The Role of Collective Bodies in Protection of Intellectual Property Rights in India

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The communitarian dimension of intellectual property rights (IPR) calls for use of collective effort of knowledge workers in the IPR enforcement and non-exploitation of IPR owners and consumers. Collective bodies (CBs), like copyright societies, patent pools, GI associations, etc. function as social economy entities in rendering the task cheap, effective and fair. The IPR, like farmers’ rights, collective marks and geographical indications involve definite collective intellect that can be better protected by CBs. Indian profile about CBs needs to be strengthened for effective enforcement of IPR, fair resolution of community claims and advancement of knowledge. Indian law has some orientation against possible dominant position or abuse by CBs but needs clearer policies and mechanisms in order to suit the requirement of constitutional goals. Unless legal environment governing these CBs guides them in the path of good governance and fair consequence avoiding the exploitation of members and consumers, the interests of knowledge society would suffer. The present paper examines the Indian IP law’s policy on CBs’ role in protection of IPR, their working and their impact. It inquires whether the legal regime is suitable to resolve the conflict of interests between different sections of the society and attain justice? Whether they have reliable democratic structure and policy thrust to ensure transparency and accountability? Whether the claims of members and society vis-à-vis the organization are adequately protected? The paper undertakes doctrinal legal research on the topic.

Keywords: Collective bodies, collective intellect, collective enforcement, copyright society, patent pool, farmers’ rights, geographical indicators, third sector organizations

The strength of unity underlying collective human efforts has the potential of protecting both individual and social interests. Their collectivity brings them closer to communitarian interests underlying economic processes for better management. One such sphere that involves interaction of group interests with individual and social interests is the sphere of IPR. CBs which help in administering, enforcing and protecting IPR not only reflect group efforts but also are crucial in ensuring a balanced position. The nature and functioning of CBs have impact upon people’s access to knowledge and upon the worker’s ability to commercialize his intellectual work. The present paper argues that if CBs are voluntary associations involved in member-helping and society-assisting activity without profit motive, attaining such a position is possible whereas sheer profiteering tendency and authoritarian approach towards its members and consumers would be obstructive in realizing the objectives of IPR law. The non-profit organizations, also called ‘third sector organizations’ (TSO) aim to promote benevolence of members unlike the other sectors, state and the market, which implement majoritarian policies and augment profits on competitive basis. Aiming at effective protection of IPR without economic or cultural exploitation, the TSO in this sphere deserve recognition of adequate space. The power equations in crucial circles of IPR management get properly settled with the intervention of group energies of intellectual workers or IPR consumers.

Regarding each type of IPR, legal development has witnessed collective acts either in the evolution of legal policies or in the enforcement of legal rights. Pluralism has prevailed in the patterns and policies of CBs. The concepts and institutions of copyright societies, patent pools, collective marks, farmers’ variety and geographical indications reflect efforts of collective defence and management of IPR. These bodies have supplied abundant strength to the legal rights of knowledge workers through effective enforcement tasks. In developed countries, they act as tools of wealth augmentation whereas NGOs criticize disproportionate revenue generated from IPR.

However, the Indian law has trodden different path. Although legal regime on these CBs not invariably provides TSO type bodies, but there is orientation towards it in some spheres and in some

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manner. Further, some NGOs in India have successfully opposed patent grants to multinational companies. Moreover, lobbying has been influential in legislative policy choices in some circumstances, especially in the enactment of new laws to meet requirements of TRIPS. Thus, CBs of different types protect diverse interests relating to IPR from different perspectives. The Indian legal system’s basic commitment to social justice and human rights has its own implication on the role and expectations about IPR. This ought not to be detracted in the name of collectivism.

Theoretical Basis for Collectivism in IPR Law

The roots of knowledge are spread over the collective wisdom of the society. Converting knowledge into property is an intimate social process where society internalizes the new knowledge and extends incentive to the knowledge worker as a measure of justice and reward. Society and law have always acknowledged the ultimate object of merging IPR into public domain to promote the corpus of human kind’s achievement and progress. Despite individualistic shade of IP, social basis of its production, community support for its currency and other-regarding consequence it ensues do not confine it into the portals of private life. Its link with knowledge-based activity and dissemination of information and with transfer of technology takes it beyond the status of policy instrument in economic process.

Two types of collectivisms are: First, protection of collective intellect; where collective intellect is explicit in some type of intellectual property like farming community’s knowledge about plant breeding and seed use/protection or geographical indications and collective marks. Second, the collective protection of individual intellects. Generally, the authors, scientists and creative artists lack time, tact, technique and perseverance in detecting, monitoring and remedying infringements. But organizations are able to perform these functions with professional excellence. Further, for the consumers or users of copyright products, it is comfortable to have a single window distribution centre. Saving of transaction cost, facilities for detection of infringement through widespread network of the union, advantages of institutionalized litigation, specialization in IPR protection tactics and availability of botheration-free atmosphere for the authors, artists and scientists have beckoned the beneficiaries to come under a common umbrella of associations.

Third Sector Organizations in IP

Historically, intellectual properties like trademarks emerged as products of communitarian acts. The marks used on merchandise for trade carried the marks of guilds, which produced those products. In ancient India, various guilds of craftsmen used marks for ensuring quality of goods. The guilds fixed rules of work and quality of finished product and its price to safeguard both the artisan and the customer. The guilds also controlled prices of manufactured articles, and these either depended on the quality of work or were calculated according to a fixed scale. In Medieval Europe, guilds involved in managing the exclusive rights of their members regarding the guild marks used in the course of trade. During Italian Renaissance, guilds developed the concept of intellectual property. The Italian textile guilds enacted private rules granting exclusive rights to those members of the guild who invented certain designs and patterns. The Venetian glassworkers’ guild prohibited selling stolen, defective or non-Venetian glass products in the name of Venetian glass. The guild rules provided for the requirements to be satisfied for grant of special right. These rules became model for Venetian Republic to enact the ever first patent statute in 1474.

Against the claims of Stationers’ company in England, the organization of authors began to lobby and bargain. For the protection of copyright owners, societies like Performing Rights Societies emerged. In order to establish a level playing field in the inter-party relation these intellectual property TSO (IPTSO) acted as service providers. In England, Performing Rights Society was formed in 1914, which administers as assignee, the performing, broadcasting, and cable diffusion rights in music and lyrics. In India, the Society for Copyright Regulations of Indian Producers of Films and Television (SCRIPT) for cinematography films, Indian Performing Rights Society Limited (IPRS) for musical works and Phonographic Performance Limited (PPL) for sound recordings came into existence in 1969. Patent pools were also organized in countries like England and US.

Copyright Societies

Copyright society (CS) is given specific legal recognition and detailed scheme for in-house management and functioning on behalf of its members in protecting their rights in the Indian legal
regime. Formerly known as Performers’ Rights Societies, the Copyright Societies are voluntary organizations of intellectual workers or creative artists.

**Nature of Copyright Society**

CS means society registered under Section 33(3) of the Copyright Act. The latter provision provides, ‘The Central Government may, having regard to the interests of the authors and other owners of rights under this Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licenses in respect of relevant rights and ability and professional competence of the applicants, register such association of persons as a copyright society subject to such conditions as may be prescribed.’

The spirit of Section 33(3) is that CS shall protect the interests of authors or copyright owners and promote convenience to the public. The proviso recognizes the principle of one society in one class of work and avoids unnecessary and purpose-defeating rivalries and competitions. Further, the CS shall have exclusive rights to carry on the business of issuing or granting licences in respect of any work in which copyright subsists or in respect of any other right conferred under this Act [Section 33(1)]. As a result, they have virtual monopoly in the sphere of their activity. Since there can be CS for each category of rights under the Act, the societies have both plurality of basis and exclusivity in functioning in each area. They license and commercialize the copyrights of their members; collect royalty from licensees; investigate on infringements of members’ copyrights by using their network spread over the country or abroad; litigate on behalf of members and protect the rights of members; collect compensation; and distribute the money earned amidst members in proportion to their claims after deducting their expenses and contribution to the reserve or welfare fund. There are elaborate provisions that make them not for profit bodies and purposive organizations that balance the rights of copyright owners with that of licensees and public at large.

It is controversial whether the membership of CS is confined to owners of copyright or is open to potential licencees also. The whole legal arrangement for CS, gives an impression that CS are basically members helping organizations and their activities revolve around licensing the rights of owners and getting adequate remuneration for them. Although, Section 33(3) of the Act refers to the ‘interest and convenience of the public and in particular of the groups of persons who are most likely to seek licences in respect of the relevant rights’ as objects to be protected through CS, implications of other provisions should be taken into account. Section 33(2) points out that any association of persons who fulfils the conditions prescribed by the Central Government through Rules may apply for permission to do the business of granting or issuing licence. Rule 12 of the Copyright Rules prescribes that ‘any association of persons, whether incorporated or not, comprising seven or more owners of copyright’ can file application for such permission. Thus at the stage of registration, the CS shall comprise at least seven owners of copyright. Although there is no explicit provision prohibiting non-owners from becoming members of CS, the clear words in Section 35(1) to the effect that ‘every CS shall be subject to the collective control of the owners of rights under this Act whose rights it administers’ make CS an exclusive body of copyright owners. This position in India is significant when compared to the position in EU, where the collecting societies are private organizations without uniform legal basis or structure, and accommodate the potential licencees also to become members of such societies. This has created problems of control on policy and functioning of CS. The fear of hijacking of copyright owners’ interests because of dominance by potential licencees is lurking. India has ruled out the conflicting interests within the CS lest there be any deadlock. Thus, homogenous character of members of CS is a legal policy. From the inception of registration to its multitudinous functioning, transparency is required under the law.6

**Democratic Functioning and Transparency**

The factors of democratic functioning and transparency are vital for ensuring that choice of policy and leadership of CS is in accordance with the consent of members. In self-help bodies like copyright societies, evolving policies and reins of control from within supports their success and protects the interests of members.

The principle of governance in accordance with the consent of the governed is laid down categorically in Section 35 of the Act. It ensures control over the CS by the owner of rights by providing that every CS shall be subjected to the collective control of the owners of rights under this Act whose rights it administers and shall (a) obtain the approval of such owners of rights for its
Functions of Copyright Society

The primary function of CS is the administration of rights of owner by the society. According to Section 34(a), a copyright society may accept from an owner of rights exclusive authorization to administer any right in any work by issue of licences or collection of licence fees or both; and (b) an owner of rights shall have the right to withdraw such authorization without prejudice to the rights of the copyright society under any contract. The law also provides national treatment to foreign copyright. A CS may (i) issue licences in respect of any rights under this Act; (ii) collect fees in pursuance of such licences; (iii) distribute such fees among owners of rights after making deductions for its own expenses; and (iv) perform any other functions under the authorization of owners consistent with the provisions of Section 35. In order to render systematic service, every CS shall maintain the necessary registers at its Registered or Administrative office (Rule 14I).

Right of CS to Litigate and Remedy the Infringement

There has been a snag in the matter of CS’ competence to enforce copyright by litigating against infringement. This came to limelight in Phonographic Performance Ltd v Hotel Gold Regency, where the Delhi High Court declined to sustain a suit by plaintiff CS on the ground that under Section 55 read with Section 54 of the Copyright Act, only the owner of copyright or exclusive licensee was entitled to seek civil remedy for infringement of copyright in spite of an agreement between owner and CS, which authorized CS to enforce through adjudication or alternative dispute resolution. The argument that authority to collect license fee and to administer copyright incidentally included authority to sue was rejected by the Court. As the CS was not an exclusive licensee, impeding of the owner was not required under Section 61, but the very right to sue was not available. It is submitted, the Court’s interpretation was only literal, and did not satisfy the spirit of the law. It rendered the CS totally ineffective body, incompetent to perform the function as CS under copyright law or as an agent of the copyright owner. The member-welfare function cannot be carried with such narrow interpretation. There is need for liberal and purposive interpretation to cure the present unsatisfactory position.

Extent of Governmental Control

Although step-by-step supervision of CS by the Government is not contemplated under the Act,
remedial measures to set right the malfunctioning of CS are provided for. Such measures include cancellation of registration, holding of inquiry, suspension of registration and appointment of administrator to discharge the functions of CS in case of injury to public interest. The administrator shall, within six months before the expiry of the period of suspension, arrange election for re-constituting the dissolved bodies failing which, the bodies so superseded shall stand revived at the end of the period of suspension for their remaining term, excluding the period of suspension. On the whole, the extent of governmental control is on higher side and goes to the very root of identity of the erring copyright society. But law operates at the juncture of abuse, and not as a routine affair; and that too, with the guarantee of procedural safeguards. Further, the CS enjoys autonomy in its composition and is not bedecked by government nominees. Although the criterion for Central Government’s interference is detriment to the interests of copyright owners, in deciding the question as to detriment, the Central Government can hardly ignore the interest and convenience of the public because under Section 33(3) of the Act, the very interests of all these classes of persons.

Financial Discipline and Accountability

Financial management is the essence of CS’s functioning. Since CS stands in between copyright owners and licensees or public at large, reasonableness in fixation of the tariff and distribution schemes, policy of not-for-profit to CS and distribution in proportion to each copyright owner’s revenue have attained legal status in CS’s fiscal policy. Instead of giving a free scope for group interest and then countercheck it with anti-trust or anti-monopoly law, an appropriate fiscal policy through legal regime of CS is contemplated here. The statutory scheme’s elaborate measure to ensure maximum benefit to the copyright owners along with adequate protection of possible licensees avoids the problems of both economic and cultural exploitations.

CS has obligation to frame a scheme for determining the quantum of reasonable remuneration payable to individual copyright owners by having regard to the number of copies of the work in circulation. The principle that remuneration shall commensurate with the level of circulation and shall be reasonable has been stated in Section 35(2) and is elaborated in the Copyright Rules that ‘all fees distributed among the owners of rights shall, as far as may be, distributed in proportion to the actual use of their works.’ This is vital to the cause of justice to copyright owners. CS shall also frame (i) a scheme of tariff to be called the ‘tariff scheme’ setting out the nature and quantum of fees or royalties which it proposes to collect in respect of such copyright or other rights administered by it; (ii) a scheme to be called the ‘distribution scheme’ setting out the procedure for collection and distribution of the fees or royalties specified in the tariff scheme among the owners of copyright or other rights whose names are borne on its Register of Owners. Any distribution under the Distribution Scheme shall, as far as possible, be in proportion to the income of the copyright society from actual use of the work or works of each owner of rights. Both, the tariff and distribution schemes shall be deliberated upon in the general meeting of the owners of rights and shall be accepted after the approval by the majority of owners present. The democratic control over fixation of tariff and distribution schemes ensures transparency and collective decision-making.

Rule 14H (2) upholds the policy of not-for-profit. It provides, ‘the distribution of fees collected shall be subject to a deduction not exceeding fifteen per cent of the collection on account of administrative expenses incurred by the CS.’ Further, distribution shall be in proportion to the income of the CS from actual use of the work or works of each owner of rights. CS is responsible to maintain proper accounts of fees and royalties received and payments made, and to get its accounts audited annually (Rule 14M). The CS shall submit to the Registrar of Copyrights such returns as may be prescribed. Central Government may call for any report and also call for records of any CS for the purpose of satisfying that the fees collected by the society in respect of rights administered by it are being utilized or distributed in accordance with the provisions of this Act.

Copyright Board’s Jurisdiction upon CS

Copyright Board is a quasi-judicial body constituted under Section 11 of the Act and vested with jurisdiction to decide certain disputes relating to copyrights. One such kind is the dispute in the matter of assignment of copyright and issuing or granting of licences. Since CS gets assignment of copyright from the copyright owner, and involves in copyright business by licensing, disputes occurring in any of these contexts come within the jurisdiction of
Copyright Board. The aggrieved party may file complaint, and the Copyright Board will hold such inquiry as it considers necessary and pass suitable orders. Both in Indian Performing Rights Society and Eastern India Motion Pictures cases, the Supreme Court and Calcutta High Court, respectively, held that ‘Copyright Board has jurisdiction on matters relating to licencing by the CS’. As the facts of the former case indicate, the CS had acted on behalf of the composers and demanded charges for use of the copyrighted work from cinema producers, who were owners of copyright in the music incorporated in the film. The Copyright Board, and subsequently the judiciary declined to recognize the claim of CS as legally justified. This means that abuse of the position of CS is remediable by the Copyright Board.

CS in India

While the statutory scheme is quite facilitative for the functioning of CS, in practice the number is very less. At present, there are three registered copyright societies. These are: the Society for Copyright Regulations of Indian Producers of Films and Television (SCRIPT) for cinematography films; Indian Performing Rights Society Limited (IPRS) for musical works; and Phonographic Performance Limited (PPL) for sound recordings. These societies, particularly PPL and IPRS, have been quite active in anti-piracy work. The PPL has even set up a special anti-piracy cell under a retired Director General of Police, and this cell has been working in tandem with the police. One prominent CS is IPRS. This was incorporated in Maharashtra on 23 August 1969, as a company limited by guarantee, for the purpose of carrying on business in India of issuing or granting licences for performance in public of all existing and future Indian musical works in which copyright subsists in India. The IPRS has amongst its members the composers of musical works, authors of literary and dramatic works and artistes. It has litigated the famous Performers Rights case vindicating the claims of its members with partial success.

Comparison with Parallel Systems

In United Kingdom, collecting societies emerged as one of the prominent mechanisms of monitoring infringement, and management and enforcement of copyrights which have greatly expanded scope. They are able to negotiate and act without individual consultation. Copyright owners assign their rights to the collecting societies enabling creation of repertoire of works at the disposal of potential users. The collecting societies are private organizations and have no great uniformity in the organizational structure. These societies have the assignment of rights by the members with regard to their works at the time of joining. Some rights may be administered on the basis of individual agreement. Members are required to give substantial period of notice before quitting the society. Proportional distribution of revenue on the basis of sampling estimation of market-worth after deducting the administrative expense is practiced by the collecting society. A small portion is set aside for cultural purposes like funding indigenous music, for pension or welfare payment. Collecting societies resort to individual or blanket agreement with users. The tariff is fixed by negotiating with the association of users. They aim to generate returns on repetitive uses of copyright material such as performances, photocopying and new electronic distribution, which would be too costly for owners to demand on an individual basis. Collecting societies reduce the transaction cost that would otherwise exist in ascertaining and negotiating individual licences with individual copyright owners....For the copyright owner, collective administration relieves an otherwise impossible burden of policing and enforcement of rights. It also provides copyright owners with bargaining power that they would not possess as individuals. More interestingly, with the functioning of collecting societies, there is a shift in the character of copyright, from property form to welfare payment form. The new approach looks to copyright as community’s liability, and looks to licence fee as tax upon user’s activity. The collecting societies have international dimensions because of their global network and reciprocal representation contracts.

The growth of collecting societies as dominant institutions has posed the problem of controlling them, from the perspective of both owners and users. Both the categories of persons have little alternative but to rely upon the collecting society. To tackle this position, the member-society relation and society-user relations are regulated by application of domestic law and European law.

The former relation is regulated by application of the Competition Act, 1998 and Article 82 EC (formerly, Article 86 of the Treaty). Under the Competition Act, the Monopoly and Mergers Commission assesses whether there is a situation of monopoly and whether it is operating contrary to public interest. The EC law lays down four principles:
(i) societies may not discriminate on grounds of nationality and must permit other nationals from EU to join the society; (ii) rules of collecting societies shall ensure that no group of members obtains preferential treatment in revenue distribution; (iii) abuse would occur if a society imposed obligations on members which were not absolutely necessary for the attainment of society’s objectives and which would encroach unfairly on members’ rights; and (iv) societies are not permitted to impose unduly lengthy notice periods. Regarding the latter, Copyright Tribunal’s jurisdiction or EC law’s application have been invoked in England. Fixation of exorbitant fee, unfair discrimination between different kinds of users and compulsion to take more works than the user actually wants are some of the abuses of dominant position of collecting societies. Under the Copyright Designs and Patent Act, 1988, the Copyright Tribunal has wide ranging powers to review licences and licensing schemes operated by collecting societies and consider the complaints by representative organizations and individuals. It may approve or vary schemes, direct for grant of licence to particular applicant, hear the disputes and declare that the complainant is entitled to a licence. Principle of reasonableness guides the adjudicative process. The EC law also comes to the rescue of the users in case of unfair trading in the process of licesing. In Tournier case the practice of blanket licence was considered by the European Court as a cause giving rise to national court’s adjudication about the necessity of such practice. Abuse of dominant position on the part of collecting society was condemned in this case.

Another problem, which the British collecting societies face, is keeping the composition of them conducive for pro-owner policies. They may have to prevent penetration of its ranks by users whose ultimate interest is to keep royalty rates low or otherwise undermine the society’s objectives. In India, this problem is avoided by the legal policy of ‘owners-as-exclusive members’.

In United States, copyright organizations called Performing Rights Societies (PRS) emerged in the field of musical works, as it was most difficult to police and enforce copyright in respect of them. In other fields collecting societies made little inroad, giving scope for individual bargaining. The PRS believe in strength in numbers and concerted actions.

In response to the decline in licencing and increase in music piracy, in 1914 American Society of Composers, Authors and Publishers (ASCAP) was formed as a non-profit organization to pool the non dramatic performance rights in members’ musical compositions for licensing to any one who wished to make a non dramatic public performance for profit. It is an association exclusively meant for copyright owners, and hence has homogeneity in the character of members. A rival body, Broadcast Music Inc (BMI) came into existence in 1939. Taken together, ASCAP and BMI, control 95 percent of the US market for performance rights in musical composition. Both the bodies have large number of members, and assignments of compositions and huge distribution of royalty. Presently, motion picture producers shall also obtain performing rights licence at the source itself.

Their procedure of enforcement consists in warning the users to have license and complaining against infringement. Most of the actions are successful because of strong evidences and weak defences and lead to award of high amount of damages. ASCAP and BMI generally issue blanket licences and exceptionally issue part licences also. In BMI case, the US Supreme Court reversed a court of appeals ruling that blanket licences constituted per se price fixing under anti-trust laws, and held that they should instead be subjected to a more discriminating examination under the rule of reason.

The rights of owners or member-composers were protected by the practice of non-exclusive licence, developed under the consent decree of 1941 by ASCAP. There was also distribution of revenue between publisher members and writer members on the basis of equal claims or complex formula set forth in the consent decree. While judicial intervention provided remedies to the owner-members, the need to ensure fairness in licence fee was met by application of anti-trust laws. In 1998, the Fairness in Music Licencing Act was passed to determine reasonable licence fees for individual proprietors. If the licence fee charged is unreasonable, the statute entitles individual proprietor to a determination of reasonable licence rate or fee under its guidelines. During pendency of the case, an interim licence fee or rate must be paid. Thus, judicial determination of a reasonable licence rate or fee protects the rights of licencees or of the public at large. Further, operation of anti-trust law is not dispensed with by the
The Copyright Clearance Center (CCC) indicates in the first page of the publication, photocopying fee to be paid by the users and instructions for remitting the fee to CCC for each copy made. It then distributes the fee to the copyright owner after deducting the cost. It also annually audits user’s photocopying activity, calculates the frequency of copying and determines the statistical basis for quantifying the user’s licence fee and each publisher’s entitlement.

The comparative analysis identifies that: (i) it is largely in the sphere of music works and performing rights that collective action strategy is employed; (ii) homogeneity in the membership of such organizations avoids unnecessary problem of conflicts within the organization; (iii) the societies are primarily member helping organizations with non-profit policy; (iv) legal systems have, by legislative or judicial interventions or by international norms, worked against monopoly, and tried to provide remedy against exorbitant licence fee or obstruction to dissemination of useful art to the public; (v) democratic and inbuilt checks and balances avoid the situation of dominance and abuse.

Compared to the British and American position, Indian law not only conforms to the above benchmarks but also has comprehensive policy of uniformly moulding the structure and relations of copyright societies by laying down detailed rules about the formation and working of CS. It avoids inter-union rivalries and intra-class conflicts. There are drastic control mechanisms like cancellation or suspension of registration of CS or holding of inquiry by the Central Government for protection of the interests of the CS members. Regarding control of abuses owing to dominant position of CS, there is no clear mechanism in copyright law as a result of which one has to invoke anti-monopoly or competition law. However, one remedy available in cases of disputes including those relating to royalty is through intervention by the Copyright Board. Compared to other systems, the Indian position has welcome features of in-built safeguards within the copyright law. However, Indian law does not compel philanthropic approach of supporting poor or old artists and indigenous artists.

**Patent Law and CBs**

In India, the Patents Act, 1970 does not provide specific measures in the pattern of copyright societies for collective protection of patents. However, there is scope for use of this strategy in commercialization of patent, detection of its infringement and its protection through dispute resolution systems. Two types of group efforts can be found in this sphere, ‘patent pool’, which is a collective arrangement for patent protection; and ‘patent NGOs’, which try to safeguard the intellectual efforts and knowledge traditions of the indigenous community against unjustified grant of patents especially to multi national companies.

A patent pool is an arrangement among multiple patent holders to aggregate their patents. A typical pool makes all pooled patents available to each member of the pool. Pools also usually offer standard licensing terms to licensees who are not members of the pool.\(^5\) It allocates a portion of licensing fee to each member according to a pre-set procedure. The arrangement arose from an effort to overcome transaction costs and bargain failures and to reap gains of trade by bundling the rights.\(^5\) This, in fact, converted property rights into liability rules by mutual agreement amidst members to allow royalty-free cross licensing of their patents and to forbear from infringement suits.\(^24\) In India, Section 68 of the Patent Act provides scope for assignment of patents by contract in writing. This enables pooling of patents through written contracts. However, practice of pooling of patents is not presently practiced in a noticeable manner.

In US and UK, patent pools range from mega pools to technology-specific pools capable of simplifying transactions in a wide variety of industries.\(^25\) Exercising jurisdiction under the antitrust law, the Department of Justice upheld their arrangements as not amounting to monopoly scheme but only reducing the transaction cost.\(^24\) In UK also, cartel-like patent pools designed to exclude competition or to facilitate

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2. 1998 Act. This means availability of another lever of control over the PRS to allow dissemination of music or entertainment. With the emergence of Internet as the dynamic media for transmission of music and other performances, the problem of settling fair relation between Performance Rights Organizations (PRO) and webcasters who plan for worldwide performance and protecting the webcasters against unauthorized copying has arisen. Webcasters are new community of music users forming organizations. PRO also use sophisticated methods of tracking online performances. Regarding royalty distribution system and coordinating the claims of affiliated PRO, appropriate legal policies are sought for securing the future of music performance rights.\(^18\)

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price fixation within the purview of Competition Commission.\textsuperscript{25} Thus, to combat abuse of the combination of patentees there is a legal mechanism. Patent pool system has come into existence in various sectors of industry. Application of Antitrust review has put forward certain controls over royalty prospects and bargain power.\textsuperscript{24}

Patent pools have pro-competitive potentialities as they integrate complementary technologies, reduce transaction costs, avoid costly infringement litigation, and promote smooth dissemination of technology. But they become anti-competitive when they exclude firms from effective competition in relevant market for the goods incorporating the licensed technologies; or when pool participants collectively possess market power; or when limitations on participation are not reasonably related to the efficient development and exploitation of the pooled technologies.\textsuperscript{25} Promotion of social equity requires legal control on abuses. The Justice Department insisted that there shall be no aggregation of competitive technologies and setting a single price for them; an independent expert should be used to determine whether a patent is essential to complement technologies in the pool; the pool agreement must not disadvantage competitors in downstream product markets; and the pool participants must not collude on prices outside the scope of the pool, e.g., on downstream products.

The second type of group effort in patent regime in India can be found in bodies like Navadanya, which have tried to protect the interests of Indians in general, and farmers in particular, by challenging the grant of patents to inventions in turmeric, neem and other products. Regarding the post-1995 amendments to the Patents Act, NGOs representing the interests of pharmaceutical and other industries have tried to wield influence in legislative process. Under Section 25(1) of the Act, opposition to grant of patents can be filed on specific grounds within the prescribed period by any person interested. Since ‘person’ includes corporate bodies also, the formal NGOs can file their opposition. Clauses (j) and (k) of this provision are relating to the grounds which clearly reflect collective interests. Clause (j) enables challenging the grant of patent on the ground that the specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention. Clause (k) enables challenging on the ground that the invention is anticipated having regard to the knowledge available within any local or indigenous community in India or elsewhere. The role of these provisions in combating unjust enrichment at the cost of community’s interest is of much importance. Protection of IPR through group effort has been witnessed when some organization (led by Vandana Shiva) has litigated successfully against wrongful grant of patents on neem, haldi or basmati.

Collectivism and Plant Varieties and Farmers’ Rights

Collective enforcement of IPR by the farming community has great economic and social significance in India.\textsuperscript{26} Their inventions and intellectual contributions have a collective character and social base.\textsuperscript{27} Farmers’ right arise from their past, present and future contributions in conserving, improving and making available the plant genetic resource.\textsuperscript{28} Since they are the original breeders and developers and form eighty percent of seed supply force competing with seed industry, their interests involve ethical, ecological and social value.\textsuperscript{29}

While TRIPS provides scope for enacting sui generis law to give effective protection to plant breeders’ rights, the multinational biotechnological industries involving plant breeding aspired for enhanced protection to their rights. Due to successful lobbying by the NGOs, the public and farmers,\textsuperscript{20} the draft Bill on Plant Varieties was modified to include a chapter on farmers’ rights. The Protection of Plant Varieties and Farmers’ Rights Act, 2001 arranges for protection of collective rights in specific manner.

The concern for community right expressed in Section 41 is ‘any person or group of persons (whether actively engaged in farming or not) or any governmental or non-governmental organization may, on behalf of any village or local community in India, file before any centre established by the government for this purpose, any claim attributable to the contribution of the people of that village or local community, as the case may be, in the evolution of any variety for the purpose of staking a claim on behalf of such village local community. Such centres, after verifying these claims, if satisfied that such village or local community has contributed significantly to the evolution of such variety which has been registered under this Act, shall report its finding to the Protection of Plant Varieties and Farmers’ Rights Authority (PPVFRA)’. When the
Authority is satisfied after necessary inquiry that the variety has been registered under the provisions of this Act, it may issue notice in the prescribed manner to the breeder of that variety and after providing opportunity to such breeder to file objection and of being heard, may by order grant such sum of compensation to be paid to a person or group of persons or governmental or non-governmental organization which has made the claim. This is a clear example of collective strategy to enforce right of the vulnerable sections of the population, who because of their illiteracy, lack of awareness of rights or lack of will to assert their rights, are disadvantaged to vindicate their rights.

Another measure is legal arrangement for participation of NGOs in the PPVFRA’s decision-making process. Under Section 3(5) of the Act, in addition to the nomination of top-level bureaucrats, representatives from NGOs are to be nominated by the Central Government. One representative each from National or State level farmers’ organization, tribal organization, seed industry, and National or State level women’s organization nominated by the Central Government find a place in PPVFRA. Moreover, the concept of benefit sharing under Section 26 has clear dimension of collective enforcement. After the issue of registration certificate in connection with plant varieties claims for benefit sharing may be invited. In such context, any person or group of persons (being Indian citizens) or firm or governmental or non-governmental organizations (formed or established in India) shall submit its claim of benefit sharing to such variety in the prescribed manner. Collective entitlement and enforcement are thus prominent features of the Act.

**Geographical Indications and Collectivism**

Collectivism is inherent in the very concept of Geographical Indications (GI) because a geographical name connects all goods of particular type originating in that area with a common tag of identification. Producers of those goods assert collective entitlement to it to exclude others from abusing it, and have legal means for its collective enforcement. GI reward the collective traditions and collective decisions while allowing for continued product evolution. Evolved through Paris Convention (1883), Madrid Agreement (1891), and Lisbon Agreement (1958, revised in 1967 and 1979), GI got concrete recognition in TRIPS Agreement owing to Europe’s lobbying for wine and spirit industry.

Section 11 of the Act states, ‘any association of persons or producers or any organization or authority established by or under any law for the time being in force representing the interests of the producers of the concerned goods, who are desirous of registering a geographical indication in relation to such goods shall apply in writing to the Registrar.’ The fact that only a collective entity can apply for registration speaks about the importance given to collectivism in this sphere. Under Section 17, ‘any person claiming to be producer of the goods in respect of which a GI has been registered may apply for registering him as an authorized user of such GI’. Thus, individuals get rights through the initial collective effort. The grant of registration to the association or to the individuals as registered users is to be preceded by compliance with the procedure of advertisement, calling for objections, hearing and acceptance for registration. Protection against infringement of GI consists in setting into action, the provisions about offences and penalties. The Act has potentiality to deal with infringements that have been experienced in the context of Basmati patent obtained by an US company. In the background of abuse of the GI like, Darjeeling tea and Mysore silk, the collective instrument of law has significant role to play.

**Trademarks and Collectivism**

Historically started as a tool of collectivism, trademarks, in modern times, assume the character of individualist commercial transactions. However, there is a concept and practice collective mark in the Trademarks Act, 1999. Section 2(g) of the Act defines collective mark to mean a trademark distinguishing the goods or services of members of an association of persons (not being partnership) which is the proprietor of the mark from those of others. Here, the association is the proprietor of the trademark and its members are its authorized users. The application filed for getting registration of a collective mark shall be accompanied by the regulations governing the use of such collective mark, which shall specify the authorized users, the conditions of membership of the association, conditions of use of the mark, sanctions against misuse and such other matters (Section 64). Law does not allow registration of a collective mark if it is likely to deceive or cause confusion on the part of public (Section 62). In a suit for infringement instituted by the registered proprietor of collective mark (association) as plaintiff, the court shall take into account any loss suffered or likely to be suffered
by authorized users and may give such directions as it thinks fit as to the extent to which the plaintiff shall hold the proceeds of any pecuniary remedy on behalf of such authorized users (Section 67). The registration of collective mark may be removed on the ground of misleading the public or non-compliance with law. This essentially means that the regulations of the association shall be strictly followed, and the interests of the members shall be effectively protected. The concept of collective mark resembles guild marks of mercantile community of ancient times. In England, collective marks serve to distinguish the goods and services of the members of relevant associations. They are given to an association of traders, not in order to indicate anything about quality, but in order to show that a member belongs to the association. In US, collective marks identify the good or services of members of an organization, and not considered as making any representation in respect of goods themselves or their quality.

Conclusion

Combination of IPR holders confers strength and enthusiasm to them to enforce their rights against infringement. Saving of transaction cost, ability for bargaining, ease in detection of infringement and comforts of intellectual workers have made approach of collectivism valuable one. While law has facilitated such combinations, it has also tried to prevent the abuses of combination so that it cannot hold the society or knowledge seekers or technology users into ransom by exploitative price fixation or licensing terms. Indian copyright law provides the democratic structure of CS, transparency in functioning, fair governmental supervision and exclusion of profiteering or exploitative policy. Patent pools, which are innovations of collectivism in recent times, are practiced only in the developed countries. Regarding welfare of the artists or authors through positive action, the law needs reform. The trend of legal development is towards conscious avoidance of abuse by them and protection of public interest against monopoly.

Laws relating to plant varieties, farmers’ rights and geographical indications have recognized legal space for the collective effort for their better protection. In the context of tall challenges posed by globalization, aggravated by pro-market withdrawal by the state, the need for effective protection of IPR and avoidance of their abuse is realized by the CBs. On the whole, TSO type of CB functioning in the sphere of IPR has great advantages. In the light of enormous power of CB by virtue of freedom of association vis-à-vis members, elaborate and specific legal framework for TSO type of CB is very much required in the place of present law which is sketchy and inadequate. Law reform on these lines will require appropriate statutory changes. By supporting the values of freedom, development and justice, this will have a longstanding impact upon the life of knowledge workers and users of knowledge products.

References

1. This counters the proposition in the Preamble to TRIPS that intellectual property is a private property right. Ultimate merger of IPR with public domain renders IPR only temporary interest born out of community’s obligation to reward the intellectual worker’s contribution. The accumulated skill and intellect of the past generations make the intellectual worker to have a vantage point on the shoulders of the past to look for a new vista and give a unique creation, which further adds to the knowledge system.
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5. Bently Lionel and Sherman Brad, Intellectual property (Oxford University Press, Oxford), 2001, 268-270, 288, 523. The Mechanical Copyright Protection Society (1924), Phonographic Performance Limited (1934) and Authors’ Licensing and Collecting Society (1977) are voluntary organizations that administer as agents the rights relating to sound recording, transmission by cable or broadcasting. In US, the American Society of Composers, Authors and Publishers (1914) and the Broadcast Music Incorporated (1939) were formed for similar purpose.
8. Indian Performing Rights Society v Eastern India Motion Pictures Association AIR 1977 SC 1443.
The Authors’ Licensing and Collecting Society (ALCS) represents the interests of all UK writers and aims to ensure writers are fairly compensated for any works that are copied, broadcast or recorded. Writers’ primary rights are protected by contract, but it is the life of the work over the following decades that need to be monitored and fairly rewarded. It is with secondary rights that copyright has an important role to play in protecting writers and creators from unpaid use and moral abuse of their work, http://www.open.ac.uk/Arts/philos/warburton.htm.


The Authors’ Licensing and Collecting Society (ALCS)


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The creation of a patent pool can save patentees and licensees time and money, and, in case of blocking patents, it may also be the only reasonable method for making the invention available to the public… Patent pools are only one example of cases where members of an otherwise competitive industry join in common cause to create some resource that is to their collective benefit. A ‘patent pool’ is an agreement between two or more patent owners to license one or more of their patents to one another or third parties. Alternatively, a patent pool may also be defined as ‘the aggregation of intellectual property rights which are the subject of cross-licensing, whether they are transferred directly by patentee to licensee or through some medium, such as a joint venture, set up specifically to administer the patent pool, Wikipedia.


22 Merges Robert P, Institutions for intellectual property transactions: The case of patent pools in Dreyfuss Rochelle et al, Expanding the Boundaries of Intellectual Property (Oxford University Press, Oxford), 2001, 123 at 154. There are also quasi pool systems, which supplement the formal pools. Patent pool of Curtis and Wright Brothers, which earned millions of dollars in royalties and the Manufacturers Aircraft Association that required arbitration to resolve disputes amidst members in the matter of compensation to patent holders are examples of mega pools of earlier times. In addition, there were small, contract-based pools for diverse industries ranging from movie projectors, hydraulic pumps to swimming pool cleaners. In Great Britain, dominant radio and electronic companies set up the British Patent Pool into which flow thousands of patents owned or controlled by members. Recently, new breed of patent pools concerned with one technology, rather than all patents in an industry, came into vogue. DVD and MPEG-2 constituted pools of patents relating to specific technology.

23 Merges Robert P, Institutions for intellectual property transactions: The case of patent pools in Dreyfuss Rochelle et al, Expanding the Boundaries of Intellectual Property (Oxford University Press, Oxford), 2001, 123 at 151; In Philips-Sony patent pool case, the pool was asked to desist from forcing its licensees to take blanket license of the entire CD patent pool portfolio.

24 The pooling of the patents, licensing all patents in the pool collectively, and sharing royalties is not necessarily an antitrust violation. In a case involving blocking patents, such an arrangement is the only reasonable method for making the invention available to the public, International Mfg Co v Landon, 336 F 2d 723, 729 (9th Cir 1964).


26 Shiva Vandana et al, The Enclosures and recovery of the commons (Research Foundation, New Delhi), 1997, 160-161.

27 Shiva Vandana, Captive Mind and Captive Living (Research Foundation, Dehradun), 1995, p. 116. In the Third World, where privatization is not the norm, most knowledge generation takes place in the public domain, either in the formal or informal sector; Shiva Vandana, The Seed keepers (Navadanya, New Delhi), 1995, p. 33.

28 Text of the International Undertaking on Plant Genetic Resources of the FAO; It is well known that the total genetic changes achieved by farmers over the millennia was far greater than achieved by the last hundred or two years of more systematic science-based rights.


30 The PPVFRA shall hear the parties and dispose the claims by quantifying the benefit sharing by taking into consideration the extent and nature of he use of genetic material and commercial utility/value of the variety in the market.

31 Nair Latha R and Kumar Rajendra, Geographical Indications: A Search for Identity (Butterworths, New Delhi), 2004.