

## A Critical Analysis of Constitutional Aspects on IPR

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### ABSTRACT

The Indian Constitution outlined a number of rights, including freedom and fundamental rights. It also established economic, social, and political fairness for all citizens. The Indian Constitution does not officially recognize Intellectual Property Rights as Property Rights, but it also does not expressly exclude them from the definition of Property Rights. Individuals are given the freedom to publish their own books, and doing so is currently protected by the Indian Constitution. Any copyright violation is subject to the morality-based prohibition set forth in Article 19(2) of the Constitution. The right to trade or conduct business includes the right to protect against infringement on the company's trade name and goodwill built up through trade or business. The right of customers to know about products, their origins, and services is also protected by trademarks and geographical indications. The Indian Constitution guarantees protection for property rights, including intellectual property rights, and it also upholds the fundamental rights outlined in Parts III and IV. The paper would help the readers understand the history of IPR as to how certain acts came into force pre-independence and after certain conventions and treaties then would explain some key provisions through which IPR exists in the constitution as it is hard to pinpoint which are the provisions that deal with IPR. The paper would proceed to highlight what all things qualify to come under IPR as well as how would it thrive when it is a fundamental and constitutional right in various countries under various provisions and treaties.

**Keywords:** IPR, Fundamental rights, Constitutional rights, trademark, copyright.

### RESEARCH QUESTION

Q1 Whether is intellectual property mentioned in the Constitution of India?

Q2 Whether there are provisions in the Indian Constitution that highlight the presence of IPR?

### STATEMENT OF PROBLEM

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This research paper would explain what is IPR and what are the provisions in the Constitution that deal with IPR because if the readers are not aware of these provisions then they wouldn't be able to identify how copyright (example of IPR) can be protected with relevant articles from the Constitution. Then the paper would explain how pre-constitutional acts of the IPR came into force with relevant provisions from the constitutions.

## INTRODUCTION

India and intellectual property have a long history that dates back to the Indus Valley Civilization's early years. Evidence indicates that town planning, the entertainment industry, music, and other activities were highly prevalent in the ancient past, particularly during the Indus Valley Civilization era. Trademarks were also used to distinguish the products of the makers from one another. In the current market, trademarks and other intellectual property are mostly employed by rival companies to distinguish their products from one another. It is safe to claim that the concept of protecting one's product or service from competition has been prevalent in India from the beginning of time.

When George A. DePennings<sup>198</sup> submitted the first patent application in India in the year 1856, the British Empire implemented the British Patent Act, of 1852<sup>199</sup>, which later resulted in the creation of Act VI of 1856. This was the first time that intellectual property law had been widely accepted in India. The Indian Constitution's recognition of intellectual property as property is imprecise and confusing. The Indian Constitution does not explicitly recognize the intellectual property as property, but it also does not outrightly deny it either. If the definition of "property" in the Indian Constitution is examined, it could be any tangible property, but it also has a far broader definition. However, it does indirectly contain intellectual property. The Indian Constitution had included the "Right to Property" as a fundamental right in Article 19 (f)<sup>200</sup>, but the 44th amendment later replaced it. However, the addition of another Article, namely, Article 19(f), did not result in the "Right to Property" being abolished. Through the 44th Amendment, Article 300A converted it from a fundamental right to a constitutional right, and as a result, any legislation that violated the constitutional "Right to Property" could no longer be directly challenged in the Supreme Court but instead had to go through the High

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<sup>198</sup> Deepseeng Shyam, *Constitutionality aspect of Intellectual Property Rights in India*, THE LAW BLOG (Dec. 29, 2016), <https://thelawblog.in/2016/12/29/constitutional-aspect-of-intellectual-property-rights-in-india/>.

<sup>199</sup> Patent Law Amendment Act 1852, 15 & 16 Vict. c. 83 (UK).

<sup>200</sup> INDIA CONST. art. 19, cl. (f).

Courts. However, as intellectual property is a type of property, it can be included in the definition of property under Article 300A and be given a legal right.

The United States Constitution, in contrast to the Indian Constitution, expressly protects intellectual property (Article 1(8) of the U.S. “To promote the growth of science and useful arts, by providing for authors and inventors the exclusive right to their respective writings and discoveries for a certain period of time” is stated in the Constitution). However, the Indian Constitution does not have a clause addressing intellectual property. This means that laws pertaining to intellectual property may be passed without being constrained by the Constitution, even though the intellectual property does not have a special standing under the Constitution.

### **WHAT EXACTLY IS IPR?**

When used literally, the term “intellectual property” refers to things that result from the application of the human mind, or things that are the result of a person’s intellectual labour. The two main components are the writers' writings and the inventors' creations. The phrase “Intellectual Property” is used to refer to a variety of creative abstractions, including ideas, concepts, and know-how, as well as the literary, artistic, or mechanical manifestations that represent these abstractions. The main distinction between this type of property and others is that intellectual property places more emphasis on the results of the mind than it does on the actual product. For instance, in a literary property (copyright), the intellectual creation—which includes ideas, conceptions, sentiments, and other thoughts set in a certain form—is what is protected and is referred to as property.

Traditionally, only a small number of things fell under the umbrella of intellectual property. Currently, intellectual property includes copyright, designs, patents, and trademarks. But a lot of new goods have been added to this area as a result of the advancement of the arts, sciences, and technology.

### **PROVISIONS IN THE CONSTITUTION THROUGH WHICH IPR CAN BE BROUGHT IN OR IS RECOGNIZED**

The Indian constitution's preamble recognizes economic liberty as one of the most essential freedoms and permits mixed economies. The property system has been used to guarantee this.

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It is Article 253<sup>201</sup> of the Indian Constitution, which mandates the recognition of the international nature of laws, legislations, and agreements and gives the Indian parliament the authority to enforce international treaties through the legislative process, which plays a significant role in the context of intellectual property rights. Article 300A<sup>202</sup> of the Indian Constitution provides constitutional safeguards against the unlawful taking of property. A specific clause in Article 372<sup>203</sup> also recognizes the pre-constitutional legislation as valid, provided that certain conditions are met. For example, Article 372 (1)<sup>204</sup> states that: “Nothing withstanding the repeal all the laws in force in the territory of India immediately before the commencement of this constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority” so through the above statement, we can infer Thus, it was because of these articles that pre-constitutional intellectual property rights laws came to be in effect in India and for Indian legislation to accept a number of international treaties on intellectual property laws. For example, if there was an act that was there before the commencement of the constitution then article 372(1) of the constitution had the power to authorize the legislature or any competent body to repeal, alter or amend the pre-constitutional laws.

One such example is how Article 372 (1) of the Indian Constitution led to the repeal of the 1911 Patent Act and the adoption of the current Patent Act, 1970. The majority of current intellectual property laws are also impacted by other international laws; for example, the current patent rules are a product of the Budapest Treaty, TRIPS Agreement, UN Convention on Biodiversity, and other international agreements. Further, we can see that the Indian Constitution’s recognition of intellectual property comes from the reference to the intellectual property system in the Constitution's entries. Rightfully, Entries 12, 13, and 14 were included in List 1 of the 7th Schedule of the Indian Constitution. List I entry 49 is the one that has been specifically and solely committed to the intellectual property system. Only trademarks, designs, patents, and other intellectual property are recognized by Entry 49. The concepts of traditional

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<sup>201</sup> INDIA CONST. art. 253.

<sup>202</sup> INDIA CONST. art. 300A.

<sup>203</sup> INDIA CONST. art. 372.

<sup>204</sup> INDIA CONST. art. 372, cl. (1).

knowledge, biodiversity, geographical indicators, and other intellectual property rights are not acknowledged, although they can be incorporated into the current one. If we examine entry 97 of List I, which stated that “any other matter not specified in List II or List III, including any tax not specified in either of those Lists”, we see that Article 248<sup>205</sup> states that “the legislature has the sole authority to make any laws with respect to any matter not specified in the concurrent List or State List”. Since the Indian Constitution recognizes traditional knowledge as intellectual property, it is safe to presume that it can be incorporated alongside other intellectual properties.

## **IPR AS A CONSTITUTIONAL RIGHT UNDER OTHER CONSTITUTIONS AND TREATIES AND DECLARATIONS**

The ability to “advance research and useful arts” was granted by the United States Constitution in Article 1, Section 8, Clause 8<sup>206</sup>, which granted inventors a limited but exclusive right to discover. This refers to Section 310<sup>207</sup>, which provides equal protection for trademarks and copyrights under the trade clause. The American Constitution and the country's geographical integrity are the foundations of IP law. An author's artistic creation that is produced for commercial purposes and, in theory, belongs to the creator, is one of the fundamental characteristics of copyright as a property in the meaning of the constitution.

At the level of the European Union (“EU”), where the EU Charter of Fundamental Rights serves as the foundation for a new “constitutional” power, the so-called “constitutionalization” is already taking place. There is no doubt that society values the right to the protection of intellectual property, especially the freedom of expression. The constitutional provisions would also assist in ensuring that the core ideas behind intellectual property rights are fully upheld because, in the current context of the European Union, enacting new laws is becoming an increasingly difficult task. Moreover, it tries to safeguard intellectual property rights and uphold the value of integrity.

It can be inferred from Article 27 of the “Universal Declaration of Human Rights”<sup>208</sup> that Each person must have the right to defend of his or her moral and material interests from every

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<sup>205</sup> INDIA CONST. art. 248.

<sup>206</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>207</sup> United States Trade Act, 1974, § 310.

<sup>208</sup> Universal Declaration of Human Rights art. 27, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810.

scientific, literary, and creative achievement. The “International Covenant on Economic, Social, Cultural Rights 1966”<sup>209</sup> which is an international agreement binding on its member nations repeated this very section from the “Universal Declaration of Human Rights” which kind of implies or acknowledged IPR as a fundamental right.

It can be argued that the right to own intellectual property rights, and more specifically copyright, is an accepted fundamental right that is embodied in the Universal Declaration and the International Covenant (along with the International Covenant on Civil and Political Rights, both of which were adopted in 1966). South Africa is a party to the International Covenant even if it did not support the Universal Declaration. The Constitutional Court held in the Certification case that the “right to own intellectual property was not generally recognised as a fundamental right and that it was not required to be recognised under the South African Constitution” when asked to rule on the constitutionality of the South African Constitution as part of the process of its adoption, checking if the constitution of South Africa has universally accepted principles.

The court argued that since intellectual property is a type of “property” that is covered by section 25 of the Constitution<sup>210</sup>, it was unnecessary to address it separately in the Bill of Rights (South African Constitution) but through a thorough reading we can see that the court’s defense was very unsatisfying as the section’s protection of the intellectual property is very restricted and is primarily confined to avoid the removal of existing property and in the case of *Laugh it Off Promotions CC v. The South African Breweries International*<sup>211</sup> the court held that the concept of the estate also includes intellectual property under article 25 of the South African Constitution and it also held that trademarks are also property even if they are tangible or intangible.

## CONCLUSION

There is just an issue the term property coming under Article 300 should be understood properly by the readers and should understand whether it includes Intellectual properties or not. How would you know if clinical experimental data would be considered as intellectual property or which concept of property does it come under In the case of Entertainment Network

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<sup>209</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>210</sup> SOUTH AFRICA CONST. art. 25.

<sup>211</sup> *Laugh It Off Promotions CC v. S. Afr. Breweries Int’l (Fin.) BV*, [2005] ZACC 7 (South Africa).



India Ltd. (ENIL) v. Super Cassette Industries Ltd. (SCIL)<sup>212</sup> the supreme court held that along with any human rights attached to the property, possession of any copyrights must be viewed in the context of the values outlined in Article 19(1)(g) of the Constitution. The judgment further goes on to say about how the right to property is not a constitutional right but it also states that Even “clinical trial data” gathered after thorough testing is likely to fit within the scope of “property” as allowed for in Article 300A, as evidenced by the Supreme Court's agreement that "copyright" falls within the scope of Article 300A<sup>213</sup>.



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<sup>212</sup> Entertainment Network (India) Ltd. v. Super Cassette Indus. Ltd., (2008) 13 SCC 30 (India).

<sup>213</sup> INDIA CONST. art 300A.