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Propinquity of Intellectual Property and Trade Laws

■ **Ravneet Kaur**

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orld economy has faced the most profound transformation in the last two decades which has led to an increase in the world's commercial flow, rhythm and magnitude. Also, there has been substantial advancements in the field of computing, telecommunications, biotechnology, chemistry for uses such as pharmaceutical uses among others. And, this has changed the productive structures of various economies, thereby leading an increase in inclination towards Intellectual Property (hereinafter referred to as 'IP') and its protection thereof.

Furthermore, from a global perspective, due to the establishment of free-trade zones, international economic and trade relations have grown rapidly, which has resulted in increased awareness for protection of rights that come along with ones IP. Before delving deeper, it is important to understand the concept of Intellectual property.

According to the World Intellectual Property Organization, IP refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.¹ Every country have laws to protect intellectual property for two main reasons-

1. To give statutory expression to the moral

and economic rights of creators in their creations and the rights of the public in access to those creations.

2. To promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.²

Laws governing IP form a formal mechanism by which property is established as intellectual assets.

PROTECTION OF INTELLECTUAL PROPERTY

Intellectual property rights (IPR) refers to the general term for the assignment of property rights through patents, copyrights, and trademarks. And, these property rights allow the holder to exercise a monopoly on the use of an item for a specified period. By restricting imitation and duplication, monopoly power is conferred, but the social costs of monopoly power may be offset by the social benefits of higher levels of creative activity encouraged by the monopoly earnings.³ International trade is a major factor that influences the health and stability of any economy. The international exploitation of IP is crucial for trade, foreign direct investment (FDI) and technology licensing across borders. There has been a severe demand for a systematic change arising out of friction



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between the increasing need for international exploitation of intellectual assets and the territorial restraint over IPR. Countries across the globe have tried having bilateral and multilateral negotiations on IPR, which has solidified minimum required standards to an extent. However, the most important achievement is the introduction of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), an initiative by the World Trade Organisation (WTO).⁴

Furthermore, IP is traded every day between people, nations, and industries to benefit the global economy. Effort must be made to protect their owners' rights while simultaneously advancing their shared accessibility. For instance, in an international market of any product or service, it is highly important to protect one's patent. In certain fields, various concepts of protections have been developed and one such protection is granted to trade secrets. Companies

develop valuable industrial processes and strategies that are not patentable and maybe are not even worth patenting expenses but are more advantageous to a company if they are not revealed through the patenting process. These strategies and processes are called trade secrets.⁵ They are protected by legal liability rules against unfair expropriation. However, IP is a matter of national law, and IPR granted in one nation are not legally recognized and enforceable in another, unless the owner intends to protect his IPR in a particular country.

TRADE-RELATED ASPECTS OF THE INTELLECTUAL PROPERTY RIGHTS

Trade-Related Aspects of the Intellectual Property Rights, as an initiative of WTO, was a result of efforts on part of certain governments and private sector organisations to establish adequate and effective levels of protection of IPR. The idea of trade, and what makes it important for societies, has evolved beyond merely shipping

goods across borders. Today, innovation, creativity and branding represent a large amount of the value that changes hands in international trade. The TRIPS Agreement plays a crucial role in facilitating trade in knowledge and creativity, in resolving trade disputes over intellectual property, and in assuring WTO members the latitude to achieve their objectives. The Agreement is legal recognition of the significance of links between intellectual property and trade.⁶

The extent of protection and enforcement of IPR vary widely around the world; and as intellectual property became more important in trade, these differences became a source of tension in international economic relations. The new internationally-agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability and settle the disputes more systematically.⁷ The TRIPS Agreement is an attempt to narrow the gaps so that these rights are protected and enforced around the world, and bring them under common international rules. It establishes minimum standards of protection and enforcement that each government has to provide the intellectual property held by nationals of fellow WTO members.

ECONOMIC INDICATORS OF INTELLECTUAL PROPERTY ISSUES

The economic growth of a country is likely to be directly affected by IPR by encouraging innovations in different sectors that in turn improves productivity. As previously mentioned, IPR can affect the inflows of FDI,





technology transfers and trade that may intervene on the economic growth of a country. Studies have found the relationship between IPR protection and the level of development non-linear. This suggests that patent protection tends to decline in strength as economies move beyond the poorest stage into a middle-income stage in which they have greater abilities to imitate new technologies.⁸

There exist certain unambiguous economic indicators that conclusively quantify trade-related intellectual property. A national or sector trade balance is one of many indicators employed at times by the media, politicians and multiple business groups. This measure is often contradicted and agreed upon on the grounds that it is purely an accounting phenomenon and is not apt for policy purposes. While trying to measure the success of intellectual property by comparing the number of patent filings or copyright registrations in one country with others is often considered inaccurate.⁹

The impact of copyright on an economy is not very clear. The economic analysis can hardly predict whether lowered or increased copyright provisions lead to the publications of more or fewer books, creation of more or less films and movies, better development of websites and pro or anti-competitive business practices will be unleashed. It can be contended that there is at least some economic impact arising from copyright protection if we were to look at the extent of which income distribution can be considered a matter of economic policy and not an issue of social policy.

CASE ANALYSIS OF INTELLECTUAL PROPERTY AND TRADE LAWS

In the renowned case of *First Flight Associates v. Professional Golf Co., Inc.*¹¹, Professional Golf Company (hereinafter referred to as 'Pro Golf') manufactured and sold golf equipment under a highly recognized brand name "First Flight". In the year 1961, Pro Golf entered into an agreement with Robert Wynn, who was to act as a foreign sales representative in

Japan with no formal agency or distribution agreement. Subsequently, Robert Wynn incorporated First Flight Associates, Inc. (hereinafter referred to as 'FFA') to carry out the activities as per the agreement with Pro Golf in Japan. The said parties later executed a trademark agreement that entitled FFA to use trademark "First Flight" that was ideally Pro Golf's on golf soft goods in exchange of royalty in the year 1967.

FFA tried sublicensing the trademark, for a royalty much larger than what it was paying to Pro Golf, to another Japanese company called 'Teito'. But, when Pro Golf attempted to terminate its Japanese sales agency relationship with FFA, FFA brought a lawsuit for breach of contract against it. Under the trademark law of the U.S.A, sales agency contracts are terminable at will; however, Pro Golf was not entitled to royalties that was earned by FFA on soft goods bearing "First Flight" trademark as it failed to protect its rights to use the said trademark under Japanese Law. And, due

to lack of protection specially under Japanese law, their trademark was not recognized.

Indian Jurisprudence - It has been established that even if a brand has not been marketed in India, but its trademark has acquired trans-border reputation,¹² it will still be granted protection in India. Therefore, the jurisprudence is that goodwill is not limited to a particular country. In the landmark decision delivered by the Bombay High Court in *Kamal Trading Co., v. Gillette, UK Ltd.*,¹³ the Court duly noted that goodwill of a brand is not limited to a particular country because trade is international and leads to goods being transported from one country to another. Goods are not limited to a country because their marketing strategies are often targeted globally. In *NR Dongre v Whirlpool Corporation*¹⁴, a suit of passing off was brought by Whirlpool Corporation in order to restrain the appellants from manufacturing, advertising and selling products using the trademark “Whirlpool”. The claim of Whirlpool was based on prior use of the mark and a trans-border reputation indicating that any goods marketed with the use of the mark gave the impression of it being a good marketed by it. The Court

found that the trademark “Whirlpool”, for the longest period of time had been associated with the respondents and for the same, its trans-border reputation extended to India.

It is evident that IP rights constitute one of the most significant intangible assets for businesses around the world. As aforementioned, their benefits are tangible and material; however, there are also certain constraints like limitation of time and space. The protection of intellectual property is essential in fostering international trade. Businesses are now operating in an increasingly competitive global marketplace. Having strong domestic and international protection of intellectual property is crucial for success in the global marketplace. IPR will remain part of mostly all international trade agreements, but varying standards when added to less discriminatory enforcements will characterize future global activity in IPR. The transformation in approach to trade-related IPR stands as evidence of evolution of social, cultural and political scenarios. This means that we are moving towards a finely tuned understanding of the associations between creation, innovation, and wider, more efficient, dissemination of IP.¹⁵ 



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¹J. Mossinghoff, G., *The Importance of Intellectual Property Protection in International Trade*, 7(2), 3-7. *B.C. Intl & Comp. L. Rev.* (1984)

²WIPO *Intellectual Property Handbook*, www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf

³Glossary of Statistical Terms, stats.oecd.org/glossary/detail.asp?ID=3236

⁴Raizada, G. and Singh Dhillion S., *Impact of Intellectual Property Rights on International Trade: Evidence from India*. *JIPR* 22(1), 206. (2017)

⁵Abhik Guha Roy, *Protection of Intellectual Property in the Form of Trade Secrets*, *Journal of Intellectual Property Rights*, Vol 11, May 2006, pp 192-200

⁶Intellectual property: protection and enforcement, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm

⁷Verma, S., *Impact of the Intellectual Property System on Economic Growth, Fact-Finding Surveys and Analysis in the Asian Region*. *WIPO-UNU Joint Research Project*, 3-5 (2019), ⁸Supra 5

⁹Ilias, S. and Fergusson, *Intellectual Property Rights and International Trade*, *CRS Report for Congress*, 17-19 (2011), ¹⁰Ibid

¹¹*First Flight Associates v. Professional Golf Co. Inc.*, 527 F.2d 931 (6th cir 1975) 189 U.S.P.Q. 497 (1975)

¹²Venkataraman.A., *Approach to Trans-border Reputation and Territoriality: India-US Poles Apart?*, <https://spicyip.com/2015/02/approach-to-trans-border-reputation-and-territoriality-india-us-poles-apart.html>

¹³*Kamal Trading Co., v. Gillette, UK Ltd.* (1988) I.P.L.R 135 (India), ¹⁴*NR Dongre v. Whirlpool Corporation* (1996) 5 S.C.C. 714 (India)

¹⁵Srivastawa, B. and Rai, A., *Management of intellectual property rights in India: An updated review*, *J Nat Sc Biol Med* 2(1), 3 (2011)