



Intellectual Property Rights and Legal Research: Issues and Challenges

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Intellectual property rights are very important rights that help in the economic development of a country by promoting healthy competition and encouraging industrial development. How IPR is used as a tool in legal research is significant to note. Research is a systemized effort to gain new knowledge. Legal communication *via* writings shall manifest higher moral values; shall maintain high degree of competence discipline. Legal research inculcates necessary theoretical and practical skills to deal with the diverse and expanding world of law, change and satisfaction. So, the issues that will arise during legal research and the challenges faced by the researchers during the period of research is discussed in this article. This article basically elaborates copyright related issues and challenges during legal research writing. It also specifies provisions for infringement of copyright and rules relating to plagiarism. Hence, present study furnishes a brief overview of intellectual property rights with special reference on research in law.

Keywords: IPR, Legal Research, Fair Dealing, Copyright infringement, Plagiarism

Intellectual property plays a pivotal role in modern economy as because it is the time for new invention, creation and development of every nation. Intellectual property (IP) contributes a lot in the development of the economy both at the national, state and the regional level. Industries across all economies work extensively on research and adequate enforcement & protection of their patents, trademarks, industrial designs and copyrights. Intellectual property rights are intelligence related rights which specifically deals to any original creation of the human intellect such as artistic work, literary work, technical or scientific creation. This right protects the legal right of the inventor or creator-with a view to protect his invention or creation for a certain period of time. By this right, the inventor or creator can exclusively use this right to its full extent.¹ Intellectual property rights are the strong tool, to protect investments, time, money and efforts invested by the inventor or creator of an intellectual property. For consumers, intellectual property gives them an assurance that they are purchasing quality, guaranteed products. Therefore, the need arises to protect intellectual property rights because these rights are worth protecting, both at domestic level and world over.

Intellectual Property: Its Kinds and Descriptions

The word 'property' is derived from the Latin term 'proprietate' and the French equivalent 'proprius' which means a thing owned. The concept of property and ownership are very closely related to each other. There can be no property without ownership and no ownership without property. The concept of property occupies an important place in human life because it is impossible to live without property.² So many kinds of properties are discussed in Indian law such as, movable and immovable property³, tangible and intangible property, corporeal and incorporeal property⁴, real and personal property⁵, public and private property⁶ etc. Intellectual property can be classified broadly into two categories:

- (i) Copyright and related rights:
 - a. Copyright give authors the right to protect their work. It covers artistic, literary, dramatically work, computer programs, technical drawings etc.
- (ii) Industrial property rights:
 - a. Trademark: It is a mark or a unique sign used to identify a product or a service. It can be a single word, combination of words and numbers, 3-D signs, symbols, etc.
 - b. Patent: It is an exclusive right to an invention that introduces a new solution or a technique.

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It means owner of a patent can only manufacture, distribute, sell or commercially use that product. It is usually granted for a period of 20 years.

- (iii) Geographical Indication: It states that a product belongs to a specific region and has quality or reputation owing to that region eg. Banarasi sarees, Bengali Rasgulla, etc.
- (iv) Industrial design: Industrial design is what makes a product unique and attractive eg. 3-D shapes, 2-D shapes, lines or patterns, etc.

International Protection and Intellectual Property Rights

As intellectual property rights relating to intellect therefore, special protection should be accorded to them. It helps in developments and economic growth of the country. The following conventions and treaties are some of the most important international documents for protecting intellectual property rights:

World Intellectual Property Organization (WIPO)

It harmonizes global policy and protects intellectual property rights across the borders. The objectives of the Organization as given under Article 3 of the WIPO Convention⁷ lays down for promotion for protection of intellectual property across the globe through cooperation among States and in collaboration with any other international organization. It further lays for ensuring administrative cooperation among the states.

Berne Convention

Another convention which protects intellectual properties around the globe is Berne Convention. The Berne Convention for the Protection of Literary and Artistic Works is a very significant international treaty that addresses international protection for copyright. A copyright generated in a member country of the Berne Convention is automatically protected in all the member countries, without any need for registration. Another thing which is pertinent to note is that copyright will not be automatically available in countries that are not the members of the Berne Convention.

Universal Declaration of Human Rights, 1948 (UDHR) and International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)

It states that 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. Article 15 (1)(c)⁸ of the International Covenant on Economic, Social and Cultural Rights

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

It is an international legal agreement between all the member nations of the World Trade Organization (WTO). The Agreement on TRIPS came into effect in 1995, as part of the Agreement Establishing the WTO. TRIPS includes and builds upon the latest versions of the primary intellectual property agreements administered by the World Intellectual Property Organization (WIPO), the Paris Convention for the Protection of Industrial Property, and the Berne Convention for the Protection of Literary and Artistic Works, agreements that go back to the 1880s.

The above said important international documents have regulated the protection of intellectual property. As far as the said research paper is concerned authors aims to mainly discuss the copyright issues in legal research and writing. Legal research is that field of research that deals with the principles of law and legal institutions. It is a process by which one identifies and retrieves information necessary to support the making of the law.

Legal Research and Writing

With globalization, law is not restricted to domestic arena it has gone beyond borders. Therefore, researchers have also widened their arena and legal fraternity is expected to act as catalyst of social change. Judges, academicians, lawyers, and researchers are the social engineers of governance, cross-national communication and development. Law is a tool for social engineering and enables the legal fraternity to solve issues/problems in socially acceptable ways and assist in developing public pleasure. The legal researchers through their writings should highlight the ever-growing demands of the society. It has an important role in directing and moderating social and legal change. Legal communication *via* writings shall manifest higher moral values; shall maintain high degree of competence discipline. Legal research inculcates necessary theoretical and practical skills to deal with the diverse and expanding world of law, change and satisfaction.

So, what is research? The word 'research' is a combination of two words *i.e.* 're' + 'search' meaning

thereby, to search again and again, to confirm a given information or searching further existing knowledge for a given purpose. In simple language research is a systematized effort to gain new knowledge.⁹ Research is a systematized process by which researcher come to a definite conclusion by way of formulating hypothesis, collecting, organizing or evaluating and at last carefully testing the conclusions to determine whether they fit to the formulating hypothesis. Research and writing are important in every profession. It is particularly true with legal profession as well. Lawyers, judges, academicians, researchers and students, means all those engage in legal writing are also bound to follow copyright laws. The legal researchers and writers play a double role in their academic exercise as both are creators or owners as well as user of copyrighted material. As creator/user, they have certain legal rights, duties and responsibilities, while making use of others copyrighted work and it is similarly desirable not to violate the rights of copyright holder. This research paper mainly discusses copyright issues in legal research and writing.

Theories of Copyright System

Copyright revolves around two theories (a) Fairness Theory and (b) Welfare Theory. Knowledge is very essential for research and writing and both these theories play an important role in recognition of the creativity and new works and there is a need to a balance the benefit which is enjoyed by the author himself and the benefit enjoyed by the rest of the society.

Fairness Theory

This theory is author centric, which promotes the rights of author, by giving them exclusive opportunity to profit from their work. This theory is in support that hard work and the creativity of the author should be rewarded and he should retain control of the fruits of its creative writing.

Welfare Theory

Welfare theory focuses on the interest of the society. According to this theory, work created by the author must be available to the society for greater public interest. It is based upon the principle that greatest good for the greatest number of people. So, a fair balance is needed between these two theories. Balancing can be done through the mechanism of 'fair dealing' or 'fair use'. Hence, both the readers and the authors need to understand the rights and liabilities of each other.

Infringement to Copyright *viz-a-viz* Plagiarism

Let's now see what constitutes copyright infringement. This question is to be answered first before proceeding for exceptions to copyright infringement and plagiarism. Copyright infringement occurs when any of the following occur:

- Unauthorized use of the exclusive rights of the owner of a copyright whether in relation to the whole or a substantial part of the copyright work;
- Permitting a place to be used for infringing purposes on a profit basis; and
- Displaying or exhibiting in public by way of trade or distributing for the purpose of trade or importing infringing copies of a work.¹⁰

There are theoretically several differences between Copyright infringement and Plagiarism. Copyright infringement takes place only with respect to copyrighted work. Copyright is territorial in nature and its acquisition is subject to statutory formalities. Further copyright is given for specific period of time. So the perils of plagiarism would arise at any time. The question of plagiarism occurs when ideas are copied without attributing the source. In copyright infringement, the permission of the author is required, if fair dealing doctrine is not applicable. Copyright and plagiarism may merge, when the researcher, copies somebody's work without authorization and pass it off as his own work. Copyright violation is a legal right violation of copyright holders' intellectual property rights, whereas, plagiarism is a moral wrong and academic offence.

One such landmark judgement is *A C Sampath Ayyangar v Sarvashri Jamshed G Kanga & A Palkhiwala and Messrs N M Tripathi Ltd.*¹¹ The plaintiff who was the author of the book titled 'The Indian Income Tax Act' sued the defendants in the High Court of Madras for infringement of his publication by another book entitled 'The Law & Practice of Income-Tax' of which the defendants *Sarvashri Jamshed G Kanga & A Palkhiwalawere* joint authors and the 3rd defendants *Messrs N M Tripathi Ltd.* for publishing the alleged infringing copies. The defendants denied any act of piracy and asserted that their book or compilation was an independent endeavor. The suit was dismissed, *Panchapakesa Ayyar J*, observed:

A perusal of the book (of defendants) has convinced me that it will sell by its own merit. It was further stated that though infringement is

alleged on the basis of common headings, common conclusions, quoting of common extracts, common criticism of sections, and common mistakes yet that doesn't make out the case since both the commentators had gone to the common sources like the sections of the Act or the Income Tax Manual. The learned Judge held that the common conclusions could also have been arrived at by each author by considering the matter independently and arriving at the same conclusion and, thus, such examples of infringement are useless for proving piracy."

Action for Copyright Infringement

Management of intellectual property and intellectual property right is a multidimensional task and calls for many different actions and strategies which need to be aligned with national laws and international treaties and practices. It is no longer a question of national perspective because intellectual property and its associated rights are seriously influenced by the market needs, market response, cost involved in acquiring intellectual property into commercial venture and so on. Thus, trade and commerce considerations are important in the management of intellectual protection rights.

Infringement is the main offence under copyright law and all the remedies are focused towards providing relief against this offence. Infringement not only includes the commission of unauthorised act but also the permitting for any profit the use of any place for these actions and other acts like selling, letting for hire, distributing exhibiting for trade, or importation of infringing copies.¹²

Different forms of intellectual protection rights demand different treatment, handling, planning and strategies. Similarly, rules for infringement are different and needed to be treated separately. There may be possibility that some invalid rights are unlawfully asserted but each should be resolved according to the evidences adduced by theasserter at the time of registration of marks. The major Acts and Rules related to Copyrights are: The Copyright (Amendment) Act, 2012; Copyright, Act 1957; and Copyright Rules, 1958. India is a member of the Berne Convention and Universal Copyright Convention. The Government of India has also passed the International Copyright Order, 1999. According to the said Order, any work first published in any country who is a member of any of the above conventions is given

the same treatment as if it was first published in India.

Under Civil and Criminal Law, a copyright holder can take several actions against an infringer. The following remedies are provided for copyright violation in India:

- (i) Civil Remedies - these provide for injunctions, damages, rendition of accounts, delivery and destruction of infringing copies and damages for conversion. The main civil remedy is the grant of interlocutory injunction since most actions start with an application for some interlocutory relief and in most cases the matter never goes beyond the interlocutory stage. The other civil remedies include damages - actual and conversion; rendition of accounts of profits and delivery up.
- (ii) Criminal Remedies - these provide for imprisonment, fines, seizure of infringing copies and delivery of infringing copies to the owner.¹³ These are given under Section 55 and 58 of the Copyright Act, 1957. The guilty is liable for punishment such as imprisonment that can be from 6 months to 3 years or a fine of at least INR 50,000 up to INR 2 lacs.
- (iii) Border Enforcement - the Act also provides for prohibition of import and destruction of imported goods that infringe the copyright of a person with the assistance of the customs authorities of India.

Exceptions To Copyright Infringement

All works are not copyrightable. There are exceptions to copyright infringement. The Copyright Act, 1957 provides for certain exceptions under Section 52¹⁴ which permits limited use of copyright material without the owner's authorization. For example, Section 52(1)(a)(i)- Fair dealing of any work for private or personal use, including research. When we focus specifically on legal research and writings the underwritten things are also excluded from Copyright violation.

Judgements of Courts/ Judicial Opinions

It is well established that the literary production of judicial officers acting in their official capacity as judges are not subjected to copyright. Further, when these judgements are published in law journals, reporters, digest etc. Except for the things specified in Section 52 of Copyright Act, 1957 if the things are in

the public interest, such as judgments of a Court, judicial interpretations published in AIR, SCC, SCW, work in common or public domain etc. are out of the preview of copyright infringement. In *Eastern Book Company v D B Modak*,¹⁵ the Apex Court of India made it clear that there can be no copyright in the *raw text* of court judgments and decisions. The Court adopted “minimal degree of creativity” as the threshold for copyright protection and further held *that to claim copyright mere copy editing would not sufficient*. However, headnotes would qualify for copyright protection since there is some creativity involved in their making.

Judiciary in India relies on innumerable foreign judgments for deciding whether a particular work constitutes infringement of copyright laws or not. Various principles and doctrines have been applied to answer the issues raised regarding violation of copyright laws. The Indian courts follow four factor test that was borrowed from American *Pretty Woman Case* i.e., *Campbell v Acuff Rose Music*¹⁶ to determine whether a particular use of a work is fair, and thus entitled to protection under the fair dealing exception even if the use of the work doesn't really fall under any of the categories mentioned in Section 52. These four factors are:

- (i) The purpose and character of the use (educational purpose or critique etc.)
- (ii) The nature of the copyrighted work- whether the work is eligible for copyright protection in the first place
- (iii) The substantiality of the portion used in relation to the copyrighted work-the extent and nature of the copying done with respect to a work
- (iv) The effect on the potential market for, or value of, the copyrighted work-whether the new work would adversely affect the market value of the original work.

Judicial Interpretations

Judiciary in India relies on relevant foreign precedents for the purpose of fair dealings such as *Hubbard & Another v Vosper & Another*,¹⁷ *Wiley Eastern Ltd & Ors v Indian Institute of Management*¹⁸ etc. where the Court ruled that

“the basic purpose of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India, so that research, private study, criticism or review or reporting of

*current events could be protected. Section 52 is not intended by Parliament to negatively prescribe what infringement is.”*¹⁹

Copyright do not exist in Catalogues, Street Directories, Brochures, Prospectus, Index of Railway Stations or A Railway Guides, List of Stock Exchange Quotations, Dictionaries or Compilations, Directories etc.²⁰ Publicly delivered lecture in media like newspaper, magazine or similar periodicals do not constitute an infringement. In *Academy of General Education, Manipal v B. Manini Mallya*²¹ it was held by the Apex Court that under the fair dealing with any work (a literary, dramatic, musical, artistic work, cinematographic film or sound recording) for the purpose of private or personal use; research; criticism or review; for the purpose of reporting current events, current affairs or publicly delivered lecture in media like newspaper, magazine or similar periodicals do not constitute an infringement.

Statutes & Legislative Code

Statutes cannot have copyright as they fall under the public domain and therefore, the State cannot obtain a copyright on what is in the public domain.

Prevention of Copyright Infringement

No degree of vigilance can guarantee an ‘infringer-free’ environment, but certain deterrent measures must be adhered to by copyright owners, for instance:

- (i) documentation of instances of use;
- (ii) registration of copyright;
- (iii) proper notice of copyright;
- (iv) monitoring the activities of habitual infringers;
- (v) making independent contractors and employees subject to confidentiality;
- (vi) having proper licensing agreements incorporating a proper control mechanism; and
- (vii) publicizing a successful infringement trial (if resources allow).

However, apart from all these certain remedies are also provided under the Copyright Act for Copyright violation i.e. the civil remedies and criminal remedies which has already been discussed earlier in the article.

Conclusion

The ability to conduct legal research is indispensable for academicians, lawyers, and judicial

officers, researchers and law students, regardless of area or profession or type of practice. The central idea for promoting legal research is to generate creative inspiration. Indeed, the practice of law and legal academic writing both require creative thinking and strategy. From the above study the conclusion emerges that access to the copyrighted material and new knowledge is must for academicians and to keep well-informed with new developments and to create next generation of original work. Similarly, the protection of economic right of copyright owner should be kept in mind by all the copyright users and it should not be mingled with their human right to have access to knowledge. Unauthorized use of someone else's work contrary to the statutory exception is not a fair use. However, if you are aware of your rights under fair dealing, you can use the original work for non-commercial endeavors even if you have not taken the consent. But one need to consider a few variables that might affect one's usage. Therefore, as a researcher, writer or the member of academic community they have to be vigilant to protect their copyright in their creative works and at the same time they have the duty and responsibility to respect the rights in the works of others who provide them the basic idea for future innovation or creativity. Any deviation from the said integrity is not only an act of plagiarism but the death knell of academic creativity.

References

- 1 Saha C N & Bhattacharya S, Intellectual Property Rights: An Overview And Implications in Pharmaceutical Industry, <https://pubmed.ncbi.nlm.nih.gov/term=bhattacharya>, (accessed on 19July 2020).
- 2 <https://www.srdlawnotes.com/>(accessed on 19July 2020).
- 3 Movable property is one, which can be transferred from one place to another place with the human efforts. For example, money, goods etc. whereas, According to the General Clauses Act, 1897 "Immovable property includes land, benefits arising out of land and things attached to the earth or permanently fastened to the earth."
- 4 Corporeal property is the right of ownership in material things. Corporeal property is always visible and tangible, can be perceived by senses and can be seen or touched. Whereas, incorporeal property is also called as intellectual or conventional property. It includes all those valuable interests which are protected by law. Incorporeal property is intangible. It cannot be perceived by Senses.
- 5 The real property includes all rights over land with such additions and exceptions, as the law has deemed fit. However, the law of personal property includes all other proprietary rights whether they are in rem or in personam.
- 6 Public property is that owned by the public as such in some governmental capacity. Public property is used as a designation of which are Public Juris and therefore, are considered as being owned by the public. The entire state or the community and not restricted to the domain of private person or that which belongs to a state or political constituents like provinces etc. Whereas, the private property is that which is owned by an individual or some other private person.
- 7 Article 3 of the WIPO Convention (Convention Establishing the World Intellectual Property Organization (Signed at Stockholm on 14July 1967 and as amended on 28September 1979))-to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, to ensure administrative cooperation among the Unions.
- 8 Article 15, International Covenant on Economic, Social and Cultural Rights
The States Parties to the present Covenant recognize the right of everyone:
To take part in cultural life;
To enjoy the benefits of scientific progress and its applications;
To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- 9 Lukose L P, Copyright issues in legal research and writing, *Journal of Intellectual Property Rights*, 21(3-4)(2016) 275.
- 10 Anand and Anand, Copyright Infringement and Remedies in India, www.lexcology.com, ((accessed on 2 July 2020).
- 11 C. S. No. 350 of 1951.
- 12 Section 51 of the Copyright Act.
- 13 Section 63 of The Copyright Act, 1957:
a) where any person knowingly infringes or abets infringement of the copyright in a work and any other right as covered by the Copyright Act, 1957 (broadcast reproduction rights, performers' rights, moral rights, etc.), such person may be punished with imprisonment of a minimum term of six months and a maximum term of three years, and a fine of between 50,000 and 200,000 rupees.
b) Section 65A penalizes circumvention of effective technological measures that may be applied to copies of a work with the purpose of protecting any of the rights conferred under the Act (ie., copyright, performance rights). The punishment under this provision is imprisonment that may extend to two years and payment of a fine. Section 65A was inserted by the Copyright (Amendment) Act, 2012.
c) Section 65B makes unauthorized removal or alteration of 'rights management information' punishable with imprisonment of up to two years and payment of a fine. The provision makes the unauthorized distribution, broadcast or communication to the public of copies of the work punishable in the same manner if the person is aware that electronic rights management information in the copy has been removed or altered. Section 65B was inserted by the Copyright (Amendment) Act, 2012.
d) Section 63A provides for enhanced penalty on second or subsequent convictions under section 63.

Other provisions in the chapter provide penalties for offences such as using infringing copies of a computer program, making or possessing plates for the purpose of making infringing copies of works, and making false entries in the Register of Copyrights.

- 14 Section 52: Certain acts not to be infringement of copyright.
- 15 *In Eastern Book Company v D B Modak*, (2008)1 SCC1.
- 16 *Campbell v Acuff Rose Music*, 510 US 569 (1994).
- 17 *Hubbard & Another v Vosper & Another*, 1 (1972) 2 Q.B.84.
- 18 *Wiley Eastern Ltd. & Ors. v Indian Institute of Management*, 61 (1996) DLT 281.
- 19 *The Chancellor Masters & Scholars of the University of Oxford v Narendra Publishing House*, 2008 (38) PTC385, American Pretty Woman Case, [510 US 569 (1994)].
- 20 Section 52 of Copyright Act, 1957.
- 21 *Academy of General Education, Manipal v B Manini Mallya*, 2009 (39) PTC (SC).