CHAPTER –II

CONCEPTUAL ANALYSIS OF INTELLECTUAL PROPERTY RIGHTS
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2.1 Introduction

‘Intellectual Property’ is a generic term that probably came into regular use during the twentieth century. This generic label is used to refer to a group of legal regimes, each of which, to different degrees, confers rights of ownership in a particular subject matter.

2.1.1 Origin and Development of Intellectual Property

With the advent of the knowledge and information technology era, intellectual capital has gained substantial importance. Consequently, Intellectual Property (“IP”) and rights attached thereto have become precious commodities and are being fiercely protected. In recent years, especially during the last decade, the world has witnessed an increasing number of cross-border transactions. Companies are carrying on business in several countries and selling their goods and services to entities in multiple locations across the world. Since intellectual property rights (“IPRs”) are country-specific, it is imperative, in a global economy, to ascertain and analyze the nature of protection afforded to IPRs in each jurisdiction. The existence of IPRs is not new. The basic aim of conferring an IPR upon the person entitled is to give a social recognition to him. This social recognition can further bring economic benefits to its holders. It is just and reasonable to award a person an IPR in the form of "limited monopolistic rights" for his/her labor and efforts. IP is that branch of law which protects some of the finer manifestations of human achievement. IP laws aim at securing the outcomes that are proportionate to the aim of protecting them. Each of the IP is concerned with marking out types of conduct which may not be pursued without the consent of the right owner. All
IPRs are enforced in similar ways. They are dealt with by broad analogy to property rights in tangibles.¹

2.1.2 Understanding the concept of Intellectual Property

Intellectual property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields.² IP protects application of ideas and information that are of commercial value. The subject is growing in importance to the advanced industrial countries in particular as the field of exploitable ideas becomes more sophisticated and as their hopes for a successful economic future come to depend increasingly upon their superior corpus of new knowledge and fashionable conceits.³

2.1.3 Special features of Intellectual Property Regime

1) One of the most distinctive features of IP regimes, compared to other policy areas, has been their peculiar nature compared to the other issues involving general public debates. Over the years IPRs have emerged in discussions and debates on topics as diverse as public health, food security, education, trade, industrial policy, traditional knowledge, biodiversity, biotechnology, the Internet, the entertainment and media industries, and on the role of IP in a knowledge-based economy.

2) A second special feature is that the IP has been one of the most dynamic fields of international trade law.

² WIPO Intellectual Property Handbook: Policy, Law and Use, p.2
3) Thirdly, there are changes in the number and nature of institutions dealing with these matters. Today, a number of intergovernmental bodies beyond the WTO and WIPO are also involved in programmes relating to IP. These bodies include WHO, UNESCO, FAO, CBD, Interpol and certain other United Nations programmes (UNCTAD, UNDP, UNCHR). Given the crosscutting nature of IPRs, this horizontal expansion of institutions dealing with IP matters raises complex issues and concerns about policy coherence.

2.1.4 Role of WIPO in development of Intellectual Property

The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations. WIPO is the outcome of an evolutionary process that started with a fairly simple administrative framework established in the late nineteenth century when the two principal treaties for the protection of IP—the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works—were negotiated.\(^4\) WIPO itself has been established by an International Convention.\(^5\)

It is dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest. WIPO administers 24 international treaties and carries out rich and varied programs of work with its 184 Member States. WIPO’s activities in progressive development of IP laws, international registration and dispute resolution services, and cooperation for development programs

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\(^5\) The “Convention Establishing the WIPO” was signed at Stockholm in 1967 and entered into force in 1970.
continue to support international trade and commerce which in turn brings economic
gain, efficiency and certainty to business enterprises around the world. India has been in
WIPO’s sights for several years. In 2005, India implemented a new patent law in order to
comply with the World Trade Organization Agreement on Trade-Related Aspects of
Intellectual Property Rights (TRIPS), creating a large new market for WIPO activities.

2.2 Concept, definition and components of Intellectual Property

2.2.1 Intellectual Property in general

Term ‘Intellectual property’ is reserved for types of property that results from the
creation of human mind, the intellect. The term intellectual property in the Convention
establishing the World Intellectual Property Organization or “WIPO” does not have a
formal definition.6

Intellectual property law creates property rights in a wide and diverse range of
things from novels, computer programs, paintings, films, television broadcasts, and
performances, through dress designs, pharmaceuticals, genetically modified animals, and
plants.7 They also include marks on products to indicate their difference from similar
ones sold by competitors. Over the years, the concept of IP has been stretched to include
not only patents, copyright, industrial designs and trademarks, but also trade secrets, plant
breeders’ rights, geographical indications, and rights to layout-designs of integrated
circuits.

These new additions are result of technological advancement and the socio-
economic adjustment by the societies accordingly. The scope of IP is expanding very fast

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6 The term IP has come to be initially recognized as covering patents Industrial Design, Copyright,
Trademark, Knowhow & Confidential Information.
& attempts are being made by person who creates new ideas to seek protection under the umbrella of IPRs.

Intellectual Property Rights (IPRs) are rights granted to a person or a company by a state for products of intellectual effort and ingenuity. There are various forms of Intellectual Property Rights e.g. patents, copyright, trademarks, labels or plant breeders’ rights.

The term intellectual Property has been used for almost one hundred and fifty years to refer to the general area of law that encompasses copyright, patents, designs & trademarks as well as a host of related rights.

In today’s market-based economies, the rationale for protecting intellectual property is essentially utilitarian. If everybody is free to access new knowledge, inventors have little incentive to commit resources to producing it. By transferring knowledge from the public good to the private good, creative minds and innovative firms have an incentive to engage in inventive activities and are guaranteed to recuperate their expenditure in creating new knowledge and to make profit.

2.2.2 Definition of Intellectual Property under WIPO Convention

Despite the number of international agreements and conventions dealing with intellectual property, none of them attempt a definition of this term, but rather list the categories of intellectual property within their purview. The Convention establishing the World Intellectual Property Organization (WIPO) concluded at Stockholm on 14 July 1967, in Article 2(viii), defines intellectual property as rights relating to:

‘(1) literary, artistic and scientific works;
(2) performances of performing artists, phonograms and broadcasts;
(3) inventions in all fields of human endeavour;
(4) scientific discoveries;
(5) industrial designs;
(6) trademarks, service marks and commercial names and designations;
(7) protection against unfair competition.’

Ever since the date of this Convention, intellectual property rights have been considered touch plant varieties, integrated circuits, trade secrets and confidential information and expressions of folklore. A fuller catalogue of intellectual property rights is listed in Part II of the TRIPS Agreement as the subject matter of that agreement, namely: copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs (topographies) of integrated circuits and confidential information. Intellectual property is usually divided into two branches, namely: ‘industrial property’ and copyright and the rights which neighbour upon copyright. In the catalogue of rights contained in Article 2(viii) of the WIPO Convention, mentioned above, items (1) and (2) embrace copyright and the rights which neighbour upon copyright. The balance falls within the rubric of industrial property.

2.3 Nature and Scope of Intellectual Property

In most of the national laws including India, most intellectual property rights are recognised by legislation and protected by statutes and a large number of judicial decisions in the realm of Law of Torts.

2.3.1 Intangible nature of Intellectual Property

Intellectual Property has been conferred with rights in line with property rights in almost all legal systems. “Property means the highest right a man can have to anything
which does not depend on another’s courtesy: It includes ownership, estates, and interests in corporeal things and also rights such as trademarks, copyrights, patents and even rights in personem capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured.”

Intellectual Property of whatever species is in the nature of intangible corporate property. In each case it consists of bundle of rights in relation to certain material objects created by the owner. The term ‘intellectual property’ can be split into two parts, viz., intellectual and property. ‘Intellectual’ refers to the mind, and more particularly, to the efforts of the mind. This part of the term tells us that this area of law is concerned with the realm of human creation, novelty, and inventiveness. It relates to that sort of property which a person creates through an application of his mind, rather than pre-existing property that he somehow acquires. The word ‘property’, indicates that intellectual property, like any other form of property, consists of a bundle of rights in the hands of the owner. The owner of intellectual property can, therefore, deal with it in much the same manner that the owner of any property can deal with his property:

i) It can be transferred, in whole, or in part, to another person;

ii) It can be exploited for commercial profit; and

iii) It can be subject to exclusive use by the owner.

2.3.2 Intellectual Property as a bundle of rights

Like real property, intellectual property is a bundle of rights that allows its owner to prevent others from accessing the protected matter, and also helps in exploiting and

8 R.C. Cooper v. Union of India, 1970, 1 SCC, p.248
controlling their intellectual property. Intellectual property rights are in essence negative rights; this means that they allow one to prohibit certain acts with respect to their intellectual assets. Thus, it is possible to create value in that property if others are interested in acquiring the product or innovation. IPR are largely territorial rights except copyright, which is global in nature in the sense that it is immediately available in all the members of the Berne Convention. These rights are awarded by the State and are monopoly rights implying that no one can use these rights without the consent of the right holder.

2.3.3 Implications of Treating Intellectual Property as movable property and chose in actions

Intellectual Property is a property in legal sense. IP is something that can be owned and dealt with. Most forms of IP are ‘chose in action’, rights that are enforced only by legal action as opposed to possessory rights.\(^{10}\)

Intellectual property is treated on par with movable property for the purpose of protection and therefore can be owned, transferred, licensed, and assigned, and is also subject to taxation and stamp duty. The distinguishing features of this property are its intangibility and non-exhaustibility by consumption. Rights in intellectual property are granted by the State to an inventor, author, or originator of products that reflect his intellectual effort and ingenuity. The definition of intellectual property rights is left for the nation-state to decide. Just as in the case of other rights, intellectual property rights carry with them a set of duties that in some cases bind the owner of the rights himself, and in some cases, bind other people. For example, if I own copyright in any training materials, there is a corresponding duty that everyone else in the world owes, not to make

unauthorized copies, sale, or distribution of these materials! In the case of a patent, if I have the exclusive right to manufacture and commercially exploit my invention, I also have a duty to ensure that the invention is available in sufficient quantities to satisfy public needs, at affordable price. If I do not fulfill this duty, the law provides for compulsory licensing, or even revocation of my patent, in extreme cases.

In March 2012 the Indian Patents Office granted its first compulsory license, for the manufacture and sale of Bayer’s patented drug Nexavar, in *Natco Pharma Limited v. Bayer Corporation*.\(^\text{11}\) (*Natco v. Bayer*). In this case Bayer’s inability to make Nexavar available to nearly 98 per cent of the Indian public was held by the Controller to amount to a failure to satisfy the reasonable requirements of the public. This case sets the precedent for making expensive patented drugs available for compulsory licensing under the Patents Act. However, questions remain as to whether competitors of dominant undertakings holding patent rights may use section 4 of the Competition Act to enable them to compete on the same market as the IP owner.\(^\text{12}\)

### 2.4 Justification for protection of Intellectual Property Rights

Intellectual Property supporters cite various grounds and theories for the protection of these rights. The same is discussed as under.

#### 2.4.1 Theoretical rationale for the protection of Intellectual Property

The main thrust of the entire field of IP law is that a third party is not permitted to make a harvest for what he has not sowed.\(^\text{13}\) As already mentioned, this form of property is slightly different from other forms of property because it is created, rather than

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acquired. Therefore Intellectual property Rights are a reward for the creative effort of the creator. Therefore it can be said that intellectual property rests on the rationale of giving innovators an incentive. In modern law every man owns that which he creates. The immaterial product of a man’s brains may be as valuable as his land or his goods. The therefore gives him a proprietary rights in it, and the unauthorized use of it by other persons is a violation of his ownership.\textsuperscript{14} If we want to ensure that innovators continue their activities and research that lead to growth in the sciences and the arts, then we have to build a solid barrier against copying and protect the rights of the innovators subsisting in their creations. Countries have laws to protect intellectual property for two main reasons. One is 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. The second is 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.\textsuperscript{15}

At the time of introduction of protection for intellectual property, the law was designed to reward the inventor for making his work public and thereby allowing the society to access something that would otherwise have remained secret.\textsuperscript{16} Protection in the form of intellectual property rights (“IPRs”) was the price paid by society to the inventor so that the latter would make his work public. As a result, there was greater focus on the individual right of the inventor. It was not envisaged that protection of

\textsuperscript{15} WIPO Intellectual Property Handbook: Policy, Law and Use, p.2
intellectual property ("IP") benefitted the society as well. With time, however, the idea of what must be rewarded has changed. It is not the act of making the invention public that is being sought to be rewarded, but the necessity to promote innovation and creativity through the creation of incentives.

2.4.2 The reasons for grant of intellectual property rights are

Historically following are the reasons for:

1. Incentive to invent;
2. To encourage disclosure;
3. Commercialization of technology through licensing; and
4. To increase dynamic efficiency.

But all of these reasons may not be true in respect of some IPs like Confidential Information, Trade Secret, and Know-How. The reason for the protection of these newly added species of IP is to prevent misappropriation and unjust enrichment. In modern business ‘information’ is so precious that it deserves protection from piracy even though it cannot fulfill all the requirements of IP protection. Thus the object of protecting confidential information and other inclusions is not on their categorization as IP but to prevent their abuse unethically and illegally. The increasing ease with which information can be dispatched round the world electronically gives urgency to pleas for greater legal security over confidential information. Hence most IPs are protected on the basis of the above grounds except some newly added categories like confidential information.

2.4.3 Challenges to Intellectual Property

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20 Cornish, Llewelyn and Aplin, supra note 3, p.331
There is a political suspicion and criticism as against protection to IP. This criticism is based on the following arguments:

1. First, developing countries are in the process of developing IPRs of their own and customers of these nations may get attracted towards foreign goods and services. In the race for development, there is a real need to acquire technology from the advanced nations and there is often strong popular demand for products of western prosperity.21 This requires the developing countries to observe the TRIPs norms.

2. Secondly, there is a tendency amongst developed countries to limit the monopolistic tendencies of successful private enterprise by anti-trust laws. The developing countries are facing the problem of balancing the two regimes.

3. Economists take the basic objection that the people who are prepared to buy at the monopoly price would have paid a competitive price or something in between. These customers are left by the monopolists behavior to buy something else less valuable to them and in this sense there is a misallocation of resources, too little of society’s resources by this criterion are being put into the production of the goods monopolized22. But this argument holds good only in those markets where substitutes are available.

4. The IPR holder acquires monopoly position and thereby he acquires his normal profits at the expense of persons who pay monopoly price. Redistribution of wealth from large strata of people to only a few is always unjustifiable.

5. The IP monopolist can affect consumers by determining factors about goods in addition to their price. For ex:- after sale service

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21 Ibid. p.40
22 Ibid. p.41
6. The monopolist loses the incentive to keep down costs that come from competition\textsuperscript{23}. Thus the monopolist will not bother to invest in research to keep his costs reduced as he is not afraid of the competition.

\subsection*{2.4.4 Arguments for maintenance of Intellectual Property}

An extreme economic argument for IP monopoly is that there are economies of scale. It means the efficient production can be procured from a single source. This may imply natural monopoly and the consequences but it is desirable to make it publicly accountable though the property is in private hands.

Intellectual Property implies some exclusive right to perform some defined activity in productive or commercial field. But this cannot be regarded as ability to exert monopoly power within a market. The market as it is perceived in the present context is greatly characterized by the availability of substitutes, technical advances, of fashion and respected advertisements. In this sense it can be said that IP has very little capacity to generate market power. With the market power for IP owners there are potential disadvantages outweighing the public policy considerations. On the other hand, if inventions and ideas are unprotected competitors will imitate without paying anything. Hence there will be little incentive to invest in intellectual activities. No person shall like to invest his time and resources into creating something unless he is assured of the use of it and in cases where monetary gains are involved he is assured that he shall have the exclusive right to make such gains.\textsuperscript{24}

The only way out of this dilemma is, on the one hand to make the practicable estimate of the dangers that unjustified monopolies may produce and on the other hand,  

\begin{itemize}
\item \textsuperscript{23} \textit{Ibid.} p.42
\item \textsuperscript{24} Justice R.C.Lahoti, \textit{Role of Judiciary in IPR Development and Adjudication}, (2004) 8 SCC (J) 1
\end{itemize}
to assess the degree to which the claimant’s investment will be open to dissipation if he is not accorded his right.\textsuperscript{25} The quid pro quo principle of trade negotiations thus offers a basis for why the developing countries accepted such an enormous shift to a new regime, which included all IPRs of WIPO, added new sui generis rights and imposed rules of administration and enforcement.\textsuperscript{26} The very rationale behind intellectual property rights protection is to offer a quid pro quo, between creators and the public, intended to spur innovation. Inventors gain exclusivity in exchange for publicly disclosing details about their creations. The public gains free access to information. This information can be used to support further innovation in the society. Innovation is seen as inherently good in this context, as it can lead to the development which is deemed to be good for people.

Further it is true that to the extent IP owner is able to generate market power there is possibility of reduction of output and increase in prices. But there are techniques like CL which can neutralize the monopoly tendencies.

Intellectual property rights are the result of idealistic and utilitarian perceptions. Every aesthetic and cultural value alone is held to justify these rights in some cases. These non-economic values also express the wrongness of allowing one person to take over and reap rewards from the intellectual or the marketing efforts of another.\textsuperscript{27} Reaping without sowing” is unjust. Hence the law must establish regimes of intellectual property protection to the extent that it will rectify the most evident cases of misappropriation of intangible values.

\textsuperscript{25} Cornish, Llewelyn and Aplin, supra note 23, p.43
\textsuperscript{27} Cornish, Llewelyn and Aplin, supra note 25, p.37
Today phenomenal advancement is made in telecommunications, biotechnology etc. They require huge investments and the fruits can be very easily pirated. In view of this IP protection is inevitable.

2.4.5 Justification of Intellectual Property in the Indian context

The philosophy behind grant of IPRs finds origin in the Locke’s “Theory of Property” according to which labor should be rewarded.28 Traditionally, IPRs – especially patents and copyright – have been justified on both consequentiality and rights-based grounds. These are not mutually exclusive since some arguments contain elements of both. The consequentiality justification is that when inventors, authors or artists have an exclusive right to reproduce and sell their works, society benefits in consequence. This proposition is based on two assumptions. First, it assumes that such a right encourages inventors to invent, authors to write and artists to paint. Second, it presupposes that the greater the quantity of inventions and creative works eventually released into the public domain, the more the public benefits through economic or cultural enrichment, or enhanced quality of life. Thus, advocates of this justification tend to argue that IPRs are incentives that encourage creative endeavor. According to rights-based justifications for IPRs, property in intellectual works is primarily a matter of justice rather than of public policy. IPR laws exist to define and enforce the property rights but are not the source of these rights; since to enjoy a property right over one’s creative work is a human right. According to such a view unauthorized use of somebody’s invention or creative work is

an unfair – and therefore illegal – intrusion on the creator-proprietor’s freedom to benefit from its use without interference. This justification does not of course apply so easily to those many cases where IPRs are owned by companies and not individuals. Consequentiality justifications have inspired national IPR laws and policy making far more than rights-based ones.

In general terms, IP rights – especially patents – are tools for economic advancement that should contribute to the enrichment of society through (i) the widest possible availability of new and useful goods, services and technical information that derive from inventive activity, and (ii) the highest possible level of economic activity based on the production, circulation and further development of such goods, services and information. In pursuit of these aims, inventors are able to protect their inventions through a system of property rights – the patent system. Once acquired, the owners then seek to exploit their legal rights in the marketplace. The possibility of attaining commercial benefits, it is believed, encourages invention and innovation. But after a certain period of time, these legal rights are extinguished and the now unprotected inventions are freely available for others to use and improve upon. Enhancing the society’s capacity to generate such useful goods, services and information by itself is one means for achieving such ends (and may, it could be argued, be a sufficient end in itself). But it is not the only means. After all, these could also be imported, and legal incentives could be created for such importation, as they were in the past.29

Intellectual property rights also could stimulate acquisition and dissemination of new information. Patent claims are published, allowing rival firms to use the information

in them to develop further inventions in strengthening their IPRS regimes, either unilaterally or through adherence to TRIPS, developing countries hope to attract greater inflows of technology. There are three interdependent channels through which technology is transferred across borders. These channels are international trade in goods, foreign direct investment (FDI) within multinational enterprises, and contractual licensing of technologies and trademarks to unaffiliated firms, subsidiaries, and joint ventures. Economic theory finds that technology transfers through each channel depend in part on local protection of IPRS, albeit in complex and subtle ways.\(^{30}\) In India the IP regime has contributed to the technological advancement and other activities having international flavor. Economic theory demonstrates that IPRS could play either a positive or negative role in fostering growth and development. The limited evidence available in India suggests that the relationship is positive but dependent on other factors that help promote benefits from intellectual property protection. Every individual is the monopolistic owner and source of his individual intelligence. He is responsible for its application. To own intellectual property is to own the benefits as well as the risk arising out of that property. By protecting infringement of intellectual property economic incentive can be availed by creator and this economic incentive will instigate one for further researches. At the same time defined ownership of an intellectual property will help the society to peg the responsibility and identify the source if this intellectual property is found to be a pollutant. Thus, a strong intellectual property law will attract new investments and encourage development of new technology with due safeguards. Further India is well acquainted with the IPR philosophy for its socio-economic

\(^{30}\) Keith E. Maskus, *Intellectual Property Rights And Economic Development*, February 6, 2000, available@www.colorado.edu/economics/mcguire/workingpapers/cwrurev.doc
relevance. Intellectual property is important for a common businessman. In the words of honorable Justice Lahoti, the country's economy is opening up, the industries of our country are going far and away into different countries to open up business and foreign entrepreneurs are fast entering into domestic economy. There is a need to protect our businessmen. In recent times, intellectual property is being considered as one of the most valued asset.

2.5 Enforcement of Intellectual Property Rights

Intellectual property enforcement mechanism is dealt with under the national legislations. But the TRIPS also provides for norms in this respect. Having intellectual property laws is not enough. They have to be enforced. This is covered in Part 3 of TRIPS. The agreement says governments have to ensure that intellectual property rights can be enforced under their laws, and that the penalties for infringement are tough enough to deter further violations. The procedures must be fair and equitable, and not unnecessarily complicated or costly. They should not entail unreasonable time-limits or unwarranted delays. People involved should be able to ask a court to review an administrative decision or to appeal a lower court’s ruling.

2.5.1 Importance of Enforcement Mechanism

Intellectual Property Rights are a central feature of knowledge economy and with their inventiveness and creativity; the economic units generate wealth of new ideas, designs and creative materials across all sectors. Considerable private and public resources are invested to encourage innovative and creative assets in the form of IPRs.

31 (2004) 8 SCC (J) 1
But if these efforts are not safeguarded through effective enforcement mechanism the very purpose of maintaining IP system will be defeated. Hence an effective Intellectual Property Right (IPR) system is important to trade because it provides confidence to business that rights will be respected and that profits will be returned to IPR holders when goods and services are traded in the region. Accessible, sufficient and adequately funded arrangements for the protection of rights are crucial in any worthwhile intellectual property system.\textsuperscript{33} Strong IPR systems boost economic growth, promote investment and develop industries that promote creativity and innovation. TRIPS call for enforcement procedures which permit effective action against IP infringement.\textsuperscript{34}

\textbf{2.5.2 Remedies for Infringement under Indian Laws}

Indian IP laws contain enough provisions for administrative, civil and criminal remedies for infringement of the rights. However, the problem lies in effective enforcement, especially due to scientific and technological advancements, which have led to newer ways of circumventing laws. The rapid speed of technological evolution and its effect on enforcement calls for newer and effective ways to handle the situation.

\textbf{2.5.2.1 Civil Actions}

When any IP is infringed the right owner gets civil cause of action and he can claim the remedies like injunction, account of profits and even damages. In India, infringement and passing-off actions can be instituted by filing a suit in the appropriate court. All IP laws state the appropriate court in which such suits can be instituted. For example, under the TM Act, suits for trademark infringement or passing off can be filed in the district court within the local limits of whose jurisdiction, at the time of the

\textsuperscript{33} WIPO Intellectual Property Handbook: Policy, Law and Use, p.207
\textsuperscript{34} Articles 41,42,43 and 48 of TRIPS.
institution of the suit / other proceedings, the plaintiff / one of the plaintiffs (for example, registered proprietor, registered user) actually and voluntarily resides or carries on business or personally works for gain. Under the Copyright Act there is a similar provision as well. **Interim injunctions** In India, court cases often reach a final hearing after twelve to sixteen years from the date of their filing. Therefore, obtaining an interim injunction becomes crucial for the plaintiffs, especially in intellectual property lawsuits. The damages are awarded only after the final hearing. Indian courts also grant injunctions in a *quia timet* (anticipatory) action if the plaintiff proves that defendant’s activities or proposed activities would lead to violation of plaintiffs’ rights. The plaintiffs can seek ad interim and interim relief, including injunctions, **Mareva Injunctions**\(^35\), an appointment of the commissioner or the court receiver, **Anton Piller orders**\(^36\), **John Doe (Ashok Kumar) orders**\(^37\), and other orders, such as discovery and inspection, or orders for interrogatories after filing of suit.

Ad-interim and interim injunctions are granted under Order 39, Rules 1 and 2, read with Section 151 of the Code of Civil Procedure, 1908. The Supreme Court of India in **Wander Ltd. v. Antox India (P) Ltd.**\(^38\) laid down the principles for the granting of an interim injunction. For the grant of such ad interim and interim orders, the plaintiff has to show that he has a *prima facie* case, that the balance of convenience is in his favor, and the hardship suffered by the plaintiff would be greater if the order is not granted.

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\(^{35}\) Named after **Mareva Compania Naviera SA v .International Bulkcarriers SA** (1980)1 All ER 213, meaning a court order which freezes assets so that a defendant cannot surreptitiously dissipate assets to prevent the enforcement of a judgment.

\(^{36}\) Ex-parte court injunction which requires defendant to allow the plaintiff to enter the defendant’s premises, searching for and take away any material evidence and even to force defendant to answer some questions.

\(^{37}\) Cease and desist order passed by court against anonymous entity.

If the plaintiff is able to convince the Court of these points, then plaintiff can obtain an ad interim and interim injunction within a couple of days of filing of the suit. Some courts also grant *ex parte* injunctions if a strong case is made. Ex-parte injunction is issued when formalities like notice will defeat the purpose of suit and if there is perpetual damage to the property. In granting an ex-parte order the basic safeguards of equity must be strictly enforced.\(^{39}\) Generally, a plaintiff is required to give at least forty-eight hours notice to the defendant for a hearing of the interim application. If the defendant appears before the court, he may be granted further time to file his reply and the plaintiff in turn may be allowed to file his response to the defendant’s reply. The hearing of the interim applications could go on for three to four days, depending upon the complexity of the matter. Both the parties have the liberty to file an appeal from the interim order and subsequently the parties may have to fight the matter even up to the Supreme Court of India. The appellate court also has the power to grant interim orders pending the final hearing of appeal. Indian courts have realized the importance of protecting IP and have started granting innovative orders.

Following are the principles of granting interim injunction as laid down by the honourable Supreme Court.\(^{40}\)

a) Prima facie case that patent is valid and the same is infringed

b) Balance of convenience is in favour of plaintiff.

c) Irreparable loss to plaintiff.

The damages are awarded only after the final hearing of the suit. Traditionally Indian courts have been slow and conservative in granting damages in intellectual

\(^{39}\) P. Narayanan, *supra* note 9, p.609

\(^{40}\) *Hindustan Lever v. Godrej Soaps*, AIR 1996, Cal.367, p-372
property matters. However, recently the courts have started granting punitive and exemplary damages in the intellectual property law matters. In the matter of *Time Incorporated v. Lokesh Srivastava and Anr.*\(^41\) the Delhi Court observed: “This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trademarks, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them”.

### 2.5.2.2 Criminal Actions

Intellectual Property Rights can be enforced by initiating infringement actions in civil courts or through criminal prosecution and the procedure for both civil and criminal actions has been specifically set out under the relevant IP legislations governing the specific form of IP.

It may be noted that the costs of filing, registration and litigation are relatively low in India as compared to foreign countries but it is felt that the legal procedures in India can take quite longer time.

Over the years various decisions passed in favour of foreign companies against local infringers have demonstrated the Indian judiciary’s impartial approach. In copyright and trademark infringement cases (which come under criminal litigation) courts routinely tend to award damages.

\(^{41}\) 2005 (3) PTC 3 (Del)
In India, infringing action is normally the result of a complaint made by rightful owners to magistrates or police authorities. As in other commonwealth countries, in India also state becomes a party to such criminal proceedings against infringers. The IP statutes provide for punishments and fines in respect of infringements of different IPs.

2.5.3 Enforcement of Intellectual Property Rights: Territorial and at Border

Enforcement of IPRs may be divided into two categories viz., territorial enforcement and enforcement at border. Territorial enforcement involves a civil or criminal action for violation of copyright or trademark which may be initiated against the infringer in a District Court or a Magistrate Court having jurisdiction. In this context it is noteworthy that even if a civil action is taken against infringement of IPRs it is not a bar to initiate criminal action against the infringer. Enforcement at border involves the protection against infringement when goods come at border for domestic use or for importation or exportation. The Government of India is empowered to prohibit importation and exportation of goods of specified description for the purpose of protecting IPRs.

2.5.4 Scope of ADR Mechanism in resolving Intellectual Property Disputes

In many areas of law, the cost and hassle of litigation has encouraged the growth of mechanisms like arbitration and mediation for settling disputes. ADR refers to procedures for settling disputes by means other than litigation. ADR primarily consists of two basic forms - arbitration and mediation. Parties may use arbitration, mediation,

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42 Sections 62 and 70 of Copyright Act, 1957 and Sections 134 and 115 of the Trade Marks Act, 1999.  
43 For example remedy under section 53 of the Copyright Act is not a bar to file a suit or to lodge a complaint against the infringer.  
44 Sections 11(2)(n0,111 (D),2(23) &110 of the Customs Act, 1962.  
and other hybrid forms of dispute resolution to settle their disputes without proceeding through the trial process.\textsuperscript{9,46} ADR mechanisms vary from country to country. But the use of ADR mechanism is not popular in IPR disputes except when the same is compulsory in International Arbitration System.

2.6 International character of Intellectual Property Rights

International instruments dealing with IPRs are discussed in the following section.

2.6.1 TRIPS and Intellectual Property standards

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement is generally considered as the cornerstone of global intellectual Property Laws as it lays down the minimum standards for all World Trade Organization (WTO) member countries. More importantly, TRIPS is often talked about as a package deal whereby developing countries agreed to the TRIPS standards in exchange for the other carrots associated with WTO membership, which definitely included increased access to foreign markets. India, which is also a member of the WTO, is in the process of adjusting itself with the new international trade regime. This acclimatization process included a lot of changes in its laws and notably Intellectual Property Laws. The different policy objectives underlying the protection of IPRs have shaped the structure and evolution of the international intellectual property system. The earlier domestic intellectual property laws provided no legal protection to intellectual property products created in other nations, thereby permitting those products to be exploited by free riders operating outside the state in which the products were created. The unfairness of this result prompted governments in the late nineteenth century to consider an international approach to

\textsuperscript{46} Ibid.
protect IPRs. For TRIPS therefore, any increase protection standard for a substantive or an enforcement provision would normally be permissible.\textsuperscript{47}

2.6.2 Limited treaty obligations

The drafters of the first multilateral intellectual property treaties quickly realized, however, that there was insufficient political support for reconciling many of the differences that existed among national IPR laws. For this reason, the drafters abandoned the idea of harmonizing diverse national laws to create a single, international IPR applicable in all signatory states. They fashioned instead a system that creates a limited set of treaty-based obligations that each member state of that system is then required to implement in its national IPR laws.

Implementation of treaty-based obligations in national IPR laws can occur in one of two ways. In some nations (often referred to as "automatic incorporation" states), treaties become binding as a part of domestic law as soon as formal ratification procedures have been adopted. In these nations, treaties are considered to be "self-executing" or capable of being given "direct effect" in domestic law such that courts and administrative agencies can construe the treaty directly and enforce the rights it grants to the owners of intellectual property products. In other nations, however (often referred to as "legislative incorporation" states), treaties are considered to be "non-self-executing" and can only become binding in domestic law once the parliament or legislature has adopted legislation to implement the treaty. In these nations, owners of intellectual property products rely on this domestic legislation rather than on the treaties themselves when they seek to enforce rights granted to them under the treaties. India follows the

\textsuperscript{47} The draft of 23 July 1990 by the chairman of the negotiating group on TRIPS, MTN.GNG/NG11/W/76 even stated explicitly "nothing shall prevent Parties from granting more extensive protection to intellectual property rights than that provided in this agreement".
dualist theory for the implementation of international law at domestic level. International treaties do not automatically become part of national law in India. It, therefore, requires the legislation to be made by the Parliament for the implementation of international law in India.\(^{48}\) International treaties do not automatically become part of national law. They have to be transformed into domestic law by a legislative act.\(^{49}\)

### 2.6.3 The territoriality of Intellectual Property Rights

Because of the limited scope of international IPR agreements, even today (with the limited exception of the European Union) no international IPRs are available to inventors and creators who seek to market their products across borders. IPRs are territorial in nature and are acquired and enforced on a country-by-country basis under territorially-circumscribed national IPR laws. The "territorial" nature of intellectual property refers to the fact that countries enact their own intellectual property laws, typically by statute, and these intellectual property laws have no application or force outside the country in which they are enacted.\(^{50}\)

Thus, for example, the inventor of a genetically enhanced variety of corn who seeks patent protection for that variety must apply for protection in each country in which he or she hopes to sell the corn. The inventor must comply with all of the requirements that each country imposes for granting patent rights to the new variety. Similarly, once protection is granted, issues like the scope of the exclusive rights the inventor enjoys in the patented plant variety, the term of patent protection and the limitations imposed on

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\(^{48}\) Article 253 of the Indian Constitution.

\(^{49}\) State of Madras v G.G. Menon AIR 1954 SC 517 and People’s Union for Civil Liberties v. Union of India (1997) 3 SCC 433

\(^{50}\) Donal O’Connell, Why Intellectual Property Matters, available @ http://www3.imperial.ac.uk/information-property-research/aboutus/why-ip, accessed on 24-02-2013
the inventor’s rights are all determined by the different national laws. Recent international agreements have achieved some modest forms of procedural harmonization, but they have not altered the fundamental premise that national laws rather than international treaties are the immediate source of nearly all private rights in intellectual property products.

The two basic principles can be deduced from territorial nature of IPRs. First, where national laws differ as to the scope or content of the protection they provide to intellectual property products, the rights enjoyed by the owners of those products will vary in different national jurisdictions. Second, territoriality implies that each nation has the right to decide on the form of IPR protection to be granted within its own borders, provided that it complies with the obligations contained in international IPR agreements to which it is a party.

Although territoriality thus gives governments some autonomy to set national IPR policies within their own borders, states often view the policies other governments choose as a subject of concern. Indeed, the global reach of markets for intellectual property products makes this concern a necessity. To take just one example, most patent laws grant inventors owning patents within a state the right to prevent the importation into that state of products created in other nations that contain the patented invention. Thus, where distribution markets transcend national borders, an industry may find itself precluded from distributing products in other jurisdictions as a result of patent rights, as occurred when Indian cotton producers were precluded from importing certain forms of transgenic cotton into the United States.

2.6.4 Core obligations imposed by international intellectual property agreements
The territorial approach to IPR protection appears at first to present myriad difficulties for creators and owners of intellectual property products. In fact, however, the content of each nation’s IPR laws are often quite similar since they have been shaped by international IPR agreements ratified by many states. These obligations have been substantially successful in eliminating differences in national IP systems.

2.6.5 National treatment

One of the cornerstones of international IPR agreements is the national treatment principle. National treatment bars discrimination against foreign IPR owners by requiring that each state provide the same IPRs to private parties from other member states as are provided to the state’s own nationals. National treatment levels the playing field among treaty parties and prevents a state from giving its own creators and inventors unfair advantages over foreign creators and inventors. In the absence of national treatment, for example, domestic firms could freely exploit intellectual property products created in other member states while simultaneously enjoying legal protection within their own domestic markets.

2.6.6 Reciprocity

The provisions of several intellectual property treaties contain a limited exception to national treatment known as reciprocity. Where a treaty permits reciprocity, State A may condition the grant of legal protection to intellectual property products from State B upon State B’s granting of legal protection to intellectual property products from State A. Reciprocity is often applied to new IPRs as means of encouraging other nations to

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51 Article 3 of TRIPS Agreement.
52 National treatment (GATT Article III) stands alongside MFN treatment as one of the central principles of the WTO Agreement.
recognize the new rights and extend their protection to foreign nationals. Once a large number of states have recognized the new IPR, they may revise the treaty to eliminate the reciprocity option and impose a national treatment obligation.

2.6.7 Most favored nation treatment

The Most Favored Nation ("MFN") principle is a common feature of international trade agreements but has only recently been applied to IPRs. The principle extends the national treatment rule by compelling a government that provides a privilege or benefit to one state within a treaty system automatically to grant that same privilege or benefit to all states within the same system. In the context of international trade, MFN treatment is essential for ensuring a level playing field between all trading partners and is therefore the central pillar of the international trading system. The MFN principle thus prevents a subset of states within a larger treaty system from entering into bilateral or other special agreements among themselves, unless they grant the rights contained in those agreements to all other parties within the larger treaty system.

2.6.8 Subject matter and eligibility requirements

Intellectual property agreements specify the subject matter characteristics of the products that are eligible for legal protection. In the context of patents, for example, a treaty may specify the types of inventions (such as products and processes) to which states parties must grant legal rights. These subject matter requirements are generally drafted using language that instructs member states concerning the basic characteristics that a product must possess for it to merit protection under domestic IPR laws, while

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53 Article 4 of TRIPS Agreement.
preserving sufficient flexibility for states to tailor the details of protection to the particularities of their national legal systems.

2.6.9 Exclusive rights

Where an intellectual property product satisfies a treaty’s subject matter eligibility requirements, states parties are required to grant an enumerated set of exclusive rights with respect to that product. These exclusive rights grant to the product’s owner the power to exclude all third parties from engaging in the activity that the right covers such as reproducing or modifying the product or distributing it to others. It is the exclusivity of the rights granted that allows IPR owners to recoup the investment of time, money and resources required to create intellectual property products. The particular exclusive rights mandated by IPR agreements differ depending on the specific type of IPR product at issue. They are drafted with greater or lesser degrees of specificity depending on the degree of consensus among member states’ national IPR laws, thus affording varying levels of discretion to governments to implement the rights in their domestic legal systems.

2.6.10 Terms of protection and the public domain

Intellectual property agreements also specify for their states parties the minimum term of years during which intellectual property products must receive legal protection. Once that term has expired, the treaties do not require states to grant legal protection to the products. Thus, unless the state adopts a longer term of protection, after the expiration of the initial term of protection the product may be freely used by anyone for any purpose, including as a source for creating new products or simply for consumption. A corollary of this rule is that national IPR laws do not permit putative inventors and
creators to claim IPRs in materials as they are found in nature or where they are already part of the public domain.

2.6.11 Exceptions and limitations to exclusive rights

International IPR agreements constrain the ability of national governments seeking to restrict the exercise of IPRs to achieve competing social or policy objectives, such as access to information, research, education and cultural development. Restrictions designed to achieve these objectives are generally known as "exceptions and limitations" to exclusive IPRs. These exceptions and limitations generally appear in two forms. The first form permits third parties to engage in specified uses of intellectual property products without the permission of the rights holder and without the payment of remuneration. The second form is known as a "compulsory licence." Compulsory licenses allow third parties to use intellectual property products without the owner’s permission, but only upon the payment of adequate compensation. To prevent both forms of exceptions and limitations from eviscerating IPRs altogether, intellectual property agreements impose specific constraints on the ability of member states to adopt them.

2.6.12 Enforcement provisions

The grant of IPRs in national laws would be meaningless without adequate and effective mechanisms to enforce those rights. For this reason, recent intellectual property agreements specify the types of enforcement provisions that member states must adopt in their national laws. These provisions include the imposition of civil and criminal penalties against any person who engages in acts of exploitation reserved to the owner of an intellectual property product without the owner’s authorization. The penalties include civil judicial proceedings for monetary damages or an injunction to prevent the continued
unauthorized use of the product and criminal proceedings commenced by the government itself.

2.6.13 The minimum standards framework

Taken together, these core provisions of international IPR agreements impose significant legal obligations on member states. The agreements do not, however, purport to definitively address all of the issues raised by the grant of legal protection to intellectual property products. For this reason, the treaties are often referred to as "minimum standards" agreements in that they create only a basic floor of legal protection to which all member states must adhere.

There are three important consequences of this minimum standards framework. First, it allows member states the discretion to interpret and apply those provisions of the treaties that are ambiguous or that reasonably permit more than one construction. Second, a minimum standards approach permits, but does not require, states to grant additional IPR protections within their national laws. And third and perhaps most importantly, the framework leaves member states free to enact laws that serve other political, economic or social objectives, even where those objectives are in tension with IPRs, provided that those laws are not inconsistent with the terms of IPR agreements.

In the last five years, however, an increasing number of developing countries have entered into bilateral or regional trade and investment treaties with the United States or with the European Community. These treaties often contain higher standards of intellectual property protection than those specified in multilateral intellectual property

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55 Article 5 of TRIPS Agreement.
They thus restrict the minimum standards approach contained in the multilateral agreements, for example, by requiring states to enact specific intellectual property protection rules in their national laws or by requiring developing countries to follow the standards contained in multilateral agreements to which they are not parties. The minimum standards framework (as limited by bilateral or regional treaties requiring higher standards of protection) provides a methodology for analysis but not a solution for every potential clash between IPRs and other governmental policies. This is particularly true for plant varieties and plant breeders’ rights, an area of intellectual property protection regulated by several international IPR agreements and subject to diverse standards of legal protection under different domestic laws. To understand how national governments can reconcile competing and sometimes conflicting domestic laws and objectives consistently with the obligations imposed by different international IPR agreements, it is first necessary to examine other international agreements and international institutions relating to plant genetic resources that have promulgated policies in tension with IPRs.

In order to ease trade and knowledge sharing among different countries, many intellectual property laws are based on the same general ideas. The World Intellectual Property Organization (WIPO) and the Berne Convention for the Protection of Literary and Artistic Works have led to standardization of many laws, and advanced international parity.

The World Trade Organization (WTO) also requires its members to adhere to

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56 Peter Drahos, Developing Countries and International Intellectual Property Standard-setting 2001; available @http://www.iprccommission.org/papers/pdfs/study_papers/sp8_drahos_study.pdf, accessed on 21-02-2013)
many of Berne’s conditions through the Agreement on Trade-Related Aspects of Intellectual Property Rights.\textsuperscript{57}

The 1996 World Intellectual Property Organization Copyright Treaty further standardized international copyright issues by addressing contemporary technology, most notably the internet.

Although the TRIPS Agreement affirms that one of its objectives is to reduce distortions and impediments to international trade, intellectual property rights are by their very nature trade restrictive.\textsuperscript{58} This kind of experience can be controlled only when IPR culture is developed in both developed and developing countries on same footings.

2.7 Intellectual Property Regime in India

2.7.1 India’s International Trade Obligations

In the era of expanding multilateral trade and commerce, it has become inevitable for any country to protect its intellectual property by providing statutory rights to the creators and inventors and thus help them fetch adequate commercial value for their efforts in the world market. India as a founder member of WTO has ratified the Agreement on Trade Related Intellectual Property Rights (TRIPS). As per the agreement, all member countries including India are to abide by the mutually negotiated norms and standards within the stipulated timeframe. Accordingly, India has set up an Intellectual Property Right (IPR) regime, which is WTO compatible and is well established at all levels whether statutory, administrative or judicial.

2.7.2 Statutory Framework governing Intellectual Property regime in India

\textsuperscript{57} Article 2 of TRIPS Agreement.
The general laws in relation to Intellectual Property Enforcement in India are mainly the following:

i) The Code of Civil Procedure
ii) The Indian Penal Code
iii) The Civil and Criminal Rules of Practice

While Civil Procedure Code provides for the civil remedies and enforcement through civil courts, the Indian Penal Code provides for penal remedies. The rules of practice of the trial courts, High Courts and the Supreme Court of India set the finalities of the enforcement procedure.

India follows common law tradition and judicial precedents do have binding force. Hence the decisions of the Supreme Court bind the lower judiciary of the country.

The Intellectual Property Laws do provide for statutory enforcement mechanisms. The most important of the Indian Intellectual Property Laws are:-

i) The Patents Act, 1970
ii) The Trade Marks Act, 1999
iii) The Copyright Act, 1957; and

The above legislations are supported by the relevant Rules there under and these rules are:-

i) The Patents Rules, 1972 as amended by the Patents (Amendment) Act, 1999
iii) The Copyright Rules, 1958; and
The main post WTO Intellectual Property legislations are:-

i) The Geographical Indications Act, 1999


There are well-established statutory, administrative, and judicial frameworks for safeguarding IPRs in India. India has complied with TRIPS obligations by enacting the necessary statutes and amending the existing ones. Well-known international trademarks have been afforded protection in India in the past by the Indian courts despite the fact that these trade marks were not registered in India. The existing civil law was relied upon to extend this protection. Computer databases and software programs have been protected under the copyright laws in India\(^{59}\) and pursuant to this; software companies have successfully curtailed piracy through judicial intervention. Although trade secrets and know-how are not protected by any specific statutory law in India, they are protected under the common law. The courts, under the doctrine of breach of confidentiality, have granted protection to trade secrets. The Government has taken a comprehensive set of initiatives to streamline the intellectual property administration in the country in view of its strategic significance. In the Ministry of Commerce and Industry, the office of the 'Controller General of Patents, Designs and Trade Marks (CGPDTM)' has been set up under the Department of Industrial Policy and Promotion. Nomenclature ‘IPR’ in India was imported from the west. The Indian Trade and Merchandise Marks Act 1884, was the first Indian Law regarding IPR. The first Indian Patent Law was enacted in 1856 followed by a series of Acts being passed. They are Indian Patents and Designs Act in 1911 and Indian Copyright Act in 1914. Indian Trade and Merchandise Marks Act and

\(^{59}\) Computer database is included in the definition of ‘literary work’ under section 2 (O) of the Copyright Act, 1957.
Indian Copyright Act have been replaced by Trade and Merchandise Marks Act 1958 and Copyright Act 1957 respectively.

2.7.3 Administrative Mechanism of the protection

Matters relating to patents, designs, trademarks and geographical indications are administered and supervised in the following way:

i) The Patent Office (including Designs Wing)
ii) The Patent Information System (PIS)
iii) The Trade Marks Registry (TMR), and
iv) The Geographical Indications Registry (GIR)

Besides, a 'Copyright Office' has been set up in the Department of Education of the Ministry of Human Resource Development, to provide all facilities including registration of copyrights and its neighboring rights.

As far as issues relating to layout design of integrated circuits are concerned, 'Department of Information Technology' in the Ministry of Information Technology is the nodal organization. While, 'Protection of Plant Varieties and Farmers' Rights Authority' in Ministry of Agriculture administers all measures and policies relating to plant varieties.

For complementing the administrative set up, several legislative initiatives have been taken. It includes, the Trade Marks Act, 1999; the Geographical Indications of Goods (Registration and Protection) Act 1999; the Designs Act, 2000; the Patents Act, 1970 and its subsequent amendments in 2002 and 2005; Indian Copyright Act, 1957 and its amendment Copyright (Amendment) Act, 1999; Semiconductor Integrated Circuit

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60 Available @ www.iprlawindia.org, visited on 1-1-2013.

The rapidly growing international trade makes it imperative that intellectual property rights are properly recognized and managed in different countries of the globe. National protection is no longer adequate to safeguard intellectual property rights which can easily be pirated or copied by nationals of other countries and exploited in their own market or even in international markets. International remedies for such infringement are necessary.61

2.7.4 Intellectual Property Enforcement Mechanism in India

Figure 1 shows the hierarchy of courts in IP Administrative Disputes. This hierarchy holds good for patents, trade marks, designs and Geographical Indications.

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Dr Justice A.S. Aanad, Intellectual Property Right — The Indian Experience, (1997) 6 SCC (Jour)1

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Figure 2: shows the hierarchy of courts in IP Infringement Disputes. This hierarchy holds good for patents, trade marks, designs and Geographical Indications.

![Hierarchy of courts IP Infringement Disputes]

**Under Article 32, 133, 136 and 142 of the Indian Constitution.**

**Under Article 226 and 227 of the Indian Constitution.**

**Under sections 104 of the Patents Act**

### 2.8 Conclusion

After looking to the above analysis of IP especially in Indian context, there is a need to adopt the notion “Change, yet continuity.” Justice as the basis for property, economic relations, and approach towards nature is embedded in the mainstream Indian tradition and has much input to inspire. 62 This approach towards the problem of creating, maintaining, and enforcing IPRs is can have both historic propriety and logical justification. India’s IP systems and mechanisms are becoming rich and diversified which is very much necessary for spurring and supporting technology innovation for socio-economic benefits. India is witnessing rapid development in almost all sectors. Indian IP law and mechanisms are also changing to adapt to global practices. The patent filings are increasing rapidly with Indian companies also beginning to file patent applications and oppositions. On one hand, mechanisms are getting better to create and protect IP rights as

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private property for individuals and organizations investing in creating them while on the other hand, mechanisms to create intellectual property that will be held in trust for public use towards pursuing social and strategic goals are also coming up. The issue of balancing between public and private interests is at the central place for policy makers. It is undisputed that creation of intellectual property is critical to India’s economic development and the achievement of social and strategic goals. The only controversial issue is how to use IP and how best to reward its creator. There is a need to back up intellectual property activity in India to achieve the economic goals. The investment in IP needs to be sustained in variety of manners. Private investors, industry, government, and the not-for-profit sectors need to have an agenda to achieve the economic goals based on our social objectives. India has to leverage every possible source of investment to accelerate technology innovation. Both the private and public sector investments are important in promoting technology innovation and delivering the fruits of technology innovation to the people. It is therefore important that India creates an ideal legal regime to promote both private and public initiatives in technology innovation. Generation of intellectual property often requires sustained investments of a considerable amount of money and effort over long time periods under circumstances of uncertainty and risks relating to not only technology but also regulatory hurdles, acceptance by end-users and customers, etc. Private investors come forward to invest only if sustainable competitive advantage is ensured to justify taking the risks. The public must also nurture strong public initiatives in creating intellectual property and holding them in trust for public use directed at social or national strategic goals. Public action, philanthropy, and shaping of

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public policy are all necessary to ensure that the government and the not-for-profit sector earmark sufficient funds for the creation of intellectual property and technology innovation directed at social and strategic objectives.\textsuperscript{64} There is need for initiatives addressing the problems such as public health, energy security, food security, water, environment, natural resources, defence, etc. The ability of our country to sustain economic growth while meeting social and strategic objectives through next several decades rests strongly in its ability to prioritize and facilitate investment into technology innovation and the creation of intellectual property through both private and public initiatives, and such a balanced and well-reasoned approach is the need of the hour.

To conclude this chapter the following suggestions can be made with regard to the effective implementation of IPRs in India.

i) There is urgent need to educate the masses regarding importance and benefits of protection of Intellectual Property Rights. Protection of IP Rights fosters economic growth and attracts foreign investment.

ii) People must be made to understand that protecting intellectual property is important to employment, which leads to growth and a better quality of life. If intellectual property rights are not respected, no one would like to invest in the country.

iii) Intellectual property rights holders also might help themselves by educating the consumers to understand that not all decisions should be based merely on price alone. The protection of IP Rights is also essential from the point of view of health and safety of the people.

\textsuperscript{64} For example the recent Open Source Drug Discovery (OSDD) initiative of CSIR is an important development in this regard.
iv) The Government and the IP Rights holders can jointly play an important role in educating the masses that IP Rights protection is not only an economic issue, but a health and safety issue as well. Counterfeit food products and counterfeit pharmaceuticals at times have resulted in deaths.

v) Developed countries and organizations like WIPO must ensure adequate financial and technical help to those nations who lack adequate resources to have proper enforcement mechanism of IP Rights.

vi) Developed countries should encourage public – private partnership in enforcements of IP Rights.

vii) Developed countries and organizations like WIPO must coordinate and help local enforcement agencies so that proper protection is ensured.

viii) Developed countries and international organization like European Commission and WIPO should encourage use of holograms, Anti-copying devices; encryption so as to ensure that piracy can be detected and handled effectively.

ix) Developed countries and agencies like WIPO must create awareness in each country about the urgent need of setting up of special or fast-track courts to decide cases pertaining to IP Rights.

x) There is a need to integrate the functioning of IP courts and regular courts in respect of IP litigations. In fact there are views that India should go for separate and exclusive IP courts.