 2014). Scientific discovery is different from invention, scientific discovery may be defined as "the recognition of phenomena, properties or laws of the material universe no hitherto recognized and capable of verification". IP is usually divided into two branches as- (a) Industrial Property. and (b) Copyright. The WIPO and WTO directs to its member States to protect these creation of human intellect However all these objects are not protected in all over the countries (Oxley, 1999).

Although the kind of intellectual property is the creations of human mind. These includes inventions, industrial designs, trademarks, service marks, commercial names and designations, indication of source, appellations of origin and the protection against unfair competition. The Paris Convention for the Protection of Industrial Property provides this subject matter of industrial property as protected by its provision. Let's define different kinds of Industrial property (Bodenhausen, 1968).

Inventions are new solutions to specific technical problems. Such solutions must, naturally, rely on the properties or the laws of the material universe. It means any manner of new manufacture and includes an improvement and an alleged invention. It means any new and useful art, process, method or manner of manufacture, machine apparatus or other article or substance produced by manufacture and includes any new and useful improvement of any of them, and an alleged invention (Hobsbawm and Ranger, 2012). In order to be protected an invention must fulfill the following three conditions:

- 1) It must be new,
- 2) It must involve an inventive step,

3) It must be industrially applicable.

Industrial design is the ornamental or aesthetic aspect of useful article. Such aspect may be of the shape, or pattern or color of the article, which must appeal to the sense of sight. The designed article must be reproducible by industrial means and that is why it is called industrial design. Mass production need not only to meet the public's expectations as to their utility, but also to appeal in their appearance to the taste of concerned purchaser in order to be efficient and saleable product. The ornamental or aesthetic aspect of the design must appeal to the eye and reproducible by industrial means. If it is not 'industrially reproducible' the creation will not be protected under the category of industrial property rather by the copyright law (Jewkes, 1969).

The protection for industrial property may not be availed if the design-

1. Do not give special appearance to a product of industry or handicraft and cannot wave as a pattern.
2. Serve solely to obtain a technical result,
3. Are not new or differ only in minor respects from earlier.
4. Are contrary to public order or morality, or is not industrially reproducible.

Trademark is a distinctive sign which is used to distinguish the products of one business from those of another business. It is a sign which allows the customer to identify the manufacturer of a product. Any visible symbol in the form of word, a device, or a label or a sign or combination of such signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings shall be eligible for constituting as trademark. A trademark is a type of intellectual property, and typically a name, word, phrase, logo, symbol, design (Ulmer, 2003). Image or a combination of these elements. A trademark is a distinctive sign or indicator used by an individual, business organization, or other legal entity to identify that the products or services to consumers and to distinguish its products or services from those of other entities e.g. McDonald's & Coca-Cola®, Wikipedia & It distinguished the goods manufactured or otherwise dealt in by a particular person from similar goods manufactured or dealt in by other person. A trademark can be used for perpetually subject only to the condition that it is renewed periodically. The owner of a trademark enjoys exclusive rights over the mark. These exclusive rights can be obtained through use or registration. Generally, a trademark is designated by the following symbols:

1. TM (for an unregistered trade mark, that is, a mark used to promote or brand goods)
2. (For a registered trademark) generally a trademark performs the following functions:
 1. It distinguishes or differentiates the product of different enterprises,
 2. It creates an image for the products,
 3. It guarantees the quality of the products.
 4. It advertises the products.
 5. It identifies the product and its origin.

Two special kinds of marks namely collective marks and certification marks have also to be taken in to account. Collective marks refers to a mark which is usually belongs to a group or association of enterprises and its use is reserved for the member of that group or association. Certification marks refers that the goods bearing the mark have been certified by the proprietor of the mark as to certain characteristics of the goods like geographical origin, ingredients and so on (Wagner (2016).

A mark which is used for the purpose of distinguishing the service of one enterprise from the service of another enterprise is called service mark instead of trademark (Schmoch, 2003). Commercial names and designation or trade names are the names. Terms or designations which serve to identify and distinguish an enterprise and its business activities from those of other enterprises. A trademark or service mark differentiate the goods or services of different enterprise, whereas trade names identifies the entire enterprise, without making any reference to the goods or services. And symbolized the reputation and goodwill of the business as a whole (Bado and Detrick, 1987). Indication that identifies a goods as originating in the territory or a region locality in that territory, where a given quality, or reputation or other characteristics of the goods is essentially attributable to its geographical origin. Such

indication may be constituted by any denomination, expression or sign indicating that a product or service originates in a country or region or a specific place (Calboli, 2006).

4. UNFAIR COMPETITION

Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition (Rangnekar, 2004). The following in particular shall be prohibited:

1. All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor.
2. False allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor.
3. Indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods.

In the sense of copyright the author's idea is the main object (Correa, 2007). It is particularly deals with that form of creativity concerned essentially with mass or public communication, and not only with printed communication but also such matters as sound and television broadcasting, films for public exhibition in cinemas, and computerized systems for the storage and retrieval of information. Copyright protects the owner of the rights of his works against those who make unauthorized copy of the form of expression of the original work of the author. The copyright law protects the creativity of the author in the choice and arrangement of the words, musical notes, colors, shapes and so on. Following types of works are protected under the law of copyright:

1. Literary works- novels, short stories, poems dramatic works, any other writings etc.
2. Musical works- songs, choruses. Operas, musicals, operettas etc.
3. Artistic works- drawing, painting. Etching, lithographs (as two dimensional) or sculptures, architectural (as three dimensional), pure art, for advertisement (as destination).
4. Maps and technical drawing.
5. Photographic works- portraits, landscapes current events etc.
6. Motion pictures (cinematographic work) theatrical exhibition, television broadcasting, film dramas, documentaries, newsreels, filming live, cartoons, pictures on transparent film pictures on electronic video tapes.
7. Others- work of applied arts (artistic jewelry, lamps, wallpaper, furniture), and choreographic works, phonograms records, tapes and broadcast also as works.

A copyright holder may own the works as he wishes and none other can use the works without the authorization of the author (Ficsor, 2002). The rights vested to author as protected are described as exclusive rights. The exclusive rights include the following:

1. The right to reproduce the work,
2. The right to control the public performance of the work.
3. The right to control the sound recording of the work.
4. The right of motion picture (i.e. visible recording),
5. The right to broadcast the work,
6. The right to translate (transform the language) and adopt (modification) the works.

A copy right holder also enjoys moral rights. Enjoyment of moral rights is independent of his economic rights and this right remains in force even after the transfer of right. Moral rights denotes the rights of the author to-

1. Claim authorship of the work and
2. Object any distortion, mutilation, or other modification of, or other derogatory action in relation to the work that would be prejudicial to the honor or reputation of the author.

There are three other rights that arise from the original work and these rights are called neighboring rights (Ficsor, 2002). These neighboring rights protects those who assist the creator of the intellectual works, in

communicating his message and help to disseminate work in public at large, enjoys some rights. The neighboring rights includes -

1. The rights of performing artists in their performance.
2. The rights of the producers of phonograms in their phonograms,
3. The rights of broadcasting organizations in their radio and television programs.

The protection of the IP depends on the laws of different countries and it varies from country to country (Merges *et al.*, 2003). In our country different IP is protected in following ways-

1. An invention is protected by the grant of patent from the concerned authority upon registration. The patent certificate refers the title of the invention.
2. A design is protected by the issuance of a certificate by the concerned office upon registration. The certificate acts as the title of that design.
3. A trademark is protected either upon registration by the issuance of certificate or by the principles of common law.
4. Copyright protection does not require any registration. Publication of work can alone justify as being eligible for the copyright protection.
5. Confidential information, secret information and know can be protected by the principles law of contract and law of tort.

The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up (Rahl, 1969).

5. ISSUES AND CHALLENGES

The case of issue of intellectual property let's discussed about the software product related item . Such as many specialists and programmers use wide open source software or incorporate such software to their work in expanding products or technology. However the user or incorporation of such available source software by way of a selling company can result in possession, licensing, and conformity issues for an acquirer. A definite issue is the fact that some open up source licenses require any individual modifying and distributing the wide open source software to make its source code generally open to other users also to certificate its software to third party under the same conditions as the open up source permit. For an acquirer counting on the capability to specifically use the seller's technology, open up source issues could turn into a package killer. The acquirer will expect representations and guarantees from owner to the result that no open up source or similar software has been integrated into some of its software or products in a manner that would obligate owner to reveal to any people of the foundation code of amazing software or IP in its products, which there has been no infringement or violation of any available source licensing contracts. Of course, owner will try to limit such representations by knowledge and materiality qualifiers. The problem most of us face is the training about how to ensure these valuable of intellectual property protection under the law are usable, as well as how to ensure that their value is conserved. When confronted with relentless infringement on a massive size . However intellectual property protection under the law cannot flourish in their core economical function of incentivizing development if protection under the law are disregarded or are very costly to enforce. Even inadequate protection under the law regimes are even worse than no privileges at all. That's where government will come in. Many countries now say that intellectual property protection under the law are private privileges. In some instances the correct compensation is through the civil courts, and privileges holders can be kept to begin it. The thing is that whenever infringement is so popular and so harmful that legitimate companies are at risk of collapse, it is no more a private subject. As administration stand directly behind businesses,

designers and innovators of most types. In that case can not sit down by while protection under the law which may have been developed to nurture of invention and encourage investment are rendered incapable. That is true whether it's triggered by the deliberate habit of serious infringers or by the unthinking activities of men and women who don't appreciate the damage that is triggered by observing free loading sites or buying "bargain" counterfeit goods.

6. CONCLUSION

In this paper shows the of intellectual property right , issues and problem . In simple sense intellectual property (IP) is a group of property which includes intangible masterpieces of the human being intellect, and mostly includes copyrights, patents, and trademarks. In addition, it includes other styles of protection under the law, such as trade secrets, promotion rights, moral privileges, and privileges against unfair competition. Creative works like music and books, as well as some discoveries, innovations, words, phrases, icons, and designs, can all be covered as intellectual property. It had been not before 19th century that the word "intellectual property" commenced to be utilized, and not before late 20th century which it became commonplace in a lot of the world. The primary reason for intellectual property legislations is to encourage the creation of a huge variety of intellectual goods. To do this, the law provides people and businesses property to protection under the law that to the info and intellectual goods they create, usually for a restricted time frame. Because they can earn benefit from them, thus giving financial incentive because of their creation. These monetary incentives are anticipated to stimulate development and donate to the technological improvement of countries, which will depend on the amount of protection awarded to innovators.

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