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How common are Commons?

Focus on IP in Education and Research

Alphonsa Jojan

Balakrishna Pisupati

**Forum for Law, Environment,
Development and Governance**

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1. The 'Global Commons'

The definition of 'global commons' has undergone a significant change during the past few hundred years, particularly in the way humans have understood resources such as land, air, water, natural resources and knowledge and the principles applied to their governance. Our ancestors recognized these as common resources to humankind and wanted to share them, use them and ensure they acted as trustees of these resources than owners.

Currently, the approach has changed to the extent that almost all of the above commons are seen private and there has been an unprecedented rush to own them. Even the commons that are currently available such as space, Arctic and Antarctic regions are not being spared by countries and individuals who have technology and resources to prospect and use these commons indiscriminately.

There has been some rethinking in the understanding and importance of finite common property resources, especially by virtue of the works¹ of noble laureate Elinor Ostrom challenging the concept of 'Tragedy of Commons' and proving that even finite resources can be sustainably governed by

¹ For detailed reading, Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Actions*, Cambridge University Press, 1990

retaining the common characteristics of the property. Today, many have recognised the importance of common property and community management of the common property resources especially on the fronts of equity and sustainability.

While the matter is so with finite resources, how far we have been able to apply the significance of common property to infinite resource space of knowledge and information? Intellectual property protection regimes have completely changed the way we see and manage the commons. Justice Prabha Sridevan, in her insightful article², has pointed out that the fortified protective regime of Intellectual Property Rights is leading to detrimental effects on access to technology especially for those in developing countries.

Our particular interest in this area, for purposes of this article, is the way knowledge and information is being privatised, removing options for current and future generations to learn.

2. Education as a Global Common

Imparting education in the era of information technology and digital revolution is a changed concept. In addition to the traditional

² Prabha Sridevan, "Where are the Commons", the Hindu, 22nd June 2017
<http://www.thehindu.com/opinion/op-ed/where-are-the-commons/article19120696.ece> last retrieved on 07-09-2017

pedagogical ways, academic institutions are offering courses through different digital media such as online learning, virtual classrooms and so on. Cyberspace have become the new learning environment integrating social networking, instant messaging and online broadcasting with faculty having opportunity to use multiple tools at their disposal to facilitate learning. In the changing scenario, the application of Intellectual Property Rights in education requires new thinking and approach. The main IPR regime governing education are the copyrights and patents. The Biological Diversity Act, 2002 is another legal framework that becomes important especially for research in biological diversity –ecosystem, species and genetic diversity; and the knowledge associated with it.

The IPR regulatory framework provides fair use exceptions for education. Though the fortified territory of intellectual property regime is designed so as to have open doors for education, there are many barriers in availing this exception. We will have a quick overview of the specific intellectual property rights and their interaction with education.

(a) Copyrights

Privatisation of knowledge and information through copyright law is taking interesting as well as strange shape. A recent pronouncement from the European Court of Justice has ruled that even hyperlinks provided in articles and

blogs may be subjected to copyright issues.³ But courts, particularly Indian courts, also have passed judgments that cater to facilitating learning and research. Delhi High Court's decision holding that DNA sequencing is not copyrightable is one such example pertinent to the field of life sciences and biotechnology.⁴

There are also emerging discussions within the academic community to move away from publishing their findings due to limitations set by journals restricting use of the knowledge and information due to copyright issues. But still, the number of predatory journals usurping the gullible academicians to publish is on the increase, undermining the very purpose of intellectual pursuits.

While the above are the general trends in research and education, the IPR regime as mentioned earlier offers exceptions for education. The exception is available under the fair use category. Internationally, this exception for education is known as the 'teaching exception' originally found in the Article 10 (2)

³ G S Media BV v. Sanoma Media Netherlands, 8th September 2016, European Court of Justice, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5506dc2c999f14cc9bdd3a228e972afcd.e34KaxiLc3eQc40LaxqMbN4Pa3qOe0?text=&docid=183124&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=432611>

⁴ Emergent Genetics India Pvt Ltd v. Shailendra Shivam. Also refer, Shan Kohli, "The Debate On Copyright For DNA Sequences Finally Put To Rest?: The Delhi High Court's Verdict", Spicy IP, December 8, 2011 <https://spicyip.com/2011/12/debate-on-copyright-for-dna-sequences.html> last retrieved on 07-09-2017

of the Berne Convention and carried onto the Article 9(1) of the Trade Related Intellectual Property Rights (TRIPS)". The exception states as follows:

*"(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice."*⁵

While there are many terms in this provision that requires greater scrutiny, we would like to highlight here the phrase 'by way of illustration' (quantitative restriction) especially in the context of India and the Delhi University Photocopy case. The education exceptions to Indian copyright law is available in Sections 52 (1) (g), (h), (i) and (p).⁶

The DU photocopy case⁷, is a watershed moment in affirming the right of the education sector for an accessible and equitable space for non-commercial research, teaching and

learning. The case held that photocopying excerpts of copyrighted books for making course packs by Delhi University (DU) or its agents (like authorised photocopiers), inside or outside the DU is not a copyright infringement as the same is covered by the fair use exception. This single judge judgment does not make clear references to quantitative restrictions. A division bench has held that the question of whether copying of full work amounts to infringement or not is a matter to be determined in trial court.⁸ Thus, there is no much clarity on quantitative restriction but when many works (such as photographs, paintings etc.) that are required to be reproduced in full for being meaningful for pedagogical purposes need to be an exception.⁹

(b) Patents and Education

With respect to patents also, in India, there is an exception for education and research. Here, the patents are granted under the condition that *"any machine, apparatus or other article in respect of which the patent is granted or any article made by the use of the process in respect of which the patent is granted, may be made or used, and any process in respect of which the patent is granted may be used, by any person, for the purpose merely of experiment or*

⁵ Article 10(2) of the Berne Convention for Protection of Literary and Artistic Works

⁶ L Liang, "Exception and Limitation in Indian Copyright Law for Education: An Assessment", Law and Development Review, Vol 3 Issue 2, 2010

⁷ University of Oxford v. Rameshwari Photocopy Services, Delhi High Court judgment dated 16th September 2016

http://lobis.nic.in/d_dir/dhc/RSE/judgement/16-09-2016/RSE16092016S24392012.pdf.

⁸ L Liang, 'The Essence of Education', the Hindu, December 13, 2006

<http://www.thehindu.com/opinion/lead/The-essence-of-education/article16798107.ece>

⁹ Supra at 6

research including the imparting of instructions to pupils'.¹⁰

This exception is argued to be a liberal educational exception¹¹, how much of this exception is leveraged or can be leveraged for educational purposes is not very clear. Unlike copyrightable materials, the very nature of patented inventions can preclude their easy duplication.

Then, how can educational institutions make patented inventions available for students for instruction purposes? Can the law which guarantees many exceptions to the education sector in terms of tax rebates, tax holidays etc., take a similar approach in patent law as well? Can the patent law ensure that patented inventions are compulsorily licensed to education sector royalty—free or within certain royalty tabs? Can educational institutions have agents who will assist in providing technologies which are patent protected, through reverse engineering or through other means, for the purpose of teaching students?

One of the challenges of using educational exception in research will be to differentiate the non-commercial and commercial research which is currently intertwined in educational

institutions. But with legally binding contracts between academic institutions and the industry and standard protocols relating to non-commercial and pure academic research and teaching, we may be able to navigate through this situation to make education, especially technical education, an accessible and equitable space.

(c) Biodiversity law

Biodiversity law regulates, *inter alia*, access to knowledge associated to Indian biological resources¹². Foreign nationals and entities, non-resident Indians and Indian entities with non-India participation in management or share capital are required to obtain the prior permission from the National Biodiversity Authority before they obtain knowledge associated to biological resources occurring in India.¹³ The law also precludes Indians from transferring research results relating to Indian biological resource. In this context, discussions under statutory bodies in India focusing on overseeing the sovereign rights over our biological resources is moving in a direction that even sharing of traditional knowledge and information through workshops and seminars is seen as violation of the Biological Diversity Act, 2002 (BD Act).

The BD Act, but, provides tremendous potential and opportunities to attract research and

¹⁰ Section 47(3) of the Indian Patent Act, 1970

¹¹ Shamnad Basheer and Prashant Reddy, “*The Experimental Use Exception Through A Developmental Lens*”, IDEA, Vol 50, No. 4, 2010 (https://ipmall.law.unh.edu/sites/default/files/hosted_resources/IDEA/idea-vol50-no4-basheer-reddy.pdf) last retrieved on 07-09-2017

¹² Read as ‘biological resources occurring in India or obtained from India’

¹³ Section 3 of the Biological Diversity Act, 2002

technology in India. One of the objectives of the BD Act is equitable sharing of benefits and the benefit sharing options under the Act includes joint ownership of IPR, transfer of technology, association of Indian scientists in research and so on.

The BD Act also provides explicit inter-linkages with intellectual property law especially the patent law through Section 6 which states as follows:

“No person shall apply for any intellectual property right, by whatever name called, in or outside India for any invention based on any research or information on a biological resource obtained from India without obtaining the previous approval of the National Biodiversity Authority before making such application: Provided that if a person applies for a patent, permission of the National Biodiversity Authority may be obtained after the acceptance of the patent but before the sealing of the patent by the patent authority concerned”

The India Patent Office has also published Guidelines relating to this inter-linkage.¹⁴ An efficient administration of the BD Act can contribute significantly to the progress of education in the field of life sciences.

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http://www.ipindia.nic.in/writereaddata/Portal/IPO/GuidelinesManuals/1_39_1_5-tk-guidelines.pdf,
http://www.ipindia.nic.in/writereaddata/Portal/IPO/GuidelinesManuals/1_38_1_4-biotech-guidelines.pdf

3. Conclusions

The global community can recognise the importance of common property with respect to finite resources and it is high time that we actively encourage the implementation of common characteristics of educational use of intellectual property more openly. Exceptions in IPR regime needs reconstruction to save it from being defunct.

The intent of this piece is not to provide an academically rigorous overview of the issues related to treating education as a global common but to raise issues related to education as a global common and the impacts of intellectual property rights on education. A more detailed analytical paper is being prepared by the authors that will focus on the need to deal with exceptions for education within the realm of intellectual property rights, the role of people-centered approaches to innovations in education rather than technology centered approaches and make recommendations for exceptions.



Ms. Alphonsa Jojan is Hon. Fellow, FLEDGE
Dr. Balakrishna Pisupati is Chairperson, FLEDGE

Corresponding Author: pisupatibalakrishna@gmail.com

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