A COMPARATIVE STUDY ON PRIVATIZATION AND INTELLECTUAL PROPERTY RIGHTS IN INDIA

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ABSTRACT

In the year 1991 the then finance Minister Dr. Manmohan Singh accepted the concept of open economy and thus introduced Liberalization, Privatization, and Globalization in the Indian economy. The Indian economy which was a closed economy since its independence was now an open economy eyeing industrial development and foreign direct investments. This major step taken by India opened areas in the field of intellectual property rights. The IP regime in India was still at its infant stage. But rapid industrial growth demanded a stronger IP regime in India. India was a member of World Trade Organisation (WTO) and was thus signatory to TRIP’S (trade related intellectual property) in the year 1995. TRIP’S looking at the economic and political situation in India allowed a transition period of 10 years to India to make its domestic laws in consonance with TRIPS. The IP regime thus gradually developed in India and by the year 2017 we see that privatization has engulfed the very objective of intellectual property rights. This paper will examine the effects of privatization on the IP regime in India and whether it serves the objective of intellectual property rights. Also this paper will discuss various case studies that differentiate the private benefit v/s public benefit in the IP regime of India and the steps taken by government to serve the purpose of IP. At the end the paper will conclude whether privatization is a merit or a demerit to intellectual property rights.

Keywords: Privatization, Intellectual Property Rights, Compulsory licensing, Traditional Knowledge, Fair use.
INTRODUCTION

India got independence in the year 1947 and according to the economic & political scenario in the nation at that time, the leaders thought that adopting the concept of closed economy would be a better option for India because due to foreign investments in our country the britishers were able to penetrate its regime in India. So it was essential to restrict foreign countries to invest in India during the time of independence. By the year 1991 we realized that in order to achieve economic development we need to change the economic system of our country and need to adopt open economy to match up with the changing times and developed nations. Thus in the year 1991 the then finance Minister Dr. Manmohan Singh accepted the concept of open economy and thus introduced Liberalization, Privatization, and Globalization in the Indian economy. The Indian economy which was a closed economy since its independence was now an open economy eyeing industrial development and foreign direct investments. This major step taken by India opened areas in the field of intellectual property rights. The IP regime in India was still at its infant stage. But rapid industrial growth demanded a stronger IP regime in India.

TRIPS

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all the member nations of the World Trade Organization (WTO). It sets down minimum standards for the regulation by national governments of many forms of intellectual property (IP) as applied to nationals of other WTO member nations.\(^1\) TRIPS was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994 and is administered by the WTO. {The obligations under TRIPS apply equally to all member states, however developing countries were allowed extra time to implement the applicable changes to their national laws, in two tiers of transition according to their level of development. The transition period for developing countries expired in 2005. The transition period for least developed countries to implement TRIPS was extended to 2013, and until 1 January 2016 for pharmaceutical patents, with the possibility of further extension.}\(^2\) India

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\(^1\) TRIPS Article 1(3)
\(^2\) Outline of Jurisprudence by Rosco Pound
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Nature of IP
Roscoe Pound has observed that, ‘in a civilized society men must be able to assume that they may control what they have discovered and appropriated to their own use, what they have created by their own labour, and what they have acquired under the existing social and economic order'. Intellectual property rights can generally be considered as specie of intangible property. It is meant to promote creativity and innovation by rewarding innovator with an exclusive, but temporary property right. As society has grown and personal possessions increased, governments have found it desirable to provide for the regulated exchange of property between persons, to enable a larger enjoyment of the wealth of the world by an interchange of property among the creators of this wealth, thus encouraging individual effort and talent to provide effective and efficient promotion of better ways of producing and utilizing the means at hand. This provides an incentive to progressive individuals by rewarding them with the depredations of less industrious persons. The basis for the recognition of intellectual property by specific grant by government has always been that the innovation into the community enriches the public welfare, and the innovator to that extent is a public benefactor.

Nature of Privatization
Privatization means the transfer of a business, industry, or service from public to private ownership and control. Privatization focuses on the benefit of an individual. Privatization is person centric. While the objective of intellectual property rights is exactly opposite to privatization. The main objective of IP is to promote innovations that would be beneficial for public at large and in order

3 Solomons v united states 137 U S 342 (1890)
4 “the law and society” by Posnack Emanuel R, journal of patent office society 27 (1945) 361
5 United states v. Dubilier Condenser Corp, 289 U S 178 (1933)
6 Traditional Knowledge And Patent issues : An overview of turmeric, basmati, neem cases by Saipriya Balasubramanian
to achieve this exclusive right is given to the innovator for a limited time period. The main aim is not to give exclusive right to the innovator, rather the main aim is to benefit public out of that innovation. The exclusive right to the innovator is given only for a limited time period just to facilitate more and more innovations. The ultimate objective is public welfare. IP follows partial privatization till the time public is benefited out of it. Thus in the debate of public benefit vs private benefit, both IPR and Privatization falls under opposite parts respectively.

EFFECTS OF PRIVATIZATION ON IPR IN INDIA

1. Natco Pharma Ltd V. Bayer Corporation

Facts:-Bayer Corporation was a producing a drug named “Nexavar” that helped the patients suffering from the liver and kidney cancer. It was the only drug manufacturing company that came up with such medicine. Bayer first applied in the United States for patents. On January 12, 2000 it made an international filing. Hence they got the drug patented in many countries, India being one of them. In India it got its patent registered under the name “NEXAVAR” on March 3,2008. NATCO Pharma ltd found a way to produce the generic form (SofraneibTosylate) of the patented drug (Nexavar). NATCO repeatedly applied for voluntary licensing to BAYER, but BAYER rejected it and did not allow NATCO to produce the medicine.

Point of concern:-BAYER was manufacturing “Nexavar” and it was available to the public at the cost of approximately 2,84,000 RS per month. While NATCO developed a method wherein the same drug was available at the rate of 8,800 per month to the public. NATCO applied for voluntary license to BAYER but as all the rights for commercial exploitation of the drug vested in BAYER, it denied NATCO a license to produce the drug. This is the classic example of the negative impact of Privatization on IPR. The main objective of IPR was to promote more and more of inventions so that the society is benefitted out of such invention. But privatization has engulfed the very objective of intellectual property rights. In the present case, because of the exclusive rights given to BAYER, NATCO could not deliver the medicine at a much lower rate.
2. **DU Photocopy Case**

*Facts:* Delhi school of economics has authorised Rameshwari Photocopy service shop to print various pages from books published by the plaintiffs (it includes some international publishers also like Oxford University Press, Cambridge University Press, Taylor & Francis) and give it to students as course packs. Rameshwari photocopy service was asked to print the course packs and give it to students after binding the same at a nominal price of 50 paise per page. The plaintiffs filed a case of infringement of copyright against the Delhi University and Rameshwari Photocopy service.

*Point of concern:* The plaintiffs sort a ban on all the course packs because according to them it leads to commercial exploitation. A copyright is given over a book to acknowledge the creativity of the author and to let the people benefit out of that. In case of educational books, when we see the price of the books of some international publishers like Oxford University Press, it is very costly. Rather than encouraging the availability of the course packs at such cheaper rates, the plaintiff’s attempted to ban the course packs by bringing in the suit of infringement. “Higher education in India will be impossible if we have an over-zealous copyright law” says Satish Deshpande, author and professor of sociology at Delhi University. Filing of suits by the plaintiffs in this case raises the question to the private vs public benefit. The authors and publishers are only concerned only about the private benefit. Privatization has reached to such a level that we have started making attempts to stop public getting benefit out of an invention. The authors and publishers should understand that these course packs are beneficial even to them as it allows a wider dissemination of their works.

3. **Basmati Patent**

*Facts:* US patent office has granted patent on a strain of basmati rice to the company “Rice Tec”. Rice is considered to be a staple food in India and for years the farmers of India has conserved and developed over a million different varieties of rice to meet different tastes of the people. The company claimed that it had invented certain "novel" Basmati lines and grains "which make possible the production of high quality, higher yielding Basmati rice worldwide." The Indian Government had pursued to appeal only 3 claims out of 20
claims made in the original patent application of RiceTec Inc. What were being challenged were only claims regarding certain characteristics of basmati (specifically starch index, aroma, and grain dimensions). However, US being a strong proponent of Patent protection of plant varieties allowed the patent application. Three strains development by RiceTec are allowed patent protection and they are eligible to label its strain as "Superior Basmati Rice". Therefore, in Basmati case, RiceTec altered the strain through crossing with the Western strain of grain and successfully claimed it as their invention and the case is an example of problems illustrated in TRIPS with regards to patenting biotechnological processes.

Point of issue:-United States of America follows the concept of capitalist economy and thus lays more focus on privatization. Hence something which was already in produced by the farmers in India was considered as novel by the USA patent office and patent was granted to Ricetech. In India plant varieties are protected under the Protection of plant varieties and farmers rights act while in USA patent is granted on plant varieties. Thus privatization exploited the traditional knowledge in India.

**STEPS TAKEN BY JUDICIARY**

1) **Compulsory licensing in Natco Vs Bayer**

NATCO in 2011 filled with the controller for compulsory license for “Nexavar”. Controller allowed compulsory licensing on Nexavar. Subsequently BAYER filed an appeal in the IPAB. The main issue before the court was whether or not the claim of NATCO falls under the ambit of section 84 of Patents act. In order to get compulsory licensing under section 84 three conditions have to be fulfilled:-

a. Whether the drug is available to public at large or not?

b. Whether it is economically viable for the public at large?

c. Whether the drug has worked in the territory of India or not?
As far as the first issue is concerned the court held that BAYER has failed to meet the demand in the market as the drug was not easily available hence then first issue is in the favour of NATCO’S claim. As far as the second issue is concerned it was pretty evident that the claim of NATCO would succeed because the drug produced by BAYER was not economically viable. NEXAVAR produced by BAYER was available at the price of 2,84,000 approximately in a month, while the NATCO was giving the generic “SofraneibTosylate” at only 8,800 per month. Thus, the second issue was also issued in favour of NATCO. Coming to the third issue the court accepted NATCO’s contention and held that “worked in territory of India” means “manufactured in the territory of India” and BAYER was producing the drug outside the territory of India.

Thus, for the first time in the year 2012, compulsory licensing was given to NATCO over NEXAVAR with a consideration of 7% royalty to BAYER Corporation.

2) **Fair use in DU Photocopy case**

Section 52 of the copyright act talks about fair dealing. The court in the DU photocopy case held that the secondary statutory limitation on the rights of copyright owner is fair dealing with his work. Under copyright law, some uses or protected works are free. These are usually referred to in general terms as fair use or fair dealing. The free uses can be made for private study and research, teaching, criticism, reporting current events, etc. By april 2017 three plaintiffs in the DU photocopy case i.e. oxford university press, Cambridge university press, taylor&francis withdrew its case and accepted the court’s view that these course packs are beneficial even to them as it allows a wider dissemination of their works.

**CONCLUSION**

Even-though the private entities have tried to engulf the very objective of intellectual property rights through privatization, the judiciary have tried and attempted to let the objective of IPR prevail. Judiciary has focused more on public benefit than private benefit and accepted the view that an invention or a creation of art is protected just because it aims for public welfare. The public
welfare is the main objective. But that does not mean that the private benefit is neglected by the court. The exclusive rights given to the inventor acts as a catalyst for promoting more and more inventions that would ultimately led to public welfare. For instance even-though compulsory licensing was allowed in NATCO’s case at the same time 7% royalty was given on the total sales to BAYER Corporation. Thus we can say that too much of privatization would spoil the genesis of intellectual property rights, but if we interpret the view point of Indian judiciary we can say that partial privatization prevails in the IP regime of India. Partial privatization means that private benefit of an individual will be protected till the time public benefit prevails.