CHAPTER 1

Intellectual Property Rights and Patents: Introduction to Intellectual Property Rights

Intellectual Property Rights (IPRs) are legal rights that result from intellectual activity in the industrial, scientific, literary and artistic fields.[1] It is essentially a western concept based upon Roman law foundations of property allocation. Culturally and historically, the eastern oriental culture had never placed private rights over any type of knowledge property. In ancient India, the cultural and philosophical practice was in freedom of knowledge as mandated in the Rig Veda (one of the ancient Indian philosophical texts of the Hindus). It was believed that there should not be any restriction or bondage on knowledge as it is universal and free. Hence inventions or creations of human beings were to be utilized for the development and well-being of the human society at large.[2] In China, imitation was considered as a high compliment to the artist (the logic being, the work is so good that it has inspired others to imitate or replicate the work) and in ancient Java (Indonesia) community values and hence community rights were greater than private rights.[3]

IPRs are legal rights that were exported to the eastern countries by their colonial rulers and as a result of this, Intellectual Property (IP) legislation conferring private rights to IP were established in countries that had never followed the philosophy of such private rights. In some other countries (in erstwhile Soviet Union and those which were part of the Soviet bloc until its breakdown) private rights on means of production were totally withdrawn due to the influence of Bolshevik Revolution. As a result, rights for intellectual creations were said to be people's rights, which effectively meant that they were owned by the State. Individuals were limited to be recognised and honoured, short of being able to dispose of their work.

1 WIPO, "The Concept of Intellectual Property" in WIPO Intellectual Property Handbook: Policy, Law and Use, paragraph 1.1, 2001.

2 Mukherjee Santanu, "The Journey of Indian Patent Law towards TRIPS Compliance", 35 (2) IIC pg. 126, (125–150) 2004.

3 Gerster Richard, "Patents and Development Lessons Learnt from the Economic History of Switzerland", Intellectual Property Rights Series, pg. 2, No. 4, Third World Network 2001. Available at, http://www.gersterconsulting.ch/docs/TWN_Patents_and_Development.pdf.

IPRs are statutory rights assured to the moral and economic aspirations of the creator of the IP to provide incentive to the inventor by way of providing legally protected exclusivity against rival enterprises in direct competition, for a certain restricted period.[4]

Different IPRs protect different types of IP, e.g. patent rights deal with the protection of scientific and technological inventions while copyright deals with protection of literary and artistic creations and trademarks to distinguish one's goods from similar other goods.[5] There are more types of IPRs to protect different other types of IP, in particular trademarks and related rights which seek to distinguish products from each other. This book focuses on the patent system and the nature of the right elaborating on the doctrine of exhaustion in relation to international trade rules under the aegis of the World Trade Organization (WTO).

One needs to understand that the main reason for having patents is economic gains wherein the inventor discloses the invention and the process to work it instead of adopting secrecy and in return gets market exclusivity.[6] In return, the patent system allows the owner market exclusivity and even restricted monopoly under a mandatory contractual agreement through an elaborate application and grant procedure that requires meeting certain specific requirements. Thus, such agreement requires the invention to be new or novel, to make an inventive step, to be industrially applicable and to disclose the patent in a manner to enable a person skilled in the art to work the invention. This balances the monopoly right on one hand and public welfare on the other through dissemination of knowledge and technology, enhancing social progress.[7] In other words, to ensure that the general public at large can benefit from the invention that is being accorded market exclusivity through the patent, the inventor is mandated to fully disclose the invention. The patent rights are wide in nature allowing the right owner to exclude others from making, using, selling, offering to sell or importing the patented invention.[8] Hence it becomes important to ensure effective disclosure so that a person with ordinary skills in the particular field to be able to make and practice the

4 Cornish William, "Intellectual Property and Monopoly" in "Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights", 4th edition, Sweet & Maxwell, pg. 40, 1999.

5 Abbott Frederick, Cottier Thomas, Gurry Francis, International Intellectual Property in an Integrated World Economy 4th edition, Aspen Case Book Series, Wolter Kluwer, pg. 8, 2019.

6 Penrose Edith Tilton, "Economics of the International Patent System", Johns Hopkins Press, pg. 101–107, 1951.

7 Moore Adam, "Intellectual Property: Theory, Privilege, and Pragmatism" 16 Canadian Journal of Law and Jurisprudence at pg. 198 (191–216), 2003.

8 Barett Margrett, "Intellectual Property cases and materials", West Group, pg. 115, 2001.

invention. This on one hand incentivises the inventor by protecting the efforts of the inventor and as well as encourages others to enhance innovation beyond the invention.

1.1 Brief History of Patents

Historically, the first statutory recognition of monopoly right for inventions (and can be termed as ancestor of 'patents' due to the nature of protection to inventions) was provided by the Venetian Senate through its ACT of 1474.[9] This legal right provided the author with a licence to exclude others from making the protected product, for ten years provided the inventor could prove the usefulness and novelty of the invention to qualify for protection.[10] It also had a provision for penalty against infringement wherein the infringer could be summoned by the city Magistrate and obliged to pay hundred ducats and the counterfeit destroyed.[11] This type of continental patent law moved to England in the form of royal grants for inventor privileges where, although the grants provided market monopoly, the aim was more to reward political creditors through issuance of '*Litterae Patentes*' or 'Letters Patent' (open letters – '*patentes*' meaning open) rather than for promoting inventions.[12] The grant of letters patents carrying the message of the monarch under his/her seal became popular under the English crown. Early records show that William Cecil, chief advisor of Elizabeth I used patents to encourage foreign innovators to come and work in Britain by assured protection of their creative work.[13] During the period 1561–1590 of Queen Elizabeth I, England granted about 50 patents.[14] In 1610 '*The Book of Bounty*' was issued and the first judicial precedent can be attributed to the *Cloth worker of Ipswich Case* of 1614 where the ambit of patent as a monopoly right was determined.[15] In 1623 the Statute of Monopolies was

9 Mandich Giulio, "Venetian Patents" (1450–1550), 30 J. Patent & Trademark Off. Society, pg. 166, 177, 1948.

10 May Christopher and Sell Susan, "Intellectual Property Rights: A Critical History", Lynne Reinner Publishers, pg. 89, (66–111), 2006.

11 Ibid at 9.

12 Holyoak Jon and Torremans Paul, "Themes in Intellectual Property" in "Intellectual Property Law", pg. 6, Butterworths 1995.

13 Walterscheid Edward, "The early evolution of the United States Patent Law: Antecedents", 76 J. Patent & Trademark Off. Society, Part 1 pg. 697, 1994; Part 2 pg. 849, 1994; Part 3 pg. 771 & 847, 1995 and Part 4 pg. 77, 1996.

14 Graff Garrett, "The Patent Trap" in The Harvard Magazine, July–August 2005.

15 Young David, Watson Antony, Thorley Simon and Miller Richard, "Terrell on the Law of Patent", pg. 2, 3, 14th Edition, London Sweet and Maxwell 1994. The *Clothworkers of Iswich*

promulgated by King James I in England although it gradually lost importance as it became more of a royal favour to well-placed courtiers.

In the United States of America (US), before George Washington signed the United States Patent Grant on 31st July 1790, all inventions by the natives of the colony were owned by the British monarch. Hence if the inventor wanted to protect his invention, he needed to make a special appeal to the governing body of the colony. The first recorded grant of such right was made by the Massachusetts General Court, in 1641, to Samuel Winslow for the novel method of making salt.[16] The US Constitution was the first ever to accord constitutional rights on creative arts and scientific inventions. In *Article 1, Clause 8* it states,

> Congress shall have the power … to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

After the signing of the United States Patent Grant in 1790 under the New Constitution recognising patents for the first time in such a document, the first patent under the statute was granted to Samuel Hopkins of Pittsford, Vermont, for making potash (a chemical used in industrial production of soaps, fertilisers, gunpowder and glass).[17]

Later when the US Patent Act of 4th July 1836 was introduced, patents were numbered and the first patent to be granted under this law was for the invention of traction wheels by John Ruggles in 13th July, 1836.[18] It is interesting to note that even then, questions were raised on the role played by patents on innovation, thus raising doubts as to the purpose of the monopoly in first place. This is clear from a letter of none other than the first examiner of patents in the United States, Thomas Jefferson to Isaac McPherson in 1813.

Case stated, "But if a man hath brought in a new invention and a new trade within the kingdom in peril of his life and consumption of his estate or stock, etc. or if a man hath made a new discovery of anything, in such cases the King of his grace and favour in recompense of his costs and travail may grant by charter unto him that he shall only use such a trade or trafique for a certain time, because at first people of the kingdom are ignorant, and have not the knowledge and skill to use it. But when the patent is expired the King cannot make a new grant thereof".

16 See, https://constitution.congress.gov/browse/article-1/section-8/; https://cambridge.dlconsulting.com/cgi-bin/cambridge?a=d&d=Sentinel19420926-01.2.46 for further discussions.

17 For details of the first patent see, http://www.philly.com/philly/blogs/TODAY-IN-PHILADELPHIA-HISTORY/Samuel-Hopkins-granted-first-patent-in-the-United-States.html.

18 For the first US patent for the invention of traction wheels that was registered see, http://www.patentstation.com/mdm/tractionwheels.htm.

It states,

> He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody. *Accordingly, it is a fact, as far as I am informed, that England was, until we copied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea. In some other countries it is sometimes done, in a great case, and by a special and personal act, but, generally speaking, other nations have thought that these monopolies produce more embarrassment than advantage to society; and it may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices.* (*Emphasis added*)[19]

By early nineteenth century, IP legislation was already established as municipal law in most of the western countries. IP legislation gained international importance from the early 19th century by means of bilateral agreements securing IP protection in neighbouring countries, protecting inventors from unfair competition. It becomes the subject matter of the first multilateral treaties in international economic law with the signing of the Paris Convention for the Protection of Industrial Property in 1883 (Paris Convention) and the Bern Convention (Bern Convention) for the protection of literary and artistic works in 1886, building upon the stock of bilateral agreements and domestic legislation. During the passage of time, different other international conventions and multilateral agreements were signed modifying old rules and introducing changes in new ones to suit the need of the day. However, although there was

19 Thomas Jefferson's letter to Isaac McPherson see, https://founders.archives.gov/documents/Jefferson/03-06-02-0322.

considerable internationalisation of the IP legislation, the essentially municipal character of the law was never questioned. In the modern day, internationalisation of IPRs has reached a stage that countries can hardly resist the contemporary IPRs model, which can no longer be identified solely as a western concept. Today, alienating from the IPRs system would actually mean exclusion from profitable foreign markets as well as barring the home market from efficient products and advanced technologies that can benefit the consumers at home.[20]

1.2 Rationale for Patents

The patent system in a sort of monopoly rights, was known to be first developed by German miners who invented new processes for mining in the Alps, but evolved in the form of statute later in the Venetian state.[21] As it evolved since then, the first Venetian *Act of 1474* had been enacted, it was based on the Faustian exchange.[22] The inventor committing to disclose details about the invention and the way to work it while in exchange the government providing legally protected exclusive rights over the invention.[23] This means that the government contracts to grant restricted market exclusivity to innovators as a reward for the innovation. This provides incentives to them with an intention to enhance innovation and help technology dissemination in return of the knowledge of how to make the invention work.

This rationale of 'private gain in exchange of public good' is clear from the text of the statute enacted by the senate of Venice on 19th March 1474 and quoted below:

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20 Hamilton Merci, "The TRIPS Agreement: Imperialistic, Outdated and Overprotective" in Adam D. Moore (eds.), "Intellectual Property: Moral, Legal, and International Dilemmas", Lanham, MD: Rowman & Littlefield, pg. 243, 1997.

21 Ibid at 12, pg. 33, 34, 1995.

22 In the 'Faustian Exchange', often also referred to as or 'Faustian Pact' or 'Faustian Bargain', there is a 'give and take' arrangement. As the legend goes, Dr. Johann Georg Faust or popular in English as Dr. John Faustus, a 15th century alchemist was said to have traded his soul to Mephistopheles (a demon in German folklore acting on behalf of the Devil) to obtain 24 years of unrestrained creativity.

23 Daniele Archibugi and Filippetti Andrea, "The Globalisation of Intellectual Property Rights: Four Learned Lessons and Four Theses", Volume 1, Global Policy, London School of Economics and Political Science and John Wiley and Sons Ltd., Issue 2, pg. 138, May 2010.

> Therefore it is enacted by the authority of this body that whoever makes in this city any new and ingenious device not previously made within our jurisdiction, is bound to register it at the office of the Provveditori di *Comun* as soon as it has been perfected, so that it will be possible to use and apply it. It will be prohibited to anyone else within any of our territories to make any other device in the form or likeness of that one without the author's consent or license, for the term of ten years. But anyone should act thus, the aforesaid author and the inventor would be free to cite him before every office of this city, by which office the aforesaid infringer would be prepared to pay one hundred ducats and his artifice would be immediately destroyed. But our government will be free, at its total pleasure, to take for its own use and needs any of the said devices or instruments, on this condition, that others than the authors may not employ them.

It will also be noticed that in case any proposed invention or technological improvement was presumed to impact the '*guild monopoly*', this government authorised monopoly could be breached on grounds of '*socioeconomic utility*'. Further, the Venetian legislators explicitly excluded some monopolies in fields for public utility, e.g. the manufacturing of eye glasses so that public could access reading glasses through their wide distribution. It is also interesting to note that there was a possibility of revoking the monopoly if the invention did not work. E.g. the right for windmills.[24]

Edith Tilton Penrose's seminal work regarding the international patent system in 1951 addresses the fundamental balance between economic costs and gains.[25] The modern patent system is not restricted to a single country jurisdiction but is more global in nature while the rights are acquired and enjoyed nationally in each jurisdiction. Based on her fundamental work on the international patent system and its rational, Penrose states that there are many factors to be considered while assessing the costs and gains from a patent system. She states that the incentives gained through acquiring the patent for the invention is negligible (for the community) if considered in respect of its global contribution, and only some firms gain. She concludes that, considering the patents system of incentivising is based on restricting the use of new inventions to enable the patentee earn monopoly rent, heavy social costs are incurred. According to her, the costs are not only due to the monopoly rents by

24 Ibid at 10, pg. 59, 60.

25 Ibid at 6, pg. 101–107.

way of royalties but also due to the production lost through use of less efficient technology as the patent restricts use of newer more efficient technology.[26]

One might indeed raise valid concerns regarding the patent system and the possibility of costs overrunning the gains, but the patent system provides time-tested mechanism to incentivise the inventor. One needs to look at the possibility of the internal checks and balance of the system that enables the society through the intervention of the State to regulate the grant and use of the patents in a balanced manner.[27] To balance the private monopoly rights and public interest in an effective manner the patent system embeds several processes. For example, a proper patent examination procedure that caters to the strict patentability criteria helps in maintaining a balanced approach. It must be admitted that in today's complex nature of scientific innovation, a strong patent system without compromising on the public interest in the technological advancement is necessary.[28]

The patent system is based on clear philosophical foundation that has helped it grow in a systematic manner. There are number of philosophies that influenced the development of IP legislation in general, as illustrated below.[29]

1.2.1 *Libertarian*

This approach is based on concepts developed by the British philosopher John Locke. John Locke wrote the "*Two Treatises of Government*" in which he primarily argues that people form governments through social contract for preservation of their natural rights.[30] According to this approach, all people have natural rights to life, liberty and property, which the government of the land is duty-bound to protect. Because this philosophy highlights the natural right of a person, it is often referred to as '*natural right*' philosophy. According to Locke, if a person removes a property from nature and works on it ('mixed his labour') to add value to it, the result is his property. It is in this context that intellectual property would deserve protection.

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26 Ibid at 5, pg. 119–124.

27 Ibid at 12, pg. 35, 36.

28 Organisation for Economic Co-operation and Development (OECD) "Overview of recent trends in patent regimes in United States, Japan and Europe" Working Party on Innovation and Technology Policy of the Directorate for Science, Technology and Industry, pg. 5, June 2003.

29 Resnik David, "A pluralistic account of intellectual property", 46 Journal of Business Ethics, Kluwer Law pg. 319–335, 2003.

30 See, https://www.thefederalistpapers.org/wp-content/uploads/2012/12/Two-Treatises-of-Government-by-John-Locke.pdf.

1.2.2 *Self-expression*

This approach is based in the German philosopher Friederich Hegel's philosophy regarding freedom, self-expression and property. It also drew support from other philosophers like S. Avineri, J. Waldron, M. Radin, and John Rawls. According to this view, intellectual property can act as a medium for a person's self-expression and development because it helps a person to identify himself or herself with the outside world and allow control over his or her expression and creativity as his or her property.

1.2.3 *Utilitarian*

The utilitarian approach can be said to be the main foundation of IPRs today, propounded by the English philosopher Jeremy Bentham in 1780.[31] According to his utilitarian philosophy, an act can be considered as utility based on whether it brings more pleasure, happiness or prevents pain or unhappiness than any other alternative. The characteristics of bringing more pleasure or removing pain can be stated to result in more welfare enhancing for people. Patents protection is hence justified since they increase utility in society by encouraging artists, authors and inventors through rewards and incentives; thus, they contribute to the enhancement of arts, science and technology. To be more precise, Bentham justifies patents as a way of reward for labour, where he categorises labour as the physical labour needed to bring an effect and the skill and mental power needed for the labour. After considering different possible incentives, he concludes that a temporary monopoly to the author of the invention in exclusion of all others is the appropriate '*recompense*' for such industriousness, genius and ingenuity that goes into the invention.

This philosophy also influenced economist John Stuart Mill who even argued from a human rights perspective and stated that allowing others to freely use the inventor's works without his consent would be immoral. According to him the inventor needs to be both compensated and rewarded. He states that although at times pecuniary grants are made to the inventor, it cannot suffice and an exclusive privilege for certain period is preferable.[32]

1.2.4 *Human Rights*

Further expanding on the human rights aspect of the Utilitarian philosophy that was influenced by economist John Stuart Mill as discussed earlier in

31 Bentham Jeremy, "Introduction to the Principles of Morals and Legislation" written in 1780 and published in 1789. See discussion, https://www.utilitarianism.com/bentham.htm.

32 Fisher Matt, "Fundamentals of patent law: Interpretation and scope of protection", Bloomsbury, pg. 69, 70, 2007.

this chapter, there has been contemporary efforts in linking IPRs and human rights. The logic being, ability to use an inventor or creator's works without his/her consent would be immoral and against his/her human rights. It is important to address the human rights approach since it is increasingly becoming important and relevant. The development of doctrinal human rights as a legal discipline has been more in public international law and has evolved in national jurisdictions locally as part of Constitutional law, only after the World War II. On the contrary patents and copyrights as two of the mainstream IP protection has been well-established since very long time as human creativity involves reward from one's labour and cannot be delinked from rights of the human. Further, it will be noticed that international agreements like the TRIPS Agreement provides a direct link between sustainable development goals and human rights through the objectives of Article 7 and 8 of the Agreement of societal gains and public interest.[33]

On a broader perspective if one considers IPRs in perspective of multilateral trade laws, it is important to consider the similarities and differences between multilateral trade regulations and human rights. In both general approach and substantive rights between the principles of human rights covenants and the international trade regulations there are distinct similarities. The covenants on human rights ensure individual freedom, non-discrimination, equal opportunities and respect for rule of law while on the same note, principles of non-discrimination, most-favoured nation national treatment and rule-based dispute settlement mechanisms are the fundamentals of the multilateral trade regulations.[34] However there are some differences between the two too, the main aim of the multilateral trading system is to create welfare enhancing economic environment. Although it can be said that this economic welfare would result in a conducive human rights atmosphere, this has never been established with an aim to enforce human rights.[35] It has also been argued that given the recognition of IPRs as individual rights hence considering it as human rights would justify application of interpretation methods for human rights to certain IPRs to balance private rights and public interests.[36]

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33 Ibid at 5, pg. 172, 173, 184.

34 Petersmann Ernst-Ulrich, "The WTO Constitution and Huma Rights", Journal of International Economic Law, pg. 19–25, 2000.

35 Lim Hoe, "Trade and Human Rights: What's at Issue?", 2 Journal of World Trade, Volume 35, pg. 5, 2001.

36 Helfer R. Lawrence, "Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy", in 39 Harvard International Law Journal, pg. 396, (357–441), 1998. Available at, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2648&context=faculty_scholarship.

The human rights approach bases its philosophy on owning property being a fundamental right and as such includes both tangible and intangible property. It evolves from the United Nations' recognition of one's right to own property, provided in *Article 17.1* of the Universal Declaration of Human Rights. But it must also be noted that it does not specifically mention IPRs in any manner, hence interpretation varies.[37] *Article 17* of the Universal Declaration of Human Rights states:

(1) Everyone has the right to own property.
(2) No one shall be arbitrarily deprived of his property.

One also needs to take into consideration that although protected, the nature of property rights and its treatment given by sovereign states differ from one another. For example, the Indian Constitution was amended in 1977 (given effect in 1978) to remove the right to acquire, hold and dispose of property as a fundamental right. At the same time, the right to property was not totally abolished in India, it was made statutory right through insertion of *Article 300* (*A*) to assure that a person would not be deprived from owning a property, *'… save by authority of law.'* Hence, while the state has authority to take over a citizen's property, it needs to be through due process of law where the person owning the property has the right of appropriate compensation.[38]

It is noteworthy that irrespective of the nature of property rights that is accorded by a sovereign state, the United Nations also recognises the underlying moral and material interests resulting from one's creativity.

Article 27 of the Universal Declaration of Human Rights states:

(1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[39]

Similarly, the Covenant on Economic, Social and Cultural Rights of 1966 also provides in *Article 15*:

37 Peter Drahos, "Intellectual Property and Human Rights", Intellectual Property Quarterly, pg. 6,7, 1999. Available at, https://www.researchgate.net/publication/285855355_Intellectual_property_and_human_rights.

38 https://www.india.gov.in/my-government/constitution-india/amendments/constitution-india-forty-fourth-amendment-act-1978.

39 https://www.un.org/en/about-us/universal-declaration-of-human-rights.

1 (c) To benefit from the production of the moral and material interests resulting from any scientific, literary and artistic production of which he is the author.

2. The steps to be taken by the States to the present Covenant to achieve the full realisation of this right shall include those necessary for the conversation, the development and diffusion of science and culture.[40]

Even the more recent Declaration of Rights of Indigenous People of 2007 protects traditional knowledge and traditional cultural expressions where *Article 31* states:

1. Indigenous people have the right to maintain, control, protect and develop their traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and generic resources, seeds, medicines, knowledge of their properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.[41]

From the above one might be tempted to question whether '*the moral, legal, political and economic justifications of human rights appropriate for intellectual property rights? Has the TRIPS Agreement been influenced by the 'human rights revolution' of the 1990s?*' Such analogy needs to be considered however, considering that human rights are not mentioned in any WTO regulations and that '*moral rights*' had been specifically kept outside the TRIPS, there was no intention of linking the public interest clauses related to IPRs with human rights.[42]

40 https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

41 https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

42 Petersmann Ernst-Ulrich, "The WTO Constitution and the Millennium Round", in Bronckers M. and Quick R. eds. "New Directions in International Economic Law", Kluwer, pgs. 125, 131, (111–133), 2000.

1.2.5 *Distributive Justice*

This approach advocates that the creator of something new, e.g. inventors and authors, should be rewarded by the granting of some exclusive rights since they provide a service to society through their contribution. It would be unjust to allow people who have not contributed to the new creation to 'free ride' on the work done by the creator.

1.2.6 *Privacy*

This approach supports some specific types of IPRs, such as trade secrets and confidential business information. According to this view, intellectual property protection for business and trade secrets is justified since they accord protection to commercially valuable confidential information. However, such a justification is exclusively applicable to confidential information and would not qualify for other types of intellectual property rights, e.g. patents (where disclosure is necessary) or trademarks (which are required to be seen by people).

1.2.7 *Egalitarian*

This approach deals with how intellectual property rights affect the distribution of the protected property. It brings in a balance between the philosophy of individual rights on one hand, and the Marxist philosophy on the other, which is against private property rights (irrespective of whether they are tangible or intangible). This philosophy was propagated by John Rawls (although not specifically from the intellectual property perspective). His '*Theory of Justice*' states that justice is an essential of well-ordered societies that are based on basic liberties and equal rights for all which should emanate into equal opportunities to the least advantaged. In his own words,

> the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established.[43]

43 Rawls John, "A Theory of Justice", Library of Congress Cataloging-in-Publication Data 1921, Revised Edition, Harvard University Press, Pg. 10, 1971. Available at, https://giuseppecapograssi.files.wordpress.com/2014/08/rawls99.pdf.

The '*Utilitarian approach*' and the '*Natural rights*' or '*Libertarian approach*' are the two philosophies that play the most important roles among the different ones that has been enumerated above. The utilitarian approach is based on the economic perspective to generate the greatest welfare for society at large and to create suitable incentives for investment. Accordingly, the rights of inventors need to be protected to prevent third parties who have not contributed to the invention, from copying the work. Thus, profiting on the inventor's cost can be restricted and at the same time the innovator can be provided incentives.

In the latter approach, rights are justified from the perspective of the creator's moral rights. This is based on the notion that since the creator has put in labour to create something new, the creator should be allowed to restrict others from using or enjoying it without his or her prior consent. As elaborated earlier in the utilitarian philosophy and as propagated by economist John Stuart Mill, it is argued that considering the physical and mental labour that goes into an invention, the inventor should be able to protect the invention. Any unauthorised use of such invention would be a violation of the inventor's moral rights, hence his or her human rights.[44]

Both philosophies aim to support incentives for further innovation through patents. The problem arises when one group wants the rights to be the mandatory representation of their moral and economic aspirations while others view them as public rights inappropriate for private ownership. In such circumstances, the most appropriate path can be a balanced approach by which IPRs are allowed for innovation but regulated for purposes of social and economic policy.[45] Apart from this, the argument that patents are not essential for innovation needs to be examined too.[46] One of the prominent arguments detaching innovation from the patent system is that there are complex motives for inventors to invent and hence it cannot be said that only patents encourage invention. One might even argue that instead, it facilitates investors to invest in manufacturing and distribution of the patented products.

> The question is no longer whether the patent system stimulates inventive talents to use more of their time and energy than they otherwise would for the development of new technology, but rather whether it stimulates

44 Ibid at 32, pg. 69.

45 Maskus Keith, "Globalisation and the Economics of Intellectual Property Rights: Dancing the Dual Distortion", in "Intellectual Property Rights in the Global Economy", Institute for International Economics, Washington D.C. pg. 27, 28, August 2000.

46 Gutterman Alan, "Innovation and Competition Policy", Kluwer Law, pg. 36, 37, 1997.

business corporations to hire more of these talents than they otherwise would for this task.[47]

Whether patents encourage innovation through direct incentives or because of attracting investments, the impacts of such innovations need to spill over industry and contribute to society positively.[48]

1.3 Specific Characteristics of Intellectual Property Rights

On careful study it will be noticed that IPRs have some specific characteristics. They are:

a. Negative rights – IPRs are intangible property rights that protect innovations and provide incentive to the innovator. It is important to note that like any (physical) property right, IPRs are also negative rights which mean that it excludes third parties from using, enjoying or in any way exploiting the rights.[49] This means that this is a right given to the owner of IPRs to restrict others from using, selling or doing any other activity with the IPRs without the owner's prior consent.
b. Exclusive rights – IPRs allow certain amount of exclusivity in the market for a limited period to encourage creative intellectual output, both in the field of science and technology and art and culture. Protection is required to restrict competitors from usurping the creators work without taking permission of the creator. For this reason, the IP owner is allowed lead time against competitors and enable them to commercially gain by way of a justified but restrictive exclusivity.[50] This time-bound exclusivity enables the IP owner to gain sufficient exclusivity to generate some additional market power through restricting output, however it cannot create monopoly sufficient to drive out competing alternatives from the market. It must also be

47 Machlup Fritz, "An Economic Review of the Patent System", Study No. 5, "Study of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, US Senate", pg. 36, 1958.

48 Moir Hazel, "What are the costs and benefits of patent systems?", in Arup Christopher and Caenegem William van (eds.), "Intellectual Property Policy Reform", Edward Elgar Publishing Ltd., pg. 31, 36, (29–54), 2009.

49 Ibid at 9, pg. 12.

50 Cornish William, D. Llewelyn and T. Alpine, "Intellectual Property: Patents, Copyrights, Trade Marks and Allied Rights", Sweet & Maxwell, pg. 6–8, 2010.

noted that unlike unlimited duration of trademarks or long tenure of copyrights, patents are of limited nature for 20 years from grant (filing) specifically to enable diffusion of the scientific and technological invention thus balancing private rights and public interests. From this perspective, IPRs also are qualified as private rights. They deploy their effects among competitors and do not primarily establish a vertical relationship. The point of view does not consider the nature of patents as publicly granted monopoly rights by government.

c. Ubiquitous in nature – A careful study of IPRs will show that they are 'Ubiquitous' in nature, which means that the intellectual property aspect of the physical goods exists independent of the goods incorporating such rights. Since the rights occur simultaneously for all goods irrespective of where the goods are being marketed, all the products manufactured in a single batch will be protected at the same time even if they are physically located in different places (subject to the condition that protection is accorded to them through due process of law). In other words, the IPRs follow the product downstream and as such the owner of the IPRs would be able to control the movement of the product. Hence this ubiquitous nature of IPRs enables it to be a broad right with far-reaching effects that can control many markets at the same time.[51] Hence the ubiquitous nature of the right might result in distortion of the market in favour of the right holder.

From the above it will be clear that each of the different approaches set certain values and goals and as such, are important. Each has its own strengths and weaknesses thus they can complement each other if addressed from a pluralistic approach. One of the major characteristics of patent law and IPRs in general, is that they are non-exclusive in nature. This means that two persons can acquire, possess and enjoy the intangible property at the same time without preventing each other from doing the same. Moreover, most of the time when a product is marketed under a trademark often along with a logo and even a trade-dress. While the technology in the product may be protected by patents, the brand and logo of the product may be protected trademark law. Considering that trademark law protects the brand name and logo and not used for market segregation, in most jurisdiction the trademark exhausts internationally. Profit motive can influence a patent holder to extend the legitimate patent exclusivity to a dominant monopoly beyond its ambit, leading to a

51 Ibid at 5, pg. 99, 100, (98–102).

situation of patent abuse. Any such attempt would distort the market and have anti-competitive effect and as such need to be regulated. In such scenario, a pluralistic approach to such IPRs become important in order to balance private rights and public interests and restrict possibilities of adverse effect on market competition.