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INTELLECTUAL PROPERTY RIGHTS COMMITTEE | SCHOOL OF LAW, CHRIST (DEEMED TO BE UNIVERSITY) | FIRST EDITION 2020-21 | VOL. 3

# INTELLECTUALS

**DEVELOPING SYNERGIES:  
IPR RAMIFICATIONS OF A  
PANDEMIC**



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# EDITORS' NOTE

**Dear Readers,**

We proudly present the Volume 3, Edition 1 of *Intellectualis* with the theme of 'Developing Synergies: IPR Ramifications Of a Pandemic'. Through this issue, we have thrived to keep the tone of the e-newsletter contemporary while ensuring practical relevance of the same. Grappled by uncertain times of the Pandemic, this issue intends to come out as a harbinger of changes and challenges in the IPR regime.

You may have noticed that we have introduced various elements in the design of the e-newsletter along with other structural changes such as an IP events calendar, the showstopper being our 'Feature interview with Mr. Satyam Rathore (Litigation Associate, K&S Partners)'. We are grateful for the practical insights provided by Sir. Through *Intellectualis* we continue to bridge the gap between industry practice and legal education.

We hope that you take the time to read what our e-newsletter has to offer. We would like to extend our gratitude to the student body of School of Law, CHRIST (Deemed to be University) for their overwhelming response to the newsletter. We would also like to thank our Chairpersons, Dr. Avishek Chakraborty and Dr. Aradhana Satish Nair for constantly supporting us and guiding us through the drafting of this newsletter.

We hope you enjoy reading this Edition!

Intellectual Property Rights Committee

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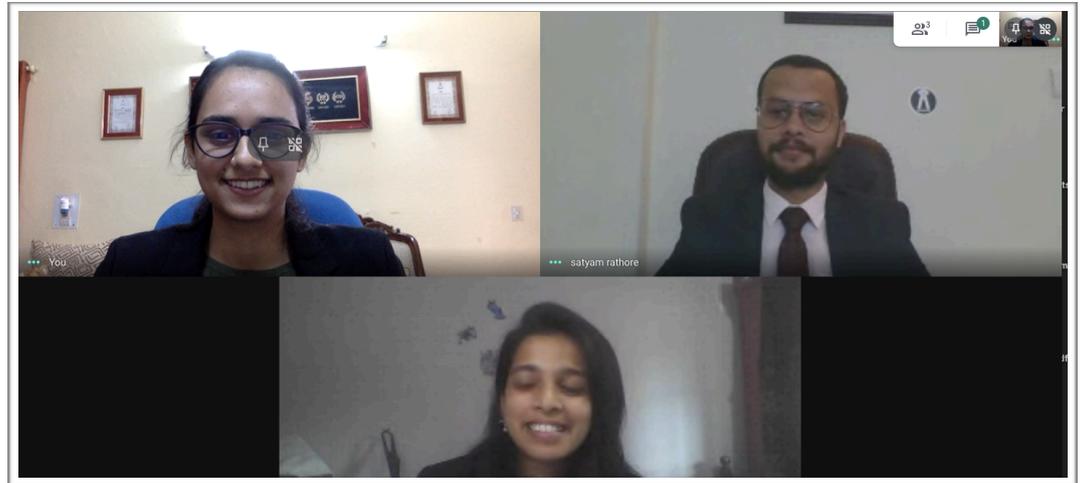
## **FACULTY CONVENERS**

Dr. Aradhana Satish Nair & Dr. Avishek Chakraborty

# COVID-19 & THE WAY FORWARD

- Ankita Malik & Maria Grisha Borges

The Intellectual Property Rights Committee had the opportunity to interview Mr. Satyam Rathore, Associate, K&S Partners. His practice focus is litigation and he primarily assists in handling enforcement, protection and dispute resolution in the areas of patents, designs, trade mark and copyrights. He also



assists clients on availability and registration of trademarks, transactional work, due diligence and renders opinions on the exploitation of trade mark and copyrights.

**Q. Recent discourse among the legal fraternity is that Covid-19 will turbocharge the legal industry transformation and propel it into the digital age. In legal practice, can you throw some light upon your experiences with the changes and challenges that Covid-19 has brought about on a personal and organizational level?**

**A:** Covid-19 has in a way, changed everything in litigation. These changes have their pros and cons, and from my experience I would say that since most of the courts have moved towards virtual hearings, ranging from the recording of evidence to the trial proceedings, the process as a whole is being done through video conferencing. Before Covid-19 nobody could have imagined that there would be such a dynamic shift towards the virtual mode. This is primarily because when we think of the litigation practice, you always picture files everywhere around you and as a counsel you're running from one courtroom to the other.

Therefore, in terms of this, yes, it has changed a lot. From my personal experience, initially, it was a little difficult for us to adjust to the virtual mode as we are in the habit of referring to our files. However, as of now I would say litigation in India has changed for the good, with regard to all the lawyers who are practicing.

Another change that we have seen in terms of the process of litigation itself, is that it has become more streamlined. Proceedings have become faster because when in the virtual mode, the arguments are crisp and to the point. Earlier the scenario was a little different, wherein the arguments were lengthy and would continue for quite some time, therefore the current streamlining can also be seen as a positive development. But I would again like to reiterate that everything has its own pros and cons and therefore, I don't think virtual courts can totally replace the physical hearings, however, to a great extent it can provide necessary support, specially in cases like this, wherein we've been hit by an unprecedented pandemic.

As for the changes on an organizational level, earlier we used to have our meetings physically whereas now we have them virtually and this also includes briefing the senior counsels, organizational meetings etc. For

example, yesterday we celebrated our 26th Founders day and usually we would go out to celebrate but this time we had a virtual celebration. So at all levels, I see this as a great development due to the shift to the virtual mode.

**Q. The first step in every suit is to prove jurisdiction, trademark suits are no exception. Have you come across jurisdictional issues that are heightened due to Covid-19?**

**A:** The jurisdictional issues are not impacted by Covid-19. However in cases of trademark litigation, before filing the suit, we have to look into investigating the infringing mark to ascertain in which Court's jurisdiction it is available. For that purpose, the infringing product and invoice has to be procured and subsequent evidence of its availability has to be filed with the Court. Such physical investigations are made difficult due to the spread of Covid-19. Apart from that, especially trademark litigation involves issues concerning online jurisdiction and has a very complex jurisprudence i.e. even advertising in a particular place can entitle that Court with jurisdiction. In IPR, I would say that the jurisdictional issues are not impacted with a visible way due to the already existing flexible and innovative understanding of the Court vis-à-vis jurisdiction in IPR cases. The same goes for Designs as well, since the infringing product has to be recoverable in case of trademarks, designs and product patent and compared against the right holder's product/mark. The difficulties in physical investigations faced now is something we can overcome in the long-run.

**Q. In the context of the pandemic, courts are growing increasingly flexible in carving out new infringement cases and ordering new and creative remedies. Do you think this is a boon or a bane to the current legal practice?**

**A:** In a way, as far as remedies are concerned, I would say it is a difficult situation, because specially in terms

of IPR suits, for example the appointment of local commissioners, to seize the products or to conduct raids, and even in case of counterfeit products, if you go with a criminal complaint then you have to go for these investigations and raids with the police, so aspects such as these are what have been negatively impacted. This is because, apart from Section 39(1) and Section 39(2) injunctions which are usually used for infringement suits, we do also ask the court for the appointment of a local commissioner for seizure as well as investigations and raids.

However, alternatively we have methods, for example under the Civil Procedure Court we have a provision for appointment of interrogatories, wherein the courts asks the other party to appear before the court and answer specific questions with regard to the product. So these can be considered as a substitute for local commissioner's appointments. But I would still say that in terms of remedies, this shift has had a negative impact as far as IPR suits are concerned.

Apart from that, if you look at the positive side, there are certain things such as service of summons. Service of summons can be served through emails, which has been incorporated by the court and thereby an easier method has emerged. Therefore, this shift has had its own pros and cons rather than a specific tilt towards any one side.

**Q. Apart from court judgements, there are policy changes which are in the pipeline. For example - The Draft Information Technology Intermediary Guidelines Rules 2018, Draft National E-Commerce Policy 2019 regarding counterfeit products. How do you see the horizon for intermediary liability policy progressing?**

**A:** The policy changes can be seen as a welcoming change. In case of trademark infringement matters, a lot of matters concern counterfeit products. I handled a recent case related to the use of an identical mark of a registered trademark on counterfeit products. Counterfeit products are a menace and as far as my

knowledge of the e-commerce policy goes, there are certain positive changes such as intermediaries are required to abide by a uniform take-down policy with greater power vested in trademark owners. In another case concerning trademark infringement of a well-known mark and intermediary liability, I had to overcome the hurdle posed by the *Shreya Singhal* judgement which read that according to S.79 of the Information Technology Act, 2000- only illegal and unlawful content can be taken down by virtue of a court order. The new e-commerce policy changes propose a better mechanism to deal with such issues through uniform take-down policies which, in my opinion should be admired by practitioners of IPR litigation.

**Q. If you belonged to Batch 2020, how would you advise your younger-self on legal practice and the road ahead given the pandemic?**

**A:** I would tell them to be highly competitive in this time because this was something that was unimaginable earlier. The industry is also facing a lot of problems. So I would say, to the batch, which is graduating in 2020, and the ones who will graduate in 2021, that we have tough times ahead and we have to be competitive. One thing I would say to all the batches and not just the 2020 batch is that, after a particular time they should streamline their field. This is something I suggest to all students, that by around 3rd year, you should decide your area of interest and into which field would you want to go and then accordingly you should go ahead with strategizing

your further actions. For example your internships, your research, your publications etc., should be dedicated in one direction in which you would want to go in terms of your career perspective and this is

s o m e t h i n g  
which is rather  
important.

If we look at  
the 2021 batch,  
we realize that  
they would be  
facing double  
c o m p e t i t i o n

because the batch which graduates this year, would also be looking for similar career roles. The industry scenario, as far as the current situation is concerned has not been looking too great, however we are hopeful that it would change. But the best thing would be to stay focused towards your goals, do as many internships as you can, gain practical knowledge because you must have an upper hand wherever you go due to the fact that the competition is going to be tough. Even in terms of internships, its important to streamline it, for example when interns apply with our firm, we look as to whether they have consistency or not. Internships should not be just for the sake of having internships on your CV, rather it should align with your knowledge and your area of interest.

Therefore, its important to be focused and the situation will slowly change. In fact, the situation is changing, wherein in the last months I have seen many positive developments in the industry as well as the practice areas. So I am very hopeful that by the next year things will change for the better.

*“But the best thing would be to stay focused towards your goals, do as many internships as you can, gain practical knowledge because you must have an upper hand wherever you go ”*

# AUTHENTICITY IN THE COVID ERA: A HOAX ?

**-Lian Cicily Joseph**

Trademarks act as effective and essential communication tool that indicate and distinguish goods and services from each other. Being such a valuable asset, it is often illegally used with the goal to falsely benefit from the goodwill of the mark. Some of the most commonly used methods of impersonation include cybersquatting, piracy and sale of counterfeit goods. Counterfeiting of goods can be understood as the creation of an imitation of good with the intention to deceive or defraud consumers. The pandemic and the increased dependency on technology- facilitated commerce has, in essence, facilitated the unauthorised use and sale of protected material.

The increased demand for goods such as hand-sanitizers, cleaning products and medical supplies including PPE kits when met with a reduced supply has resulted in the sale of counterfeit goods. Technology has also facilitated an easy mode of replication of goods to the point where a layman would find it hard to ascertain the originality of a specific product, thereby further encouraging and deterring the capture of such counterfeiters. Prior to the pandemic, reports identified a significant increase in the volume of counterfeiting. In 2013 reportedly, counterfeit goods occupied 461 billion USD, or 2.5% of world trade market versus 509 billion USDs, or 3.3% of world trade in 2016. During the pandemic however, the number of counterfeit detections increased 38% between March and April 2020 across apparel, accessories, healthcare, sanitary products and pharmaceutical goods. In a joint operation by the police, customs and regulatory authorities from over 90 countries called Operation PANGAEA XIII, authorities seized over 34,000 counterfeit surgical

masks, corona spray, “*coronavirus packages*” or “*coronavirus medicine.*” In one of the many instances in India, an unlicensed company in Noida, was ready to ship spurious hand sanitizers and inferior quality face masks before they were shut down by the authorities who seized over 10,000 of such sanitizer bottles.

The TRIPS Agreement defines counterfeit trademark goods as “*goods that bear, without authorisation, a trademark that is identical to, or which cannot be distinguished in its essential aspects from, a registered trademark.*” Article 61 of TRIPS states that member states need to provide for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. India despite being a signatory to the TRIPS Agreement currently lacks any regulation that explicitly deals with counterfeiting. The Indian Penal Code broadly covers some punishments that can be levied in this regard. More specifically however, the owner of a trademark has the right under the provisions governing the law of passing off. The tort of passing off prevents one person from

***“The lack of such safeguards, results in intellectual property crime appearing to criminals as something that is relatively low risk and one that can also be used to support other forms of organised crime.”***

misrepresenting their goods as that of another. This right is primarily enforced by virtue of certain safeguards provided vide Section 27, etc.

The need to provide for specific measures that tackle counterfeiting is highlighted primarily by the

magnitude of the problem and its devastating effects. The lack of a specific legislation fails to account for the individualised and specialized action required to counter the crime effectively. It requires the complete co-operation of law enforcement agencies, legislators and the public at large. The lack of such safeguards, results in intellectual property crime appearing to criminals as something that is relatively low risk and one that can also be used to support other forms of organised crime. A report with Europol suggested that there was a direct co-relation between counterfeiting and other crimes such as money laundering, cybercrime and financial fraud among others. The National Intellectual Property Rights Policy of 2016 looked at India's outstanding obligations under the TRIPS Agreement ultimately concluding that India needed to come up with measures to check counterfeiting and piracy. Objective 6 of the policy highlighted in specific the need for enforcement and adjudication of counterfeiting.

The problem of counterfeiting of goods has been at the forefront for many business and countries across the world primarily due to the devastating effect it could have on a business and on human health and life. The sheer size and magnitude of the problem requires the formulation of robust redressal mechanisms that can adapt quickly to the changing orifice of the crime. Brands have been forced to come up with innovative solutions to adequately tackle the issue. Amazon had reportedly taken down over one million bogus products that claimed to have unsubstantiated claims regarding COVID 19. Companies have also allowed for an online reporting mechanism whereby, the owners or authorized representatives can report counterfeit products.

Consumer awareness also plays a very significant role. Customers should be encouraged to exercise due diligence and caution before proceeding with purchase from an unknown or unfamiliar site or seller. Online retailers must also ensure that there is a strong vetting procedure in place that ensures that the products purchased are from legitimate sources. Such due

diligence will ensure that sellers are supporting legitimate companies rather than phony imitators. Some of the measures that could be taken would include verification of supplier contact details and information, including banking and tax information.

Another recommended step is to protect their own intellectual property by ensuring that the same is properly recorded with relevant authorities. Companies and brands must also disclose cases where they were either supplied with or have been informed of counterfeit goods with law enforcement agencies and other specialists for further investigation. Finally, working in partnership with community driven and centred organizations along with larger national and international organizations will assist in raising awareness while simultaneously forming effective counter-measures.

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# COPYRIGHT AND COVID-19: ENSURING ACCESSIBILITY TO QUALITY EDUCATION

- Amala G

The Coronavirus pandemic has brought the entire world to a standstill, and has drastically affected every aspect of our lives. Education and learning has arguably been one of the most affected fields, with educational institutions, teachers and students being forced to rapidly adapt to online modes of learning. Many universities, including those having a substantial international student base, have shifted to e-learning. At this juncture, it becomes imperative that quality education remains accessible to everyone. This means that students should be able to access lectures, seminars and most importantly, reading materials like textbooks at an affordable price. The scope of this article explores two modes of e-learning that have emerged during the course of the pandemic – online classes, and digital libraries and open access resources. While concerns of privacy violations have been in the limelight during the discussions pertaining to these modes, it is equally important to give adequate emphasis to the copyright issues surrounding the same. This is important to ensure that IP policies maintain their relevance and are able to keep up with the changing times.

## THE CONCEPT OF FAIR DEALING IN INDIA

The fair use doctrine is an exception to copyright infringement. In India, this defense exists in the form of fair dealing which exempts a person from liability if a copyrighted work is used by him/her for the purposes of research, criticism or review. This further



Image Source:<https://freerangestock.com/photos/119885/online-library-.html?hcb=1>

extends to the usage and reproduction of literary, dramatic, musical, or artistic work for the purpose of reporting, bona fide teaching, review or research. The term “fair dealing” has not been explicitly defined in the Copyright Act. However, Section 52(1)(h) to Section 52(1)(j) provides for a copyrighted work to be used for educational purposes without attracting liability. In the *Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services & Ors.* case, colloquially known as the *DU Photocopy case*, the Delhi High Court conferred expansive scope upon the term “in the course of instruction” as that which is aimed towards an overall educational goal. The Court further held that the extent or amount of the copyrighted material being used is immaterial for the purposes of determining whether or not it is fair dealing.

These fair dealing provisions have been invaluable for countless students in India. However, the question that arises now is whether these provisions will continue to serve their purpose even during the new reality of e-learning. Let us now assess their effectiveness by looking at each of the three modes of e-learning highlighted above.

## DIGITAL LIBRARIES AND OPEN ACCESS RESOURCES

Students at the undergraduate level and higher rely to a great degree upon a plethora of textbooks. This is not only limited to usual course material used in classes but also those resources necessary for projects, research etc. A multitude of textbooks is simply unaffordable to most students. This is especially true when we consider the fact that a very minimal portion of a textbook may actually be used by the student. With the lockdown and the evacuation of students from college campuses as part of containment efforts, students have lost access even to their college libraries and photocopy centres.

The sharing of copyrighted material online by teachers or colleges in the form of PDFs can arguably be included within the broad scope of Section 52 (1)(j). In addition to this, a number of open access online resources in the form of digital libraries, thanks to the Open Access movement, have widened their reach and availability. For example, the Internet Archive introduced a National Emergency Library in the USA. In India, we have the National Digital Library of India, sponsored by the Ministry of Human Resource Development.

The approach of the Internet Archive is worth examining from a copyright perspective. The Internet Archive has adopted a “controlled digital lending” (CDL) program. This allows for multiple users to simultaneously borrow a copyrighted work for

a particular time period only. The usual defences against allegations of copyright infringement resorted to by such digital libraries are – the first sale doctrine, which allows for copyrighted book which has been bought lawfully to be resold, and the other defense is that of fair use/dealing.

Let us first explore the first sale doctrine defence. The exhaustion of the first sale doctrine means that the owner of a copy of a copyrighted work has the right to re-sell, lend, give to someone else, or destroy it. The person who holds the copyright in the particular work will no longer have the right of distribution over that particular copy after the first sale has been made. Prior to the pandemic, the Internet Archive had a waiting list and used to “lend” online only the same number as the number of hardcopies of the books that they owned. Thus, its operations closely resembled that of a physical library. However, presently, these waiting lists have been suspended and the books have been made accessible to everyone simultaneously. Publishers and authors consider this to be piracy and a violation of their copyrights. The Internet Archive responds to this criticism by the second defence of fair

*“These waiting lists have been suspended and the books have been made accessible to everyone simultaneously. Publishers and authors consider this to be piracy and a violation of their copyrights.”*

use stating that they have received innumerable requests from educators in

order to meet the demands of all the students of classes because of the closure of schools and libraries.

Section 14 (ii) of the Copyright Act provides for the first sale doctrine in India. However, the application of this doctrine to digital works is not entirely clear due to the rapid nature in which these can be reproduced with little cost or consequences. However, the Controlled Digital Lending mechanism followed by the Internet Archive can be adopted by educational institutions and libraries in India as the elaborate

scope given to fair dealing for educational purposes in the DU Photocopy case and the exhaustion of the first sale doctrine act as strong justifications.

## ONLINE CLASSES

By a reading of the fair dealing provisions contained within Section 52 of the Copyright Act, it is apparent that there is no explicit mention of using copyrighted materials in online classes. However, the intention of the judiciary, clear from the DU Photocopy case, is to enable these fair dealing provisions to adequately support students in the access and assimilation of knowledge necessary to fulfil their academic goals. Therefore, even in the online mode, the use of copyrighted materials can be justified, as fair dealing provided that a lawfully purchased copy of the copyrighted work is being used.

## CONCLUSION

In reaching the conclusion of this article, this author would like to highlight two key points. Firstly, developing a comprehensive IP policy in general, and copyright policy in particular, is important not only from the perspective of the pandemic but also for the advancement of education and accessibility in general. In times where there is a general demand from the public for more openness in IP, policies that equitably balance the interests of users and copyright owners is essential. The second point is that such an open IP policy will encourage creativity in society at large and the subsequent creation of new works. One of the main underlying theories of copyright law known as

the “culture theory” calls for copyright to promote a robust culture of creativity in society by providing adequate material for the creation of new works. These concerns must be kept in mind while approaching this domain

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# COMPULSORY LICENSING: A BOON AT THE TIME OF A PANDEMIC?

- Shefali Fernandes

While we are currently battling a pandemic, there is some comfort that at least when a vaccine/ pharmaceutical product is invented in some part of the

world to address the same, we can sigh a breath of relief. Compulsory Licensing, a terminology and process generally used for patents can create a system

that which permits the use of a patented invention without the owner's consent. The primary objective of compulsory licensing is that it gives access to pharmaceutical products and especially to, those countries like the third-world and developing countries. However, it has raised many other concerns like that of stagnating innovations and inventions. Although, that can be a valid claim with regard to other commodities, however one also needs to take into consideration that pharmaceutical products are extremely essential especially during this period, and any process which makes a drug/vaccine for the purpose of COVID-19, needs to be able to be accessed by all persons. When a company owns a patent over a particular medicine in any part of the world, another country can produce a generic version of the same where manufacturing costs are low. This will enable countries to access these drugs, in a faster, and cost-effective manner.

### WHAT ARE COMPULSORY LICENSES?

In India, compulsory licensing is dealt with under Section 84 and Section 92 of the Patents Act, 1970. In context of COVID-19, Section 92 will come into play. This is in case of a national emergency, an extreme emergency, or for a non-commercial use, this can be taken up by any person interested after the patent is sealed. Grounds for granting the license after three years of the expiry of the patent are:

1. The reasonable needs/requirements of the public with respect to the patented invention have not been satisfied; or
2. If the patented invention cannot be availed by the public at a reasonably affordable price; or
3. The patented invention has not been created not in the territory of India.

The Act also has provided under Section 87 to expedite the procedure of compulsory licensing in a time of a public health crisis such as the present times.

The controller has the duty of ensuring both the rights of the patentee and the persons by whom the medicinal drugs are used, are balanced. At the same time, the patentee must not take advantage of the situation of such emergency.

### COVID-19 AND COMPULSORY LICENSING

In India, there is a shortage of medical facilities and drugs and the death toll is on a rampant increase. A large chunk of the population falls in lower income classes and cannot afford the large expense of these potential vaccines and medicines, In this scenario,

*“Licensing for an emergency will lapse after the emergency is in control.”*

compulsory licensing can possibly be a blessing.

To address the current situation, there are a large number of countries who are introducing compulsory licensing in an emergency situation. On the other hand, there are still a number of countries that do have laws of compulsory licensing in their respective IPR regime. So far, Israel is the only country which has issued compulsory licensing to a drug, Lopinavir/Ritonavir. Although this medicinal drug has been used so far to treat HIV, it is being tested along with a combination of other drugs to treat the novel coronavirus. However, the company, Abvie that owns the Kaletra Drug has already stated that it will not enforce its patent rights throughout the world, thus waiving its rights to profit in public interest.

While compulsory licensing does provide a ray of hope to people, it also has shortcomings. Licensing for an emergency will lapse after the emergency is in control. Patent owners will also have to be paid and the amount varies from case to case. Again, in the case of developing countries, this may be challenging as they have lesser resources. However, from the view of large pharmaceutical companies, greater good of

the public must be sought and it must not be done solely with a profit motive.

At this juncture, the interplay between Intellectual Property and Medicine will be interesting, and if this indeed works in practice, then it will be a significant development in the domain of Intellectual Property.

## IMPACTS OF COVID-19 ON IP INDUSTRY AND METHODS TO SPUR INNOVATION DURING THE PANDEMIC

- Ruthu Shivani R

Intellectual Property Rights is recognized as one of the most critical professional segments in today's world due to its ceaseless growth in the global economy. It is viewed to be one of the fields of law that identifies, incentivizes and encourages one to explore their creativity as well strengthen and secure the creative ideas of individuals who would otherwise lose the opportunity of reaping the benefits.

The outbreak of COVID-19 has resulted in a global health crisis from the past 8-10 months. This has largely impacted the IP industry by curtailing its growth and development. As the pandemic continues to prevail, many industries including the IP industry are predicted to witness a sharp decline in their overall growth. Thus, in view of the IP industry, one of the major challenges that were encountered during the pandemic was the misuse of existing patents due to the break in the functioning of courts which resulted in delay in dispensing justice. Due to this reason, many IP holders have suffered huge losses as they could not seek legal remedy for infringement. Organizations possessing huge IP portfolios have significantly been affected due to the pandemic crisis and on this account; these organizations are attempting to execute some mandatory steps to minimize the impact of the crisis on the economy. Few organizations have begun

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- The Patents Act, 1970

to reorganize their portfolios to limit their expenditure by further cutting down the expenses incurred for maintaining patents, the legal proceedings and researching. It is also anticipated that many IP holders shall choose to get patents in specific sets of countries where the possibility of occurrence of infringement is much lower in comparison to others, thereby providing them with an opportunity to cultivate the concept of refined and selective filing.

The pandemic crisis has adversely affected prominent bodies like the World Intellectual Property Rights Organisations, the U.S Patent and Trademark Office, European Patent Office, Canadian Intellectual Property Office (CIPO), Intellectual Property India, U.S Federal courts, Supreme courts and many IP organizations across the world. These organizations have taken initiatives to develop effective strategies to combat the challenges that the lockdown is posing by adopting measures that will ease down the process of filing of patents and trademarks. Many judicial systems across the world too have taken significant steps to avoid the risk of transmission of the virus. For example, the United States Court of Appeals has taken steps to hear trials related to patents, copyrights and trademarks telephonically and submit relevant

documents electronically to provide a sense of relief to the entire IP society.

## **METHODS TO SPUR INNOVATIONS DURING PANDEMIC CRISIS**

### **1. DEVELOPMENT AND ADVANCEMENT OF CRISIS – CRITICAL PRODUCTS:**

The pandemic situation has brought about a comprehensive change within the IP industry by disrupting the normal ways in which IP activities are performed. For example, many companies possessing huge IP portfolios have been greatly affected due to the pandemic and there is a significant drop in the number of PCT filings because IP holders are of the view that patenting their invention in every other nation can attract higher costs. Ever since the outbreak of the coronavirus, there has been a constant need for Critical – Crisis Products and therefore to cater to the shortage of manufacturing these products, many non CC Sectors who ordinarily deal with luxury products, aerospace, automobiles and fashion have shifted their focus on overcoming the problem of shortage of supplies of these products.

### **2. IP POOLS:**

Recently, the World Health Organization (WHO) embraced a proposal to create a voluntary pool to compile and gather patent rights and information that is crucial for the development of vaccines, drugs and diagnostics. Creation of IP pools will facilitate access to medical products to the needy and disadvantaged section of the society who would otherwise be deprived of the same. Instituting such a voluntary mechanism with the support and assistance of WHO will further pave the way for achieving the objective of engaging dynamic government authorities, diverse groups of institutions and universities as well as various non-profit organizations. WHO has released the COVID-19 Technology Access Pool (C-TAP) that targets making tests, immunizations, medicines and other health-care advances to battle COVID-19 to

make them available to all the nations. More than 30 countries have extended their support and signed up for this initiative. The main objective of this initiative is to speed up the medications, discovery of vaccines and other advancements through open science research. It also focuses on expediting the process of product enhancement and advancement by organising additional production facilities.

### **3. COMPULSORY LICENSING:**

Keeping in mind the expectations, needs and wants of the most vulnerable sections of the population, the government of developing countries should undertake the necessary steps in order to grant the issue of compulsory licensing of COVID -19 medications and treatments that are proven to be effective. Compulsory licensing was proven to be an effective tool for facilitating easy access to antiretroviral drugs during the AIDS epidemic. Therefore, by issuing compulsory licensing, the rate at which Critical – Crisis Products are manufactured can be accelerated to cater to the growing demands of these products. This can also be considered as a method that would prevent the new entrants from infringing existing IP.

### **4. INDEMNITY AGAINST INFRINGEMENT CLAIMS:**

Another technique that countries could adopt is to discontinue the enforcement of IP rights for Covid-19 related advancements and grant compensation against enforcement measures and infringement lawsuits. This interpretation proposes that nations can adopt specific laws that aim to suspend the implementation of IP laws.

### **CONCLUSION:**

The extent to which Covid-19 has been spreading has left many industries to struggle and grapple with tremendous obscurity and distress. Although the gravity of the situation is escalating day by day and its impact is persuasive, this hasn't brought the IP

industry to a halt. It is contemplated that many IP offices are developing constructive measures that will focus on overcoming the harsh consequences that the global economy has been witnessing as well as providing a sense of relief to IP holders. IP holders need to strategize judiciously in order to accommodate the dynamic changes that the post pandemic environment will pose. Countering the infringement challenges related to critical – crisis products, IP pools, compulsory licensing, indemnity against infringement claims, etc. is proven to be advantageous especially during the current situation. Hence, there exists an imperative need to deal with Intellectual Property crucially as well as cautiously during the current situation to not lose out on any crucial resource

*“IP holders need to strategize judiciously in order to accommodate the dynamic changes that the post pandemic environment will pose.”*

identified with Intellectual Property which is a consequence of several years of research and development.

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## PATENT POOLING TO FIGHT COVID-19

**-Joanna L Mathias**

To get back to a state of normalcy and to bring an end to this pandemic a vaccine is the only permanent solution. However, this can take a very long time as the procedure for approvals combined with the red-tapism and the capacity for producing such a vaccine on a large scale is a complex and tiresome process. The estimated time for a vaccine is still a few more months and even once it has been formed it will be impossible for it to be made available across the globe instantly. Consequently, even after approval for commercial production is issued in one country, approvals would be required in each and every country for the product to be available to the rest of the world. Then countries would have to prepare themselves for rapid drug development and marketing. This requires a continuous dialogue between all stakeholders that is

the manufactures, government authorities, innovators, international organisations and private players.

As countries compete amongst each other to form a working vaccination there is a rise in the trend of medical patent pools. These are arrangements between two or more proprietors to license one or more of their patents to each other or to third parties. In essence, a patent pool encourages greater creativity, joint research and development, eliminates bottlenecks in patent regimes and accelerates the production of products or in this case a vaccine. Historically, patent pools in the medical field are rare as innovators seek market exclusivity due to the high production costs in development, series of clinical trials and regulatory approvals. Innovators want to retain control over their products and seek to keep commercial secrecy. The

difficult time we are living in now has changed this thought process and innovators and private parties are moving towards a more collaborative effort. This can be inferred through the open sharing movement during the onset of Covid-19, where research and online sources were open to all temporarily.

A patent pool is advantageous as having a patent pool would mean there are hundreds of producers worldwide. As a result, vaccines and drugs would be available easily and some portion of the royalties could be allocated annually to patent holders and some portion could be retained to finance further research into such pandemics in the future. The main benefit of patent pools is that because of better access to information and technological know-how it speeds up the production process. This increases innovation and productivity. In addition, patent pool members don't have to go through the hassle of seeking permissions, licenses, approvals, etc. which helps save time and money. These pools fasten the Research and Development process, it may enable and allow the drug manufacturing companies to combine distinct medications into single/fixed doses to create better medicines and it also can aid in teaming of big pharma companies with generics companies globally for coming up with the required medicines. Now that Patent Pools have been established as a workable solution to forming a vaccine, a reference must be made to Medicine Patent Pools or MPP. MPP is a United Nations-backed international organization founded in July 2010, based in Geneva, Switzerland. It was founded by Unitaid (a global health initiative that collaborates with potential partners to make medical innovations to prevent, diagnose and treat major diseases in low- and middle-income countries). MPP's mission is to aggregate patents, clinical trials data and other IP relating to HIV/AIDS, Tuberculosis and Hepatitis-C medications and make them available at low or no cost to

*“The difficult time we are living in now has changed this thought process and innovators and private parties are moving towards a more collaborative effort.”*

manufacturers that commit to produce and sell drugs to users in low-income countries.

MPP more as a clearinghouse or intermediary that obtains inbound licenses from willing IP holders and then sublicenses those rights to generic drug manufacturers operating in developing countries. In view of this context, advocates have proposed that a patent pool or MPP-like clearinghouse be formed to combat the Covid-19 pandemic. In March 2020, the President and Health Minister of Costa Rica requested that the WHO “undertake an effort to pool rights to technologies that are useful for the detection, prevention, control and treatment of the COVID-19 pandemic.” This recommendation was intended to ensure that the results of the efforts could be used by countries with limited economic capital to address the problem. The pooling of patent resources is also aligned with the Doha Declaration on Public Health, which is part of the TRIPs Agreement. This declaration acknowledges the need to take steps to 'protect public health' and 'promote access to medicines.' Patent pools requires the cooperation not only of countries and organisations, but also of thousands of researchers, innovators, companies and universities involved. Concern regarding the income to be received is a matter that should be left aside. The world must recover as soon as possible from this pandemic, and patents should be fast tracked rather than hindered. Patent pools are a good solution for the same and countries must join resources in this time of need.

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## IPR REWIND: September 2020

- **Bishop Cotton Women's Christian Law College's Workshop on IPR and Innovations [Sep 1-5]**- A 5 day workshop conducted on Patents, Copyrights, Trademarks and Designs with various resource persons addressing the event.
- **VIPS' National Virtual Workshop on Erudition on IPR in Contemporary Era [Sep 17-19]**- The workshop revolved around 2 major themes including Artificial Intelligence and Reprography, with the keynote speaker being Hon'ble Ms. Justice Prathiba M Singh.
- **Lawtopus & NoticeBard's 4-Hour Online Workshop on the Patent Agent Exam [Sat-Sun, Sep 26-27]**- A 4 hour, 2 day workshop discussing the nuances of the Patent Agent Examination, and the differences between a Patent Attorney and a Patent Agent.
- **HNLU and CAN Foundation's webinar on Transborder Reputation and Jurisdiction under IPR [27th September, Sunday 11:30 a.m.]**- A virtual session hosting Hon'ble G.S. Patel, Bombay High Court Justice Pratibha Singh, on the various jurisdictions of IPR.
- **The IPR Gorilla's 2020 Virtual IP Conference [23rd and 24th September, 9:00 a.m. to 3:30 p.m. EST]**- A conference which addressed the current issues of IPR, as well as the COVID 19 pandemic along with refreshing 1-1 networking and quick games.
- **Amity University presents Intellectual Property and Intellectual Property Right: Basic Principles and Processes [23rd September]**- A webinar examining the basic principles of IPR open to all those interested.Â
- **Photon Legal's e-Summit on Startups, Funding, IP:Nexus Explained [22nd - 25th September]**- A summit open to all those interested, with over 10 resource persons representing various fields, examining the COVID-19 era along with the relevance of IP.
- **FICCI's webinar on IP Protection and Enforcement in Digital WorldÂ [24th September]**- FICCI is the largest and the oldest apex business organization which frequently conducts webinars, workshops and other events for the purpose of awareness. This webinar was regarding the regulations and methods to protect IP in the digital world, with Justice Prathiba Singh as the keynote speaker.

# INTELLECTUAL PROPERTY IMPLICATION IN DIGITAL ENTERTAINMENT SECTOR DURING A PANDEMIC

- Aleena Anabelly A

(Re)Think; before you download or watch pirated content.....

An imperceptible, but fatal virus has familiarized us to unfamiliar terms, it has confined our thoughts, ideas, and actions to the luxury of our living rooms. This global pandemic has leveled all existing human-made 'differences' with general uncertainty. But we are still searching for a silver lining with undying optimism. And this popular perception that persuades us to conform to the 'new normal' is incentivizing private individual actors and tech companies to create and innovate apps, software, and content with entertainment value. Additionally, social networking sites and technology-mediated platforms are imparting unlimited access to generate and share creative ideas. A global upsurge in the number of entertainment and gaming industries during these unprecedented times calls for the formation of well-founded intellectual property protection mechanisms.

In these challenging times, the gaming industry is creating new high scores by exponentially expanding its user base. A statistical study conducted by National Purchase Diary, an American market research company, suggests that video game sales have increased by 35% as a net revenue of \$1.6 billion was generated in march 2020 alone. The US Supreme Court, through the judgement of Alice Corp v. Cls Bank, categorically reiterated that video games and e-sports are non-patentable due to the implementation of abstract ideas in its creation. Similarly, the domestic legislations of various developed and developing

countries extend content protection mechanisms to game developers through copyrights alone. The evident but subtle disregard by policymakers in acknowledging the employment of software and engineering knowledge in the creation of video games is debilitating the authority of copyright protection offered to game industries. The growing demand for video games and e-sports, the ban on popular games, and mind-numbing boredom during the lockdown period has increased the availability of copycat games. Paradoxically, the absence of protection through patent systems in the said industries is furthering the intellectual property violations, as games with conspicuously similar core mechanisms are available in the market. Therefore, by duly recognising the trans-national increase in the creation of video games during this lockdown period, along with intellectual property protection through copyright mechanisms video games and e-sports should be given patents also.

*“The statistical data published by MUSO, a London based tech company with anti-piracy objectives, shows an increase of 63% in pirated content available on Indian websites during this lockdown.”*

On a similar account, the content rolling out from the media and entertainment industry has escalated after the pandemic. The demand for unlimited

content is inducing media and entertainment companies to remotely create content and distribute it through digital and technology-mediated platforms. In such haste, the entertainment companies should be mindful of the right to the intellectual property distributed remotely. The enormous content created to

fulfil the raging demand makes the identification of intellectual property infringement and enforcement of authorship rights laborious. Furthermore, in India, intellectual property rights enforcement through judicial proceedings are delayed due to restricted hearings through online platforms. The court has limited the number of hearings by compartmentalising the cases according to urgency. Therefore, availing an injunction that deters a third party actor from infringing the intellectual property rights of entertainment companies has become unattainable as courts are actively prioritising matters pertaining to the right to life and property as 'the most urgent' ones.

Movies and web series with high commercial value are being streamed online through media service providers like Netflix, Amazon Prime, etc. But, the unauthorised copies of such creative content are readily available on websites that distribute pirated copies. According to Section 13 of the 'Copyright Act, 1957', all innovative literary, dramatic, musical, and artistic works, cinematographic films, and sound recordings protected by copyright mechanisms are bestowed with economic and moral rights. Piracy or unauthorised distribution of copyrighted work is in direct contravention of the right to intellectual property envisaged under section 13 of the Copyrights Act. The statistical data published by MUSO, a London based tech company with anti-piracy objectives, shows an increase of 63% in pirated content available on Indian websites during this lockdown. The rampant piracy concerns arising in India should be dealt with more solemnity as such IP infringement leads to economic loss to the creators and distributors. Therefore, the government should create technological systems that can identify and take

down websites providing pirated content. Subsequent offenders, who create piracy sites with slightly different domain names should be punished by imposing economic liability.

The world is trying to adapt to new circumstances, and online entertainment has become our perfect getaway from a mediocre and weary life. This growing demand for new, creative content has led to a global upswing in pirated content and copycat games. It's high time that policymakers regulate the influx of unauthorised content circulated through technology-mediated platforms.

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## CASE INGOTS

### **Mittal Electronics v. Sujata Home Appliances (P) Ltd. and Ors. Decided on September 9 2020**

The plaintiff Mittal Electronics filed a suit seeking a decree of injunction against the defendants, from manufacturing, purchasing or selling the home appliances and other accessories under the trademark 'Star SUJATA' or 'SUJATA'. The Plaintiff manufactured mixers, grinders etc and defendants manufacture geysers under the make SUJATA. The court held that "Though the goods of the plaintiff and defendant may fall in the same broad classification of home appliances are different goods used for different purposes."

### **Arudra Engineers Private Limited and Ors. vs. Patanjali Ayurved Limited and Ors. (06.08.2020 - MADHC)**

The case is concerned with the trademark of "Coronil". The plaintiff had established that their mark "Coronil-92 B and Coronil-213 SPL" is registered and that registration still subsists and are in force till 2027. The court held "The usage of the word 'Coronil' by the defendants will be detrimental to the distinctive character of the mark of the plaintiff, since as stated above, there is no connection between the mark 'Coronil' used by the defendants and their projected statement that it is a cure for Coronavirus."

### **Shyam Investments and Ors. vs. Masti Health and Beauty Pvt. Ltd. (11.09.2020 - MADHC)**

The concerned case is relating to the infringement of the trade name O2. The issue was Whether the registered trademark of the plaintiff is restricted to the goods for which they have obtained the registration? The plaintiff had a trademark under fitness equipment and apparatus. The court held that The nature of services in which they are used is also the same, namely Spa and Salons. The similarity in the nature and the character and purpose of the service is also the same because both the plaintiffs and the defendant give the same service, namely, providing Spa and Salons services. The class of customers are also the same, namely, anybody who requires and prefers special attention to be given to the grooming of their body and physical health.

# THE INTERSECTION OF AI AND INTELLECTUAL PROPERTY RIGHTS IN RELATION TO COVID-19

- Sanjana Rebecca

In the fight against the COVID- 19 pandemic, Artificial Intelligence (AI) has established itself as a

pre-dominant technology in delivering quick solutions to the medical industry. In answer to the sudden

impact of the virus, AI has been able to provide better alternatives by limiting human involvement for pandemic testing as well as the recovery process. More and more researchers have started to use artificial intelligence in developing vaccines and building an accessible system of pandemic data resources, for instance, COVID-19 Smart Management System (AI-based solution by South Korea), that uses data from security camera footage, credit card records and even GPS data from cars and cell phones to trace the movement of individuals with COVID-19 symptoms. Complex and sophisticated artificial intelligence (AI) and machine learning algorithms are also employed to retrace the movement of the infected person and all persons in close contact, feeding into individual risk assessment of three levels—low, medium and high which would ultimately help in creating a massive database for vaccine development. Besides its incorporation into the healthcare industry, recently, AI has been utilised in the COVID-19 dataset to verify shared data content to develop a standardised collection of data by skimming over thousands of research work contributed to combating the deadly pandemic and answering high priority scientific questions. This project called for artificial intelligence experts to dive into developing text and data mining tools to encapsulate the success of the compilation. Without a doubt, AI has played a major role in streamlining this project but what incentivises persons to work towards AI-based COVID-19 solutions?

In response to this, the author aims to discuss whether the data for AI-based solutions and unique innovations

derived from AI can be protected under Intellectual Property Law.

### **Copyright, AI and the COVID-19**

In this period of uncertainty, technologists and innovators are in a rush to discover AI-based solutions, however, there should be awareness that using training data or other inputs that constitute third party intellectual property raises potential copyright concerns. Copyright concerns can be dealt with by using the exception of fair use but the usage of this exceptions depends on the case and circumstances of copyright infringement. Fair use can be used as a defence to deal with unauthorised and unlicensed use of AI training data to build feasible pandemic situations. Inevitably, this raises questions of whether there is a pressing need for licensing AI training data. Several jurisdictions have dealt with this question by adopting licensing strategies, for instance, Japan has amended its statutory provisions to allow for copyrightable content to be used as AI training data as long as it is not referred to for any usage purposes in creating solutions but only for comparative and classification purposes. However, the United States might rely on a fair use analysis in licensing AI training data and determine infringement on the extent

*“Inevitably, this raises questions of whether there is a pressing need for licensing AI training data.”*

of harm caused by the alleged infringer and whether unrestricted or unfettered use might affect the rights of the copyright holder. Recently, in *Naruto v Slater*, the Ninth Circuit declined to hold that anything

other than a human could have standing as an author under the copyright laws so works written by AI are non-copyrightable. The only reason why AI training data can be copyrightable is because they are created by a human and can be utilized by other humans.

### **Patent, AI and COVID-19**

As discussed, the software sector has been dropping solutions for increasing the role of AI in the supply of healthcare to larger numbers of people. The incentive for software companies in devising new AI solutions related to the health care industry (monitoring and managing hospitals) is the protection of the market to ensure that they remain impenetrable. In this light, it becomes imperative to consider the patentability of AI based solutions. The US Supreme Court declared in *Alice v. CLS Bank*, that patenting AI or software would be patenting human activity as the same automated activity can be performed by a human. This created an air of confusion with reference to the patentability of AI-based solutions in tackling the COVID-19 problem. Undoubtedly, more clarity should be shed on the patentability of AI software in relation to COVID-19 so that small and medium companies bringing in contributions are not exploited.

Another question that arises with reference to AI and patent protection is when the inventor of the solution is AI as opposed to innovations where a human identifies a solution but utilizes AI to verify the results. According to the current US Law, an inventor must be 'human', an individual capable of conceptualisation and invention. There has been much speculation with reference to expanding the definition

of inventor to go beyond the 'natural person' in the America Invents Act. Furthermore, the definition of conceptualisation deals with the formation of thought in the mind of the inventor. Keeping this in mind, can the inventions of artificial intelligence be viewed on the same lines as creations made by humans?

To answer this question, there might arise a situation where new inventions are created almost entirely by AI including the treatment, better alternatives for hospital management and vaccine production and the inventions cannot be ultimately attributed to any human inventor as a result. This becomes problematic to patent and protect because the inventions were creations that were born from the artificial mind. The same view has been expressed by UK as well in rejecting the contention of naming DABUS as a creator in the patent application process. Ultimately, the problem in naming the AI as an inventor is awarding legal status to the AI as an individual and many countries are yet to recognize AI as a legal entity capable of instituting law suits for infringement. An alternate approach to naming AI as an inventor is naming the creator of the AI as the patent holder and thus creators of AI especially in the time of a global pandemic have to be extremely thorough in patenting innovations by AI.

### **Conclusion**

Indisputably, the role of AI in tackling COVID-19 cannot be dismissed and with the increase in AI-generated solutions to everyday problems, the implications of protecting intellectual property rights cannot be overlooked. Copyright concerns over original works and non-patentability of inventions and technology disincentivises persons towards notable

contributions. Although, the author aimed to shed some clarity on the IPR ramifications of AI-based COVID solutions, a comprehensive and detailed approach to tackling infringement and violation of rights is imperative and this can be brought about through amendments to the current law or introducing new inclusive legislations.

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## Watch out for these events!

**1. Sharda University's National Seminar on Role of IPR in Economic Growth [Oct 3]-**  
A forum for all individuals, from students to research scholars to participate in the virtual presentation and present their research papers on issues related to a few broader themes which can be found here: <https://www.lawctopus.com/wp-content/uploads/2020/09/IPR-Brochure-2020.pdf>

**2. JICIL's Data Protection Law Research Competition 2020:** Register by October 5- A two-pronged research competition, with the first written submissions being selected until October 5. This competition is open to all students, however 1 of the tree teammates must be studying law. The topics for research and presentation can be found below. <https://www.lawctopus.com/wp-content/uploads/2020/08/Brochure->

**3. The Law Gazette & Areness's 1st National IPR Quiz Competition [October 4]-** A quiz based on the most recent developments of Intellectual Property Rights, along with landmark judgments and important issues within the field, open to students only. The details can be accessed at : [https://docs.google.com/forms/d/e/1FAIpQLSc6izV1jb-8ZgiKTTaMA6ytlb\\_6DEc7vzDlceEmbMDIfqR0zw/viewform](https://docs.google.com/forms/d/e/1FAIpQLSc6izV1jb-8ZgiKTTaMA6ytlb_6DEc7vzDlceEmbMDIfqR0zw/viewform)

**4. Assimilate IP Webinar, Intellectual Property for Commercial Lawyers (Virtual) [October 14]-**  
This course provides an overview of the key IP rights (e.g. patents, trade marks, copyright, design rights, utility models, trade secrets, know how) and associated agreements commercial lawyers experience in their day-to-day practice. It is open to access for all individuals.

**5. CEIPI's Advanced Training on AI and IP (Virtual) [October 1-3]-**  
This training program will explore these thorny questions by dissecting legal, policy and ethical issues concerning AI impact on creativity and innovation. This training program should be of interest to creative economies and high-tech professionals and entrepreneurs, attorneys, policy makers, judges, and students. [Download the](#)

# ADAPTING TO THE NEW NORMAL

**-Prateek Singh**

The novel coronavirus pandemic response depends mainly on the rapid mass production of sanitary products necessary for the Prevention, treatment, etc. of the disease. Intellectual property (IP) rights can create a barrier in the mass-scale production of these products or treatment processes. This could create a significant issue in particular developing countries which will need to acquire these products in large amounts, becoming incredibly hard if there are barriers to local manufacturing and heavily dependent on import.

IP rights can also create a monopoly on the invention, research, and development of new products/technology related to public healthcare. As only the grant owner can use IP rights, they can withhold letting anyone else manufacturing/ developing a product. It is a prevailing commercialization strategy for firms to bundle several IPRs around a single technique/technology. That is to take a separate patent on the primary technology and several different combinations of the product to cover as many possible uses. This makes it difficult for another innovator to invent. For example, “An MNC Roche refused to share with the Dutch companies the formula for producing the RC-PCR test for COVID-19.”<sup>1</sup> Nation members of WTO comply with the standard of IP protection and enforcement established by the WTO-TRIPS Agreement. The TRIPS agreement enforces all WTO members to grant a minimum of 20 years of patent protection. This impacted the ability to develop a strong local pharmaceutical industry in many nations as they restricted the manufacturing of these products locally ignoring the public health and focusing on monopolistic behaviour.

But in the light of COVID-19 several countries have used the flexibilities available under the TRIPS agreement to ensure that IP rights don't create hurdles to innovation and availability of medical technology required to respond to the COVID pandemic. Different strategies have been adopted in several domestic measures. Countries primarily focus on standards enabling their ministries of health to grant compulsory

licenses or government use authorizations with some states also offering indemnity against IP infringement proceedings and use of competition law. Canada enforced the COVID-19 Emergency Response Act that allows the government to issue compulsory licenses without negotiating with the holder or establishing its own ability to supply a product. The patent holder is to receive an amount as remuneration instead of compensation. While the Canada Commissioner of Patents has the discretion under the Canadian patent law to a governmental use on the application, The ER Act has made it compulsory for the commissioner of patents to grant authorization upon the Ministry of Health's approval.

Chili has adopted resolution No. 896, which states that the novel COVID outbreak justify the use of compulsory licensing to give masses quick access to vaccines, drugs, supplies, and other technologies useful to combat this pandemic.<sup>2</sup> Germany has adopted the ‘Prevention and control of infectious diseases in the Human Act’, which authorizes the Ministry of Health to issue governmental authorization on patent law by the declaration of a nationwide epidemic. The ministry's authorization made medical products like active ingredients, starting materials, medical devices, laboratory diagnostics, and several items that were considered protective equipment and products for sanitation for public use.

These nations have taken these steps under article 73(b) OF TRIPS agreement; a country can take necessary action which it considers essential to its security interest taken in time of war or any other international relations.<sup>3</sup> Thus, to protect the country's health security, they can take steps like suspension of the grant on patent protection, etc. In line with article 6 of the TRIPS agreement, a country can also act on importing needed products that include countries where the product is produced and under compulsory licenses. These changes are crucial in the battle against Covid 19 pandemic. we are all in this together and these changes will be the stepping stone of accepting the new normal, a life with Covid- 19.

pharmalot/2020/03/18/chile-compulsory-licensing-coronavirus-covid19-vaccines/> accessed September 24, 2020

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## CASE INGOTS

### Lacoste S.A vs. Suresh Kumar Sharma (CS (Comm) No.534/19)

Lacoste S.A., the French clothing major, had filed an application for a permanent injunction in the Delhi District Court against Suresh Kumar Sharma. Lacoste contends that Suresh Kumar Sharma was selling shirts bearing the “Lacoste” mark and thus infringing its trademark and passing off. The Court observed that Suresh Kumar Sharma had no right to use the “Lacoste” mark and further held that his actions led to undue enrichment and created confusion amongst the general public. Thus, the court granted permanent injunction restraining Suresh Kumar Sharma from using the “Lacoste” mark.

### Puma Se vs. Mr. Vikas Jindal (CS No.552/2019)

Puma, a well-known German sports footwear brand, filed an application at the Patiala House Court, New Delhi, for a permanent injunction against Vikas Jindal, a Ludhiana based business proprietor, for using its trademark ‘PUMA’ and the ‘PUMA’ logo. Puma further contended that Vikas was liable for misrepresenting and deriving unfair advantage by using the ‘PUMA’ trademark in his products. Vikas Jindal did not file a reply to the suit. Based on the submissions and evidences provided by Puma, the Court passed an ex-parte permanent injunction against Vikas Jindal and ordered him to pay nominal damages of Rupees 50,000 for selling products using the ‘PUMA’ trademark.

### The Halal Guys Inc. Vs. The Registrar of Trademarks(OA/10/2020/TM/MUM)

The Halal Guys, is a restaurant chain that operates in different parts of the world. The impugned subject mark is a creative representation of long queues which are always seen in front of Halal Guys cart. The predominant issue brought before the court was regarding the question of accepting a creative artistic subject mark as a trademark. The court by responding to this question laid down that a creative artistic work associated to a brand can be protected only through copyrights, intellectual property protection through trademark cannot be extended in such circumstances.

# PHARMACEUTICAL PATENTS: AN OBSTACLE FOR ACCESSIBILITY AND AFFORDABILITY?

-Rupa Veena

In the recent past, the world has witnessed several international debates about pharmaceutical patents restricting universal accessibility and affordability.

However, this issue has taken the central stage only now due to the drastic spiral of COVID-19 cases. A patent holder holds the patent for his pharmaceutical

invention for a period of 20 years during which every other entity is excluded from duplicating the patented product. Pharmaceutical patents have proven to be obstacles in the widespread manufacture and use of COVID-19 related pharmaceutical products. Undoubtedly, public healthcare must be prioritised over commercial rights. Therefore, it is necessitated for the pharmaceutical patent holders and R&D companies to be generous during the trying times of a pandemic. Hence, they should be open to the option of voluntary licensing. With this background, this article discusses certain provisions under the Patents Act, 1970 (Act) through which the Indian Government could facilitate a greater reach of the pharmaceutical products during the COVID-19 pandemic.

### **How are the pharmaceutical patents preventing the widespread manufacture and use of pharmaceutical products?**

The motive of every patent holder is profit maximisation as they undergo in-depth research for inventions that are expensive and time-consuming. Moreover, they hold the patent for a long period of time. They do not intend to make their life-saving drugs and other products available to low-income countries. Therefore, it is pertinent to understand that even prior to the pandemic situation, the developing and underdeveloped countries could not afford some expensive patented pharmaceutical products.

Unfortunately, adding on to the woeful fact of not having found a COVID-19 vaccine yet, the world is facing extreme shortages of pharmaceutical products such as the Personal Protective Equipment (PPE) kit, N95 masks in particular, paracetamol, face shield, gloves, etc. With advanced technology, it is possible to boost the fast track production of these products. However, not many manufacturers have patents to produce them. Usually, the entire process of the patent application and its approval would take about 6 to 18 months, but the current situation presses on the need for instant manufacturing of these products. As

exceptional situations need exceptional measures, the Government intervention in this regard is indispensable if voluntary licensing does not work out.

### **Voluntary licensing**

Under the voluntary licensing, the patent holder authorizes a generic company to manufacture and sell the patented products. This would ensure that pharmaceutical products are manufactured by a large number of manufacturers through the process of reverse engineering. Therefore, it meets the demand, and further increases their affordability. However, this process is accompanied by certain drawbacks. While granting the voluntary license, the patent holders have all the authority to impose restrictions on the licensee such as the geographical indications as to where to and where not to supply the products. Furthermore, there is every possibility that the patent holder could grant such a license at a high royalty rate which is ultimately borne by the patients. More often than not, the patent holders refuse to grant voluntary licenses even if it is for life-saving drugs due to low profitability. This is when the Government intervention becomes imperative, given the fact that voluntary licensing is not governed by the Act. The ways through which the Government could intervene in increasing the access to patented drugs are discussed further.

### **The provisions facilitating Government intervention in pharmaceutical patents**

Compulsory licensing of a patented product is a licensing granted by a competent Government authority to a third party without the consent of the patent-holder. Section 84(1) of the Indian Patents Act deals with the grant of compulsory licensing. However, this provision may not be suitable for the current situation as according to this provision, an application for the grant of compulsory licensing can be made only after the expiry of three years from the date of issuance of a patent. For instance, if a vaccine for COVID-19 is patented today, an application can be

made for the grant of compulsory licensing only after three years from today which is not sensible as this three year period could claim millions of lives.

Nonetheless, if at all a pharmaceutical product invented before three years shows effectiveness in the treatment of COVID-19, this provision could be used to issue a compulsory license. Further, Section 84(6) of the Act states the pre-condition for making an application under Section 84(1) which makes it compulsory for the applicant to negotiate for a voluntary license with the patent holder before making an application for a compulsory license.

Moving on to Section 92, it lays down specific situations where compulsory licenses can be granted. They are -

1. Compulsory licensing can be issued for exports under exceptional circumstances.
2. A country which does not have sufficient or no manufacturing power in the pharmaceutical sector in order to address the public health can be issued with a compulsory license.
3. In cases of extreme urgency, national emergency or public non-commercial use, as long as a notification has been issued to the Central Government, the Controller General of the Patent can issue a compulsory license even without having received a formal application.

India has never issued a compulsory license under the said Section. However, in 2012, the Indian Government issued a compulsory license to NATCO Pharma Ltd. under Section 84(1) of the Act for a non-life saving drug which drew criticisms from the rest of the world and gave India an image of being non-patent friendly. Therefore, the author contends that the Government should use this provision judiciously to issue a compulsory license only for a patented product which is proven to be effective in saving lives during the pandemic.

Further, under Section 100 of the Act, the Central Government has the power to use the patented inventions for the purposes of the Government. Section 102 of the Act discusses the acquisitions of inventions and patents by the Central Government if it is satisfied that such acquisitions are necessary for public purposes. A notification to this effect shall be published in the Official Gazette. Thereupon, all the rights with respect to the patent shall be vested in the Central Government. A compensation shall be paid to the patent holder after it is agreed upon between the Central Government and the patent holder. The author contends that the Government should invoke powers from the aforesaid provisions only after trying to negotiate for voluntary licensing with the patent holders. Further, if the circumstances demand for acquiring the patent rights, the Government should be fair enough to provide the patent holders with a compensation that would at least cover their expenditure.

### **Disadvantages to patent holders from compulsory licensing**

Although granting of compulsory licensing might be fruitful for the public at large, there is no denying that the patent holders are at a disadvantage. While

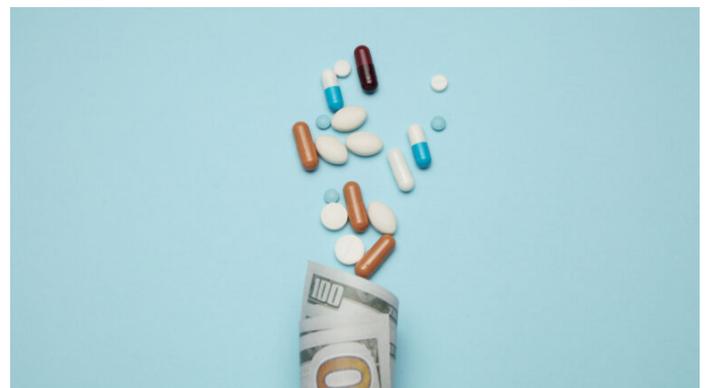


Image Source: <https://www.statnews.com/2019/07/23/patent-reform-protect-access-lifesaving-drugs/>

granting the compulsory licensing, the Government not only takes their patent rights away but also may provide them with a lesser compensation which might not even be equal to the expenditure incurred during

their research process. The laws allowing the compulsory licensing are rigid in all parts of the world so as to prevent the Government's abuse of intellectual property rights of the patent holders. This is the reason why it is unusual to grant compulsory licensing anywhere in the world.

Section 94 of the Act deals with the termination of the compulsory licensing once the conditions that made such an issuance of compulsory licensing necessary cease to exist, and when such conditions are unlikely to recur. The fear of compulsory licensing discourages the patent holders to invest further in their research. The patent rights of the patent holders must not be taken away forever. They should be entitled to their due credits for their invention. Therefore, if the compulsory licensing is granted for patented pharmaceutical products, the Government must revoke it once the pandemic situation ends as the reason for such an issuance of compulsory licensing ceases to exist.

## Conclusion

The countries with a greater money power indeed tend to have an edge over the others in buying the necessities.

However, the act of the US in buying the entire supply of COVID-19

effective drug 'Remdesivir' for three months is unfair as it renders the other countries helpless. The author contends that the WHO should intervene and prevent

*“The fear of compulsory licensing discourages the patent holders to invest further in their research.”*

such exploitations by the developed countries. Further, the author appreciates Gilead, the US-based pharmaceutical patent holder of 'Remdesivir', for signing non-exclusive voluntary licensing agreements with generic manufacturers of Egypt, India, and Pakistan with a motive of making the medicine available in 127 countries which would include several low-income countries. If more pharmaceutical patent holders take such initiatives of voluntary licensing, there would be no need for the issuance of compulsory licensing. With the rest of the world being dependent on India and China for pharmaceutical supply, voluntary licensing of pharmaceutical products specifically to these countries would help in boosting their supply for the entire world.

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# COVID 19 AND CONTENT CREATION: CONTEMPORARY COPYRIGHT CHALLENGES

In less than two months of the first case of the novel

-Ishwarya Singh  
coronavirus (COVID-19) being reported, the

government was compelled to order for a national lockdown due to the rise in number of COVID-19 positive cases. The lockdown brought the activities of many industries and sectors to a halt. While some industries were devoid of any alternatives to resume their activities, given the nature of their activities, others found a way around the limitations and restrictions that the lockdown had imposed.

Of all artists and creators that have been affected, those in performing arts and those involved in digital content creation have faced minor setbacks in their work, but have also had the opportunity to explore new ways to continue performing and creating their content due to the numerous digital alternatives at their disposal. This pandemic has only forced them to explore, and eventually avail these alternatives. However, every new opportunity comes with its own set of challenges. The novel ways in which artists started to create content and make it available for viewership has presented to them certain concerns and issues regarding the copyright over their work.

### Overview of the Copyright Act

Copyright, one of the forms of intellectual property rights, protects such work which is in the form of original literary, dramatic, musical and artistic works, cinematograph films, and sound recordings. Usually the authors, or the original creators of such work are vested with copyright in their work, however any person for whom the author is creating the work for, becomes the owner of copyright over the work, upon execution of a contract of service between the author and the owner.

*“With easy access to such live concerts, it is easy for copyright owners to know whether an artist is broadcasting and using their music with a valid license over such music or not, and take the necessary legal action if they so desire.”*

While the owner of the copyright is vested with certain economic rights over the work, such as, the right to reproduce the work, distribute it, perform or communicate it to the public, translate it, make an adaptation of such work, or make a cinematograph film or sound recording of their work, the author of the work is vested with certain moral rights that remain with which perpetually stay with the author of the work, whether he owns the copyright over his work or not. By virtue of his moral rights, an author can claim authorship over his work, and prevent any distortion, mutilation or other modification of his work that would be prejudicial to his reputation.

### Copyright Challenges faced by Creators and Performers

#### 1. Virtual Photoshoots

Digital content creators, brands, and magazines outsource most of the work involved in filming a video or doing a photoshoot. Ideally a creator, or influencer, would have one person filming them as they perform their work, to create a video or click photos that they could upload on their pages, websites or channels. There could be another person responsible to record the sound, and another who would simultaneously string together the videos to create a trending influencer video. However, the pandemic, which urged people to maintain social distancing and limit gatherings, made it impossible for an entire team of artists to come together in one place and create such content.

As a result, virtual photoshoots became the new norm for some artists, brands, creators. With Cosmopolitan India releasing a special issue of their magazine with the first #workfromhome issue, wherein celebrities did their own makeup, styled themselves, and did clicked their own cover-page-worthy photographs using their own

phones, and many creators having their photos taken over video calls, a question arises whether in such circumstances one can claim joint authorship over such work.

A work of joint authorship under the Copyright Act, 1957 is defined as “work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.” While no specific criteria has been laid down by the courts in India to determine the exact extent of collaboration that is required to claim joint authorship, the Supreme Court in the case of *Najma Heptulla v. Orient Longman Ltd.* stated that a work involving active and close intellectual collaboration between the authors would be considered to determine joint authorship. Thus, a creative contribution is required to be made by both authors to be able to claim joint authorship.

## 2. Live (streaming) concerts

Social media websites and apps like Facebook, YouTube, and Instagram offer its users live-streaming services, and one can do so by simply going “Live” on their accounts. Music artists, singers, DJs for lack of an actual concert, resorted to live-streaming their songs and work and live streaming their concert for a virtual audience. While digitalisation has made online concerts a reality, it poses a risk of being sued for copyright infringement by owners of the copyright in the music being streamed in the guise of an online concert.

With easy access to such live concerts, it is easy for copyright owners to know whether an artist is broadcasting and using their music with a valid license over such music or not, and take the necessary legal action if they so desire. Further, the artist who is streaming his content is also at a risk of unlicensed broadcasting or distribution of his work by any person in his audience.

## 3. Live streaming of plays and shows

Much like music artists have utilised the live-streaming services to host virtual concerts, other artists have utilised this feature to stream plays, shows

and other kinds of performances. In case it is an original script, the copyright over the performance of such plays vests with the theatre production company or the channel or person who broadcasts it for live viewership.

However, the copyright issue arises upon streaming this content or making such content available on the website hosting it. Depending upon the Terms of use of the website, the broadcaster is subject to having the website use their streamed and uploaded content without paying any royalty.

For instance, Facebook’s Terms of Service state that when a user shares, posts or uploads any content, the user grants it “a non-exclusive, transferable, sub-licensable, royalty-free and worldwide licence to host, use, distribute, modify, run, copy, publicly perform or display, translate and create derivative works of your content.”

Further upon using YouTube as a medium, the artist grants it “a worldwide, non-exclusive, royalty-free, sublicensable and transferable license to use that Content (including to reproduce, distribute, prepare derivative works, display and perform it) in connection with the Service and YouTube’s (and its successors and Affiliates) business, including for the purpose of promoting and redistributing part or all of the Service.”

And on posting anything on Instagram, the user grants Instagram “a non-exclusive, fully paid and royalty-free, worldwide, limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce and translate such Content, including without limitation distributing part or all of the Site in any media formats through any media channels”

While social media and its numerous services could be the only viable options for creators, artists and performers to publish and perform their work and art, it is pertinent that they choose their mediums wisely upon examining the various copyright and other intellectual property rights related issues that they might be entangled in upon using these mediums.

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## CASE INGOTS

### **Marico Limited vs Abhijeet Bhansali (Notice of Motion No. 1094 of 2019 In COMIP No. 596 of 2019)**

In this case Marico Ltd. had filed for an interim injunction against Abhijeet Bhansali, a YouTuber who operates channel "Bearded Chokra". Allegedly, Abhijeet in his video made comments that denigrated Marico's Parachute Coconut Oil, thus infringing its trademark "Parachute". While passing an injunction against Abhijeet the Court held that under the garb of educating the public one cannot provide misleading information to disparage any product. The court also ordered to take down the YouTube video uploaded by Abhijeet and emphasised the need for higher responsibility on the part of a social media influencer.

### **Imagine Marketing Pvt. Ltd. vs Exotic Mile (CS (COMM) 519/2019)**

Delhi High Court has passed an interim injunction against Exotic Mile, an audio-gadgets business firm, for violating the registered trademark "boAt" of Imagine Marketing Pvt. Ltd. Imagine Marketing is the proprietor of boAt, a well know electronic products supplier in India. It contended that Exotic Mile had dishonestly adopted the trademark "BOULT", which is phonetically and deceptively similar to "boAt". Further, it alleged that the usage of the tagline 'UNPLUG YOURSELF' by Exotic Mile was confusingly similar to its tagline 'PLUG INTO NIRVANA'. The Court passed an interim injunction restraining Exotic Mile from using the trademark "BOULT" as well as the tagline 'UNPLUG YOURSELF'.

### **Nike Innovate C.V vs. G.B. Shoe (CS (Comm) No. 542/19)**

Delhi District Court has passed a permanent injunction against three footwear companies, G.B. Shoe, Vishal Footwear and New Hira Shoes, located in Agra, the Defendants, for violating the trademark(s) of Nike, the celebrated sports shoes manufacturer. Since its adoption in 1971, Nike has been using its brand name continuously worldwide and is the registered trademark holder of marks such as NIKE, SWOOSH (logo), etc. Based on the evidence and the reports submitted by the appointed Local Commissioner, the Court noted that the Defendants' adoption and usage is creating undue enrichment by creating confusion in the minds of customers. The Court further ordered the Defendants to pay Nike a nominal damage of Rs. 50,000 each.

