

OF WAIVERS AND APPEALS

The year 2020-2021 has seen many unprecedented changes in the world; the world of intellectual property is no exception. Internationally, nations have fought hard to combat the pandemic while medical professionals and scientists were the front-end warriors combating the disease at the care-giving stage as well as in laboratories, developing medicines and vaccines that would help to best Sars-Cov-2, the organism responsible for the COVID-19 pandemic. At no other time in history has the underlying jurisprudential justification for intellectual property, particularly patents, been questioned by individuals, civil societies, other organizations as well as developing countries in the post-TRIPS intellectual property regime.

The WTO Waiver proposal is a watershed moment in the history of international intellectual property protection¹. While presently languishing in the forum and not expected to be taken up before December 2021, this proposal, with multitude of interpretations, text-based and otherwise, put forward by even the supporting countries, nevertheless presents a contrary position to the so-called uniformity of intellectual property in the post-TRIPS era. The premise that the flexibilities inbuilt in TRIPS Agreement are sufficient even for developing countries in fulfilling their obligations to their people has been sorely tested in the context of right to health during the pandemic.

Another interesting development is that the Intellectual Property Appellate Board was dissolved by the Union Government on 4th April, 2021, implementing the Tribunals Reforms (Rationalization and Conditions of Service) Ordinance, 2021. The Board, conceived to settle appeals from the against the Registrar's decisions under the Indian Trademarks Act, 1999², and the Geographical Indications of Goods (Registration and Protection) Act, 1999³, later started hearing disputes arising out of the Protection of Plant Varieties and Farmers' Rights Act, 2001⁴,

¹ Proposal for Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, IP/C/W/669/Rev.1 (25th May 2021). <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True>

² Ministry of Commerce and Industry, S.O. 1049(E) (Notified on September 15, 2003 <https://egazette.nic.in/WriteReadData/2003/212524.pdf>)

³ *Id.*

⁴ Ministry of Agriculture, S.O. 1797(E) (Notified on October 19, 2006) https://egazette.nic.in/WriteReadData/2006/E_1258_2011_004.pdf.

Patents Act, 1970⁵ and Copyright Act, 1957⁶. The decision to dissolve the IPAB and other tribunals is speculated to be partly due to the difficulty in appointing members to the Board.⁷

In its time, IPAB has delivered important decisions in IP; however, problems abound. Of late, such tribunals have had a troubled history in India and abroad; the primary reason being questions regarding appointment of members. It must be ensured that the members are qualified, and in the case of IPAB, one of the criteria is qualification to be appointed a High Court Judge. However, when members of the executive are appointed as members of tribunals, which IPAB allows⁸, it affects the independence of the judiciary and the quality of judgements. At the same time, the Indian situation was aggravated by woes of timely appointment as well as inadequate infrastructure.

The case of *U.S. v. Arthrex, Inc*⁹ deals with the US Patent Trial and Appeal Board (PTAB), a body similar to the IPAB which evaluates patents in the US assumes relevance here; the SCOTUS issued a decision invoking new oversight from the Director of the USPTO. This additional tier of review contributes further to the *inter partes* review envisaged under the Leahy–Smith America Invents Act, 2011. This matter in USA is similar to the Indian situation and the review of the PTAB decision was included so as to render ‘unreviewable’¹⁰ decisions subject to review; the Indian disbanding of the IPAB is also based on the premise that additional layers of dispute settlement results in vexation without appropriate settlement.

Moreover, the Supreme Court has held that tribunals cannot answer questions of law.¹¹ The National Tax Tribunal was struck down as unconstitutional by the Supreme Court in 2014, as it encroached into the power of judicial review vested in High Courts.¹² The Law Commission had recommended two sets of changes to Tribunals in India, citing, among others, jurisdictional and judicial issues.¹³

⁵ Ministry of Commerce and Industry, S.O. 509(E) (Notified on April 2, 2007) https://egazette.nic.in/WriteReadData/2007/E_350_2011_008.pdf.

⁶ Ministry of Finance, S.O. 1696(E) (Notified on May 26, 2017) <https://egazette.nic.in/WriteReadData/2017/176250.pdf>.

⁷ *Dissolution Of IPAB*, MONDAQ <https://www.mondaq.com/india/trademark/1066942/dissolution-of-ipab>.

⁸ Shamnad Basheer, *Fixing the tribunal mess*, FINANCIAL EXPRESS, OCT. 10, 2014, <https://www.financialexpress.com/archive/fixing-the-tribunal-mess/1296977/>.

⁹ *United States v. Arthrex Inc.*, No. 19-1434 (Supreme Court of the United States Jun. 20, 2021).

¹⁰ George Quillin and Jeanne Gills, *Justices scale back “unreviewable authority” of administrative patent judges*, SCOTUSBLOG, <http://www.scotusblog.com/?p=301936>.

¹¹ *Madras Bar Association v. Union of India & Anr.*, AIR 2015 SC 1571.

¹² *Id.*; J. Venkatesan, *National taxation tribunal law unconstitutional: SC*, THE HINDU, Sep. 25, 2014, <https://www.thehindu.com/news/national/sc-strikes-down-national-tax-tribunal-act/article6445065.ece>.

¹³ Twenty First Law Commission of India, *Assessment of Statutory Frameworks of Tribunals in India*, Two Hundred and Seventy Second Report (2017), <https://lawcommissionofindia.nic.in/reports/Report272.pdf>.

In this context, giving appellate powers back to High Courts may be advantageous in eliminating a layer of dispute settlement; at the same time, they may pose an increase in the caseload of High Courts. Setting up of specific IP benches, or an IP Division in commercial benches, as created by the Delhi High Court¹⁴ would be useful to IP litigants. However, the Parliamentary Committee on IP its 161st report suggested reviving of IPAB instead of shutting it down,¹⁵ indicating that the matter has not yet been resolved.

Yet another momentous case on intellectual property is the SciHub Libgen case, which carries momentous significance to the academia and research community. The case was filed by Elsevier Ltd., Wiley India Pvt. Ltd. and American Chemical Society¹⁶; intervention from Delhi Science Forum, Society for Knowledge Commons and students and scholars followed. It brings back to the table the matter of money being a factor in determining access to scientific and academic knowledge repositories and the relevance and application of fair dealing. While American decisions¹⁷ have been against these ‘altruistic’ sites, the Indian intellectual property paradigms are different; hence outcomes should also be different and in line with the DU photocopy case.

Hence, while the past year has been tumultuous, most of these issues will gain closure only at a later point of time; yet 2021 is instrumental in questioning the so-called ideas and ideals of IP- it has shown us that nothing is set in stone and that change is the only constant.

¹⁴ High Court of Delhi, New Delhi, No. 667/Original Side/DHC, Jul. 7, 2021, https://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_4W1UGE3WNT9.PDF.

¹⁵ Department Related Parliamentary Standing Committee on Commerce, *Review of the Intellectual Property Rights Regime in India*, Jul. 23, 2021, https://iprlawindia.org/wp-content/uploads/2021/07/GOI_IP-Review.pdf.

¹⁶ Elsevier Ltd. & Ors. v. Alexandra Elbakyan & Ors., C.S. (COMM) No. 5722020 of 2020 (Delhi HC)

¹⁷ ‘US court grants Elsevier millions in damages from Sci-Hub’. Nature. doi:10.1038/nature.2017.22196.