CHAPTER III

Intellectual Property Rights

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3.1 INTRODUCTION

Intellectual Property Rights is the recent branch of law and with the growth of ICT in recent days, IPR and library study have gained more importance. Knowing the basics of intellectual property rights before discussing on the implications of intellectual property rights on library services is felt necessary. This chapter discusses on the basics of Intellectual Property Rights.

3.2 INTELLECTUAL PROPERTY

Society values the creative fruits of the human mind, believing that they enrich the fabric of life for all of its members. Thus, a system of laws has been developed that confers rights on the creators of these fruits. These rights are collectively known as intellectual property rights, which is commonly abbreviated to ‘IPRs’ (Edenborough, 1997).

A category of intangible rights protecting commercially valuable products of the human intellect (Garner, 2009). Intellectual property is all about the results of human creativity. Its subject matter is formed by new ideas generated by man. Their application to human needs and desires can be of considerable benefit to mankind. New ideas can be embodied in familiar things such as books, music and art, in technical machinery and processes, in designs for household objects and for commercial ventures, and in all other sources of information (Colston, 1999).

TRIPS define intellectual property rights as, the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time (WTO, 2017) The subject matter of intellectual property is very wide and includes literary and artistic works, films, computer programs, inventions, designs and marks used by traders for their goods or services (Bainbridge, 2015)

Intellectual property are explained by many theories over a time. The first is a natural theory of property which defends the claims that natural facts determine what is property and who owns what. The second approach is in fact a broad class of theories that understand property as a social construction validated in terms of its
instrumental capacity to produce or secure other ethical goals. The third approach is a labour theory that grounds property claims in productive activity (Das, 2008)

Primary understanding of the development of intellectual property rights is very important to have basic knowledge on the evolution of intellectual property at the international level. International conventions on different categories of intellectual property gives the uniform international standards.

3.3 ORIGIN AND DEVELOPMENT OF INTELLECTUAL PROPERTY

3.3.1 Paris Convention

Paris Convention is an International Convention, which provides the common platform for protection of industrial property in various countries of the world. Prior to the existence of any international convention in the field of industrial property, seeking protection for industrial property in various countries was difficult due to diversity of their laws.

Paris convention for the protection of Industrial property was convened in Paris in 1883 and was initially signed by 11 states (WIPO, 2017) Convention was revised at Brussels in 1900, at Washington in 1911, at The Hague in 1925, at London in 1934, at Lisbon in 1958 and at Stockholm in 1967 and was amended in 1979 (WIPO, 2017).

The Paris Convention addresses patents, industrial design rights, trademarks, well known marks, names and unfair competition (Colston, 1999). The Republic of India is a member of Paris Convention since December 7, 1998. At present total 177 member countries are part of the Paris Convention.

3.3.2 Berne Convention

Berne Convention was formulated in the year 1886, for the protection of Literary and Artistic works. “To protect, in as effective and uniform a manner as possible, the rights of the authors in their literary and artistic works” is the aim of the Convention (WIPO, 2017).
Berne Convention protects literary works, artistic works, dramatic works, musical works and cinematographic works and it also protects derivative works based on other pre-existing works, such as translation, adaptations, arrangements of music and other alterations of a literary or artistic work. Berne Convention states the duration of the copyright protection as 50 years after the author’s death. The Berne Convention was revised several times to cope up with the technological challenges that is, first revision took place in Berlin in 1908, followed by the revision in Rome in 1928, in Brussels in 1948, in Stockholm in 1967, and in Paris in 1971 (Ahuja, 2015).

Basic principles of Berne Convention are, “national treatment”, according to which works originating in one of the member States are to be given the same protection in each of the member States as these grant to works of their own nationals, “automatic protection”, according to which such national treatment is not dependent on any formality that is, protection is granted automatically and is not subject to the formality of registration, deposit or the like, and “independent of protection”, according to which enjoyment and exercise of the rights granted is independent of the existence of protection in the country of origin of the work. It is administered by WIPO.

3.3.3 Madrid Agreement

Madrid Agreement was framed on April 14, 1891 which deals with International registration of Marks and Protocol related to Madrid Agreement, concluded in 1989. Contracting countries to this Madrid Agreement, secure protection for their marks applicable to goods or services, registered in the country of origin, by filling the said marks at the International Bureau of Intellectual Property. Duration of the protection is valid for 10 years and which can be renewed by paying prescribed fees (Arora, 2016). Currently, total 100 members are under Madrid Agreement covering 116 contracting countries. It is administered by WIPO.
3.3.4 Patent Co-Operation Treaty

The Patent Co-Operation treaty is an International treaty, which assists applicants in seeking patent protection internationally for their inventions. It also helps patent offices with their patent granting decisions, and facilitates public access to a wealth of technical information relating to those inventions. PCT was framed at Washington on June 19, 1970 and the latest amendment to the PCT regulations was done on 1 July, 2017. There are currently 152 contracting countries (Patent Cooperation Treaty, 2017).

3.3.5 TRIPS Agreement

TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement is a multilateral agreement on intellectual property, which came into force on 1 January, 1995. TRIPS Agreement is administered by WTO (World Trade Organization). It is an attempt to narrow the gaps in the way these rights are protected around the world, and to bring them under common international rules (WTO, 2017). The agreement operates on a foundation of two of the existing conventions by embodying the substantive provisions of the Paris and Berne Conventions, as well as adding new provisions (Colston, 1999). The types of intellectual property covered by the TRIPS Agreement are copyright and related rights, trademarks, including service marks, geographical indications, industrial designs, patents, layout-designs of integrated circuits and undisclosed information, including trade secrets. It establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members (WTO, 2017).

3.3.6 World Intellectual Property Organization (WIPO)

WIPO is the global forum for intellectual property services, policy, information and cooperation, which was established in the year 1967. Mission of the WIPO is to lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all. WIPO has 191 member states and headquarters is at Geneva, Switzerland. WIPO administers conventions namely, PCT-The International Patent System, Madrid-The
3.4 TYPES OF IPR

According to WIPO, Intellectual property is divided into two categories that is, Industrial Property and Copyright. Industrial property includes patents for inventions, trademarks, industrial designs and geographical indications. Copyright covers literary works (such as novels, poems and plays), films, music, artistic works (e.g., drawings, paintings, photographs and sculptures) and architectural design. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their performances, producers of phonogram their recordings, and broadcasters in their radio and television programs (WIPO, 2017).

3.4.1 Patents

Patents are granted in respect of inventions, i.e. technological improvements, great and small, which contain at least some scintilla of inventiveness over what is previously known (Cornish, et.al.,2010). As per WIPO, A Patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. According to Halsbury's Laws of England, the word patent is used denoting a monopoly right in respect of an invention.

Patent is a monopoly right conferred by Patent Office on an inventor to exploit his invention subject to the provisions of Patents Act for a limited period of time (Ahuja, 2015). Patents are territorial rights and the exclusive rights are only applicable in the country or region in which a patent has been filed and granted, in accordance with the law of that country or region (Patents-WIPO, 2017).

Invention means a new product or process involving an inventive step and capable of industrial application (The Patents Act of 1970). Novelty, inventive step, lack of obviousness and sufficiency of description are the essential ingredients for patents (Narayana, 2013). The term of validity for every patent under Patent
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(Amendment) Act, 2002, shall be twenty years from the date of filing of the application for the patent. The term of patent in case of International applications filed under the Patent Cooperation Treaty designating India, shall be twenty years from the international filing date accorded under the Patent Cooperation Treaty. In India patents are governed by Patents Act, 1970 and the act is amended by the Patent (Amendment) Act, 2002.

3.4.2 Trademarks

According to WIPO, a trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises. A product can be copied by a competitor and can become outdated by the introduction of new products, but a trade mark is unique. A successful trade mark is timeless and the most important source of market power and enables its owner to diversify in products and geographical markets (Bansal, 2014).

Internationally trademark is observed under Madrid protocol. Duration of International registration of trademark is valid for ten years and it can be renewed for ten years from the expiry of preceding period. Protection of trademarks in India is governed by The Trademarks Acts, 1999, which is amended in the year 2010 i.e., Trademarks (Amendment) Act, 2010. Registration in India is also valid for ten years and can be renewed time to time in accordance with the provisions of the Act.

Trademark is a mark which includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof (The Trade Marks Act of 1999). Trade mark performs four functions, namely identifying the product and its origin, it guarantees its unchanged quality, advertising the product and creating the image of the product. The function of Service mark in relation to services is same to that of a trade mark in relation to goods (Narayana, 2013).

3.4.3 Industrial Designs

According to WIPO, an industrial design may consist of three dimensional features, such as the shape of an article, or two dimensional features, such as patterns,
lines or colour. In a legal sense, an industrial design constitutes the ornamental or aesthetic aspect of an article.

In India industrial designs are governed under Designs Act, 2000. "Design" means only the features of shape, configuration, pattern, ornament or composition of lines or colour applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device (The Designs Act of 2000).

Design is prohibited from registration when it is not new or original, or has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of the application for registration, or which is not significantly distinguishable from known designs or combination of known designs or comprises or contains scandalous or obscene matter shall not be registered (The Designs Act of 2000).

Registered proprietor for a registered design will have a copyright in the design during ten years from the date of registration (The Designs Act of 2000). Copyright in the design can be extended for the period of five years, if, before the expiration of the ten years, application for the extension of the period of copyright is made to the Controller in the prescribed manner (The Designs Act of 2000).

3.4.4 Geographical Indications

"Geographical indication", in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or
preparation of the goods concerned takes place in such territory, region or locality (The Geographical Indications of Goods (Registration and Protection) Act).

WIPO expresses, geographical indication (GI) as a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. Geographical indications are typically used for agricultural products, foodstuffs, wine and spirit drinks, handicrafts, and industrial products (Geographical Indications WIPO, 2017).

Geographical indications in India are administered under The Geographical Indications of Goods (Registration and Protection) Act, 1999. Registration of GI shall be valid for the duration of ten years and may be renewed time to time in accordance with the provisions of the section.

The basic three functions of geographical indications are, firstly, they identify goods as originating in particular territory, or a region or locality in that territory; secondly, they suggest the consumers that the goods come from an area where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographic origin; and thirdly, they promote the goods of producers of a particular area (Ahuja, 2015).

3.4.5 Copyright

Copyright was recognized only after invention of printing in the 15th century, which enabled the reproduction of books in large numbers. Before that, creative writers, musicians, artists wrote, composed or made their works for fame and recognition rather than to earn a living and question of copyright never arose because copying was a laborious and expensive process (Narayana, 2013).

WIPO defines, Copyright (or author’s right) is a legal term used to describe the rights that creators have over their literary and artistic works. Works commonly protected by copyright throughout the world include:
• literary works such as novels, poems, plays, reference works, newspaper articles;
• computer programs, databases;
• films, musical compositions, and choreography;
• artistic works such as paintings, drawings, photographs, and sculpture;
• architecture; and advertisements, maps, and technical drawings (WIPO, 2017)

3.5 COPYRIGHT LAW OF INDIA

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work (Handbook of Copyright Law).

"Copyright" means to do or authorise the doing of any of the following acts in respect of a work, such as literary, dramatic or musical work, not being a computer programme, computer programme, an artistic work, cinematograph film, sound recording (Indian Copyright Act of 1957).

Copyright in India is governed by the Copyright Act, 1957, which was came into effect from January 1958. Further, the act was revised and amended time to time in the years, 1983, 1984, 1991, 1994, 1999, and 2012.

3.5.1 Term of Copyright

Term of copyright subsist in published literary, dramatic, musical and artistic works (other than photograph) published within the lifetime of the author until sixty years from the beginning of the calendar year next following the year in which the author dies and in case of joint authorship, be constructed as a reference to the author who dies last (Indian Copyright Act of 1957). Term of copyright in case of a literary, dramatic, musical or artistic work (other than photograph), which is published anonymously or pseudonymously, copyright will exists sixty years from the beginning of the calendar year (Indian Copyright Act of 1957).
3.5.2 Infringement of Copyright

Infringement of intellectual property happens when someone attempts to exploit the rights conferred on the respective owners under different forms of IP without the assent of the owners or persons authorized by them. Copyright is one of the forms of intellectual property (Gopalakrishnan, 2009).

According to the section 51, Indian Copyright Act, 1957, copyright in a work shall be deemed to be infringed-

a) When any person, without a license granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act-
   i) Does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright or
   ii) Permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright, or

b) When any person-
   i) Makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
   ii) Distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
   iii) By way of trade exhibits in public, or
   iv) Imports into India, any infringing copies of the work (Indian Copyright Act of 1957).

Provisions related to Protection of technological measures, under section 65A(1) of The Copyright (Amendment) Act, 2012, states, any person who circumvents an effective technological measure applied for the purpose of protecting
any of the rights conferred by this Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.

3.5.3 Fair Use

An exception to infringements is fair use. Some unauthorized uses of copyright work for certain specific reasons are allowed by law and they are not considered as an infringement of that work and such unauthorized use is termed as "fair use" or "fair dealing" (Ahuja, 2015) Fair use is the right to use a copyrighted work under certain conditions without permission of the copyright owner (Copyright and Fair use: A Guide for the Harvard Community). Fair use provisions relating to free uses in the act is to strike a balance between the interests of the copyright owner and the interests of the society at large (Ahuja, 2015). Fair use exceptions of India, U.S.A. and U. K., related to library are discussed.

3.5.3.1 Fair Use and India

In India, provisions regarding Fair use or fair dealing are dealt in the section 52, under Indian Copyright Act, 1957 which are related to library services. According to Section 52 (1)(a) fair dealing with a literary, dramatic, musical or artistic work (not being a computer programme) for the purpose of private use, including research and criticism or review, whether of that work or of any other work is a fair use.

Reproduction of literary, dramatic, musical or artistic work by a teacher or a pupil in the course of instruction is a fair use (Indian Copyright Act of 1957). Reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction (Indian Copyright Act of 1957).

Non-commercial public library can make not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a Non-commercial public library for the use of the
library if such book is not available for sale in India (Indian Copyright Act of 1957). According to statutes of law, non-commercial public library cannot make copies of the book, if they are available for sale in India.

Reproduction for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access provided author or authors known to the library or institution and provision is made after sixty years of death of author or death of author who dies at last in case of joint authors (Indian Copyright Act of 1957). Storing of a work in any medium by electronic means by non-commercial public library, for preservation if the library already possesses a non-digital copy of the work (The Copyright (Amendment) Act, 2012).

3.5.3.2 Fair Use and U.S.A.

Doctrine of fair use is often called the safely valve of copyright, for the users of copyright information (Schlosser, 2006). According to United States Copyright law, fair use is judged upon satisfaction of four factors, which include 1) The purpose and character of use, including whether such use is of a commercial nature or is for non-profit educational purposes; 2) the nature of the copyrighted work; 3) the amount of substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work (17 U.S. Code. § 107).

The United States Copyright Act is particularly solicitous of educational and academic uses in many circumstances which benefits users of copyrighted material in and around the academic or research library which is included in the specific exceptions contained in the sections 108, 110, and 121 of the Copyright Act and special protections granted by Section 504(c)(2) (Association of Research Libraries, 2015). Section 108 of the U.S. Copyright Act (17 U.S. Code. § 108), provides the statutory framework regarding limitations on exclusive rights: reproduction by libraries and archives.
Section 108 (a) states that, library can reproduce no more than one copy of a work, to distribute under the condition that, reproduction or distribution should not be directly or indirectly for commercial advantage. Collection of the library are open to public and to all researchers affiliated or not affiliated to institution. Library when makes such copy should provide copyright notice, even if it is not provided in the original copy (17 U.S. Code. § 108).

Section 108(b) states reproduction and distribution of unpublished work up to three copies is allowed for the purpose of preservation and security (17 U.S. Code. § 108). Further, it say the copy reproduced is currently the collection of the library and if the copy is reproduced in digital format, it cannot be made available to outside public in that format.

Section 108(c) gives the right to reproduce or duplicate the published work in three copies if the copy or phono records is damaged, deteriorating, lost/stolen or current format in which it is stored has become obsolete (17 U.S. Code. § 108). Condition mentioned is that, copy can be reproduced or duplicated only if it is not available after reasonable efforts or replacement cannot happen at a fair price.

There are rights to make a copy of no more than one article or other contribution to a copyrighted collection or periodical issue or to a copy or phono record of a small part of any other copyrighted work, when there is a request from user or from other library or archives (17 U.S. Code. § 108) under the section 108(d). When a copy of the copyrighted work after reasonable investigation, cannot be obtained at a fair price, there are rights under section 108(e) for reproduction and distribution to the entire work, or to a substantial part of it, made from the collection of a library, where the user makes his or her request or from that of another library (17 U.S. Code. § 108).

Further it says, the copy becomes the property of the user, and the library has no notice that, the copy would be used for any purpose other than private study, scholarship, or research; and the precaution notice saying copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation, should
be prominently displayed, at the place of orders accepted and also in its order form (17 U.S. Code. § 108).

3.5.3.3 Fair Use and U.K.

Fair use is commonly referred as a fair dealing in UK copyright law. Fair dealing in Copyrights, Designs, and Patents (CDPA) Act, 1988, covers a making of temporary copies; research and private study (non-commercial); copies for text and data analysis for non-commercial research; criticism, review, quotation and new reporting; caricature, parody, or pastiche; and incidental inclusion of copyright material, under general provisions (Copyrights, Designs, and Patents Act of 1988).

Provisions of fair dealing for libraries and archives is governed by section 40A to section 44A of the CDPA Act, 1988. Lending of the book, audio-book, or e-book which is lawfully acquired by the library and lending in compliance with licensing or purchasing term, is fair dealing (Copyrights, Designs, and Patents Act of 1988). Communicating work to the public or making it available to the public by means of terminal on its premises by the institutions (a library, an archive, a museum and an educational establishment) with the condition that the copy or work is made available or communicated, for the purpose of research or private study by the individual members or public, which is made available in compliance with the licensing terms to which the work is subject (Copyrights, Designs, and Patents Act of 1988).

Librarian can make a single copy of a whole or part of the published work to supply it to another library, without infringing copyright of the work, if the request from other library is for, not for profit and at the time of making a copy library does not find out the person who has a copyright in the work. Making a copy of an article in a periodical to supply it to another library against the request do not need authorised person's approval (Copyrights, Designs, and Patents Act of 1988). And where library charges for supplying a copy under section 41, the sum charged must be calculated by reference to the costs attributable to the production of the copy.
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Making a copy of an work which is a part of institution's collection by a librarian, archivist or curator of library in order to preserve or replace that item or where the particular work of another library has been lost, damaged or destroyed, in order to replace the item in the collection of that library, archive or museum, provided the item is included in the part of the collection which is kept wholly or mainly for the purposes of the reference on the institution's premises; where it is part of collection which is not accessible to the public and which is not for profit; available on loan only to other libraries, archives or museums (Copyrights, Designs, and Patents Act of 1988).

A librarian is permitted to make and supply single copy of one article of a periodical or reasonable proportion of any other work against the declaration in writing from the person who requests for a copy and the declaration should include name of the person and details of materials requested, statement that expresses, he should not have supplied previously the material requested by that person by any library, declaration that, the material requested is purely for research or private study for non-commercial purpose (Copyrights, Designs, and Patents Act of 1988).

A librarian can make a single copy of the whole or part of an unpublished work without infringing copyright in the work provided request from person, declares it is for non-commercial purpose or for private study and the same copy has not been supplied to the person but at the time of making a copy the librarian or archivist is to be aware of the fact that, the work had been published or communicated to the public before the date it was deposited in the library or archive or the copyright owner has prohibited the copying of the work (Copyrights, Designs, and Patents Act of 1988).
3.6 CONCLUSION

Intellectual Property Rights empowers creator or researcher through giving their rights through laws of Intellectual Property Law. Copyright is the law which is basically related to libraries among intellectual property rights laws, which protects author rights. Library is the store house of knowledge viz., books, journals, manuscripts etc. which are protected by copyright and providing access through various means, to provide such knowledge is the primary service of libraries. Fair use is the exception to the copyright law. It is analysed that exception to the libraries under the law is not clear and there is a need for proper interpretation of the law, in relation to libraries. It is observed, The Copyright law of India related to libraries is very vague and there is a need for clear provisions regarding libraries.

3.7 REFERENCES


Indian Copyright Act, 1957, section 14.

Indian Copyright Act, 1957, section 22.

Indian Copyright Act, 1957, section 23.

Indian Copyright Act, 1957, section 51.

Indian Copyright Act, 1957, section 52 (h).

Indian Copyright Act, 1957, section 52 (m).

Indian Copyright Act, 1957, section 52 (o).

Indian Copyright Act, 1957, Section 52 (p).
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The Copyright (Amendment) Act, 2012, section 52(1)(n).

The Designs Act, 2000, section 11(1).

The Designs Act, 2000, Section 11(2).

The Designs Act, 2000, section 2(d).

The Designs Act, 2000, Section 4.


The Trade Marks Act, 1999, section 2(1)(m).
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