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INTELLECTUAL PROPERTY RIGHTS – LAW & PRACTICE

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CS Muskan Gupta

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CHAPTER 1 INTRODUCTION

1. CONCEPT OF PROPERTY VIS-À-VIS INTELLECTUAL PROPERTY

Human Beings are distinguished from animals by the intellectual capability endowed on them by the Almighty. The Human Beings have thus elevated themselves to the present 'Civilized State' solely on account of exercise of their intellectual capabilities.

The property which comes into existence by application of human intellect is termed as Intellectual Property. It is product of

1) Intellectual Capabilities and
2) Labour

Intellectual Property relates to information which can be incorporated in tangible objects and reproduced in different locations. For Example, Patents, Designs, Trade Marks and Copyright. The rights accrued on the owner of such property (Intellectual Property) are termed as Intellectual Property Rights (IPR).

As stated above, Intellectual Property (IP) refers to the creations of the human mind, like inventions, literary and artistic works, and symbols, names, images and designs used in commerce. It can be divided into two categories:-

1. Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and
2. Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works, such as, drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.

Intellectual property rights protect the interests of creators by giving them property rights over their creations. The most noticeable distinction between Intellectual Property and other forms of properties is that:-

Intellectual Property is intangible, that is, it cannot be defined or identified by its own physical parameters. It must be expressed in some discernible way to be protectable. Generally, it encompasses four separate and distinct types of intangible properties, namely

a) Patent

b) Trademark

c) Copyright and

d) Trade Secret,

e) Others which collectively are referred to as "Intellectual Property."

However, the scope and definition of Intellectual Property is constantly evolving with the inclusion of newer forms under the ambit of Intellectual Property. In recent times,

a) Geographical Indications

b) Protection of plant varieties

c) Protection for semi-conductors and integrated circuits, and

d) Undisclosed Information have been brought under the umbrella of Intellectual Property.

Intellectual Property Rights are like any other property rights. They allow the creators (or owners) of Patents, Trademarks or Copyrighted works (as the case may be) to benefit from their own respective work or investment in a creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions. The importance of Intellectual Property was first recognized in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both treaties are administered by the World Intellectual Property Organization (WIPO).

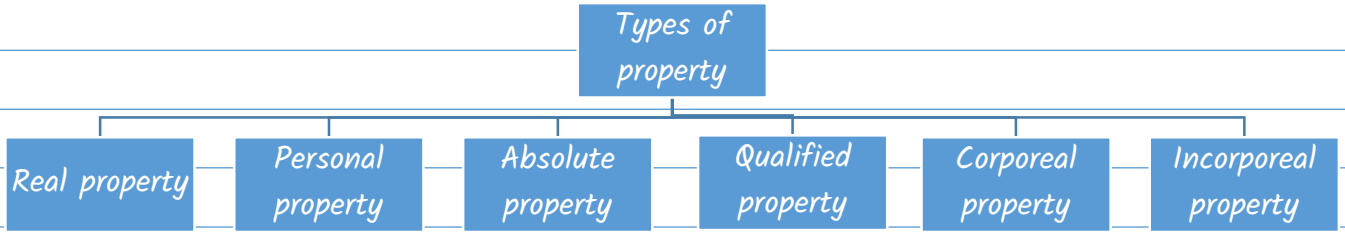
In short, Property Rights in ideas are no different than the ownership of houses, cars and other forms of private property. The rhetoric it builds upon seems convincing at first i.e. you ought to be the exclusive owner of your idea to have the incentive to develop it, the very same way you ought to be the exclusive owner of your land to have incentive to develop it.

2. CONCEPT OF PROPERTY AND THEORIES OF PROPERTY – AN OVERVIEW

The term "property" signifies the subject matter over which the right of ownership or any less right carved out of ownership is exercised. It has a very wide connotation, it not only includes money and other tangible objects of some value, but it also includes the intangible rights which are considered to be a source or an element of income or wealth. It includes the rights and interests which a human possesses over land (and chattel) and which is to the exclusion of all others. It is the right to enjoy and to dispose of certain things in the way that he pleases to, provided that such use is not prohibited by law. However, there are certain things over which property rights by any single individual (or an entity) cannot be exercised. This includes the sea, the air and the like as they cannot be appropriated. Everyone has a right to enjoy them, but no one has an exclusive right over them.

It is clear, thus, that in case of personal property no person other than its owner, who has an exclusive right over it, can claim any right to use it, or to hinder the owner from disposing it of, so that the property which is considered as an exclusive right over things, contains not only a right to use, but also a right to dispose of such property.

Property can be classified into



a) **Real property** The property which is fixed permanently to one location is termed as real property. Real property includes within its ambit land, any construction on the land, things growing on the land or existing under the face of land.

b) **Personal property**. Personal property is a property belonging to person and in case of personal property no person other than its owner, who has an exclusive right over it, can claim any right to use it, or to hinder the owner from disposing it of, so that the property which is considered as an exclusive right over things, contains not only a right to use, but also a right to dispose of such property.

c) **Absolute property**: Absolute property is the one which is owned without any qualification or restriction whatsoever. In case of sale the moment sale deed is executed the transferee becomes absolute owner of the property.

d) **Qualified property**: A qualified property consists of special, conditional or interest upon the subject matter. The owner of the qualified property lacks the complete bundle or sets of right bestowed upon the absolute owner. Rights of bailee are one of the suitable examples related to qualified property.

e) **Corporeal**: A corporeal property signifies a property which is perceptible to the senses, such as, land, house, goods, merchandise and the like.

f) **Incorporeal property**: Incorporeal property consists of legal rights, as choses-in-action, easements, and the like.

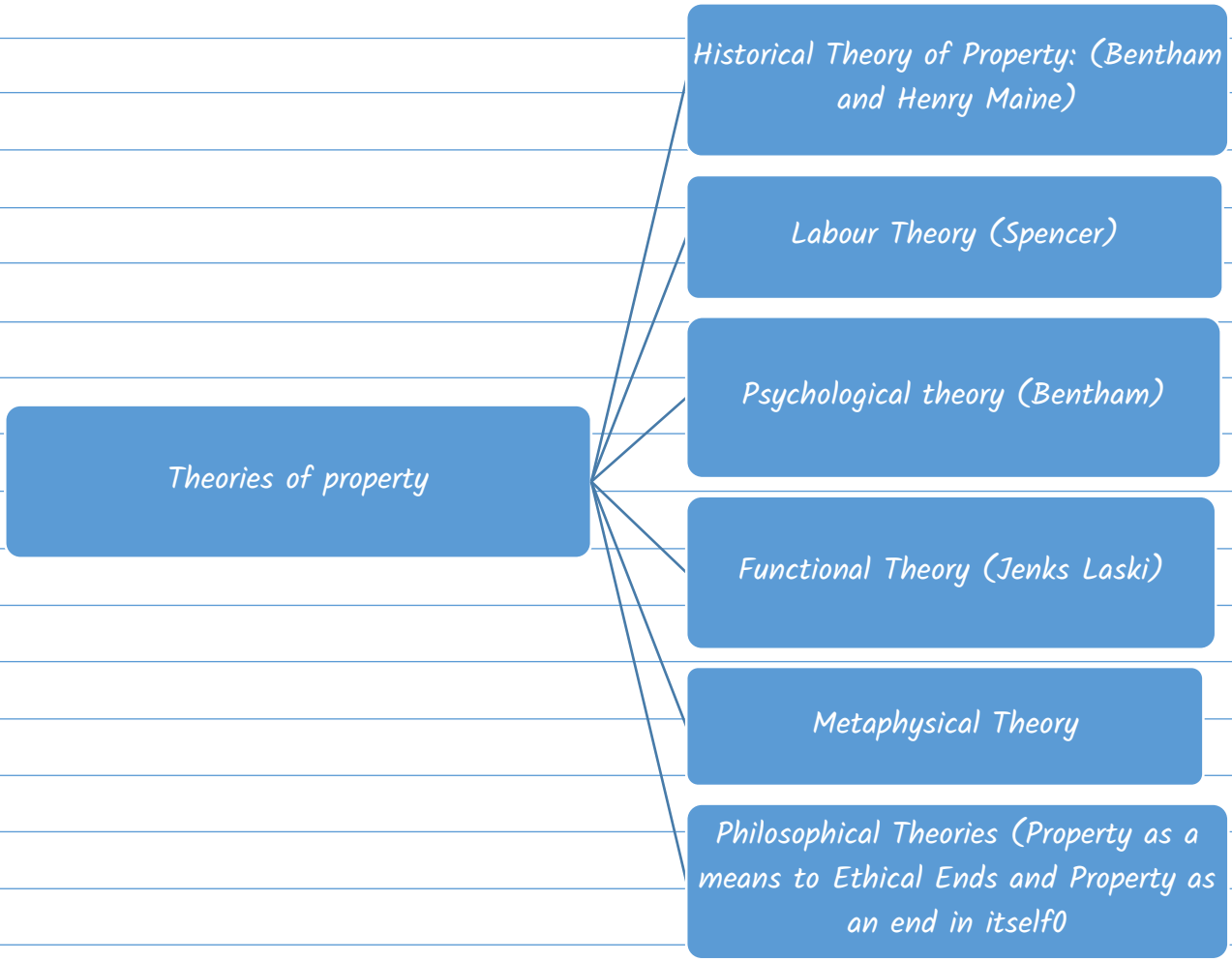
As regards standard definition of the term property, there are different definitions of the term 'Property' provided in different statutes in India. For instance

Section 2(c) of the Benami Transactions (Prohibition) Act, 1988 defines Property as, "Property means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property."

Section 2(11) of the Sale of Goods Act, 1930 defines 'Property' as, "Property means the general property in goods, and not merely a special property."

3. THEORIES OF PROPERTY:

Different theories laid down on the subject of concept of "Property" are as follows:



(a) Historical Theory

Historical theory of the origin of the property was propounded by Bentham and Henry Maine was well known supporter of the this theory According to the Historical theory of Property, the concept of Private Property grew out of joint property.

It has following main features

i) Private property has witnessed slow and steady growth

ii) It grew out of collective or joint property

iii) First stage of development consisted of natural possession

iv) Second stage of development resulted in juristic possession

v) Final and last stage of development lead to evolution of concept of ownership

In the words of Henry Maine, "Private Property was chiefly formed by the gradual disentanglement of the separate rights of individual from the blended rights of the community". In the earlier days, the ownership rights over property were vested in large

societies which were chiefly Patriarchal societies. However, with the disintegration of societies and families, there was a gradual evolution of the concept of individual rights. Roscoe Pound in his theory has also pointed out the fact that the earliest form of property was in the nature of group property and it was later on when families partitioned that the existence of individual property came to be recognised.

(b) Labour Theory (Spencer)

This theory of property is also known as 'Positive Theory' was propounded by Spencer. The underlying principle basis of this theory is that labour of the individuals is the foundation of property. The theory advocates that , a thing (res) is a property and it belongs to the person who takes the pain of bringing into exsistence. Spencer, who developed the theory on the principle of 'equal freedom' has stated that property is the result of individual labour, and therefore, no person has a moral right to property which he has not acquired by his personal effort.

(c) Psychological Theory (Bentham)

Bentham propounded this theory. According to this theory, Property came into existence on account of the acquisitive instinct of the human beings. Every individual has a desire to own and have into his possession things which is the factor responsible for bringing Property into existence. According to Bentham, Property is altogether a conception of mind and thus it is nothing more than an expectation to derive certain advantages from the object according to one's capacity. Roscoe Pound also supports Bentham on this school of thought and has observed that the sole basis of conception of Property is the acquisitive instinct of individual which motivates him to assert his claim over objects in his possession and control.

(d) The Sociological Theory / Functional Theory (Jenks and Laski)

This theory is also known as the 'sociological theory of property'. It assumes that the concept of Property should not only be confined to private rights, but it should be considered as a social institution securing maximum interests of society. Property is situated in the society and has to be used in the society itself. According to Jenks, no one can be allowed to have an unrestricted use of his property, to the detriment to others. He thus states that

the use of property should conform to the rules of reason and welfare of the community. According to Laski, who also supports this school of thought, Property is a social fact like any other, and it is the character of social facts to alter. Property has further assumed varied aspects and is capable of changing further with the changing norms of society.

(e) The Metaphysical Theory

Kant and Hegal propounded this theory. According to Kant "A thing is rightfully mine when I am so connected with it that anyone who uses without my consent does me an injury. "According to Hegel, "property is the objective manifestation of the personality of an individual. In other words, property in an object on which person has liberty to direct his will". Kant observed that law of property does not merely seek to protect possessions where there is an actual physical relation between the possessor and the object, but it goes beyond and considers the personal will of the individual more important in the concept of the property.

(f) Property is the creation of the State

The origin of 'Property' is to be traced back to the origin of 'Law' and the 'State'. Jenks observed that Property and Law were born together and would die together. It means that Property came into existence when the State framed Laws. As per this theory, Property was non-existent before Law.

According to Rousseau, 'it was to convert possession into property and usurpation into a right that Law and State were founded.' The first who enclosed a piece of land and said – this is mine – he was the founder of real society. He insisted on the fact that property is nothing but a systematic expression of degrees and forms of control, use and enjoyment of things by persons that are recognized and protected by law. Thus, the conclusion is that property was a creation of the State.

4. PHILOSOPHICAL THEORIES (Property as a means to Ethical Ends)

In the views of Aristotle, Hegal and Green, Property has never been treated as an end, but always as a means to some other end. According to Aristotle, it may be a means to the end

of Good Life of citizens. In the views of Hegal and Green, it may be a means to the fulfillment of the Will without which individuals are not full human. According to Rousseau, Jefferson, Friendman, it may be a means as a pre-requisite of individual freedom seen as a human essence. The supporters of utilitarian tradition treat, accumulation of property as, an end, always meant as a right of unlimited accumulations. Later the concept changed and the utilitarian Bentham held that ultimate end to which all social arrangements should be directed is maximization of the aggregate utility i.e. pleasure minus pain of the members of the society.

5. TANGILBLE AND INTANGIBLE PROPERTY

a. Tangible Property

The term 'Tangible property' refers to any type of physical property that can generally be moved (i.e., it is not attached to real property or land), touched or felt. It generally includes items such as furniture, clothing, jewellery, art, writings, household goods etc.

b. Intangible Property

Intangible property on the other hand refers to some personal property that cannot actually be moved, touched or felt, but instead it represents something of value, such as, negotiable instruments, securities, service and intangible assets, including goodwill etc.

c. Intellectual Property

Intellectual property is a property which comes into existence by application of human intellect. It is referred as as "Bauddhik sampada " in the Indian Context. Bauddhik means related to buddhi or intellect and word sampada means property . When word buddhi gets combined with sampada it amounts to bauddhik Sampada.

The person who is owner of Intellectual property is provided bundle of rights related to the property which has come into existence by application of his intellect. These rights collectively are termed as intellectual Property rights.

Intellectual Property is a term which refers to and indicates a number of distinct types of creations of the mind for which law confers certain property rights upon its creator. The jurisprudence developed on the concept of 'Property' has made it abundantly clear that property does not just encompass tangible things, like a house, a car, furniture, currency, investment etc and that these assets are not the only kind of property which are subject matter of protection by law. There are many other forms of intangible properties which are known with the term 'intellectual property' that have been recognised by the law and thus granted protection against any kind of infringement by a person other than its rightful owner or a person authorised by such rightful owner.

Under the Intellectual Property Law, the owners of such intangible property have been granted and conferred with certain exclusive rights over their respective intangible assets/works, these include, musical, literary and artistic works; discoveries and inventions; and words, phrases, symbols, and designs, etc. Patent, Trademark, Copyright, and Designs rights are the broad four main categories of intellectual properties, though the domain of such assets is expanding with the passage of time. Exclusive rights are provided to the owners as a reward of the intellect, time, money, skill etc. they used for creation of intellectual property.

6. PATENTS

Necessity is mother of invention and inventions are need of hour. The person who invents something having industrial application is granted Patent on the invention. Intellectual Property right related to patents provides bundle of rights related to the invention including the right to use, assign etc. Patents are conferred in order to grant protection to certain new products, processes, apparatus, etc. provided the invention involved in it is non-obvious in nature in light of what already exists or has already been done before, it is not in public domain, and has not been disclosed anywhere in the world at the time of the application for grant of patent. The invention involved must have a utility i.e. a practical purpose. Patents are territory specific and thus are registrable nationally. However, the Patents granted by European Patent Office is regarded as a 'bundle' of national Patents. Also, there is not yet any single EU-wide patent system which exists till date. Registration of patent provides its

owner the right to prevent anyone else(other than the licensed user) from making, using, selling, or importing the invention for 20 years from the date of grant of patent. Patents are enforced by court proceedings.

7. TRADEMARK

A symbol in the form of a logo, words, shapes, jingles etc. which is employed to provide the product(s) or service(s) with a recognizable identity to distinguish them from the competing products is called as a Trade Mark. Trade Marks help in protecting the distinctive identification which make up the marketing identity of a brand. They can be registered by its founder/user nationally as well as internationally, thus enabling him to use such mark on his products along with the symbol ® which reflects the registration status of the symbol. Trade mark rights can be enforced through court proceedings wherein relief in the form of injunction and/ or damages are available. In cases wherein there is an element of counterfeit, the state authorities like the Customs Department, the Police, and even the Consumer Protection Agencies can be approached to assist and provide relief in such cases. An unregistrable trade mark however is symbolised by the use of the letters 'TM'to be used along with the mark. To enforce one's right in respect of such unregistered trade mark in the court of law in case the competitor uses the same or a similar mark to trade his products in the same or a similar field, one has to prove that he/she has put to use such mark prior to the other person against whom the proceedings are brought about.

8. COPYRIGHT

Copyright is used to protect works like original creative works, published articles, sound recordings, films, and broadcasts. The right exists independent of the medium on which the work is recorded, and therefore buying a copy thereof does not confer a right to copy the work. Limited copying in the form of photocopying, scanning, and downloading without permission of the copyright owner is however permissible but only for research activities. Further, publication of excerpts or quotes from the work requires a due acknowledgement of the source from which such excerpts or quotes have been taken. However, a mere idea is outside the domain of the protection of copyright and thus a mere idea cannot be copyrighted, i.e., only the expression of the idea.

Copyright also does not exist for a title, slogan or a phrase, although all these can be registered as a trade mark. Copyright extends to the internet medium as well like the matter published through web pages which are protected by the copyright law, such that permission is required before copying the matter contained therein or even to insert a hyperlink to it.

Unlike many other Intellectual Property Rights, Copyright is not necessarily registrable and it arises automatically upon creation of the work itself. Further, Copyright can be enforced through the court of law.

9. DESIGN REGISTRATION

Registration of a Design helps in protecting the products which can be distinguished by their mere novel shape or pattern. However, the requirement for registration is that such design itself must be new and thus the element of novelty is of the essence for design registration. Design is registrable both nationally as well as under the EU-wide single registration. Such a right can also be protected through the copyright. Thus, from the aforementioned it is clear that the concept of property is in existence from very ancient period. The concept itself has a very long history and thus many philosophers/thinkers have put down their views on the subject in the form of different schools of thought. These thinkers include philosophers like Bentham, Laski etc. Their philosophies are very helpful and also indispensable to make one understand different aspects of the concept of property. Under the Transfer of Property Act, 1882 which is considered to be the most elaborate statute on the subject of Property does not contain a definition of the term 'Property' itself. In today's era, not only the things which can be seen or touched but also the things which cannot be touched or seen come within the purview of the term 'property'. This includes ideas, innovation, composition etc. These properties are known as intellectual property.

10. THEORIES OF INTELLECTUAL PROPERTY RIGHTS

The term "intellectual property rights law" is a very broad term and it now includes and refers to a cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia.

i. The law of copyright protects different forms of expression which are original, including those contained in novels, movies, musical compositions, and computer software programs.

ii. Patent law on the other hand protects different kinds of inventions as also some discoveries provided it satisfies the essential conditions for a Patent.

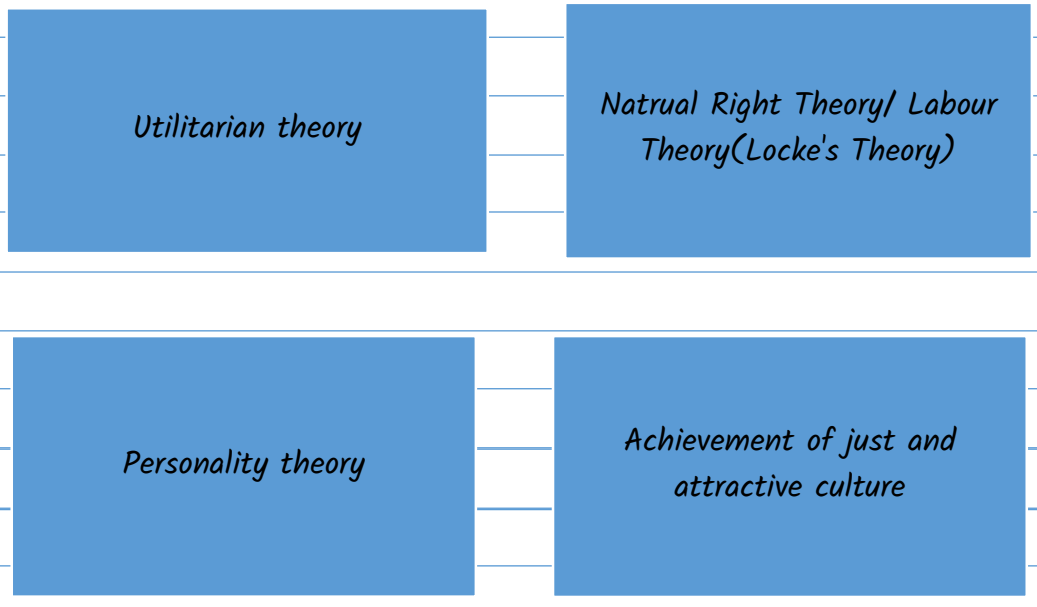
iii. The Trademark law is framed to protect 'words', 'symbols' etc. that help the consumers identify and distinguish the goods and services of different manufacturers and service providers.

iv. The Trade-secrets law which is a fairly new branch of Intellectual Property Rights law is intended to protect commercially valuable information for instance, soft-drink formulas, confidential marketing strategies, etc. that the companies would like to conceal and protect from their competitors.

The revenues of many businesses now depend substantially on the Intellectual Property that they possess and the steps that they adopt to protect them. Increasing number legal professionals are also specializing in this particular branch of law. Further, the legislatures around the world are also busy in framing and revising their intellectual property laws. As a result of these emerging trends, scholarly interest in this particular field of law has risen dramatically in the recent years.

Law reviews and journals as also those related to the subject of economics and philosophy, are increasingly focusing on including articles deploying "theories" of intellectual property.

There are many writings which have commented upon the differences and the contest amongst the four approaches.



a) Utilitarian Theory

Utilitarian Theory has been advocated by economist such as Benthem and Mill and its primary focus is upon attainment of greatest good for greatest number. It says that the any policy made and implemented by any authority should have power of ensuring greatest good for greatest number. Greatest good here refers to utmost welfare and greatest number refers to masses.

The utilitarian guideline says that: -

a) Lawmakers' beacon when shaping property rights should be the "maximization of net social welfare". This is essentially the utilitarian thought.

b) In respect of the subject of intellectual property, the school of thought, requires that the lawmakers must strike an optimal balance between, the power of exclusive rights to stimulate the creation of inventions and works of art on the one hand, and, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations, on the other.

c) The danger expressed in respect of this theory is that the creators of such products will be unable to recoup their "costs of expression" i.e. the time and effort devoted by them to writing or composing and the costs of negotiating with publishers or record companies, since copyists are likely to undercut them and persons bear a very low cost of production and thus they can offer identical products to the consumers at a very low price resulting in a loss to the creators of the products.

d) If this happens it will disincentivise the creators from making any socially valuable intellectual product.

e) This can however be avoided by allocating to the creators (for limited times) the exclusive right to make copies of their creations. The creators of works that are valuable to the consumers will be empowered to charge prices (for allowing anyone to access to their works) which shall be substantially greater than they could in a competitive market. This rationale put forward by the utilitarian thinkers has been used to shape specific doctrines within the field.

b) Natural Right Theory / Labour Theory (Locke's Theory)

The Natural Right Theory emanates from the proposition that "a person who labors upon resources that are either un-owned or "held in common" has a natural property right to the fruits of his or her efforts and that the state has a duty to respect and enforce that natural right". This idea has been elaborated in the writings of John Locke and is also applicable to the subject of intellectual property, wherein the raw materials in the form of facts and concepts do seem in some sense to be "held in common" and where labor contributes substantially to the value of the finished product. Lockean property entitles:-

a) Right to use without harm

b) Right to transfer the property

c) Right of exclusive usage of the property

c) Personality Theory

Personality theory finding place in the writings of Kant and Hegel is that private property rights are crucial to the satisfaction of some fundamental human needs. The law makers thus must create and allocate entitlements to resources in a way that best enables people to satisfy such needs. From this perspective, Intellectual Property Rights may be justified either on the ground that they shield from appropriation or modification artifacts through which authors and artists have expressed their "wills" (an activity thought central to "personhood"). Justin Hughes, taking inspiration from Hegel's Philosophy of Right, laid down following guidelines concerning the proper shape of an Intellectual Property regime (See Hughes, "Philosophy of Intellectual Property"):

(a) We should be more willing to accord legal protection to the fruits of highly expressive intellectual activities, such as the writing of novels, than to the fruits of less expressive activities, such as genetic research.

(b) Because a person's "persona" -- his "public image, including his physical features, mannerisms, and history" -- is an important "receptacle for personality," it deserves generous legal protection, despite the fact that ordinarily it does not result from labor.

(c) Authors and inventors should be permitted to earn respect, honor, admiration, and money from the public by selling or giving away copies of their works, but should not be permitted to surrender their right to prevent others from mutilating or misattributing their works.

d) Achievement of just and attractive culture theory

The fourth approach is based on the proposition that property rights, in general, and intellectual property rights, in particular, can and should be shaped with the objective to help achieve a just and attractive culture. The approach has some similarities with the utilitarianism, but does not agree to deploy a vision for a society richer than the conceptions of "social welfare" deployed by utilitarians. An appropriate illustration can be found in Neil Netanel's essay, titled as "Copyright and a Democratic Civil Society." Netanel begins by describing a picture of "a robust, participatory, and pluralist civil society," collaborating with "unions, churches, political and social movements, civic and neighborhood associations, schools of thought, and educational institutions." In such a world described, all persons would enjoy some degree of financial independence coupled with considerable responsibility in shaping their local social and economic environments. Such a civil society is vital, Netanel claims, to the perpetuation of democratic political institutions. Such a society shall not, however, emerge spontaneously; it has to be nourished by the Government.

II. Meaning, Relevance, Business Impact and Protection of Intellectual Property

In today's competitive world 'Innovation' is the buzz word and is the main requirement for the survival of every business. Identifying, developing, and leveraging innovations provide a competitive edge to the business and it aids in its long-term success as well. There is a misnomer that Intellectual property is limited to technology companies. However, the fact is that it is a necessity and is very much valuable for every business which invests huge sums in its research and development programmes in order to create new and useful indigenous products and services.

Thus, a company ought to be proactive in implementing its IP solutions to identify novel innovations, and thus increase its revenues. A well-defined IP goal not only helps in achieving business objectives but also helps in positioning the company/organisation as a business leader in the marketplace. With growth in its business revenues, company's IP strategy can include protection of certain unique aspects of its assets which may also result in fostering innovations to explore new geographies. This can be achieved through licensing or joint ventures to create novel solutions and that satisfy the unmet needs of the society.

There is also a need for a company to evaluate its existing Intellectual Property in order to ensure that it is in line with its business objectives. Such an activity helps the company to identify new ways to leverage the Intellectual Property through licensing opportunities available to it. Companies must always be on a lookout for some new avenues to expand their product offerings, increase their sales revenue, and foray into new markets.

It is a well-known fact that an organization's success largely depends upon its Patent portfolio apart from various other Intellectual Property assets, such as, designs, trademarks, and copyrights. Thus, every organization must ensure maximisation of its intellectual property portfolio which can be done through effective portfolio management policy. Furthermore, an organization must also understand its patent portfolio in tandem with its competencies and opportunities available in the market. There is a necessity to identify areas wherein the organization can license its patent portfolio or otherwise divest to gain some financial returns. A coherent and properly implemented patent strategy can aid the organization to manage its patent portfolio. To list a few points which an organisation ought to ponder while framing and implementing its Patent portfolio:

(a) Identify the Patents held by the organization.

(b) Identify the gaps (white space analysis).

(c) Framing of an investment strategy that helps the organisation to enhance its Patent Portfolio.

(d) Develop ways to effectively manage and develop the patent portfolio

An effective understanding of the key components of a Patent can also help an organization manage and grow its patent portfolio. It is critical to understand the Patent landscape which starts with conducting an audit of organization's intellectual property assets. An effective market research is involved in understanding the strength of the patent portfolio in light of the competition and technology available on date. With an understanding of its patent portfolio, an organization must also identify the white spaces to drive more growth and revenues. Some of the points which an organisation must ask itself while carrying out white gap analysis are as follows:

(a) What are the areas wherein it can invest its research and development fund in order to build an effective patent portfolio?

(b) What are the areas wherein it can draw a competitive advantage by granting license?

(c) Does the technology pose a threat from the competition?

(d) What are the possibilities for a merger or acquisition?

Out-licensing patented technologies is an essential part of an Organisation's strategy to effectively manage its IP and draw more revenues from it. Therefore, an organization must conduct its patent analysis in order to identify the technology and exploit it further for licensing. Needless to say that a detailed patent analysis helps an organisation identify opportunities for out-licensing the technology and potential infringement issues.

12. Building a strong Patent portfolio

The IP strong portfolio of a company acts not only as a shield but also as a sword. It helps in protecting company's innovations to drive long term revenues and improve market position. Thus, safeguarding its intellectual property is very critical for every organisation and the same cannot be overlooked or its importance undermined. Intellectual property helps an organisation develop and maintain its long-term revenue streams and also increases its shareholder's value.

Innovations are crucial for the success of every business and they can be patented in order to ensure that the competitor is prevented from exploiting the invention during the patent period. One of the many ways available to protect one's innovation is to file a patent for it. A patent is in the form of grant of an exclusive right to commercially exploit an inventor which is granted by the Patents Office. Generally, the term of a patent is 20 years from the date of filing of the application. The right conferred by Patent is not only to commercially exploit the invention, but also to exclude others from making, using, and selling the invention in the country where the protection is sought. Once granted a Patent, the Patentee i.e. the Patent owner can grant licences to others allowing them to make use of invention and sell the products made of it.

As already demonstrated above, innovations are very crucial and important for the long-term financial success of any business. It makes an organization more competitive than its competitors. Thus, the Organizations need to appreciate and comprehend the importance of building a strong intellectual property portfolio and use it effectively to devise effective business strategies in order to achieve long term success in the marketplace. Building a strong IP portfolio helps the organizations to market their product or services to the customers.

In order to remain ahead in the competition, the entrepreneurs/innovators must strive to continue to evolve their product portfolio and maintain consistent quality of their products and services. An effective use of intellectual property also prevents any competitor in that particular business or industry from taking any undue advantage of its goodwill in the marketplace. Without a protection of such kind, the innovators and entrepreneurs can't reap benefits of their inventions and would thus not be incentivised to focus on research and development activities. Intellectual property rights help the innovators at every stage of the business development, competition, and expansion strategy.

Conferment of exclusive rights under different forms of IPs provides an incentive for the innovations taking place in diverse industries, especially the technology space. The growth witnessed in the recognition and importance of technology innovations has made everyone realize that there is a need to create a strong IP system. A strong and effective IP system helps the nation encourage free flow of information and technology. Thus, IP plays a very important role in encouraging the inventors by rewarding them for their ideas, and thus driving productive growth. IP rights provide an incentive to the innovator to exploit and commercialize their innovations in the marketplace.

The whole process leads ultimately to more innovations and improvement in the existing technology. Therefore, the organizations are increasingly realizing the importance of Intellectual Property assets as it involves a significant percentage of company's valuation during the processes of mergers and acquisitions. Drawing force from the fact that IP provides a high rate of return and also a competitive advantage to its holder, companies are

protecting their IP assets from the competitors. There is also an international system for defining, protecting, and enforcing intellectual property rights. Some of the treaties and bodies involved in this include, the TradeRelated Aspects of Intellectual Property Rights (TRIPs), World Intellectual Property Organization (WIPO), World Trade Organization (WTO), etc.

The return on Intellectual Property assets can be maximized by developing a strong patent portfolio that helps in attaining significant portion of the earnings through licensing.

In conclusion, organizations should effectively embrace their patent portfolio management strategy to reap maximum advantage. Big Corporates are continuing with their strategy to invest large sums of money in research and development of products and services in order to build a patent portfolio to realize returns on their investment.

13. Intellectual Property as an Instrument of Development

Though the importance of the subject of Intellectual Property Rights has increased with time, it is still not a global phenomenon. The significance and importance accorded to it differs from one country to the other. Chief factors responsible for this difference are:

(a) The amount of resources that different countries allocate and spend towards creation of intellectual assets; and

(b) The amount of protected knowledge and information that is used in the process of production. A useful indicator to measure the magnitude of resources devoted towards creation of new knowledge and information is the country's expenditure on research and development activities.

Statistics make it clear that Developing countries tend to spent much less on R&D activities as compared to the Developed countries.

In general, one of the major factors responsible for increase in R & D funding is the growing importance and participation of the private sector which has also resulted in an increased reliance on IPR protection by the private players seeking state protection from any

encroachment on their intellectual property rights. This is not only beneficial for such private entities but also the State since it helps in creation and dissemination of further knowledge and information in the society. However, it has been observed that such R & D funding by the private players is predominant in developed countries only.

The other way in which IPRs influence economic activity in a country is through the use of proprietary knowledge and information — owned by both domestic as well as foreign residents — in both production and consumption. Data reveals that in countries with relatively low-income generation, the share of agricultural output is comparatively higher than the share of income earned through services. This also suggests that the IPRs, relating to agricultural processes and products, are more important in developing countries than in developed countries.

Traditionally, the relevance of Intellectual Property Rights in the agricultural research has been very minimal. This is on account of the fact that Intellectual Property Rights were mostly concentrated towards protection of the outcome of industries as against the agriculture per se. Furthermore, most of the R & D carried out in the agricultural sector was by the public sector institutions in both developed as well as developing countries. For instance, the development and dissemination of the technology which led to the Green Revolution in India did not pose any substantial conflicts around the subject of IPR. Moreover, there is still reluctance in the developing nations to accept grant of Patent in the agriculture sector.

In India, since the early 1980s, there has been a significant shift in the national policy towards agricultural research. After having tried and made continuous efforts towards public funding for R&D activities in agriculture, the budgets allocation has been rationalized. At the same time, the participation of the private sector in agricultural R&D has grown by metes and bounds. In the developed nations, about one-half of the agricultural R&D is funded by the private sector.

Therefore, it is clear that the increased participation of the private players in agricultural research, has fostered a trend towards increased reliance on IPRs. In the developed nations, most private agricultural R&D is conducted by the firms which itself has increased the relevance of IPRs for developing countries' agricultural sectors as an increasing share of new seeds and farming technologies is now becoming proprietary. In addition, IPR issues are becoming even more complex as researchers in the Developed world sometimes rely on biological and genetic material originating in the gene-rich developing world. In manufacturing, although its share in total output is similar among low, middle, and high-income countries, this does not prove that the underlying technologies and products are similar. However, very little systematic research has been done in this context and it is thus difficult to evaluate how important or unimportant IPRs are for the developing countries' manufacturing sectors. In respect of the services, Copyright protection affects mainly the industries like software production, publishing, and entertainment.

In the 1990s, Copyright protection had gained importance for its role in protecting digital information on the Internet. The protection of digital content is still not a moot point or an issue in the developing countries, where computer and network penetration is much lower as compared to the industrial developed countries. In the early 1998, there were, for example, only 0.2 Internet host per 1000 inhabitants in developing countries compared to 31 in developed countries.

Notwithstanding all this, with a consistent trend towards liberalization of telecommunications services and the plummeting costs of computing and telecommunications technologies, there is an expectation for a sustained growth of the Internet in developing countries as well and thus increased relevance of Copyright protection with regard to the digital content on a worldwide basis. The economic significance of all these forms of IPRs is revealed in the legal claims filed against the party violating such rights and cannot otherwise be estimated.

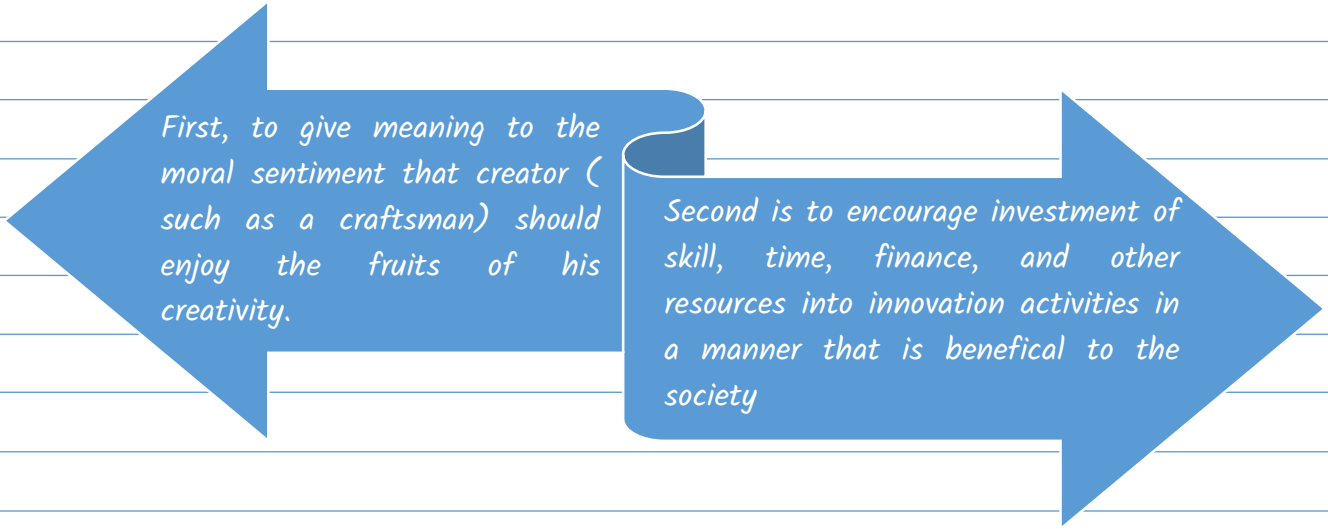
14. Need for Protecting Intellectual Property – Policy Consideration – National and International Perspectives

Protection of IPR, from the international perspective, is about the difference in the protection afforded by the developing and developed countries. While, developed countries normally bear the brunt of IPR related policies, developing countries are exposed as vulnerable and sentimental. Developing nations are sensitive to the standards of IPR protection set by the TRIPs and the tendency to extend this bilaterally which involves an element of reciprocity. Therefore, such countries maintain that different economic sophistication calls for different levels of IPR protection.

The stand of developing nations has been that under the norms set by TRIPs, there is a need to include steps that enables the marginalized developing countries to lessen the heavy social cost imposed by the TRIPs standards, and increase the gains accruing from higher international IPR protection. Different thinkers have different views on the subject. Some believe that the key motivation behind introduction of TRIPs was the desire of the developed nations to protect their accrued competitive technological advantage in the face of the threats and opportunities of globalisation. For them, a harmonized IPR regime serves as a powerful political tool enabling the Multi-National Corporates to internationalize the different phases of production without jeopardizing IPR protection. Therefore, it is felt that the ultimate and the intended outcome of TRIPs is, to consolidate the global hegemony of a few developed nations. By challenging the political limits of national sovereignty, TRIPs provisions require that member states should provide higher protection to the IPRs thus providing some leverage to the developed states to enhance the standards under their bilateral negotiations. Such a move has been called as a drive to overcome pre-existing territorial limitations on intellectual property rights. An illustrative case herein is the United States. The percentage value of U.S. intellectual property exports skyrocketed in the second half of the twentieth century, and thus U.S. got concerned about erosion of its competitiveness caused by the widespread "piracy" occurring in the developing countries. Thus, there was a thinking that by reducing piracy, the U.S. would recapture the revenue involved diverting it to enhance profit taking. For most of the developing nations, adopting a Western-style IPR regime is not a desirable change as the same is not likely to bring in any tangible benefits to it.

The term "Intellectual property (IP)" signifies the inventions, devices, new varieties of designs and other intellectual properties that are brought into existence through the exercise

of "mental or creative labour" by the human beings. "Intellectual Property Rights (IPR)" is an umbrella term which is employed to describe the legal status and the protection that allows people to own intellectual properties – the intangible products of their creativity and innovation imbedded in physical objects – in the form that they own physical properties. Under the TRIPs Agreement, IPR refers to copyright and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuit layout designs, protection of undisclosed information and anti-competitive practices in contractual licenses. The reasons behind grant of protection to such intellectual property are twofold.



These purposes are achieved through grant of certain time-bound exclusive right and protection in respect of his intellectual property such that he can control the use of such property. IPR as a concept has been discussed and debated throughout since inception and with globalisation the debate has become increasingly controversial and confrontational with different stakeholders voicing their concerns. Thus, there arose a need to settle the disputes by laying down a law for IPR protection which is applicable in the international framework. The scholars have also made their contribution in giving a shape to the IPR law. They have also debated the validity and legitimacy of IPR from different perspectives.

15. NATIONAL PERSPECTIVE

The Indian government has provided the exclusive right of intellectual property to safeguard the originality of inventors' works. The simplest form of intellectual property is an intangible work of human imagination. This intellectual property contains rights centred on copyright, patents, trademarks, trade names, industrial designs, and merchandise. Maintaining intellectual property rights is crucial for the quality, safety, and effectiveness of all pharmaceutical products and services. For the certification and identification of products in a large market, it serves as a standard authority and certification body. The privileges granted to individuals over the works of their imaginations are known as intellectual property rights.

India has robust IP laws and a strong IP jurisprudence. The legal framework does reflect the underlying policy orientation and national priorities, which have evolved over time, taking into account development needs and international commitments. An all-encompassing IPR Policy will promote a holistic and conducive ecosystem to catalyze the full potential of intellectual property for India's economic growth and socio-cultural development, while protecting public interest. Such a policy will nurture the IP culture, guiding and enabling all creators and inventors to realize their potential for generating, protecting and utilizing IPRs which would contribute to wealth creation, employment opportunities and business development.

Typically, they grant the creator a limited time, exclusive permission to utilise his or her works. The term "intellectual property" refers to human inventions in the fields of art, literature, science, and industry. This application is crucial for protecting the inventor's invention and upholding the inventor's work's high standards of quality.

As a result of these changes, the government decided to create a roadmap for IPRs in the nation. The National Intellectual Property Rights Policy was put into place to encourage innovation, enhance the business climate, and make it easier to commercially utilise intellectual property. The Policy is in accordance with India's proclamation that this decade is the "Decade of Innovation".

On May 12th, 2016, the Union Cabinet approved the Policy. It acknowledges India's well-established, TRIPS compliant legal structure to protect IPRs and strives to balance her development objectives by making use of the flexibilities offered by the global regime. The Policy places a special emphasis on spreading knowledge about IPRs and emphasising their value as a marketable financial asset and a tool for the economy.

IPR Policy focus on:

- Improving access to healthcare, food security, and environmental protection, among other areas of critical social, economic, and technological importance.
- fostering creativity and innovation and thereby promote entrepreneurship and enhance socioeconomic and cultural development.

The Policy outlines seven goals that are further defined with actions that must be taken by the designated nodal Ministry or Department. The goals are briefly discussed below.

- **IPR Awareness: Outreach and Promotion** – To create public awareness about the economic, social and cultural benefits of IPRs among all sections of society. A nation-wide program of promotion was launched with an aim to improve the awareness about the benefits of IPRs and their value to the rightsholders and the public. It will build an atmosphere where creativity and innovation are encouraged in public and private sectors, R&D centers, industry and academia, leading to generation of protectable IP that can be commercialized. It is also necessary to reach out to the less-visible IP generators and holders, especially in rural and remote areas. The clarion call of the program would be the holistic slogan "Creative India; Innovative India".

- **Generation of IPRs** - To stimulate the generation of IPR. India has a large talent pool of scientific and technological talent spread over R&D institutions, enterprises, universities and technical institutes. There is a need to tap this fertile knowledge resource and stimulate the creation of IP assets. A comprehensive base line survey or IP audit across sectors will enable assessment and evaluation of the potential in specific sectors, and thus formulate and implement targeted programs. Its main focus is on facilitating researchers and innovators regarding areas of national priority. The

corporate sector also needs to be encouraged to generate and utilize IPRs. Steps also need to be taken to devise mechanisms so that benefits of the IPR regime reach all inventors, especially MSMEs, start-ups and grassroots innovators.

- **Legal and Legislative Framework** - To have strong and effective IPR laws, which balance the interests of rights owners with larger public interest. The existing IP laws in India were either enacted or revised after the TRIPS Agreement and are fully compliant with it. These laws along with various judicial decisions provide a stable and effective legal framework for protection and promotion of IPRs. India shall remain committed to the Doha Declaration on TRIPS Agreement and Public Health. At the same time, India is rich in traditional medicinal knowledge which exists in diverse forms in our country, and it is important to protect it from misappropriation.

- **Administration and Management** – To modernize and strengthen service oriented IPR administration. The Offices that administer the different Intellectual Property Rights (IPOs) are the cornerstone of an efficient and balanced IPR system. IPOs now have the twin challenges of making their operations more efficient, streamlined and cost effective, with expanding work load and technological complexity on one hand, and enhancing their user-friendliness by developing and providing value added services to the user community on the other. The administration of the Copyright Act, 1957 and the Semiconductor Integrated Circuits Layout-Design Act, 2000 is being brought under the aegis of DIPP, besides constituting a Cell for IPR Promotion and Management (CIPAM). This will facilitate more effective and synergetic working between various IP offices, as also promotion, creation and commercialization of IP assets.

- **Commercialization of IPR** - Get value for IPRs through commercialization. The value and economic reward for the owners of IP rights comes only from their commercialization. Entrepreneurship should be encouraged so that the financial value of IPRs is captured. It is necessary to connect investors and IP creators. Another constraint faced is valuation of IP and assessment of the potential of the IPRs for

the purpose of marketing it. Efforts should be made for creation of a public platform to connect creators and innovators to potential users, buyers and funding institutions.

- **Enforcement and Adjudication** – To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements. There is a need to build respect for IPR among the general public and to sensitize the inventors and creators of IP on measures for protection and enforcement of their rights. At the same time, there is also a need to build the capacity of the enforcement agencies at various levels, including strengthening of IPR cells in State police forces. Measures to check counterfeiting and piracy also need to be identified and undertaken. Regular IPR workshops/ colloquia for judges would facilitate effective adjudication of IPR disputes. It would be desirable to adjudicate on IPR disputes through specialized commercial courts. Alternative Dispute Resolution mechanism may also be explored.

- **Human Capital Development** – To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPRs. In order to harness the full potential of IPRs for economic growth, it is essential to develop an increasing pool of IPR professionals and experts in spheres such as policy and law, strategy development, administration and enforcement. Such a reservoir of experts will facilitate in increasing generation of IP assets in the country and their utilization for development purposes.

16. IPR and WTO Agreement

The phrase "intellectual property" is a metaphor for a fashionable description of ideas in the form of inventions, artistic works, trade symbols and other aspirants. The traditional legal classification of IPR defines the creative output protected by the law, for example, of patents, copyright and trademarks. Significant social, political and technological developments over the past decades have exerted a considerable influence on how IPR is created, exploited and traded and, as a result, legal protection of IPR has become a subject of paramount importance and universal interest in not only the research but also the development and commercialization of emerging technologies.

Thus, Conventional perceptions from economic perspective tend to believe that a strengthened IPR regime annexed to the WTO is a propeller of economic growth. However, since the establishment of the global trading system, it still remains controversial as to whether and how the introduction of the international IPR regime and its infrastructure would generate significant economic growth as originally expected. Developing countries accepted TRIPs agreement with various policy goals. However, the new regime is asymmetric in the sense that it mainly benefits industrialised countries. IPR can either trigger or stifle innovation, and can either promote or hinder economic growth, depending on different national circumstances. Evidence also shows that the full interaction between stronger IPR protection and higher-level technology transfer remains untested. From a legal perspective, concern remains about the 'universal' standard of harmonisation which lacks flexibility for developing countries. In a comparative law context, legal transplants of foreign countries have proved practicable over the past decades in some developing countries, but a "fitting-in" process is usually essential to ensure effectiveness of a transplanted law in a unique socioeconomic environment. While legal transplants are feasible, cultural adaptation is essential. In the arena of world intellectual property, intellectual property law has posed as a radically new form of legal transplant in developing countries since it usually has no counterpart in the indigenous legal traditions.

However, the success of transplanted IPR infrastructure depends largely on how indigenous tradition of that imported law is remade in the image of its original model. This reception process in launching a brand-new legal system is, to a great extent, a process of indigenization of the foreign law, and this process cannot be simplified when a cultural gap is significant. In the context of political economy, the TRIPs Agreement represents a successful culmination of several attempts by developed states to consolidate their monopoly position over the global economy. The role of developing states within the TRIPs regime has been vulnerable and the concessions they have made should be enumerated in appropriate ways, such as providing financial aid and offering technical assistance.

17. Competing Rationales for Protection of Intellectual Property Rights

Intellectual property indeed is now one of the valuable assets in commercial transactions, be it intellectual property licensing, joint ventures, foreign collaborations, manufacturing, purchase or distribution agreements, or mergers and acquisitions. Licences to use patents, copyrights and trademarks, are often combined with transfers of know-how and are increasingly an important term in technology transactions. These licences provide royalty revenues to the owner of the Intellectual Property and distribute products and technologies to licensees who might not otherwise have had access to them. In such transactions, the licensees may also gain rights to create improvements or derivative works and to develop their own Intellectual Property assets, which can then be cross-licensed or licensed to others. This creates a very productive cycle of innovation and invention and adds to the revenues of the companies.

Intellectual property laws confer the right to own intellectual assets by its creator and also enables him to make profits from his artistic, scientific and technological creations for a defined period of time. Such rights are applicable to the intellectual creations and not the physical object in which it is embodied. Countries have enacted 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 to access such creations. The second is to promote creativity and its dissemination which results in economic and social development.

It is beyond any doubt that knowledge and inventions have played a very important role in the economic growth that we, as humans, have witnessed. This is more evident in the economic development seen in the 1990s. Moreover, factors like increase in global trade itself has contributed in a big way in provided an impetus to forge a connection between intellectual property policies and the trade law. This also led to the inclusion of the TRIPS Agreement as one of the agreements in the framework of the multilateral trade negotiations under the Uruguay Round.

The World Intellectual Property Report 2011- The Changing Face of Innovation – a new WIPO publication describes how ownership of intellectual property (IP) rights has become central to the strategies of innovating firms worldwide. With global demand for patents rising from 800,000 applications in the early 1980s to 1.8 million in 2009, the Report concludes that growing investments in innovation and the globalization of economic activities are key drivers of this trend. As a result, IP policy has moved to the forefront of innovation policy.

WIPO Director General, Francis Gurry, notes that "innovation growth is no longer the prerogative of high income countries alone; the technological gap between richer and poorer countries is narrowing. Incremental and more local forms of innovation contribute to economic and social development, on a par with world-class technological innovations."

Intellectual property assets are used not only in business transactions, but are also traded in their own right such as online exchanges for the evaluation, buying, selling, and licensing of patents and other forms of Intellectual Property. The buyers and sellers of intellectual property manage their intellectual property as financial assets just as investors in stocks, options and other financial instruments.

Strong intellectual property rights help consumers make an educated choice about the safety, reliability, and effectiveness of their purchases. Enforced intellectual property rights ensure products are authentic, and of the high-quality that consumers recognize and expect. IP rights foster the confidence and ease of mind that consumers demand and markets rely on.

18. Intellectual Property Rights as Human Right

Human Rights and Intellectual Property, though two very different set of laws with no apparent connection, have gradually becoming intimate bedfellows. Since inception, the two subjects developed virtually in isolation from each other. But in the last few years, international standard setting activities have begun to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other. Exactly how this new-found relationship will evolve is being actively studied – and sometimes even fought over – by states and nongovernmental organizations (NGOs) in international venues such as the World Intellectual Property Organization (WIPO), the U.N. Commission on

Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights, the World Trade Organization (WTO), the World Health Organization (WHO), and the Conference of the Parties to the Convention on Biological Diversity (CBD). A look at the lawmaking which is underway in these for a prima facie reveals two distinct conceptual approaches to the interface between human rights and the intellectual property.

a) The first approach finds that there is a conflict between human rights and the intellectual property rights. This view believes that a regime of strong intellectual property protection undermines and therefore is incompatible with the human rights obligations, especially in the area of economic, social, and cultural rights. In order to resolve this conflict it is suggested the normative primacy of human rights law over intellectual property law should be recognised in areas where specific treaty obligations conflict.

b) In the second approach, the Human Rights and the Intellectual Property Rights are seen as concerned with the same fundamental question, i.e., defining the appropriate scope of private monopoly power that gives authors and inventors a sufficient incentive to create and innovate, while ensuring that the consuming public has adequate access to the fruits of their efforts. This school of thought sees Human Rights law and the Intellectual Property Rights law as essentially compatible, although often disagreeing over where to strike the balance between incentives on the one hand and access on the other.

It is also important to understand as to how isolated the two different areas of law were and what caused the recent erosion of that isolation. Some thinkers on the subject have also expressed desire to know as to how did the Intellectual Property Rights law and the Human Rights law remained strangers for so long. The Universal Declaration of Human Rights, 1948 also protects authors' "moral and material interests" in their "scientific, literary or artistic production (s)" as part of its catalogue of fundamental liberties. In the decade of 1960s, a similar provision was inserted in the International Covenant on Economic, Social and Cultural Rights (ICESCR), but the same has now been ratified by nearly 150 nations. Nevertheless, Intellectual Property remained a normative backwater in the human rights pantheon, neglected by treaty bodies, experts, and commentators while other rights emerged from the

jurisprudential shadows. These treaties specifically mention about the protections granted to authors and inventors as their "rights."

But the principal reason for the execution of these agreements lies not in deontological claims about inalienable liberties, rather in the economic and instrumental benefits that flow from protecting Intellectual Property products across the national borders. It is also true that both areas of law were preoccupied with more important issues, and neither saw the other as either aiding or threatening its sphere of influence or opportunities for expansion. This evolutionary process resulted in a de facto separation of human rights into categories, ranging from a core set of peremptory norms for the most egregious forms of state misconduct, to civil and political rights, to economic, social and cultural rights. Among these categories, economic, social, and cultural rights are the least well developed and the least prescriptive, having received significant jurisprudential attention only in the last decade.

Human Rights law added little to these two enterprises. It provided neither a necessity nor a sufficient justification for demanding a strong, state-granted intellectual property monopolies (whether bundled with trade rules or not). Nor, conversely, did it function as a potential check on the expansion of Intellectual Property Law.

19. The Rights of Indigenous Peoples and Traditional Knowledge

Since 1990s, the UN Human Rights machinery started emphasized the rights of indigenous communities. People from such communities who were jointly entitled to the conferment of such rights/privileges started demanding from the states their right of recognition as well as right to control over their culture, including traditional knowledge relating to biodiversity, medicines, and agriculture. From the Intellectual Property law perspective, much of this knowledge was regarded as being part of the public domain, since it did not meet the established subject matter criteria for protection, or because the indigenous communities who created it did not endorse private ownership rules.

By regarding traditional knowledge as effectively un-owned by any single individual or community, the Intellectual Property law made such knowledge vulnerable to an unrestricted

exploitation by the outsiders. Many of such outsiders used this knowledge as an upstream input for later downstream innovations that were themselves privatized through Patents, Copyrights, and Plant Breeders' rights. Adding to their pains, the financial and technological benefits of those innovations were rarely shared with the indigenous communities. UN Human Rights bodies sought to cover this hole in the fabric of Intellectual Property law by commissioning a working group and a special rapporteur to create a Draft Declaration on the Rights of Indigenous Peoples, and Principles and Guidelines for the Protection of the Heritage of Indigenous People. These documents adopted a skeptical approach to Intellectual Property protection.

20. Determining Financial Value of Intellectual Property Rights

One of the most crucial and distinguishing feature of the legal protection granted by the Intellectual Property law is that it turns intangible assets into exclusive property rights, albeit for a limited period of time. In other words, IP protection makes intangible assets "a bit more tangible" by turning them into valuable exclusive assets which are taken into account in all negotiations that happen around any merger or acquisition transactions that take place between the businesses.

If the innovative ideas, creative designs and powerful brands developed by you are not legally protected by through conferment of IP rights, then the same can be freely and legally put to use by any other enterprise (including the competitor) without any limitation. However, being protected by IP rights, they acquire a substantial concrete value for the enterprise as they entail property rights which cannot be commercialized or otherwise put to use used without the owner's authorization.

The investors, stock market brokers and the financial advisors are now becoming cognizant of this reality and have begun to value IP assets as well. Enterprises worldwide are also increasingly acknowledging value of their IP assets, and, on occasions, have included them in their balance sheet as well. The enterprises (including some SMEs) have started undertaking regular technology and IP audits as well. Infact, in many cases, the enterprises have acknowledged that their IP assets value more than the physical assets held by them. This is

often the case with companies operating in knowledge-intensive and highly innovative sectors, or companies which have been into the business for a fairly long period of time and thus their brand-name is itself symbolised with a certain quality of the product by the consumers.

Contrary to the popular belief, the primary reason why firms acquire Intellectual Property is not for any litigation purposes, but to have a legal and transferable proof of ownership to some of their most important intangible assets. Intellectual property audit and valuation helps one to analyse and determine the true value of one's business and capitalize on assets that one may not be cognizant of being possessed with.

Advantages of Intellectual Property Valuation – The Intellectual Property Rights, such as Patents and Trademarks, which require necessary registration with the concerned authority, provide legal evidence of one's ownership over such intangible assets while also ensuring one's peaceful and exclusive right to the use of such property. It gives one the right to exclude others from use of such rights. This means that one is armed with the legal remedy against any infringement by the competitor(s). Moreover, it is also an asset which can be profitably licensed or sold to others to provide them with the rights they would otherwise not have, and consequent to these benefits an increase in the total value of one's business.

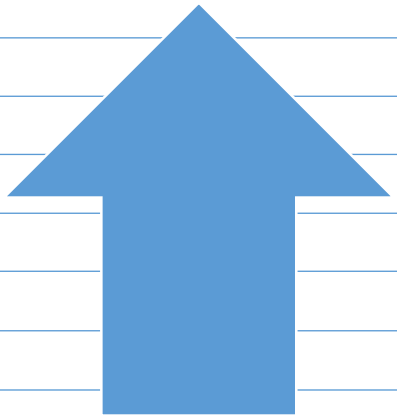
It can however be very challenging for any organisation to arrive at a precise valuation of its intellectual property. The precise monetary worth of intellectual property can be very challenging to determine, as there are a number of factors that determine the value of the intangible assets under consideration.

At times, the process of valuation of an enterprise's Intellectual Property itself requires registration of such property as a precondition which enables the process of monetizing one's intangible assets. Conducting valuation of one's Intellectual Property has its own significance and advantages. For instance, assessing the value of one's Patent, Trademark or Copyright may simplify the licensing or assignment process, and help one to determine the royalty rates that should be paid as a result of using one's intellectual property assets. Further,

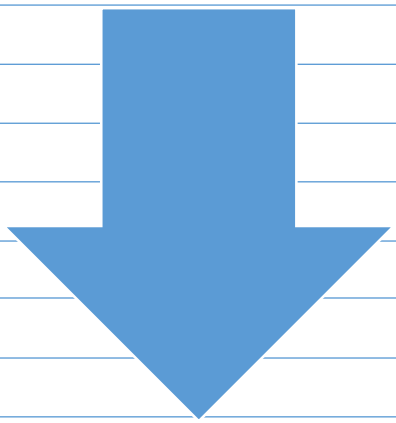
ascribing a reasonable valuation to one's intellectual property, if not currently accounted for, increases the overall value of one's business and provides one with collateral for loans and mortgages.

For the start-ups and new businesses, the process of valuation of its intellectual property is statistically an important step and is likely to enhance the outside investment into the venture.

The difference between quantitative and qualitative valuations:- An intellectual property can be valued on various parameters, but the overarching principle guiding the valuation process is, how much of a competitive advantage does one's intellectual property provides over others in the industry. While evaluating the worth of intellectual property, the following two methods of valuation have traditionally been used:



Qualitative Method: As theAs the name itself suggests, this method relies on measurable data or numerical information to produce an estimate of the value of one's intangible assests. it attempts to answer the question by providing a monetary value or contribution



Qualitative Method: The parameters of valuation under this method are very diifferent from the quantitative valuation method. This method provides a non-monetary estimate of the value of an Intellectual Property by rating it on the basis of its strategic impact, loyalty held by consumers, its impact on the company's future growth, and other intangible metrics that do not rely solely on numbers

These two kinds of valuation methods should however not be presumed to be contradictory or mutually exclusive; depending on the needs of one's business, one may employ a variation of method that fall into both the categories. It will not be wrong to suggest that the two valuation methods are perhaps the two sides of the same coin. Quantitative and qualitative attempts to tackle the question of firm value from different viewpoints, which may both come in useful depending on the audience in question and the reason for valuation. In conclusion it can be said that determining value of one's Intellectual property can be a very challenging task and an exhausting process. But obtaining a valuation can result in significant benefits to one's business and thus the need for valuation can neither be underestimated nor be undermined.

Following the valuation models described above to break down the process into simple steps and establishing a clear purpose and audience for the valuation, can make valuation manageable.

21. Negotiating Payments Terms in Intellectual Property Transaction

Intellectual Property Transactions

In the global markets today, the nature of products bought and sold has undergone a very significant change. Intellectual Property which is an intangible form of property is now often one of the most significant and valued assets that a company holds, and as such, intellectual property plays a very critical role in the commercial transactions. Drafting, negotiating, interpreting and advising on intellectual property agreements require a special set of legal skills to effectively commercialize, exploit, secure, and license Intellectual Property Rights. Thus, to ensure that one capitalizes on his/her IP to its fullest extent, one needs to be cognizant of the value of different IPs and also be familiar with the nuances of it. Generally, big businesses prefer to outsource the drafting as well as settling payment terms in all their Intellectual Property transactions to the legal experts, who being familiar with such transactions and with a wide range of commercial law subjects as well as relevant provisions of IP law, various regulations applicable to the transaction and well as the commercial best practices in the relevant industry sector, they are the people who are in the best position to suggest on such transactions.

The apparent complexity involved in Intellectual Property transactions is on account of lack of recognition of intangible assets (by certain sections) as something of very high monetary value. Thus, one needs to be made aware of the value of such intangible assets in order to properly comprehend the nature of transaction. One needs assistance in identifying and solving intellectual property-related issues that arise throughout intricate transactions related to the licensing and/or transfer of IP in a merger or acquisition. Assistance is needed in negotiating transfer and licensing of interests in:

- Patents
- Trademarks
- Copyright
- Trade secrets
- Designs

Some of the commercial transactions in the intellectual property sphere are:

1. **Licensing –**

A licensing agreement is in the nature of a partnership agreement between the licensor and the licensee and there is a need for assistance in negotiating the terms of licensing of different IPs, for instance licensing of Patent, licensing of Trademark and Copyright interests. To draft contracts for such transactions, one needs to have experience in:

- Negotiating and drafting licenses as both intellectual property owner and licensee;
- Drafting licenses meticulously to avoid perils that often occur if contingencies are not considered, such as invalidity, transfer and competitive activities.

2. **Acquisitions**

Intellectual property is the centre piece of many mergers or acquisitions transactions. It is critical in such transactions to ensure that a detailed due diligence is performed, and the transaction documents adequately address IP ownership, transfers and licensing issues. Therefore, one needs to have experience with all aspects of merger and acquisition transitions, including:

- Negotiating the transfer and licensing of patent, trademark and copyright interests

- Transactional advice and assistance related to the licensing of IP
- Document drafting and review
- Ensuring a complex transaction proceeds smoothly

The necessary issues that one needs to address before entering into such commercial transactions are:

- Am I selling or buying: Under the transaction who shall be vested with the ownership over the IP rights; what rights shall be transferred and for what use can they be exercised.
- Does the transaction involve transfer of know-how of the technology and post the transaction who shall be the lawful owner and user of the technology.
- What can be the possible litigation between the parties on different aspects of the agreement? In case there is any dispute inter se the parties, how shall they resolve it?

For instance, when you buy a car or a computer, what do you buy? Is it just the machine, and sometimes technical assistance, but not the technology incorporated in the machine, which you do not have rights upon. Similarly, the physical or electronically transfer of goods does not confer upon you any Intellectual Property Rights to that good. Even the source code of a computer program is not transferred when you purchase the right to use / exploit a computer program, if not clearly stated.

22. Intellectual Property Rights in the Cyber World

Though both Intellectual Property and the Cyber Law are independent subjects and have their own area of operation, however, the influence of one on the other cannot be denied and the same is becoming all the more evident these days. We live in a world which is dominated by computers and the internet and therefore the world today is appropriately called as the Cyber world. Intellectual Property (IP) equally is an expanding phenomenon with more and more innovations coming to surface, which also acts as a catalyst to the expanding businesses. However, in terms of vintage and history, Intellectual Property is relatively a long standing field of legal practice than the Cyber Law. In the Indian context particularly, Cyber Law emerged only with the passage of the Information Technology Act, 2000, while as an IP law, the Copyright Act was passed in the year 1957.

However, the common theme which runs through both these areas of law is that both have been significantly impacted by the development staking place in the field of technology as also the growth of Internet medium. For instance, a lot of issues cropped up in the area of Copyright law the internet enabled its users to readily reproduce materials available online. In an effort to meet such challenges, the Governments have been, time and again, bringing stringent provisions in the criminal law so as to catch-up with the criminals and thus create deterrence in the society towards such malpractices.

As already stated above Cyber Law is a relatively a new branch of law that draws from many other areas of traditional law and is becoming an increasingly important field in its own way. The issues associated with it are multi-disciplinary and have multiple dimensions to it. It covers criminal as well as civil law issues ranging from financial crimes to cyber bullying. Privacy, control, and access are the subjects with which the lawyers practicing in cyber law regularly engage.

The world today in undergoing an Information and Communication Revolution, which itself is challenging the established institutions & settled practices and in a manner which is difficult to comprehend. The widespread use of computers and internet in the modern businesses, as also in the society (in-general), is a well-known fact. The immense advantages of using computers (and internet) in the business have been felt by all. In fact, it is now perceived that societies cannot function smoothly without the use of Computers and Information Technology. While there have been some obvious advantages of such use, the flip side of it is that there has been a lot of misuse of technology through computer and internet. The most challenging aspect of such misuse is that the usage of computers and internet does not recognise any territorial limits recognised and thus the issue of jurisdiction as well. The emergence of the concept of e-commerce wherein business is conducted on the online medium wherein the biggest advantage is that the businesses can reach out to their customers anywhere in the world. But this itself has given rise to a lot of acts of Cyber Crimes taking place in the world and it is very difficult to find out the wrong doer on account of the immensity of the Cyber Space itself.

23. Cyberspace and IPR concerns

Copyright and Cyberspace – Copyright protection gives the author of work a certain "bundle of rights", including the exclusive right to reproduce the work in copies, to prepare derivative works based on the copyright work and to perform or display the work publicly.

Public Performance and Display Rights – The right that does get affected is that of display. Display of the work is also done by making copies, which are then retailed or lent out. This also falls under the right to display, which the holder of the copyright has.

Distribution Rights – Copyright Law grants the holder of the copyright the exclusive right to distribute copies of the work to the public by sale or by the transfer of the ownership.

Caching (Mirroring) – It is a violation on the internet. Caching may be local caching and proxy caching. In addition, proxy caching may give rise to infringement of the right of public distribution, public policy, public performance and digital performance.

Protection of Database in India – The Indian Copyright Act 1957 protects "Databases" as "Literary Works" under Section 13(1) (a) of the Act which says that copyright shall subsist throughout India in original literary, dramatic, musical and artistic works. The term computer Database has been defined in the Information Technology Act 2000 for the first time. Section 43 of the IT Act, 2000 provides for compensation to the aggrieved party up to one Crore rupees from a person who violates the copyright and cyberspace norms. Also Section 66 of IT Act, 2000 provides for penal liabilities in such a case.

Internet Protection in India – The internet challenge for the protection of internet is the protection of intellectual property. It is still unclear as to how copyright law governs or will govern these materials (literary works, pictures and other creative works) as they appear on the internet. Section 79 of the IT Act 2000 provides for the liability of ISP's "Network Service Providers not to be liable in certain case." Section 79 of the ITAct exempts ISP's from liability for third party information.

Indian Cyber Jurisdiction – Though it is the in nascent stage as of now, jurisprudential development would become essential in the near future; as the internet and e-commerce shall shrink borders and merge geographical and territorial restrictions on jurisdiction. There are two dimensions to deal with.

1. Manner in which foreign courts assume jurisdiction over the internet and relative issues.
2. The consequences of decree passed by a foreign court.

Thus, there is an immense need for the Indian society to be made aware about the necessity of copyright protection in all fronts to prevent any unauthorized use and pilferage of the system. The analysis of copyright in cyberspace reveals a mixed result of new opportunities and threats. Such threats often outweigh the opportunities offered by the cyberspace and necessity arises for increasing regulations of cyberspace to protect copyrights. Further lack of internationally agreed principles relating to copyrights in cyberspace gives ample room for divergent domestic standards.

Cyberspace – Cyberspace can be described as the virtual world interconnecting human beings through computers and telecommunication without regard to the limitations of physical geography. With the onset of the modern technology, more importantly the internet, copyright protection has taken a hit and thus the issues relating to it assumed greater significance. Now-a-days, the protections of Copyright law have been extended to protect internet items too. It protects original work or work that is fixed in a tangible medium i.e. it is written, typed or recorded. Although the current copyright law provides protection to the copyright owners, it has its own shortcomings when it comes to its implementation and enforcement on the Cyber world. Cyberspace is a virtual world, which technically exists only in computer memory, but it is interactive and pulsing with life.

IPR and Cyber Space – While Internet is undoubtedly acclaimed as a major achievement of humankind it cannot be denied that it has come with its own set of challenges. One of the major challenges that it poses is on account of the fact that it has captured the physical market place and has created a new substitute which is the virtual market place. It is thus the responsibility of all IPR owners to protect their IPRs from any mala fide actions of the miscreants operating on the internet medium by invalidating and reducing such mala fide

acts/attempts of such criminals by taking proactive measures. It is important to know about the copyright issues associated with the computer programs/software, computer database and various other works in the cyberspace. Under the TRIPS (Trade Related aspects of Intellectual Property Rights) agreement, Computer Programs also now qualify for Copyright protection just as any other literary work is afforded to.

IPR Violation in Cyber Space - So far international copyright law was based upon the Berne Convention for the protection of literary and artistic works and the T.R.I.P.S (Trade Related aspects of Intellectual Property Right) of 1995. Since 1974, the international copyright instruments have been managed by a special United Nations Agency by name W.I.P.O (World Intellectual Property Organisation). W.I.P.O's objective as per the treaty is to promote the protection of intellectual property throughout the World through cooperation among the states and where appropriate, in collaboration with other international organizations. W.I.P.O aims at "homogenizing national intellectual property protections with an ultimate eye towards the creation of a unified, cohesive body worldwide international law."

The General Agreement on Tariffs and Trade (GATT) has also addressed copyright issues, in parallel to WIPO. The Uruguay round of GATT produced TRIPS. The TRIPS Agreement adopts portions of the Berne, Rome and Paris Conventions in enunciating norms for intellectual property laws.

24. Piracy and the Digital Era

Piracy of the original works by some organized unscrupulous groups is becoming a universal concern now. There is now a consensus amongst different nations on the aspect of need to provide sufficient copyright protection to the original works, though there are some obvious differences that have sharpened over the levels of safeguard. In India, piracy problems are real but the entertainment industry itself has not made any significant efforts in the direction of resolving them.

In India, the law that deals with issues relating to protection of Computer Software(s) is contained in the Copyright Act, 1957. Experience has however shown that the present legal

system and the framework around it does not provide adequate means to address all aspects relating to Information Technology (IT). Like the other walks of life, law also has to ramp-up itself in order to meet the newer challenges emerging these days. The Information Technology Act, 2000, in India, which contains a major portion of our Cyber Law, does not lay down sufficient provisions for protection of Intellectual Property Rights of the individuals (and organisations) and to ensure deterrence effect of law in the Cyberspace. While it is a known fact that Copyright violations do occur very frequently on the internet medium, the Copyright Act, 1957 and the Trade Marks Act, 1999 have not created sufficient deterrence in the minds of the violators of law. Therefore, it is felt that the present law perhaps is not an answer to such issues and probably the government would need to bring in some special legislation in order to tackle such issues.

The transformation that has taken place that has moved our attention from the real world to the virtual one is tremendous. We are increasingly and also unconsciously getting dragged into the virtual world thinking that it is safe being oblivious of the actual motives of miscreants operating in it. Thus, there is an urgent need to provide sufficient safeguards to ensure that no wrong goes undetected and unpunished. People share their delicate information online without thinking as to what might be the use of the data collected from them and what if somebody takes an undue advantage of such uploads and uses it to extort money from their victims. This is where the issue of Intellectual Property Rights law and identity protection law comes into the foray of Cyber Space.

To define Intellectual Property in simple and layman's terms, it refers to the creation of the intellect of a human for which monopoly rights are assigned by the law upon him who is made its lawful owner. Intellectual Property Rights (IPRs) are thus the rights conferred upon the creators of the IP, which includes trademarks, copyright, patents, industrial design rights, and in some jurisdictions even trade secrets. Artistic works including music and literature, as well as discoveries, inventions, words, phrases, symbols, and designs can all be subject of and be protected as intellectual property.

The term 'Cyber Space' is derived from a Science Fiction movie by Mr. Fred Roderick which was published in the year 1920, and the term represents and signifies the virtual world which is something apart from the real world that we live in. These days, the term is being employed to describe the connection between the people and the internet services. It can be simply called as the "Social Media". The world today is facing a lot of challenges on account of the surge in 'Cyber Crimes' which take place in the virtual space. In India, the problem came to the fore only with the adoption of the Policy of Liberalization, Privatization and Globalisation by the Government. There are different Cyber Crimes that take place and are in the form of Cyber Bullying, Cyber Stalking, Spamming, Ransom ware and various other Malware Attacks.

'Cyber Security' denotes the technologies and procedures which are brought in to safeguard the computer networks and the data from unlawful admittance of weaknesses and attacks transported through the internet by cyber delinquents. While 'Intellectual property' refers to the creation of human mind, for instance, an invention, a design, a story, a picture, a painting, a song, a design et al, the facets of intellectual property that relates to the Cyberspace are covered by the Cyber Law. Data protection and privacy laws aim to achieve a fair balance between the privacy rights of an individual and the interests of data controllers such as Banks, Electronic mail Service providers etc.

W.I.P.O (World Intellectual Property Organisation) - W.I.P.O is an organization of the United Nations (U.N). it's activities are of four kinds:-

a) Registration
b) promotion of inter-governmental cooperation in the administration of intellectual property rights
c) Specialized programme activities and
d) Dispute resolution facilities.

In 1996, member countries found it necessary to form a treaty to deal with the protection of copyright evolvement of new technology. The internet poses two basic challenges for I.P.R administrator, i.e., what to administer and how to administer? One of the basic copyright

issues in the internet is determining the border between private and public use. The Copyright Act, 1957 (amended in 1994, 2012) also makes a distinction between reproductions for public use and can be done only with the right holder's permission, whereas the law allows a fair dealing for the purpose of private use, research, criticism or review.

The main point of contention is that TRIPS permits the patenting of biological resources but CBD grants biological resource sovereignty to the nations who own it. Within a single nation, the state's sovereignty is given priority, and the CBD framework may take precedence. However, a sovereign state's jurisdiction is constrained in a dispute with a foreign IPR holder and cannot be used against the IPR holder. Therefore, many contend that TRIPS revokes rights that are granted by CBD. Furthermore, there is worry that patenting genetic resources will promote both 'biopiracy' and unsustainable use. Additionally, TRIPS mandates that patents be offered for all technological domains; as a result, IPRs must be used to protect the use or exploitation of biological resources.

25. PATENT COOPERATION TREATY

The Patent Cooperation Treaty (PCT) makes it possible to seek patent protection for an invention simultaneously in each of a large number of countries by filing an "international" patent application. Such an application may be filed by anyone who is a national or resident of a PCT Contracting State. It may generally be filed with the national patent office of the Contracting State of which the applicant is a national or resident or, at the applicant's option, with the International Bureau of WIPO in Geneva.

The PCT was concluded in 1970, amended in 1979 and modified in 1984 and in 2001. It is open to States party to the Paris Convention for the Protection of Industrial Property (1883). Instruments of ratification or accession must be deposited with the Director General of WIPO. If the applicant is a national or resident of a Contracting State party to the European Patent Convention, the Harare Protocol on Patents and Industrial Designs (Harare Protocol), the Bangui Agreement, or the Eurasian Patent Convention, the international application may also be filed with the European Patent Office (EPO), the African Regional Intellectual Property Organization (ARIPO), the African Intellectual Property Organization (OAPI) or the Eurasian Patent Office (EAPO), respectively.

The Treaty regulates in detail the formal requirements with which international applications must comply. Filing a PCT application has the effect of automatically designating all Contracting States bound by the PCT on the international filing date. The effect of the international application is the same in each designated State as if a national patent application had been filed with the national patent office of that State.

The procedure under the PCT has numerous advantages for applicants, patent offices and the general public:

i. applicants have up to 18 months more than if they had not used the PCT to reflect on the desirability of seeking protection in foreign countries, appoint local patent agents in each foreign country, prepare the necessary translations and pay national fees;

ii. applicants can rest assured that, if their international application is in the form prescribed by the PCT, it cannot be rejected on formal grounds by any designated office during the national phase;

iii. on the basis of the international search report and the written opinion, applicants can evaluate with reasonable probability the chances of their invention being patented;

iv. applicants have the possibility, during the optional international preliminary examination, to amend the international application and thus put it in order before processing by the various patent offices;

v. the search and examination work of patent offices can be considerably reduced or eliminated thanks to the international search report, the written opinion and, where applicable, the international preliminary report on patentability which are communicated to designated offices together with the international application;

vi. applicants are able to access fast-track examination procedures in the national phase in Contracting States that have PCT-Patent Prosecution Highway (PCT-PPH) agreements or similar arrangements;

vii. since each international application is published with an international search report, third parties are in a better position to formulate a well-founded opinion about the potential patentability of the claimed invention; and

viii. for applicants, international publication on PATENTSCOPE puts the world on notice of their applications, which can be an effective means of advertising and looking for potential licensees. Ultimately, the PCT:

- brings the world within reach;
- streamlines the process of fulfilling diverse formality requirements;
- postpones the major costs associated with international patent protection;
- provides a strong basis for patenting decisions; and
- is used by the world's major corporations, research institutions and universities in seeking international patent protection.

The PCT created a Union which has an Assembly. Every State party to the PCT is a member of the Assembly. Among the most important tasks of the Assembly are the amendment of the Regulations issued under the Treaty, the adoption of the biennial program and budget of the Union and the fixing of certain fees connected with the use of the PCT system.

The Assembly of the PCT Union has established a special measure to benefit -
1. an applicant who is a natural person and who is a national of and resides in a State that is listed as being a State whose per capita gross domestic product is below US$ 25,000 (according to the most recent 10-year average per capita gross domestic product figures at constant 2005 US$ values published by the United Nations), and whose nationals and residents who are natural persons have filed less than 10 international applications per year (per million population) or less than 50 international applications per year (in absolute

numbers) according to the most recent five-year average yearly filing figures published by the International Bureau, and

2. applicants, whether natural persons or not, who are nationals of and reside in a State that is listed as being classified by the United Nations as a LDC. That benefit consists of a reduction of 90 per cent of certain fees under the Treaty.

26. PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY (1883)

WIPO is also responsible for managing the Paris Convention. It was created to bring about some global consistency in intellectual property rules and was adopted on March 20, 1883, in Paris, and it went into effect on July 7, 1884. The Paris Convention applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models (a kind of "small-scale patent" provided for by the laws of some countries), service marks, trade names (designations under which an industrial or commercial activity is carried out), geographical indications (indications of source and appellations of origin) and the repression of unfair competition.

The Paris Convention, concluded in 1883, 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. The Convention is open to all States. Instruments of ratification or accession must be deposited with the Director General of WIPO.

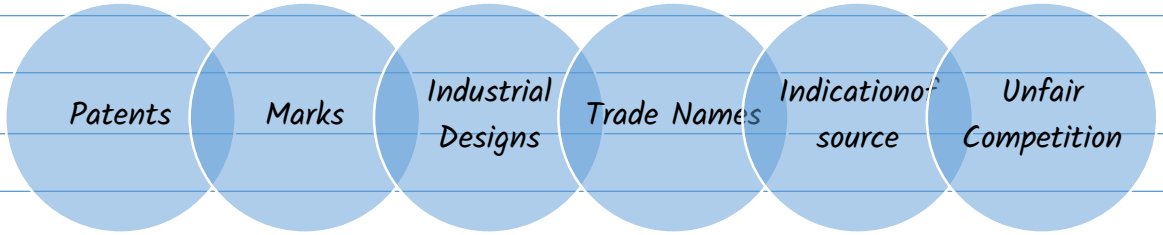
The Paris Union, established by the Convention, has an Assembly and an Executive Committee. Every State that is a member of the Union and has adhered to at least the administrative and final provisions of the Stockholm Act (1967) is a member of the Assembly. The members of the Executive Committee are elected from among the members of the Union, except for Switzerland, which is a member ex officio. The establishment of the biennial program and budget of the WIPO Secretariat – as far as the Paris Union is concerned – is the task of its Assembly.

The substantive provisions of the Convention fall into three main categories

- **National Treatment** - Under the provisions on national treatment, the Convention provides that, as regards the protection of industrial property, each Contracting State must grant the same protection to nationals of other Contracting States that it grants to its own nationals. Nationals of non-Contracting States are also entitled to national treatment under the Convention if they are domiciled or have a real and effective industrial or commercial establishment in a Contracting State.

- **Right of Priority** - The Convention provides for the right of priority in the case of patents (and utility models where they exist), marks and industrial designs. This right means that, on the basis of a regular first application filed in one of the Contracting States, the applicant may, within a certain period of time (12 months for patents and utility models; 6 months for industrial designs and marks), apply for protection in any of the other Contracting States. These subsequent applications will be regarded as if they had been filed on the same day as the first application. In other words, they will have priority (hence the expression "right of priority") over applications filed by others during the said period of time for the same invention, utility model, mark or industrial design. Moreover, these subsequent applications, being based on the first application, will not be affected by any event that takes place in the interval, such as the publication of an invention or the sale of articles bearing a mark or incorporating an industrial design. One of the great practical advantages of this provision is that applicants seeking protection in several countries are not required to present all of their applications at the same time but have 6 or 12 months to decide in which countries they wish to seek protection, and to organize with due care the steps necessary for securing protection.

- **Common Rules** – The Convention lays down a few common rules that all Contracting States must follow. The most important are



(a) **Patents** - Patents granted in different Contracting States for the same invention are independent of each other: the granting of a patent in one Contracting State does not oblige other Contracting States to grant a patent; a patent cannot be refused, annulled or terminated in any Contracting State on the ground that it has been refused or annulled or has terminated in any other Contracting State. The inventor has the right to be named as such in the patent.

The grant of a patent may not be refused, and a patent may not be invalidated, on the ground that the sale of the patented product, or of a product obtained by means of the patented process, is subject to restrictions or limitations resulting from the domestic law.

Each Contracting State that takes legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exclusive rights conferred by a patent may do so only under certain conditions. A compulsory license (a license not granted by the owner of the patent but by a public authority of the State concerned), based on failure to work or insufficient working of the patented invention, may only be granted pursuant to a request filed after three years from the grant of the patent or four years from the filing date of the patent application, and it must be refused if the patentee gives legitimate reasons to justify this inaction. Furthermore, forfeiture of a patent may not be provided for, except in cases where the grant of a compulsory license would not have been sufficient to prevent the abuse. In the latter case, proceedings for forfeiture of a patent may be instituted, but only after the expiration of two years from the grant of the first

compulsory license.

(b) **Marks** – The Paris Convention does not regulate the conditions for the filing and registration of marks which are determined in each Contracting State by domestic law. Consequently, no application for the registration of a mark filed by a national of a Contracting State may be refused, nor may a registration be invalidated, on the ground that filing, registration or renewal has not been effected in the country of origin. The registration of a mark obtained in one Contracting State is independent of its possible registration in any other country, including the country of origin; consequently, the lapse or annulment of the registration of a mark in one Contracting State will not affect the validity of the registration in other Contracting States.

Where a mark has been duly registered in the country of origin, it must, on request, be accepted for filing and protected in its original form in the other Contracting States. Nevertheless, registration may be refused in well-defined cases, such as where the mark would infringe the acquired rights of third parties; where it is devoid of distinctive character; where it is contrary to morality or public order; or where it is of such a nature as to be liable to deceive the public.

If, in any Contracting State, the use of a registered mark is compulsory, the registration cannot be cancelled for non-use until after a reasonable period, and then only if the owner cannot justify this inaction. Each Contracting State must refuse registration and prohibit the use of marks that constitute a reproduction, imitation or translation, liable to create confusion, of a mark used for identical and similar goods and considered by the competent authority of that State to be well known in that State and to already belong to a person entitled to the benefits of the Convention.

Each Contracting State must likewise refuse registration and prohibit the use of marks that consist of or contain, without authorization, armorial bearings, State emblems and official signs and hallmarks of Contracting States, provided they have been communicated through the International Bureau of WIPO. The same provisions apply to armorial bearings, flags, other

emblems, abbreviations and names of certain intergovernmental organizations. Collective marks must be granted protection.

(c) **Industrial Designs**- Industrial designs must be protected in each Contracting State, and protection may not be forfeited on the ground that articles incorporating the design are not manufactured in that State.

(d) **Trade Names**- Protection must be granted to trade names in each Contracting State without there being an obligation to file or register the names.

(e) **Indications of Source** - Measures must be taken by each Contracting State against direct or indirect use of a false indication of the source of goods or the identity of their producer, manufacturer or trader.

(f) **Unfair competition** – Each Contracting State must provide for effective protection against unfair competition.

27. WTO – TRADE -RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

Beyond simply transporting items across borders, trade has developed to include the value it brings to societies. Today's international trade involves a significant amount of value exchanged through innovation, creativity, and branding. Development and trade policy increasingly heavily weighs how to increase this value and make it easier for knowledge-rich commodities and services to move across borders.

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the most comprehensive multilateral agreement on intellectual property (IP). The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), negotiated during the 1986-94 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time. It plays a central role in facilitating trade in knowledge and creativity, in resolving trade disputes over IP, and in assuring WTO members the latitude to achieve their domestic policy objectives. It frames the IP system in terms of innovation,

technology transfer and public welfare. The Agreement is a legal recognition of the significance of links between IP and trade and the need for a balanced IP system.

The TRIPS Agreement is essential for facilitating intellectual property trade, settling intellectual property trade disputes, and giving WTO members the freedom to pursue their own national goals. The Agreement formally acknowledges the importance of the connections between intellectual property and trade. That was accomplished by the Uruguay Round. The TRIPS Agreement is an attempt to put these rights under common international law and to close the gaps in how they are safeguarded and upheld globally. It provides minimal requirements for enforcement and protection of intellectual property owned by citizens of other WTO members by each government.

WTO countries have a great deal of flexibility under the TRIPS Agreement to customise their methods to IP protection and enforcement to meet their needs and realise public policy objectives. The Agreement gives members plenty of leeway to strike a balance between the long-term advantages of encouraging innovation and the potential short-term costs of restricting access to works of creative genius. Through a variety of proceduresper mitted by TRIPS provisions, such as exclusions or exceptions to intellectual property rights, Members can lower short-term costs. Additionally, the WTO's dispute resolution mechanism is accessible in cases of trade disputes involving the application of the TRIPS Agreement.

The TRIPS Agreement addresses five main topics:

- How general rules and fundamental ideas of the global trading system apply to international intellectual property?
- What are the minimum protection criteria for intellectual property rights that members should offer?
- What mechanisms should members offer to defend those rights in their home countries?
- Specific interim framework for resolving intellectual property disputes between WTO members in order to implement TRIPS requirements.
- Special transitional arrangements for the implementation of TRIPS provisions.

28. HARMONIZATION OF CBD AND TRIPS

The Convention on Biological Diversity (CBD) 1992: Opened for signature at the Earth Summit in Rio de Janeiro in 1992, and entering into force in December 1993, the Convention on Biological Diversity is an international treaty for the conservation of biodiversity, the sustainable use of the components of biodiversity and the equitable sharing of the benefits derived from the use of genetic resources. The interface between biodiversity and intellectual property is shaped at the international level by several treaties and process, including at the WIPO, and the TRIPS Council of the WTO. With 193 Parties, the Convention has near universal participation among countries. The Convention seeks to address all threats to biodiversity and ecosystem services, including threats from climate change, through scientific assessments, the development of tools, incentives and processes, the transfer of technologies and good practices and the full and active involvement of relevant stakeholders including indigenous and local communities, youth, NGOs, women and the business community. The Cartagena Protocol on Biosafety is a subsidiary agreement to the Convention. It seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology.

The treaty defines biodiversity as "the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems."

The Convention reaffirms the principle of state sovereignty, which grants states sovereign rights to exploit their resources pursuant to their own environmental policies together with the responsibility to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other states. The Biodiversity Convention also provides a general legal framework regulating access to biological resources and the sharing of benefits arising from their use. India is a party to the Convention on Biological Diversity (1992).

The Convention on Biological Diversity establishes important principles regarding the protection of biodiversity while recognizing the vast commercial value of the planet's store of germplasm. However, the expansion of international trade agreements establishing a global regime of intellectual property rights creates incentives that may destroy biodiversity, while undercutting social and economic development opportunities as well as cultural diversity. The member countries were pressurized to change their IPR laws to conform to the TRIPS agreement.

India also followed the suit by placing in place legal frameworks for the management of biodiversity and Intellectual property laws. Following India's ratification of the Convention on Biological Diversity (CBD) at international level, the Biological Diversity Act, 2002 was adopted. The Biological Diversity Act aims at conservation of biological resources and associated knowledge as well as facilitating access to them in a sustainable manner and through a just process.

While the TRIPS and the CBD both attempt to legislate some form of intellectual property and technology transfer, the Agreement appear to provide contradictory prescriptions for the control over genetic control over generic resources and biodiversity. The two Agreements embody and promote conflicting objectives, systems of right and obligations. The core issues is that, in the area of patentable subject matter, benefit sharing, protection of local knowledge, requirements of prior informed consent and role of state.

Major tension between the CBD and the TRIPS is related to the case of National Sovereignty and the Rights of IPR Holders. Through the CBD, countries have the right to regulate access of foreigners to biological resources and knowledge and to determine benefit sharing arrangements. The TRIPS enable persons or institutions to patent a country's biological resources in countries outside country of origin of the resources or knowledge. In this manner TRIPS facilitates the conditions for misappropriation of ownership or rights over living organisms, knowledge and processes on the use of biodiversity. The sovereignty of developing countries over their resources and over their right to exploit or use their resources as well as to determine access and benefit sharing arrangements are compromised. The patent confers

exclusive rights on its owner to prevent third parties for making, using offering for sale, selling or importing the patent product and to prevent third parties from using the patent process. This makes it an offence for others to do so, except with the owner's permission, which is usually given only on license or payment royalty.

In brief, it could be rightly argued that the IPRs have the effect of preventing the free exchange of knowledge, of products of the knowledge and their use or production. This system of exclusive and private right is at odds with the traditional social and economic system in which local communities make use of and develop and nurture biodiversity.

Seeds and knowledge on crop varieties and medicinal plants are usually freely exchanged within the community. Knowledge is not confined or exclusive to individuals but shared and held collectively, and passed on and added to from generation to generation and also from locality to locality.

In the benefit sharing arrangements, a key aspect of the CBD is the one, which recognizes the sovereign rights of the states over their biodiversity and knowledge, and thus gives the State the right to regulate access and this in turn, enables the state to enforce its rights on arrangements for sharing benefits. Access where granted, shall be on mutually agreed terms (Art 15.4) and shall be subject to prior informed consent (Art 15.6). Most importantly, each country shall take legislative, administrative or policy measures with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the contracting party providing such resources. Such sharing shall be upon mutually agreed terms.

The TRIPS is a devise with international intellectual property regime that maximizes the potential for both traditional knowledge and modern scientific innovations to contribute to economic progress. To achieve this goal, the TRIPS a need to be reviewed incorporated further;

i. Establish the concept of community property rights with respect to Traditional Knowledge recognition;

ii. Recognize communities' rights over their resources and Traditional Knowledge;

iii. Recognizes safeguards and protect the Traditional Knowledge, innovations, practices and technologies of indigenous and local people and communities;

iv. Mandate legal protection for Traditional Knowledge;

v. Recognize the sovereign rights of states over their biodiversity and genetic resources;

vi. Mandate the principles of prior informed consent and benefit sharing when other countries access the biogenetic resources and local communities.

Such an amendment will restrict the inherent tension between the CBD and the TRIPS. It may also address the conflict between the private rights of IPR holders and the community rights of TK holders.

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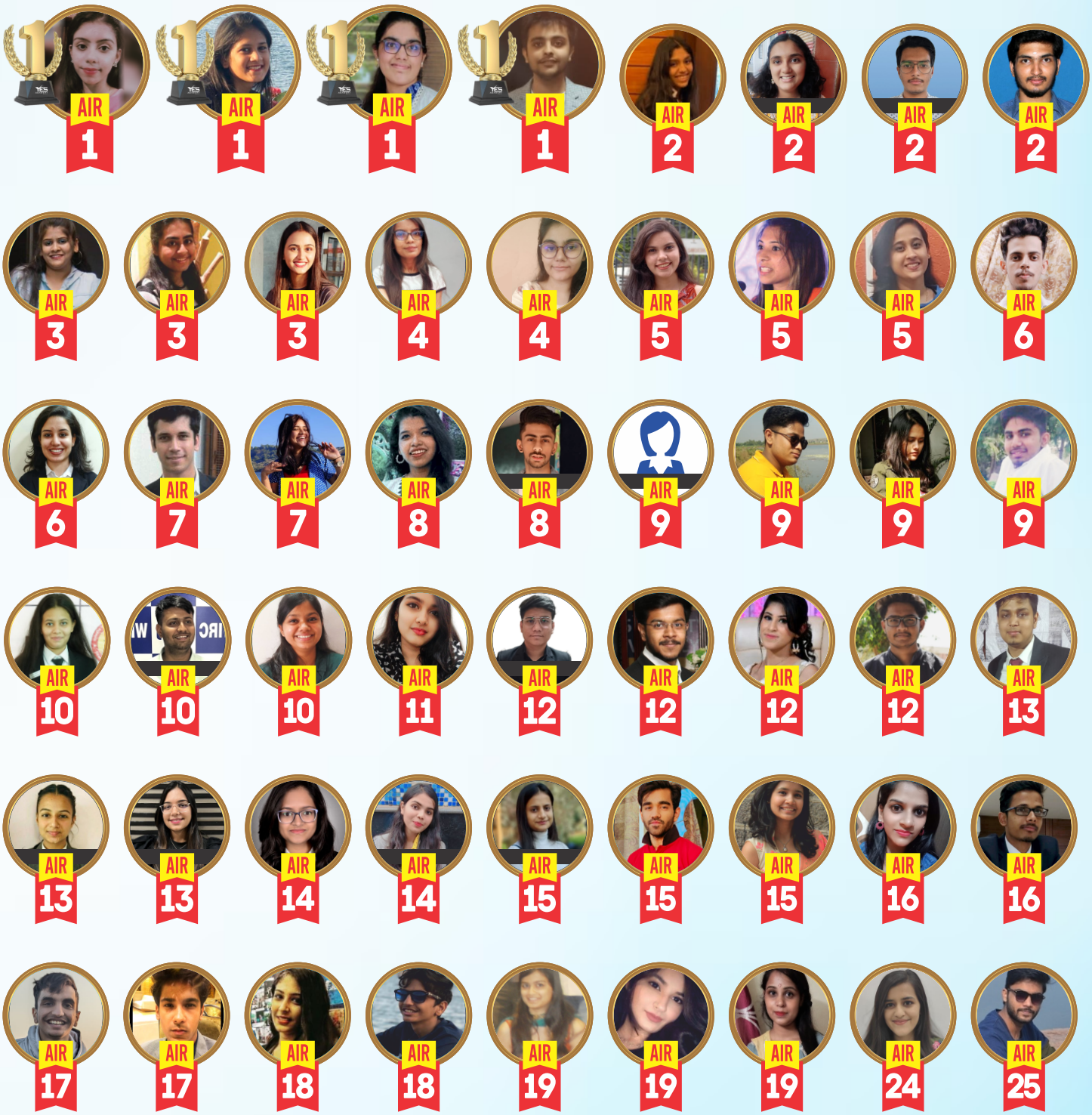

& many more

CS Muskan Gupta

Muskan is a graduate from ILS Law College, Pune. She Qualified as a Company Secretary at the age of 21 with AIR 15 in Foundation Programme. She has completed her masters in Constitutional Laws from Bhartiya Vidyapeeth, Pune.

She has worked with esteemed lawyers and firms and has always shown great interest in subjects like Crpc, CPC, Constitution of India and Corporate Laws.

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"Keep working hard, until you are insanely proud of yourself"

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