

EVOLUTION OF INTELLECTUAL PROPERTY PROTECTION AND IMPLICATIONS

FOR INDIA - Justice V. Ramasubramanian¹

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Abstract:

This article discusses the evolution of intellectual property through the ages, from times when people did not believe in asserting the rights of intellectual property to the present day, which has seen the development of a robust intellectual property system. This article emphasizes the need for balancing private rights with a larger public interest and adapting the intellectual property system to national, legal and social contexts of developing countries.

Keywords: Evolution, Intellectual Property, Intellectual Property Rights, patents, trademarks, copyright, traditional knowledge, human rights, competition law, private rights, public interest

In India, the concept that one could have property rights over the products of one's intellectual labour is yet to gain a firm footing because of the fact that traditionally India is a country where people never believed in asserting rights over intellectual properties. Factually, intellectuals were identified more with poverty than with property or prosperity and people took pride in proclaiming that the Goddess of Wealth (Lakshmi) and Goddess of Learning (Saraswathi) never co-existed. In his immortal compilation of mystic poems 'Tirumantiram',⁴ the great Siddha Tirumular⁵ says,

¹ Hon'ble Justice Shri V. Ramasubramanian – Judge, High Court of Madras. This article is an adaptation of the speech delivered by the Hon'ble Judge at the seminar on "Managing and Monetizing Intellectual Property Rights" organized by the Indo-American Chamber of Commerce on January 24, 2009.

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⁴ The Tirumantiram, is a Tamil religious poetic work written in the tenth CCE by Tirumular. Available at: <http://en.wikipedia.org/wiki/Tirumantiram>

⁵ Tirumular (also spelt Thirumoolar etc., originally known as Sundaranātha) was a Tamil Shaivite mystic and writer, considered one of the sixty-three Nayanars and one of the 18 Siddhars. His main work, the Tirumantiram (also

“யான்பெற்ற இன்பம் பெறுக இவ்வையகம்
வான்பற்றி நின்ற மறைப்பொருள் சொல்லிடின்
ஊன்பற்றி நின்ற உணர்வுறு மந்திரம்
தான்பற்றப் பற்றத் தலைப்படுந் தானே”

The translation in English of the above verse reads:

“*All the world may well attain the Bliss I have;
Who hold firm to the Heavenly secret the Books impart,
Who chant the hymns that thrill the flesh
And swell the heart,
They, sure, take their place in foremost rank*”.⁶

The gist of the above verse which refers to passing on ‘Bliss to Humanity’ is that the pleasure experienced by one should be shared with the whole world.

Similarly, in his agelessly elegant and universally acclaimed Tamil classic ‘Thirukkural’,⁷ Thiruvalluvar⁸ says,

“தாமின் புறுவது உலகின் புறக்கண்டு
காமுறுவர் கற்றறிந் தார்”.

The translation in English of the above couplet reads:

sometimes written Tirumanthiram, Tirumandhiram, etc.), which consists of over 3000 verses, forms a part of the key text of the Tamil Shaiva Siddhanta, the Tirumurai. Available at: <http://en.wikipedia.org/wiki/Tirumular>

⁶ See., Translation from: <http://www.himalayanacademy.com/resources/books/tirumantiram/Invocation.html>

⁷ Thirukkural (Tamil: திருக்குறள் also known as the Kural) is a classic of couplets or Kurals (1330 rhyming Tamil couplets) or aphorisms celebrated by Tamils, authored by Thiruvalluvar. Available at: <http://en.wikipedia.org/wiki/Tirukkural>

⁸ Thiruvalluvar (Tamil: திருவள்ளுவர்) was a celebrated Tamil poet who wrote the Thirukkural, a work on ethics in Tamil literature. Thiruvalluvar's period (based on the Thirukkural per se) is between the second century BC and the eighth century AD. Available at: <http://en.wikipedia.org/wiki/Thiruvalluvar>

“Their joy is joy of all the world, they see; thus more

The learners learn to love their cherished lore.

i.e., the learned will long (for more learning), when they see that while it gives pleasure to themselves, the world also derives pleasure from it”⁹

According to Thiruvalluvar, ‘the greatest incentive for a learned person is to know that his learning contributes to make the world happy’. This is why most of the proud products of our culture and the contribution of our ancestors to arts, literature, social and natural sciences and technology, remained in anonymity and remains the reason for the loss of recognition on contribution of our ancestors towards intellectual labor and culture.

For instance, modern scientists have humbly admitted that the ecological management practiced today by the tribes of India's Northeast is far superior to anything they could teach them. A good example is the use of alder (*Alnus nepalensis*), which has been cultivated in the *jhum* (shifting cultivation) fields by the Khonoma farmers in Nagaland for centuries. It has multiple usages for the farmers, since it is a nitrogen-fixing tree and helps to retain the soil fertility. Its leaves are used as fodder and fertilizer, and it is also utilized as timber. One could cite numerous such examples.¹⁰

For example, algebra, geometry, algorithm, higher branch of mathematics like numerical analysis, calculus, etc. and more importantly the concept of ‘zero’ were translated by the Arab mathematicians to perfect the decimal system by giving the world its current system of

⁹ See., Translation from: http://www.infitt.org/pmadurai/pm_etexts/utf8/pmuni0153.html

¹⁰ See, Rajiv Malhotra and Jay Patel, “*History of Indian Science & Technology*”, Overview of the 20-Volume Series. Available at: <http://www.indianscience.org/>

enumeration which we call Arab or Arabic numerals, which are originally Indian numerals.¹¹ The calculation of eclipses, the earth's circumference and the heliocentric theory of gravitation which were propounded by Indian astronomers were a thousand years later articulated by Copernicus and Galileo.¹² All these knowledge were shared with the world without any recognition to the contributors.

EVOLUTION OF INTELLECTUAL PROPERTY

“Modern usage of the term *intellectual property* gained momentum after the establishment of the World Intellectual Property Organization (WIPO)¹³ in 1967, but it did not enter popular usage until passage of the Bayh-Dole Act in 1980.¹⁴ The earliest use of the term intellectual property appears to have occurred in the ruling of Massachusetts Circuit Court in October 1845 in the patent case *Davoll et al. v. Brown.*, in which Justice Charles L. Woodbury wrote “... only in this way can we protect intellectual property, the labors of the mind, productions and interests are as much a man's own, ..., as the wheat he cultivates, or the flocks he rears”.¹⁵ The concept of ownership over discoveries as property that can be dealt with like real property dates even earlier. Section 1 of the French law of 1791 stated, “All new discoveries are the property of the author; to assure the inventor the property and temporary enjoyment of his discovery, there shall be delivered to him a patent for five, ten or fifteen years”.¹⁶ In Europe, French author A. Nion

¹¹ Ref., Sudheer Birodkar and Lavlesh, “*India's Contribution to the World's Culture*”, available at: http://www.geocities.com/Lavlesh/sudheer_contributions/math.html

¹² *Ibid.*, available at: http://www.geocities.com/Lavlesh/sudheer_contributions/astro.html

¹³ The World Intellectual Property Organization (WIPO) is one of the 16 specialized agencies of the United Nations. WIPO was created in 1967 "to encourage creative activity, to promote the protection of intellectual property throughout the world". Available at: http://en.wikipedia.org/wiki/World_Intellectual_Property_Organization

¹⁴ The Bayh-Dole Act or University and Small Business Patent Procedures Act is United States legislation dealing with intellectual property arising from federal government-funded research, adopted in 1980. Available at: http://en.wikipedia.org/wiki/Bayh-Dole_Act

¹⁵ See 1 Woodb. & M. 53, 3 West. L. J. 151, 7 F. Cas. 197, No. 3662, 2 Robb. Pat. Cas. 303, Merw. Pat. Inv. 414.

¹⁶ See “A Brief History of the Patent Law of the United States”, available at: <http://www.ladas.com/Patents/USPatentHistory.html>

mentioned *propriété intellectuelle* in his *Droits civils des auteurs, artistes et inventeurs*, published in 1846”.¹⁷

“The origin of the concept of Intellectual Property can potentially be traced back even further. Jewish Law¹⁸ includes several considerations whose effects are similar to those of modern intellectual property laws, though the notion of intellectual creations as property did not seem to exist – notably the principle of Hasagat Ge’vul¹⁹ (unfair encroachment) was used to justify limited-term publisher (but not author) copyright in the 16th century. The Talmud²⁰ contains the prohibitions against certain mental crimes (further elaborated in the Shulchan Aruch²¹), notably Geneivat da’at²² (literally “mind theft”), which some have interpreted as prohibiting theft of ideas, though the doctrine is principally concerned with fraud and deception, not property”.²³

Patents

In so far as the history and evolution of Patents, three periods stand out as important, namely:

¹⁷See., http://en.wikipedia.org/wiki/Intellectual_property

¹⁸ Halakha (Hebrew: הלכה) — also transliterated Halocho and Halacha — is the collective body of Jewish religious law, including biblical law (the 613 mitzvot) and later talmudic and rabbinic law, as well as customs and traditions. Judaism classically draws no distinction in its laws between religious and ostensibly non-religious life. Hence, Halakha guides not only religious practices and beliefs, but numerous aspects of day-to-day life. Halakha is often translated as "Jewish Law", although a more literal translation might be "the path" or "the way of walking." The word is derived from the Hebrew root that means to go or to walk. Available at: http://en.wikipedia.org/wiki/Jewish_law

¹⁹ Rabbi Israel Schneider in “*Jewish Law and Copyright*” states: Rabbi Sofer finds the antecedent for the protection of author's right under the rubric of "Hasagat Ge'vul" - the legislation promulgated to prohibit the encroachment upon the economic and commercial rights of others. Available at: <http://www.jlaw.com/Articles/copyright2.html>

²⁰ The Talmud (Hebrew: תלמוד talmūd "instruction, learning", from a root lmd "teach, study") is a record of rabbinic discussions pertaining to Jewish law, ethics, customs, and history. It is a central text of mainstream Judaism. Available at: <http://en.wikipedia.org/wiki/Talmud>

²¹ The Shulchan Aruch (Hebrew: שולחן ערוך, literally: "Set Table") (also Shulhan Aruch or Shulchan Arukh) is a codification, or written manual, of halacha (Jewish law), composed by Rabbi Yosef Karo in the 16th century. Together with its commentaries, it is considered the most authoritative compilation of halakha since the Talmud. Available at: http://en.wikipedia.org/wiki/Shulchan_Aruch

²² Geneivat da'at (Hebrew: דעת גניבת, lit. "stealing of the mind/knowledge") refers to a kind of dishonest misrepresentation or deception. It is a concept in Jewish law and ethics, mobilized in a wide spectrum of interpersonal situations, especially in business. Available at: http://en.wikipedia.org/wiki/Geneivat_da%27at

²³ Ibid. 17

(1) **Privileges (15th to 18th centuries):** Sovereign²⁴ of a country granted monopolistic rights sometimes as a concept of utility and otherwise as an act of favoritism through privileges. Privileges were instruments by which the sovereign afforded special rights to individuals. These privileges could contain rights of very differing kinds for the beneficiary, in particular exemption from the guild rules, exemption from taxation, allocation of land, interest-free loans, naturalization or even titles of nobility. The Republic of Venice was the first to adopt a Statute for this form of privilege “Parte Veneziana” of 1474 that laid down the principles for the grant of privileges which formed the basis for modern patent system such as the usefulness of new inventions for the State, the exclusive rights of the first inventor for a limited period and the penalties for infringement.²⁵

(2) **National Patent Laws (1790 to 1883):** Patent protection was codified during this period wherein the rules, procedures and regulations for seeking the grant of patents were set out. Almost simultaneously, the United States (1790) and France (1791) adopted patent laws for the grant of a patent to all inventors provided that certain objective conditions were met. The new system was extended throughout the early decades of the 19th century, particularly as a result of French law being applied in the French colonial countries. The inventors and their associates, the industrialists of the technically most developed countries, reacted and launched the idea of international protection for inventions.²⁶

(3) **Internationalization (1883 to the present):** Foreigners were generally able to obtain domestic patents but it remained fairly rare for one and the same invention to be patented in a

²⁴ A sovereign is a supreme lawmaking authority. Available at: <http://en.wikipedia.org/wiki/Sovereignty>

²⁵ See. Anon., World Intellectual Property Organization, *Introduction to intellectual property: theory and practice* (Kluwer Law International), 1997, p. 17.

²⁶ Ibid. 25, pp. 17-19.

number of countries. At the 1873 Universal Exposition in Vienna, a patent congress submitted various ideas in that respect. At Paris, during a further universal exposition, an international congress began with drawing up a solution for the international protection of industrial property. A diplomatic conference finally led, on March 20, 1883, to the signing of the convention that created the Union for the Protection of Industrial Property. Protection of inventions outside their country of origin is developed along with international trade and worldwide or regional conventions assist this development. Internationalization started with the signing of the Paris Convention. At the Stockholm Diplomatic Conference in 1967, an agreement was reached to create WIPO which has become the specialized agency for UN for the protection of Intellectual Property.²⁷

Trademarks

In so far as Trademarks are concerned, they, as marks of origin, were affixed by makers of bricks, leather, books, weapons, etc. even in ancient cultures. These marks were used to signify the makers of the product, which even till today is an important element in trade mark law. The English word "brand" reflects the usage, as the marking was placed on cattle by farmers with hot irons. Paris Convention is the basic international convention in the field of industrial property including trademarks. It is supplemented by the Madrid Agreement on the International Registration of Marks, signed in 1891, a special union for members of the Paris Convention. The ratification of these international treaties and their transformation into national legislation has contributed substantially to transformed trademark laws.²⁸

²⁷ Ibid. 25, pp. 17-20.

²⁸ Ibid. 25, pp. 20-23.

Copyrights

Coming to the history of the law of copy rights, the First Copy Right Statute in England was the Statute of Anne, 1709. German Philosophers like Immanuel Kant saw copyright, not merely as a form of property right. They regarded the author's creative work as an extension of or the reflection of the author's personality in respect of which he was entitled by natural justice to be protected as a part of his personality. This concept led to the development of droit moral or moral rights (non economic rights of authors).²⁹ The international period of copy right protection began with the signing of the Berne Convention for the Protection of Literary and Artistic Works in 1886.³⁰

INTELLECTUAL PROPERTY RIGHTS (IPR) SYSTEM

The debate on whether the IPR system is a blight on free trade principles or the best method of stimulating inventions is more than a century old and it is neither new nor peculiar to India. In Europe, John Stuart Mill said: “...an exclusive privilege, of temporary duration is preferable [as a means of stimulating invention]; ...”³¹ But a contra view was expressed in the Economist way back in 1851, as: “The privileges granted to inventors by patent laws are prohibitions on other men, and the history of inventions accordingly teems with accounts of trifling improvements patented, that have put a stop, for a long period, to other similar and much greater improvements...The privileges have stifled more inventions than they have promoted...Every

²⁹ Moral rights are rights of creators of copyrighted works generally recognized in civil law jurisdictions and first recognized in France and Germany, before they were included in the Berne Convention for the Protection of Literary and Artistic Works in 1928. Available at: [http://en.wikipedia.org/wiki/Moral_rights_\(copyright_law\)](http://en.wikipedia.org/wiki/Moral_rights_(copyright_law))

The term "moral rights" is a translation of the French term "droit moral," and refers not to "morals" as advocated by the religious right, but rather to the ability of authors to control the eventual fate of their works. An author is said to have the "moral right" to control her work. The concept of moral rights thus relies on the connection between an author and her creation. Moral rights protect the personal and reputational, rather than purely monetary, value of a work to its creator. Betsy Rosenblatt, Harvard Law School, “*Moral Rights Basics*”, available at: <http://cyber.law.harvard.edu/property/library/moralprimer.html>

³⁰ Ibid. 25, pp. 24-25.

³¹ See., Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*: (London) September 2002, p. 19.

patent is a prohibition against improvements in a particular direction, except by the patentee, for a certain number of years; and, however, beneficial that may be to him who receives the privilege, the community cannot be benefited by it...On all inventors it is essentially a prohibition to exercise their faculties; and in proportion as they are more numerous than one, it is an impediment to the general advancement... ”³²

To an American, the concept of a patent as a human right is particularly hard to grasp. Patent rights are not, like rights in real property, anterior to the constitutional scheme. Rather, it is given to Congress to create them. That Congress has no obligation to do so, furnishes some evidence that the Framers of the Constitution did not consider a patent as a fundamental right. Thomas Jefferson, who as Secretary of State was the first administrator of the patent system, says:

"Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made anyone thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He, who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine; receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space,

³² Machlup, F. & Penrose, E. (1950) "The Patent Controversy in the Nineteenth Century". The Journal of Economic History, vol. 10:1, p.24.

*without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody”.*³³

Further evidence is provided by the nature of the authority, the Framers actually gave to Congress. When Congress chose to create patent rights, its power was highly restricted by the following mandate:

*“The Congress shall have power... To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”.*³⁴

Four features of this grant are especially notable. First, is the clear reference to a purely utilitarian purpose - to promote Science (which at the time, meant knowledge) and to encourage the production of useful Arts (i.e., the products of what we now call science). Second, no matter how long the creative work retains its value, the creator can enjoy exclusivity for only "limited times". The value that endures belongs to the public. Third, only "writings" and "discoveries" are protectable. Ideas principles of nature, products of nature, and raw facts - no matter how valuable likewise belong to the public. Finally, while Congress can give creators the right to exclude

³³ Dreyfuss, Rochelle Cooper, Patents and Human Rights: Where is the Paradox?, *New York University - School of Law*, (Public Law and Legal theory Research Paper Series), Paper No. 06-29, p. 3.

³⁴ *Ibid.* 33, pp. 3-4

others, the Constitution does not recognize any affirmative rights of the patentee to publish, license, or even use her own work.³⁵

A scientific concept or mere idea cannot be the subject of a valid patent.³⁶ Justice Fortas³⁷ said:

*"... . But a patent is not a hunting license. It is not a reward for the search, but compensation for its successful conclusion. '(A) patent system must be related to the world of commerce rather than to the realm of philosophy'".*³⁸

In other words, a fundamental idea must go into the public domain, even though considerable ingenuity may have been required to formulate it, and even though society may owe a great debt to the originator for articulating it.³⁹ The patent domain is reserved for end products (applications of fundamental ideas).⁴⁰

PROTECTION OF INTELLECTUAL PROPERTY

There are different perspectives with regard to the level of protection to Intellectual property.

One perspective is that there is not enough protection in intellectual property law for innovation and creativity. As the world grows smaller and becomes more interconnected, there is a cry for

³⁵ Ibid. 33, p. 4

³⁶ *Diamond v. Diehr*, 450 U.S. 175, 195 (1981). Under the so-called "mental steps doctrine," earlier law was even more heavily focused on insuring the freedom to engage in mental activity and to exercise judgment, see, e.g. *In re Heritage*, 150 F.2d 554, 556 (C.C.P.A.1945)("purely mental acts are not proper subject matter for protection under the patent statutes").

³⁷ Abraham Fortas, a.k.a. Abe Fortas (June 19, 1910–April 5, 1982) was a U.S. Supreme Court Associate Justice. Available at: http://en.wikipedia.org/wiki/Abe_Fortas

³⁸ *Brenner v. Manson*, 383 U.S. 519, 536 (1966).

³⁹ See also *Metabolite Laboratories, Inc. v. Laboratory Corp.*, 370 F.3d 1354 (Fed. Cir. 2004), cert. dismissed, 584 U.S. ----, 126 S.Ct. 2921, 2922 (2006)(" The justification for the principle [excluding laws of nature from patentability] does not lie in any claim that 'laws of nature' are obvious, or that their discovery is easy, or that they are not useful. To the contrary, research into such matters may be costly and time-consuming; monetary incentives may matter; and the fruits of those incentives and that research may prove of great benefit to the human race. Rather, the reason for the exclusion is that sometimes too much patent protection can impede rather than 'promote the Progress of Science and useful Arts,' the constitutional objective of patent and copyright protection.") (Breyer, J, dissenting).

⁴⁰ Ibid. 33, p. 4

expanding the scope of existing Intellectual Property Rights ("IPRs"), such as patents, copyrights and trademarks, and to add new forms to protect new technologies undreamt of by those who created the existing forms of Intellectual Property. The other perspective is perhaps best caught in the words of two eminent professors of IP in the United Kingdom.⁴¹

William Cornish⁴² says:

"Freedom to compete should remain the norm from which any argument for a special case has to be made. That position is challenged by campaigns to make all investment values the subject of exclusive protection - the more so if the trademark model is followed, or indeed the e-commerce contract, so that no time limit is imposed on the investment right. It is IPRs and their relations, which should be treated as exceptions, each with its own objectives, and each proportionate to the achievement of its particular goal. In stressing proportion, one is claiming that there will frequently be countervailing interests - of new competitors as well as consumers - which need to be brought into account in shaping the reach of legal rights. It is vital to resist the sanctimony of property language, let alone higher absolutist ideals, when it is deployed in order to claim that there is little or no room for mediating such conflicts".⁴³

Similarly, David Vaver⁴⁴ says:

"Intellectual property cannot be treated as an absolute value. Against it, are ranged values of at least equal importance: the right of people to imitate others, to work, compete, talk and write freely, and to nurture common cultures. The way intellectual property should be reconciled with

⁴¹ Hector L MacQueen, "Towards utopia or irreconcilable tensions? Thoughts on intellectual property, human rights and competition law", *Edinburgh Law School Research Paper*, pp. 1 – 3.

⁴² William R. Cornish is Herchel Smith Professor of Intellectual Property Law at the University of Cambridge and Life Fellow of Magdalene College, Cambridge. Available at: www.wipo.int/amc/en/domains/panel/profiles/cornish-williamr.pdf

⁴³ W R Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (2004), 113-114.

⁴⁴ David Vaver, MA (BA, LLB(Hons), Auckland; JD Chicago), is an Emeritus Fellow of St Peter's College and former Director of the Oxford Intellectual Property Research Centre. He was a member of the UK Intellectual Property Advisory Committee, and chaired the University's IP Advisory Group until he retired at the end of 2007. Available at: http://denning.law.ox.ac.uk/lawvle/staff2.phtml?lecturer_code=vaverd

these values - or vice versa - has changed much overtime and continues to vary among countries and among legal systems".⁴⁵

AREAS OF CONFLICT

There appears to be three areas of conflict with regards to the protection of IP. One is Traditional Knowledge, the second is Competition Law, and the third is the Human Rights perspective.

Traditional Knowledge

Traditional knowledge refers to traditions, customs and practices of certain regions, religions and communities that might have existed for a long time in any form. A reference to two cases may be of interest. In one case, two US based Indians were granted patent⁴⁶ on turmeric's use in wound healing and this patent was assigned to Mississippi Medical Research Center, USA. The Council of Scientific and Industrial Research, New Delhi, located 32 references where turmeric is mentioned for its wound healing property, making it evident that the finding was not new, but was well known for years. Ultimately, the patent was proved invalid on grounds of lack of novelty and innovativeness and hence the patent was revoked. This decision made it clear that if a claimed invention can be traced to prior art in public domain, the patent becomes invalid. This case threw lot of insight into Traditional Knowledge.⁴⁷

The US Patent and Trademark Office granted patent⁴⁸ for a drink known as 'Ayahuasca', in 1986. It is a drink made by Shamans, an indigenous Amazon Basin tribe, using a plant grown in

⁴⁵ D Vaver, "Intellectual property: the state of the art", (2000) 116 LQR at 636.

⁴⁶ In 1995, two US based Indians at the University of Mississippi Medical Centre were granted US patent no. 5,401,504 on "use of turmeric in wound healing".

⁴⁷ Ref., Ibid. 31, p. 76

⁴⁸ An American, Loren Miller obtained US Plant Patent 5,751 in June 1986, granting him rights over an alleged variety of *B. caapi* he had called "Da Vine".

Amazon forests. It is used in religious and healing ceremonies. The applicant for patent named it as 'Da vine'. But the patent was revoked in 1999 after it was found that it was available in public domain and there was no novelty and innovativeness. However, the case took a different turn in 2001, when the applicant convinced the authorities about its novelty and again got a patent.⁴⁹

The above cases proved to be eye openers, which triggered the Government of India to create a "Traditional Knowledge Digital Library" (TKDL) and also include traditional knowledge in the International Patent Classification System.⁵⁰ Philippines has enacted a legislation to give ownership rights to indigenous communities, providing for Prior Informed Consent, access and benefit sharing and protecting their rights. On similar lines, the Bio Diversity Act was enacted in 2002 in India.⁵¹

In 1987, a medicine by name "JEEVANI" was developed from a plant found in the tropical forests of Southwestern India. The Kani tribe of Thiruvananthapuram, Kerala, possessed traditional knowledge of making Jeevani from Arogyapaacha plant. The medicine is believed to improve athletic performance, mental alertness and work output. The scientists at the Tropical Botanic Garden and Research Institute (TBGRI) undertook research and filed a patent application in India. Then they negotiated technology transfer agreement with Ayurvedic drug companies. TBGRI also created a trust called "Kani Samudaya Kshema Trust" to promote the welfare of the tribe and to ensure sustainable use and conservation of biological resources. The Trust is funded by TBGRI from out of the royalties received from the licensees. This is a great

⁴⁹ Ref., Ibid. 31, pp. 76-77

⁵⁰ Ref., Ibid. 31, p. 81

⁵¹ Ref., Ibid. 31, p. 79

example of how mutual sharing could form the basis for patenting indigenous or traditional knowledge.⁵²

Competition Law

The most famous application of competition law to IPRs was in the Magill case in 1995.⁵³ The subject matter of the case was TV guides in the UK and Ireland. Before the case, in the UK, for example, the British Broadcasting Corporation (BBC) and ITV exercised copyright in their program schedules so that while daily listings appeared in newspapers, the only weekly guides were their own Radio Times and TV Times; and each publication gave only the programs of the BBC and ITV respectively.⁵⁴ The European Court of Justice (ECJ) held that under Article 82 EC, copyright owners could be required, against their will, to license others to reproduce their copyright material in different forms. The remarkable decision of the *ECJ* was heavily and widely criticized at the time, for equating a property right what a monopoly - for saying, in effect, that if I shut you out of my house, you can challenge me for abusing a dominant position with regard to that building.⁵⁵ At the root of the decision, it seemed, was not so much the principles of competition law as a dislike of the IP regime which permitted copyright to exist in such ephemeral material as lists of TV and radio programmes.⁵⁶

⁵² Ref., Prof. Anil K. Gupta, WIPO-UNEP Study on the role of Intellectual Property Rights in the sharing of Benefits arising from the use of Biological Resources and Associated Traditional Knowledge, extracted from pp.115-120.

⁵³ Case C-241/91, *Radio Telefis Eireann v Commission* [1995] ECR I-743; above, text accompanying note 4. See also the earlier design right cases, Case 238/87 *Volvo* [1988] ECR 6211 and Case 53/87 *Renault* [1988] ECR 6039, discussed in MacQueen, *Copyright, Competition and Industrial Design*, pp. 42-45.

⁵⁴ For the legal background see *BBC v Wireless League Gazette Publishing Co* [1926] Ch 433 and *Independent Television Publications Ltd v Time Out* [1984] FSR 64. The Broadcasting Act 1990 changed the law in the UK to require the BBC and ITP to grant licences and provide advance information about weekly programme schedules.

⁵⁵ See e.g. Inge Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law* (1996), pp. 149-150. For my own positive reaction, written on the day the decision was published and after it had been faxed to me by David Edward, then the British judge on the Court, see *Copyright, Competition and Industrial Design*, 2nd edition, p. 21. The case was also remarkable in that the Court did not follow the earlier opinion of the Advocate General.

⁵⁶ *Ibid.* 41, pp. 10-11

Human Rights perspective of IPR

With the advent of the Universal Declaration of Human Rights (UDHR),⁵⁷ Intellectual Property Rights assumed greater significance on the one hand and a period of conflict also started on the other hand. Art. 27(2) of the declaration said: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". The International Covenant on Economic, Social and Cultural Rights,⁵⁸ states that "The States Parties to the present Covenant recognize the right of everyone ... To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

But from the opposite perspective, there are articles in the Universal Declaration of Human Rights capable of use to limit Intellectual Property, which are:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".⁵⁹

"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality".⁶⁰

"Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".⁶¹

⁵⁷ Dec. 8, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71.

⁵⁸ Adopted on Dec. 16, 1966, also provided under Arts. 15(1) (c), S. Exec. Doc. D, 95-2, at 13, (1997), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976)

⁵⁹ Article 19 of the Universal Declaration of Human Rights

⁶⁰ Article 22 of the Universal Declaration of Human Rights

⁶¹ Article 27(1) of the Universal Declaration of Human Rights

In reading and understanding these texts in the context of IPRs and their limitation, however, it is important to remember the "abuse of right" articles in the Universal Declaration of Human Rights, designed to prevent any right being absolute or used so as to destroy other or another's rights:

*“Everyone has duties to the community in which alone the free and full development of his personality is possible”.*⁶²

*“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.*⁶³

IMPACT OF IPR REGIMES

Different perspectives for developing and developed countries:

In UK, in pursuance of the white paper on International Development titled "Eliminating World Poverty: Making Globalization work for the Poor",⁶⁴ a Commission on Intellectual Property Rights was set up. The Commission undertook fact finding missions to Brazil, China, India, Kenya and South Africa. They also consulted key stake holders in developed countries such as UK, USA, EU and international organizations such as WTO, WIPO, World Bank and United Nations. One of the key study areas identified by the Commission was the impact of IPR regimes on health, agriculture and genetic resources, traditional knowledge, software and internet. The

⁶² Article 29(1) of the Universal Declaration of Human Rights

⁶³ Article 29(2) of the Universal Declaration of Human Rights

⁶⁴ “Eliminating World Poverty: Making Globalisation Work for the Poor”, a White Paper on International Development was presented to Parliament by the Secretary of State for International Development by Command of Her Majesty in December 2000. Available at: www.hivpolicy.org/Library/HPP000152.pdf

Commission submitted its final report in September 2002. Some of its recommendations for developed, least developed and developing countries are of interest.

“The recommendations for Developing Countries are as follows:

- *Exclude totally from patentability diagnostic, therapeutic and surgical methods for the treatment of humans and animals.*
- *Exclude from patentability plants and animals and adopt a restrictive definition of microorganisms.*
- *Exclude from patentability computer programs and business methods.*
- *Avoid patenting of new uses of known products.*
- *Avoid using the patent system to protect plant varieties and where possible, genetic material.*
- *Provide for international exhaustion of patent rights.*
- *Provide an effective compulsory licensing system and adequate government use provisions.*
- *Provide broadest possible exceptions to patent rights including adequate research exemption exception and an explicit "Bolar exception".*
- *Apply strict standards of novelty; inventive step and industrial application or utility (consider higher standards than currently applied in developed countries).*
- *Make use of strict patentability and disclosure requirements to prevent unduly broad claims in patent applications.*
- *Provide a relatively low cost opposition or re-examination procedure.*
- *Provide means to prevent the granting or enforcement of patents comprising biological material or associated traditional knowledge obtained in contravention of access legislation or the provisions of the CBD.*
- *Consider providing alternative forms of protection to encourage sub-patentable type local innovation.*

The recommendations for Developed and Developing Countries are:

- *Apply an absolute standard of novelty such that any disclosure anywhere in the world can be considered prior art.*
- *Take greater account of traditional knowledge when examining patent applications.*
- *Provide for the obligatory disclosure of information in the patent application of the geographical source of biological materials from which the invention is derived.*

The recommendations for Least Developed Countries are:

- *Delay providing protection for pharmaceutical products until at least 2016. Those who currently provide protection for such products should seriously consider amending their legislation”.*⁶⁵

⁶⁵ Ibid. 31, p.122

CONCLUSION

The fundamentals of the Intellectual Property Laws are based on the need to protect the economic rights of the owners of the intellectual properties and also to safeguard the common man from falling a victim to those who exploit the intellectual property rights. Historical studies divulge that patents, trademarks and copyrights are recognizable intellectual properties familiar in western countries for centuries. The policies and procedures adopted for protection of intellectual properties and the judicial arrangements were silent over time and adapted to the needs of the beneficial and interested parties. Instituting a uniform international regime of IPR protection could bring in conflict and controversy and therefore, imposition of such regime should be adapted to the national legal and social contexts of the countries where there are indifferences, inequalities and huge disparities.

A delicate act of balancing private rights with a larger public interest is essential at least in developing countries. While it is incumbent upon society to respect the intellectual labour of the inventors, it is equally necessary for the inventors to remember what Samuel Johnson⁶⁶ said:

*“The seeds of knowledge may be planted in solitude, but must be cultivated in public”.*⁶⁷

⁶⁶ Samuel Johnson (often referred to as Dr Johnson) who lived between 18 September 1709 [O.S. 7 September] and 13 December 1784 was an English author, who began his career as a Grub Street journalist, made lasting contributions to English literature as a poet, essayist, moralist, novelist, literary critic, biographer, editor and lexicographer, as available at: http://en.wikipedia.org/wiki/Samuel_Johnson

⁶⁷ See Oxford World's Classics, *“Samuel Johnson: The Major Works, Periodical Essays – The Rambler, no. 168 [Congruent Diction] (1751)”*, p.248