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LEGIS BYTES

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A LEGAL PERSPECTIVE

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STALKING: A LEGAL PERSPECTIVE



Liza Meghan
[Chief editor]

We are extremely proud to present you our May issue of Legis Bytes. This month we feature three articles on a variety of topics. Care has been taken to keep the legal jargons at bay and make the articles reader friendly for all our subscribers.

The article on Stalking tries to give you an idea about the laws against stalking in different countries like India, US, UK and Canada. Additionally different types of Stalkers from harmless to dangerous ones are mentioned along with short notes on Cyber stalking. We plan to introduce another write-up on Cyber stalking soon.

The next article is about Patient's Right to Information .Here the author analyzes the right of a patient to have access to his or her medical records in the light of Right to Information Act. The physician's responsibility to keep the information confidential versus the Right of a Patient is considered. The federal laws which give the patient the above rights are quoted particularly Health Insurance Portability and Accountability Act (HIPAA). Instances of revealing these confidential medical record information to third parties are also cited with its consequences.

What are Cross border merges and their importance in the current economic condition? This is a much talked about and researched topic. One of our Interns got interested in the issue and jotted down a few of his thoughts including the issues involved in these mergers with special emphasis on Intellectual property rights. Moreover the article talks about the various enacted laws in different jurisdictions for protection of IPRs during cross border mergers. IPR Enforcement Rules and other similar laws for protection of Intellectual property while importing goods to India are also mentioned.

Message from Principal Partner



Jolly John
[Principal Partner]

The month of May has seen a lot many changes inside the firm as well the world outside. Biz & Legis have started an in-depth process of appraising and engaging potential strategic partners. Additionally we have strengthened our footing and focus on various social networking media as a means to reaching out to a broader audience who will be benefited from our services.

B&L is now very actively following and being followed in almost all important social media networks. We are keenly updating our blog and are trying to put together newsworthy articles and issues.

We will continue our efforts to make our website and publications more information rich and useful to our clients as well as to our visitors. And we welcome and value your feedback!!

Patient's Right to Information, and Access to Documents on Treatments, Medical Reports & Entire Medical File.



The right to information is the primary right of each and every citizen. The Parliament of India has passed the Right to information Act which give power to the citizens to question the Government; inspect their files; take copies of Government documents and also to inspect the Government works.

Similarly, the patients do have this right to access their medical records, as well as to have complete and rationalized information with regard to their treatments, medicines, etc.

The medical records are crucially imperative for various causes. They are evidently the technique by which the doctors follow our health and the health care. Also they are important to provide for a background if the patient needs to consult a specialist and to bring new doctors up to speed. The patients can acquire and maintain the copies of their medical records. This can assure that the records are accessible to new care providers as well as, educate the patient about his or her health conditions. Again this can offer

a backup if the institutions mislay these records, or fail to maintain them after they are no longer lawfully required to do so, or alter their identity so much so that they are no longer be found.

The rights of the patients originates from human rights, constitutional rights, civil rights, consumer rights, code of ethics of medical and nursing profession. The right to healthy life is the central part of the right to life. The description of health by World Health Organization (WHO) includes the physical, mental, social, and environmental and the spiritual aspects of the health. Any kind of threat to health care must be measured as the refutation of the right to life. The fundamental purpose of any medical record is to shield the health of the patient. However, the physicians are also aware of certain circumstances in which this primary objective would be affected if the patient were allowed to access these medical records and files.

The obligation to provide copies of medical charts or information is perceptibly on part of the physician who practices the medical profession. They moreover, have the duty to keep these records confidential. But certain legal and ethical requirements oblige these physicians to provide information from medical records or even the copy of the records. Therefore the information in a patient's record cannot be released without his consent. The code of business and profession states that wilful revealing of a professional secret constitutes unprofessional conduct. The most common exception to this arises when the physician is served with a court order necessitating the production of document or testimony and the same must be complied with, unless the court reconsiders its order.

The physician's responsibility to provide information at the patient's request is determined within the bounds of physician-patient relationship. Undoubtedly the patient must be given the information regarding his or her present condition or course of treatment. This arises from the need for informed consent, and to avoid the kind of misinterpretations which lead to a crash in the physician patient relationship. The interest of the patient is most important in the practice of medicine and everything that can logically and legitimately be done to serve that interest must be done by all physicians who have served or are serving the patient. It is unethical for a physician, who previously treated a patient, to turn down for any reasons to make his records of that patient rapidly available on request to another physician presently treating that patient. It is also an indispensable requirement of a good medical practice and the physician's obligation to his patient may extend even after the termination of physician-patient relationship.

The physician who refuses for any reason to make necessary medical information available to a subsequently treating physician, maybe held to have violated his legal obligations as well as the ethical requirements. If any injury results where medical record information was refused previously, then the physician who refused the relevant information can be held liable for damages. Thus the physician faces a real risk if he fails to honour request for such information. Failure of a patient to pay outstanding bills will not itself support a refusal to provide information which has been requested and which would otherwise be made available.

Until recently, patients had no federal right to see and copy their own medical records. In 1996, the Health

Insurance Portability and Accountability Act (HIPAA) changed this condition by instigating the Secretary of the Department of Health and Human Services (DHHS) to issue the HIPAA Privacy Rule in the event congress turned unsuccessful to act in two years. As a result of the congressional inaction, the DHHS promulgated the Privacy Rule which would grant patients new Federal medical & privacy rights, together with the right to see and copy their own medical records. This rule grants the consumers the right to access, inspect and request amendments to their medical records that are held by certain health organizations, conspicuously the health care providers and plans. It instituted procedures for gaining access to personal health information. Also the Privacy Rule gave the patient the right to request that an amendment be added to the medical record. Therefore HIPAA applies not only to the health insurance, but also in the issues of privacy and medical records as well. It makes it mandatory for a doctor to furnish a copy of medical records directly to the patient. In most cases the copies must be supplied to the patient within 30 days. This time period can be extended to another 30 days but it is necessary that the patient must be provided with the grounds for the impediment or delay.

However, in a few extraordinary cases the patient may not be capable to get all of his information. For Example; if the doctor decides something in the patient's file might endanger the patient or someone else, and then the doctor is excused from disclosing that information.

Again, under the Privacy Rules the patient may be charged for making and mailing the copies. It permits the covered entity to impose reasonable cost based fees. This fee may include only the cost of copying and postage, if the patient requests that the copy be mailed. The fee may not include the cost coupled with probing for and regaining the demanded information. And if the patient finds a boob in his medical records, he can request for the correction of the same or for the addition of information to his file if it is incomplete. Though the doctor may not agree that there is an error, the patient has the right to have his disagreement noted in his records.

Therefore with regard to treatments, it must be carried by taking into account the desires or penchants of patients, after fully educating and discovering all options themselves and answering any questions that they may have about the same, before they get into on any treatment available. A surgery should not be conducted without the informed consent of the patient. There should be no concealment with regard to the medical treatment of a person or of information on surgery or the reasons for such. In case of child or unconscious patients, the particulars of surgery, treatments and the medicines must be made available to the parents or guardians or relatives. Thus full and updated information must be made available to them.

About the Author

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STALKING:

A LEGAL PERSPECTIVE

Stalking, as the word denotes is to pursue or approach a prey. In a legal sense, the word is defined as “the willful, malicious and repeated following and harassing of another person” (Meloy, 1998). It is considered to have been initially applied to harassment on famous personalities by strangers who are being obsessed by them. Nevertheless, this is a phenomenon that many people face throughout the world irrespective of their age or sex.

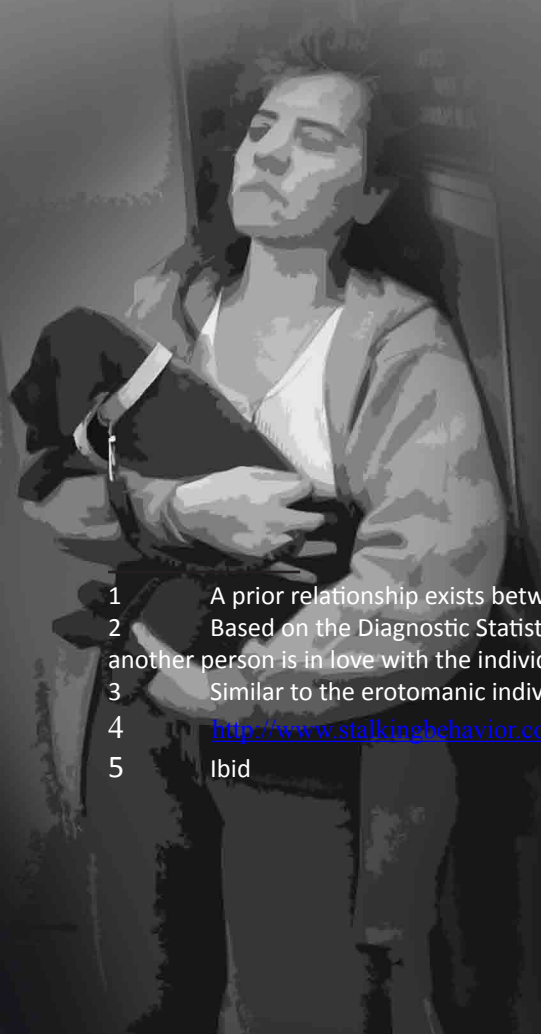


TYPES OF STALKERS

Typically, there are three main types of stalkers: Simple Obsessional¹, Erotomania², and Love Obsessional³.⁴ Another categorization developed by Mullen et al. (1999) provides five categories of stalkers based on motivations and context as follows:⁵

- **Rejected:** Arises from ending a relationship like, estrangement, disruptions, break-ups etc from an ex-partner.

1 A prior relationship exists between the victim
2 Based on the Diagnostic Statistical Manual, 4th ed. (DSM-IV, 4th ed.) The central theme of the delusion is that another person is in love with the individual
3 Similar to the erotomaniac individuals: The victim is almost always known through the media.
4 <http://www.stalkingbehavior.com/definiti.htm>
5 Ibid



- Intimacy seekers: These types of stalkers pursue an intimate relationship with an individual perceived as their true love, but their attentions are not wanted by the object of their affection.
- Incompetent: These stalkers may be intellectually limited and socially incompetent individuals who desire intimacy, but the object of their affection does not reciprocate these feelings.
- Resentful: These stalkers may have specific goal to frighten and distress the victim.
- Predatory: The power and control that comes from stalking a victim gives these stalkers a great deal of enjoyment.

FALSE VICTIMIZATION SYNDROME

This occurs when a person attempt to convince others that he or she is being stalked through concocted incidents to re-establish a fading relationship and/or gain attention. A person who exhibits such personality may also be considered to have histrionic personality disorder i.e., claiming to be the center of attention, quick change of shallow emotions, and speaks in a way that is excessively impressionistic and lacking in detail.⁶

Unlike India, stalking laws are stringent in countries like US, Australia, Canada etc. Stalking can be examined from different perspectives including:⁷

- behavior of the perpetrator
- impact on the victim
- reasoning behind the stalker's behavior

STALKING IN INDIA

Even though India is a democratic nation, when it comes to establishing specific individual rights, we are yet to learn from others. In India there is no specific penal provision to deal with this menace. As there are no definite anti-stalking laws in the country, a stalking victim is left with limited legal remedies under Indian Penal Code. Mostly, a stalker is being charged under section 441 IPC which deals with Criminal Trespass. The section reads as follows:

6 Ibid

7 http://www.scottish.parliament.uk/business/research/pdf_res_notes/rn00-58.pdf

“Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, Or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit “criminal trespass”.

As the section states, it has its own limitation when it is made applicable in each individual cases involving stalking. The legislation that deals with the menace in the cyber space is the Indian Information technology Act 2008 (amended). Even though, the Act does not define stalking as such, the Act, among other cyber crimes also deals with a provision that states “intrusion on to the privacy of individual” which may be included in sphere of stalking. Nevertheless, the IT Act 2008 does address cyber stalking in section 72 which reads:

“Breach of confidentiality and privacy: Save as otherwise provided in this Act or any other law for the time being in force, any person who, in pursuant of any of the powers conferred under this Act, rules or regulations made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.”

In fact, cyber stalking is considered as a crime that involves breach of confidentiality and privacy of an individual in the cyber space.

UK STALKING LAWS

UK laws do not provide a legal definition for Stalking. On the other hand, the term ‘stalking’ is usually used to denote the type of behavior which comprises of an unwanted and recurring following of an individual OR communicate with an individual resulting in a conduct of threatening and distressing approach towards that person.

The primary legislation of UK that deals with the topic of stalking and related issues is the Protection from Harassment Act 1997. Even though, the Act does not refer to stalking per se, it address harassment resulting from conduct which could be construed as stalking.

The Act provides for an offence of harassment and possible civil remedies along with restraining orders. Section 2 of the Act put forward a maximum penalty for conduct that do not involve fear of violence, i.e., a Level 5 fine (£5,000) and/or a term of imprisonment not exceeding six months. Section 4 deals with conduct that involve fear of violence. Such conduct provides a maximum sentence on indictment i.e., a term of imprisonment not exceeding 5 years and/or an unlimited fine.

ANTI-STALKING LAWS IN US

Stalking first received widespread public focus in 1980 with the murder of John Lennon, and again in 1981 with John Hinckley Jr.'s assassination attempt on President Reagan. But it was not until the 1989 death of Rebecca Schaeffer, a rising young actress killed by an obsessed fan who'd stalked her for two years that laws were enacted.⁸

Stalking is considered as a specific crime in all 50 US States. The conduct is either classified as an offense under felony (a serious crime) or under misdemeanor. Basically, the legislation defines a list of prohibited activities related to stalking. It is important that the stalker's activities shall cast a "real and credible threat" to the victim apart from a mere act of harassment. California was the first state in the country to enact a regulation that dealt directly with the subject of stalking in the year 1990. Since then, the subject caught great importance leading to in-depth research on the various aspects of stalking and its related psychology.

California Penal Code section 646.9 deals with stalking. Stalking is punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison. The section provides for provisions to obtain emergency protective order. The section also making it illegal for Stalkers to obtain Victims address or location and provides notification to victim on the stalker. Stalking regulation provides telephone number available to public and victims and information on parolee convicted of stalking.⁹

FEDERAL LAW

18 U. S. Code Part I, Section 2261A is a provision that states that whoever enters the jurisdiction of the United States or its tribal jurisdiction with an intent to cause injury, harassment and or intimidate another person creating a reasonable fear of death or injury or emotional distress to that person or his/her family by using mails or any interactive computer service shall be punished as provided in section 2261 (b) of this title. Federal law also deals with interstate domestic violence (Section 2261(a)(1)), interstate violation of protective order (Section 2262(a)(1), harassing communications in interstate telephone calls (47 U.S.C. Section 223(a)(1)(C)) , interstate communications (18 U.S.C. Section 875(c)).

The US Telecommunications Act of 1996 was another major step taken by the US Government to include prohibition of harassment through telephone or the use of telecommunication devices in the country.

8 <http://www.privacyrights.org/fs/fs14-stk.htm>

9 <http://www.stalkingalert.com/pc646.9statutes.htm>

CANADA ANTI-STALKING LAWS

Stalking is known as criminal harassment in Canadian criminal law. Section 264 of Criminal Code deals with stalking which states that no person shall, without lawful authority and knowing that another person is harassed (or recklessly as to whether the other person is harassed) repeatedly follow the other person, or anyone known to them, from place to place; repeatedly communicate with, either directly or indirectly, the other person or anyone known to them; beset or watch a place where the other person is visiting, lives or works; or engage in threatening conduct directed at the other person or any member of their family.¹⁰

CYBERSTALKING

Cyber stalking is a conduct where a person is followed and tracked online. The act is an intrusion on the person's privacy where he/she is being watched in their every move online. It is considered as a type of harassment that could affect the victim's life placing them to face fear and threat.

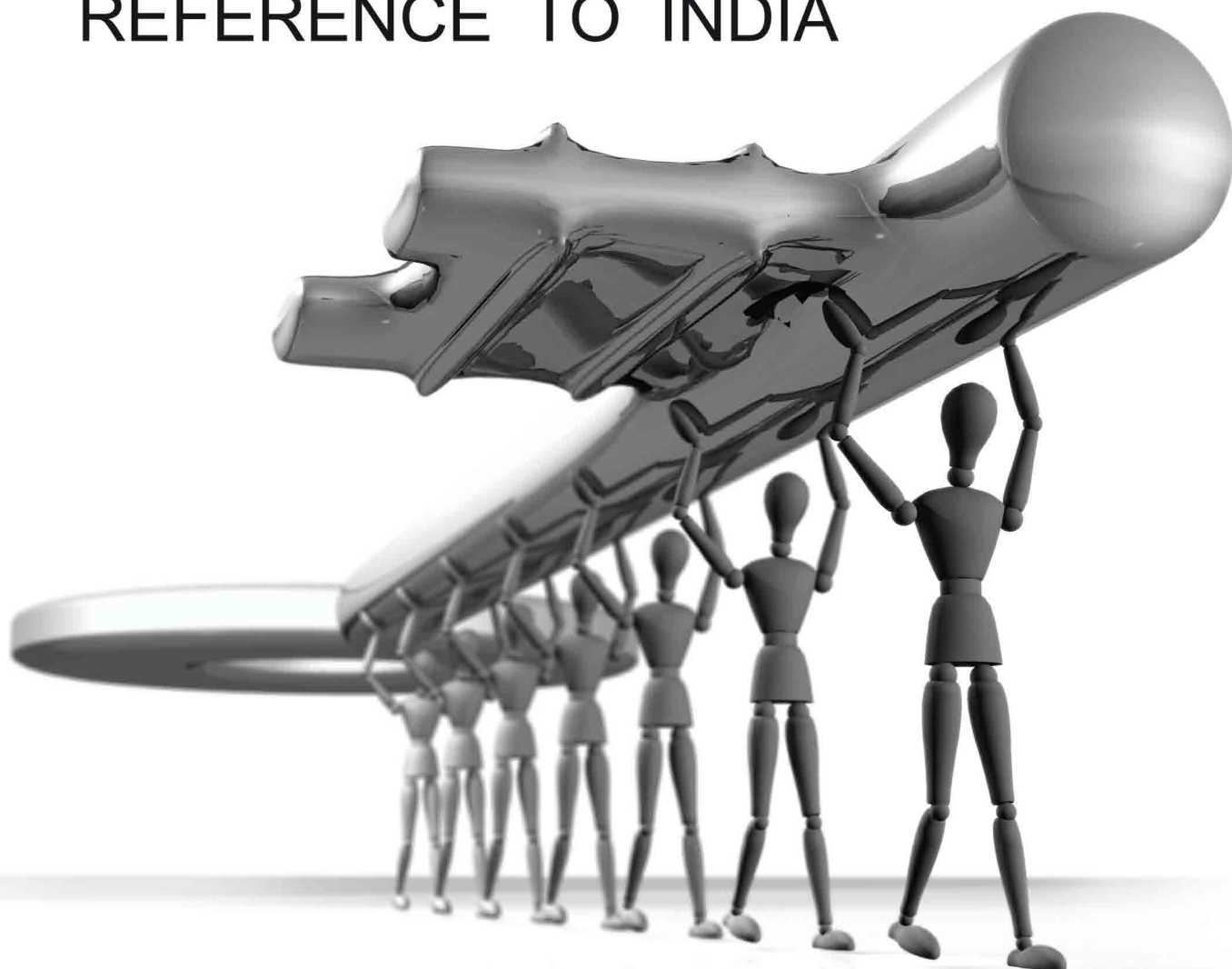
In today's cyber world the number of cases involving stalking in the cyberspace is reported to have increased tremendously. The massive use of email, internet and various other electronic communications and social networking sites provide a huge platform for such online crimes. These aspects have made to incorporate anti-stalking regulations with special reference to cyberstalking in various countries including India.

About the Author

Vinitha Prasannan is an Advocate enrolled with the Bar Council of India in the year 1998 and the Senior Associate of Biz & Legis. As she is very passionate to her profession, she has a penchant towards the society. She is an active Life Member of Indian Federation of Women Lawyers and is a Counsel and legal advisor to both Foreign and Indian Clients in the field of Domestic and International Litigation, Corporate Drafting and in handling Intellectual Property, Real Estate Law and Business issues. She was in the State Brief Panel in High Court of Kerala and had handled Criminal matters as well. Her services include providing litigation support for attorneys and pro se clients in drafting court documents and legal documents in various jurisdictions including US federal and state courts.

10 <http://www.duhaime.org/LegalResources/CriminalLaw/LawArticle-95/Stalking.aspx>

INTELLECTUAL PROPERTY ISSUES ON CROSS BORDER MERGERS WITH SPECIAL REFERENCE TO INDIA



As an adaptation to the challenges posed by the new pattern of globalization, world-wide corporate sectors are restructuring through various consolidation strategies such as mergers and acquisition further leading to the integration of national and international market. This is a result of the various de-regulation policies of the government after the advent of the neo liberal economic regime which has largely encouraged firms to use such consolidation strategies leading to the current wave of mergers and acquisitions thus materializing a large number of cross-border deals.

A cross border merger simply put together is a merger of organizations in different countries. And such a merger helps in free flow of capital across border, enhancing competition and globalizing business.

The result of the increasing presence of big Multi-National Companies and the pressure exerted by the aforementioned consolidation strategies on domestic firms led to the boom in mergers and acquisitions in the Indian sector too. It was soon realized that resorting to such consolidation techniques was easy in the Indian market as it required less time and money. The biggest factor of growth of such transactions has been the implementation of various policies by the government.

Nowadays the news of an Indian company acquiring a foreign business is very common and the situation was a lot different a couple of years back. Moreover, buoyant Indian economy and the ample finance with Indian corporate sector have contributed to the new acquisition trend. Presence of the Indian IT and ITES companies in foreign markets are quite strong. Consistent active involvement of the Indian companies in the world markets indicates not only the maturity of an Indian Industry but also extent of their participation in global market.

Cross border deals worth U.S. \$ 0.7 billion were made in 2000-01 in India which jumped to U.S. \$ 4.3 billion in 2005 and crossed the U.S. \$ 15 billion in 2006. Almost 99 per cent of the mergers were done through cash payment. In January-May 2007, statically 59.5 per cent of the total Merger and acquisitions transactions were represented by Indian companies and the cross border deals have been 102 with value of U.S. \$ 28.19 billion.

One of the most widely accepted and fairly recognized phenomenon is the protection of Intellectual Property Rights in cross border transactions. It is not uncommon and is simple and often repeated case of import or export of goods which either infringes the trademark of a legitimate owner who took years to build his reputation or infringe a patent, which undertook immense hard work for its creation. The World Trade Organization agreement on Trade Related Intellectual Property Rights attracted lot of signatories including India.

One of the critical issues has been enforcement of IPRs of the respective right holders with regard to imported goods. India, laid down a legal framework to protect the rights in the year 1964 the Ministry of Finance (Department of Revenue) issued Notification No.1- Customs dated 18th January. It could not be effectively implemented and its scope was also restricted to merely trademarks and designs only.

To fill up the lacunae and also as a step of fulfillment of TRIPS, the *Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007* (hereinafter referred to as “the Rules”) was enforced to give teeth to the protection and enforcement of Intellectual Property Rights (IPRs). The Rules are fairly concise and to the point and defined important phrases like “goods infringing IPRs”, “Intellectual Property”, “Intellectual Property Law”, and “right holder” with a global outlook as it covers both breach outside and inside India. Further, it is wider and covers copyright, trademarks, patents, designs and geographical indications. Another important aspect is that it proposes to enforce only protected IPR, which debars the right holders against protection from common law rights and thereby makes registration compulsory which establishes ownership and enforcement of these rights. Upon submitting a notice by the right holder to the Customs,

the concerned officer will reject or register the notice and once it is registered a minimum one year protection is granted to the right holder. The registration is enforceable only when the right holder or his agent executes an appropriate bond with the Customs for security, surety and indemnity in order to protect the importer, the owner of the goods and concerned authorities against all liabilities.

After registration, if the Customs Officer has reason to believe that the imported goods are infringing IPR, such goods shall be suspended from clearance based on prima facie evidence or reasonable grounds as to such infringement. After obtaining a “no objection” from the right holder, the Customs can destroy the infringing goods with no further legal proceedings.

But the major issue with regard to this is that the importer is not provided an opportunity to be heard and is entitled to seek the clearance of the goods only after he receives the communication from the customs authority. This amounts to a post-decision hearing under exceptional circumstance. The very nature of the order is that the rule of *audi alteram partem* must be excluded. The post-decision hearing session should take place as soon as the order or suspension of clearance is made. The right holder is required to join proceedings as soon as he is informed of the order, but the rules do not prescribe an upper limit which could lead to unreasonable prolonged delay. *Maneka Gandhi v. Union of India* lay down that in cases of post decisional hearing, a fair opportunity must be given right after the impugned order. If such post-decision hearing is delayed, the whole purpose of it would be defeated. There must be a stipulated time period similar to the *Article 55 of TRIPS* agreement which states that maximum duration of suspension shall not last more than ten days. Introduction of such changes will balance the interests of the right holder and those of the importer.

An exclusive is granted to Patentee's under *Section 48 of the Patents Act, 1970* whereby a right to prohibit others from making, using, selling, offering for sale and importing of that product. Though such a right is granted, the issue is that the right to initiate legal proceedings for an action arises only when the right has been infringed. On the basis of likelihood of infringement, a suit cannot be filed. The cause of action to initiate a suit for proceedings will commence only once it is cleared by the customs administration. Thereby, the rule creates a right of the patentee to prevent potential infringement and corresponds to the right to bring a quia timet action which can bring an action on the basis of threat of infringement. Though this right was available earlier, now the Rules will help the patentee to bring an action at the customary level itself without requiring agitating the courts.

Similarly according to *Section 140 of the Trademarks Act, 1999* when goods bearing false trademark or false description are imported into India, they are liable for detention or confiscation. Upon representation it requires the Chief Customs Officer to take information from the importer as to the name and address of the person to whom the goods are consigned to India, the person to whom the goods were sent and has to produce documents support the possession relating to the goods. The importer is statutorily required to furnish information within 14 days and non-compliance would make him liable with fine. The information thus collected by the Custom officials is then forwarded to the registered proprietor of rights

have been infringed.

Another issue faced by individuals is importing infringing copies of the work made abroad thereby economically hampering the individual's efforts. But *Section 53 of the Copyright Act, 1957* confers power to the Registrar of Copyrights to prohibit importation of infringing copies. Upon receiving application by the copyright owner, the Registrar may make necessary inquiries and prohibit order of infringing copies of the work made abroad. He is granted with the power to enter any ship, dock or premises where infringing copies may exist and has the right to examine them all. The Act finds nexus with the Customs Act, 1962 as similar goods are prohibited or restricted from importation. Though the confiscated copies vest with the Government, they are delivered to the owner of the copyright work.

But the major problem with regards to cross border movement and intellectual property has been the existence of law but the modus operandi for protection is weak and not clearly defined. There exist various statutory provisions it is proving to be inadequate to deal with the matters completely leaving a huge gap for the free play of courts. It must be noted that the judiciary also started spreading its wings into these matters. A recent instance is *CIASCO Technologies v. Shrikanth* 2005 PTC 53, where the Delhi High Court ordered to notify all the ports to permit any consignment except that of the plaintiff's to be imported. Following the rule laid down by the CIASCO case, was adopted in the case of *M/s Ives Laboratories Inc. v. Mr. R.B. Aggrawal* (C.S. (O.S.) No. 1940 of 2006) where Collector of Customs were notified to inform all ports not to permit import of sunblock cream consignment which bore the trademark of ST.IVES. Thus, the Indian courts have adopted a hard-headed approach to curb infringements caused during cross border movements.

CONCLUSION

The protection provided by the TRIPS Agreement is considered weak and inadequate to fight the cross-border traffic in counterfeit and pirated goods. The Government of India adopted the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 to strengthen the intellectual property protection of cross border mergers. Though law prevails, the implementation still remains a huge question mark. The famous case of Ram Kumar brought to light the propensity of abuse, as the importers were involved in multiple litigations in order to obtain clearance for their goods. And the major problem remains that the Customs authorities lack the expertise to encounter the intellectual property issues thereby making it arbitrary and inaccurate. Though it has been a positive step towards enforcement and protection of cross border issues, it has to be understood that the Customs Department have only limited resources to deal with such a technical subject as that of intellectual properties. One of the strategies to be adopted is to depute sharp and efficient officers from the IPR departments to the Customs Departments. It must be similar to that of Intellectual Property Appellate Board to handle complex IP cases. Further the Rules must also be amended to divest the customs authority with the adjudicatory function and to confine their power to seize or dispose the goods on a court order obtained in legal proceedings initiated by the importer.

Further amendments is urgent with respect to the time period required for disposing cases after suspension of clearance of goods in order to uphold the spirit of *audi alteram partem*. To reduce the burden of the customs department the right holders must be required to establish a prima facie case with respect to the validity of the patent and the infringing nature of the specific consignment of goods.

The incorporation of such amendments will make sure that a fair and equitable procedure will be established with respect to border measures enforcement for intellectual property rights in India.

About the Author

Sumit Prasad is a fourth-year student of the 5-year B.B.A-LL.B course at the Symbiosis Law School, Pune and is also in further pursuance of excellence in the Company Secretaries program. During his tenure as an intern with Biz and Legis, he wrote the article on Cross-Border Mergers specifically referring to the Intellectual Property issued faced in India. This article comes in pursuance of his enthusiastic interests in corporate and business laws.

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