

IP Flavors

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**1st
Edition**

By Kashish Intellectual Property Group (KIPG)



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ARBITRATION

ARBITRABILITY OF INTELLECTUAL PROPERTY DISPUTES

The relevance of Intellectual Property (IP) in trade is on the rise, in particular concerning cross-border transactions. IP is characterized by multi-country licensing of patents, trademarks, copyright, and trade secrets, as well as larger market forces such as globalization, digitalization, and the internet. In an international economy, Intellectual Property Rights (IPRs) are often among a brand's most valuable assets. Therefore, the inclination to protect these rights is also becoming stronger. Disputes regarding IP are conventionally contested before national courts. Nonetheless, in recent times there has been a substantial sway towards arbitration.

Arbitration is the private, judicial determination of a dispute by an independent third party. An arbitration hearing may comprise the use of an individual arbitrator or a tribunal. A tribunal may consist of any number of arbitrators though some legal systems insist on an odd number for obvious reasons of evading a tie. The disputing sides hand over their power to resolve the dispute to the arbitrator(s). Arbitration is a substitute to court action, and generally, equally final and binding. Arbitration is being increasingly used for disputes involving IP, especially when the concerned parties are from different jurisdictions. Arbitrators are chosen based on their depth of knowledge in different fields.

Can IP be Arbitrated upon?

Usually, arbitrability, the question of whether the subject matter of a dispute may be resolved through arbitration, arises in the context of arbitration of IP disputes. As IPRs such as trademarks, patents, etc., are granted by national authorities, it is often contended that disputes concerning such rights should be determined by a public authority within the national system. Nevertheless, it is now widely accepted that disputes relating to IPRs are arbitrable, similar to disputes involving any other type of privately held right. Any right, which a party can dispose of by way of settlement should, in principle, also be capable of being the subject of arbitration since, akin to a settlement, arbitration

is founded on party agreement. As a result of the consensual nature of arbitration, any award rendered will be binding only on the parties involved and will not as such affect third parties.

When talking about IP arbitration, two main issues must be considered:

- Is an arbitration clause in place? A central element of many IP disputes is the IP owner's right to prevent others from using his or her IP. Usually, there is no contract in place between the rival parties. If there is, (for instance - license agreements, technology agreements, trademark co-existence agreements), IP-specific arbitration clauses should be looked at;
- Is the matter of the dispute arbitrable? In IP disputes, the existence, validity, ownership, or scope of certain IP rights are preliminary questions to be resolved before the merits of a case can be determined. With regard to registered IPR (such as patents, utility models, trademarks, or designs), the question of whether such IPR has been lawfully registered by the authorities is typically resolved in front of the national courts and authorities.

Most IP disputes brought as arbitrations revolve around contractual issues. Contractual disputes are regularly regarded as being arbitrable in most nations, even if they are related to IPR. The area of IP disputes that attracts the objection of lack of arbitrability is further limited by the fact that only certain categories of IPRs are likely to be omitted from the scope of arbitrations. These rights are all those that revolve around the validity and existence of a registered IPR.

Currently, most IP arbitrations, particularly in the international realm, arise out of defined contractual relationships. A "defined legal relationship, whether contractual or not," usually suffices to bring about arbitration proceedings. As long as the

preliminary question could also be subject to a settlement between the parties, it is, generally, held that this question should be arbitrable.

Advantages of IP Arbitration

The territorial scope of IPR brings unique hurdles when it comes to enforcement. For instance, if a licensee breaches a worldwide patent licensing agreement, the licensor may have to initiate parallel proceedings in several jurisdictions where infringing activity occurs. Such parallel proceedings are expensive and tough to coordinate. The parties are also exposed to the risk of courts taking varying stands. Furthermore, a decision in one jurisdiction could harm the proceedings in other jurisdictions. Given these problems, a single international arbitration proceeding looks extremely attractive when compared to an array of local proceedings.

The detailed advantages of IP arbitration are:

- There's a single proceeding under the law determined by parties as opposed to multiple proceedings under different laws, with the risk of conflicting results;
- Parties can select the arbitrator(s) with relevant expertise and the ones who are specialists in the area of dispute;
- There is party autonomy;
- The relative speed of arbitration is much faster. Arbitration is premeditated to allow for set decision-making periods and is faster than court proceedings;
- Confidentiality is possible in arbitration. The dispute may contain technical or commercially sensitive information about products/services that are still in development;
- There is neutrality regarding national interests;
- There is minimal damage to the commercial relationship between parties;
- A single, uniform procedure is followed; and
- Arbitration has a binding effect (if the parties have previously agreed upon it).

The Scope of IP Arbitration in India

In India, what forms part of arbitrable subject-matter is determined as per the test laid down in the Booz Allen Case. The following two categories of disputes are thus inarbitrable in nature:

1. Disputes involving the adjudication of actions in rem as opposed to actions in personam, such as disputes relating to criminal offenses, guardianship matters, etc. (the first test of arbitrability);
2. Disputes arising out of a special statute, which are reserved for the exclusive jurisdiction of special courts, such as matters reserved for small causes courts (the second test of arbitrability).

There exist statutory remedies for infringement of copyright, trademark, and patent. As per the legislation, these remedies must be granted by courts. The statutory mention of courts, as a forum to grant these remedies, creates the primary obstacle in arbitrating IP disputes.

In the Mundipharma Case, the issue was whether a claim of 'copyright infringement' was arbitrable. The Delhi High Court held the dispute to be inarbitrable given that infringement of copyright is a statutory claim having definite statutory remedies that are to be granted exclusively by civil courts.

Later, in the Steel Authority of India Limited Case, a claim of 'trademark infringement' was held to be inarbitrable by the Bombay High Court, stating that, "the rights to a trademark and remedies in connection therewith are matters in rem and by their very nature not amenable to the jurisdiction of a private forum chosen by the parties."

The Eros vs. Telex case brought about the first positive change to this rigid trend. The respondent was allowed a copyright license to distribute the petitioner's films. The license contained a clear negative covenant that forbade the use of copyrighted films upon the termination of the contract. The respondent violated this term. Then, the petitioner brought about arbitration for 'violation of the contractual covenant' - a claim, although sourced purely in contract, still necessitated an infringement of copyright to be established.

The Bombay High Court held for the first time that it would be too broad, impractical, and against all commercial sensibilities to hold that the entire realm of IP disputes is inarbitrable. Hence, the court accurately observed the stance that that IP disputes arising purely out of contracts are arbitrable because they are actions in personam, i.e., "one party seeking a specific particularized relief against a particular defined party." Thus, the decision applied the first test of arbitrability. The court further went on to hold that a finding of infringement had to be made for establishing such a contractual breach and that an arbitrator was authorized to make such a finding of infringement as 'infringement' can only be in personam. Therefore, an infringement claim can now be determined by arbitration. The second test was rebutted in this case, stating that the law nowhere provides that the court is an 'exclusive' forum, and thus, arbitration should be allowed.

Since the Eros case, other IPR disputes that are primarily born out of such negative clauses in contracts have also been upheld as being arbitrable. So, as per the current position in India, there is no blanket ban on the arbitrability of IP disputes. Instead, arbitrability is decided based on the nature of the claims raised. Disputes of royalty, marketing, geographical area, and other terms of the license agreements, which are purely contractual, are arbitrable. However, a dispute of validity/ownership of an IPR should be decided by the court or assigned public authority since the dispute would result in a decision affecting the public's right to use the particular right.

Final Thoughts

Arbitration, as a means of dispute resolution, has emerged to be quite a successful effort. This trend has not only been observed in India but all around the world. With the onset of globalization, IPRs have also become more global and commercialized, which is apparent from the growing number of cross-border arrangements and agreements. Due to these agreements and arrangements, the request of IPR owners to deal with IP disputes at an international level is also growing. When parties seek machinery for dispute settlements, they regard their commercial interests as the main concern, and they desire the dispute settlement to be confidential, highly flexible, and effective so that their cross-border disputes can be solved without ruining their commercial rapport in the industry. Arbitration can very well be a preferred mode of solving IP disputes due to several reasons such as avoidance of parallel litigations, IPR experts deciding the matter, confidentiality, speed, flexibility, and finality.

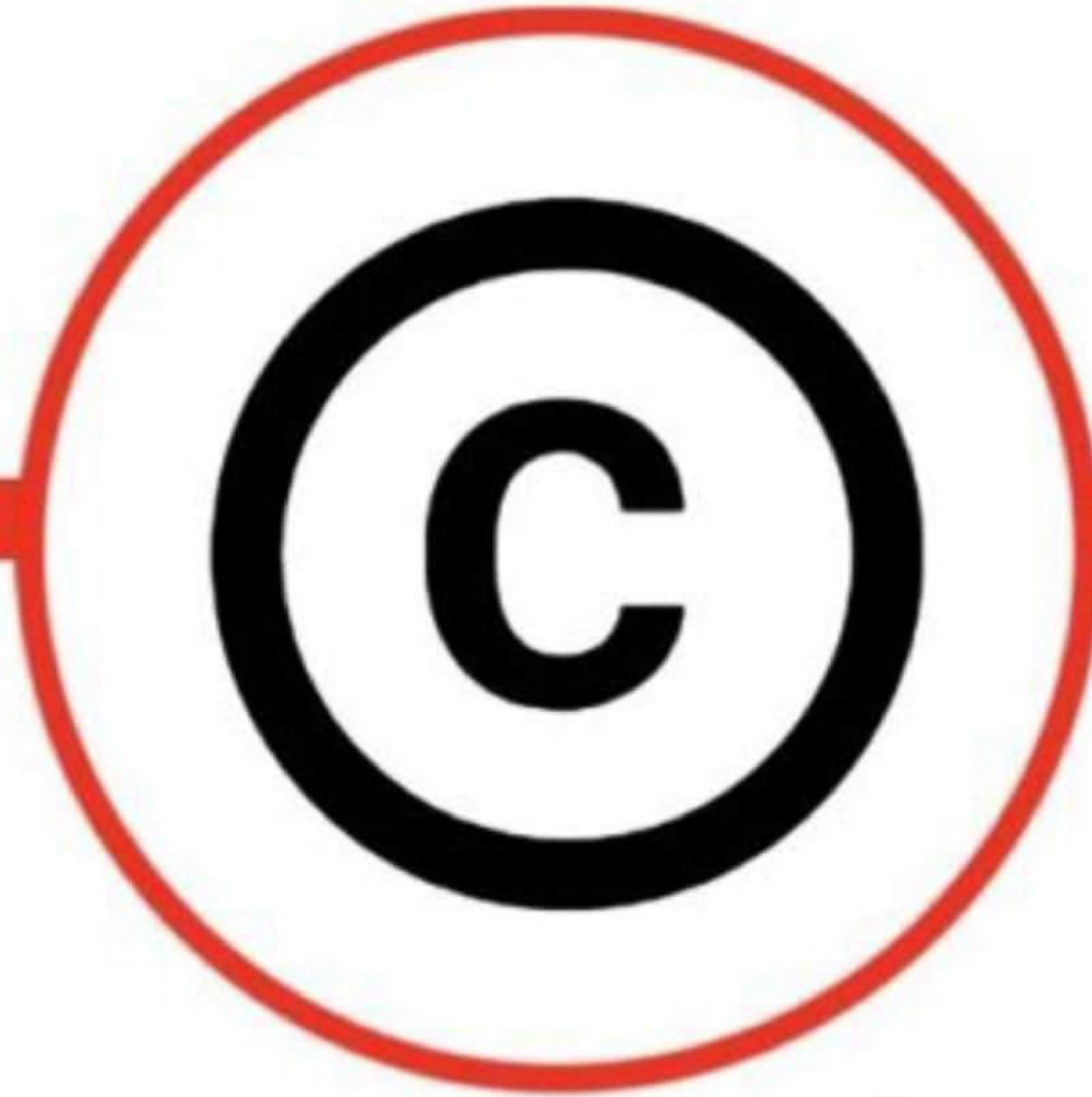
While arbitrating IP disputes offers numerous advantages, parties must plan well in advance to make the most of those advantages. At the start of any transaction, parties need to clarify their respective contractual IPRs and incorporate a well-drafted arbitration clause. Special consideration must be given to the issue of arbitrability, both when selecting the seat of the arbitration and when determining the probable place of enforcement. These issues may influence the specific form of relief to be demanded in an award. In conclusion, given the unique nature of IP disputes, in many cases, parties should be well advised to contemplate the selection of arbitration rules designed specifically for IP disputes, such as the World Intellectual Property Organization (WIPO) Rules or American Arbitration Association (AAA) Supplemental Patent Arbitration Rules amongst others.

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YouTube comes up with New Tools to Deal with Copyright Claims



IP: QUICK-HIT TREND PIECES



The widely-known online video-sharing platform, YouTube, has introduced three new tools, which shall help in resolving the copyright issues and claims and making the copyright holders feel more at ease.

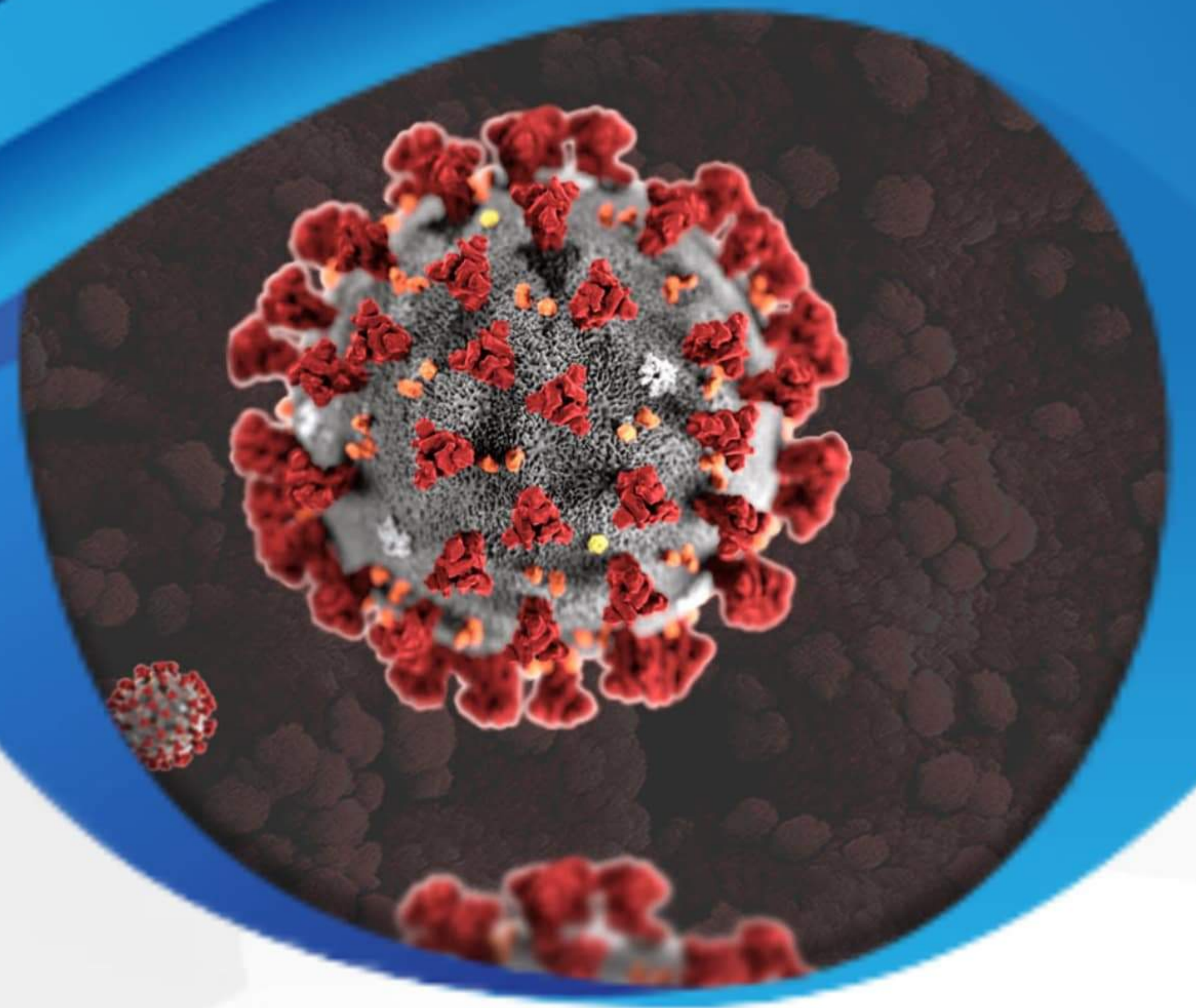
- The first upcoming change is that there will be adjustable endpoints, which you can use to trim audios or other forms of media that ended up in a copyright claim. The same implies that copyright infringement would not now lead to an entire video being taken down as the violated portion can easily be removed; thereby, resolving the entire issue.

- Secondly, there will be options to add/modify the audio content in your videos, which shall help you in replacing the copyrighted audio that you might have used in your video; in place of making that specific portion of your video silent.

- The final tool is, in many ways, a desirable addition, and it primarily involves an 'improved library.' The library consists of countless free-to-use audio tracks with no copyright restrictions. The creators wouldn't require going offline, finding a suitable editing tool, and uploading their video again. Moreover, they will also be able to add multiple tracks to replace snips and avoid copyright claims.



2020 FESTIVE SEASON ACROSS THE GLOBE : CELEBRATIONS WITH MASKS



It has now almost been a year into the pandemic, yet it seems as if there are no signs of the same stopping. Most of the nations worldwide are still experiencing a surge in the number of cases. And now, as the festive season is around the corner too, Coronavirus cases are expected to increase further since people will be seen stepping out of their homes for shopping, visiting relatives and friends, and gathering in large numbers at public places.

In general, COVID-19 spreads from one person to another via the respiratory droplets. When it comes to crowded and poorly ventilated spaces, the possible chances of the airborne transmission of this infection are undoubtedly high. Therefore, without any second thoughts, the more number of people a person gets in touch with at a gathering, the closer shall be the physical interaction, and the higher shall be the risks of the virus spreading.

Taking all these aspects into consideration, many countries around the world have issued strict guidelines to contain the spread of the virus during the festive season. These guidelines draw attention towards stern adherence to protective measures, including wearing masks, following the physical distancing norms, and maintaining hand hygiene and respiratory etiquette.

One can't deny the fact that people across the globe do gear up

for the festive season. They consider it as the best time of the year, and why not? After all, it's the time when people get to visit their near and dear ones, eat festive food, exchange food and sweets, and celebrate the small things. While giving utmost importance to health and safety, people can still enjoy this year's festive season. People should follow all the precautions for COVID-19 prevention, refrain from eating outside, avoid greeting others by shaking hands, stop assuming anything about the virus, and not ignore their symptoms.

It is a matter of fact that yes - if all the suggested precautions are not duly taken, the Coronavirus cases may double once the festive season gets over, which shall, in turn, be a setback to all the efforts taken to contain the spread of the virus.

The ongoing situation of crisis should make each one of us take a minute to think about our health and coming future. Remember, it should not only be the government but we too, as citizens, who should come up and share the responsibility of controlling the pandemic.



Widely-Known Examples of SEPs



1. Federal-Mogul produces pistons (shown below) for several different automobile manufacturers like BMW, Maruti, etc., which are produced at standard sizes with slight variations depending on what their exact use will be.

2. All television sets have standards they follow like the screen resolution and the kind of ports/slots like HDMI port, USB port, audio extensions, and internet accessibility devices.

3. As per the European Commission, more than 23,000 patents have been designated as being essential to GSM and 3G standards.

The Intrinsic Conflict of Balancing Private Rights against Public Access

The key issue with SEP is its inherent conflict with the IP regime since patent thrives on the idea of excluding the competitors from exploiting the patented technology. License seekers often accuse SEP-holders of charging exorbitant royalty fees regardless of the actual strength of the patent portfolio standardized and also administering litigation threats on innocent users. On the contrary, SEP-holders allege that users disregard the good faith in negotiating licenses and flout the terms of licenses out in the open.

In Europe, SEPs are regulated by SSO like European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC), or through consortia's. Certain rules and frameworks are operating within the EU concerning SEP, which seek to provide an irrevocable commitment from SEP-holders in writing to offer to license their essential IPRs to all third parties on fair, reasonable, and non-discriminatory terms ('FRAND' commitment), which should be given before the adoption of the standard. The court is also vigilant enough, as could be observed in the case of Apple Inc. vs. Motorola, Inc. since the SEP was not enforced overseeing the right of the junior right holder. These intricacies highlight the importance of even the meagre baselines and the involvement of the Commission in seeking solutions to the roots to facilitate the development of SEPs.

Similarly, in the US, the patentee is bound by its commitment to the SSO's licensing policy through its submission of a letter of

assurance abiding by the obligation to license the SEP under FRAND terms to any party. Furthermore, a calculative step is involved in assessing the rates of royalties. For example, according to the Federal Circuit, the necessary apportionment ought to be performed, which firstly includes the patented feature to be 'apportioned' from all of the unpatented features reflected in the standard and secondly, the patentee's royalty to be premised on the value of the patented feature, not any value added by the standard's adoption of the patented technology.



These steps are necessary to ensure that the royalty award is based on the 'incremental value' that the patented invention adds to the product, not any value added by the standardization of that technology. Also, Section 5 of the Federal Trade Commission Act of the United States enforces the prevention of the use of "unfair methods of competition in or affecting commerce." It made recommendations to courts to deploy the 'hypothetical negotiation framework' for analyzing royalty rates for patents subject to FRAND.

India's Standpoint on the Issue



However, in India, the SEP jurisprudence is still in the blooming stage, as witnessed after the tiff between the Competition Commission of India (CCI) and the High Court. SEP falls under the scrutiny of Section 4 of the Competition Act, 2002 that speaks of abuse of dominant position for which the CCI has set a very high threshold. SEP holders often enter into NDAs to prevent the competitors from discovering license rates, which CCI observes to be creating a hindrance in having a fair-trade environment. The CCI and the Indian courts have differed on the method to calculate FRAND royalty rates. CCI's approach uses the Smallest Saleable Patent Practicing Component (SSPPC) while the courts accept Ericsson's use of the 'net price of the Downstream Product.' As a result, the different approaches of CCI and the courts over FRAND royalties have led to differing outcomes in SEP disputes.

The Probable Solution and Concluding Remarks

As observed above, stalking of royalty is an issue due to which it becomes crucial to determine the measures to be adopted to ensure fair pricing. Therefore, firstly, as also stated by the CCI, Non-Disclosure Agreements should be treated as a prima facie case of abuse of dominant market position as they act as a barrier to free trade, which in today's global economy, is unacceptable for both the consumers and opponents in the industry. It may be used to hide the licensing cost and royalties that may be levied from one hindering in the determination of the actual fair price or minimum price. Secondly, if not, the maximum and minimum rates of royalties should be disclosed before entering into license agreements. In the light of the prevalent Indian economic scenario where the government is undertaking ambitious projects like 'Make in India' and 'Digital India,' it is imperative to stabilize the judicial trends and create a baseline for executable guidelines for hatching confidence and certainty in the minds of those looking to invest in India. Furthermore, it is suggested that the judicial pillar of the nation should refrain from relying on Chinese decisions corresponding to issues about SEPs since they take a protectionist stance inclined towards the proprietor of such technology, which goes against the principles of non-discrimination and FRAND, widely advocated for in international trade affairs.

2:- THE ROLE OF TRADEMARK IN CULTURAL APPROPRIATION

We have seen countless instances where massive public uproar emerged when brands have come up with merchandise that 'borrowed' elements from different cultures. WIPO defines 'traditional cultural expressions' as including "music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts, narratives, and many other artistic or cultural expressions." The role of a trademark in cultural appropriation is parallel to the two sides of a coin - on the one hand, brands try to protect their merchandise based on cultural elements with the help of trademark registrations, and on the other hand, it is the trademark law itself, which plays an important role in countering cultural appropriation.

What is Cultural Appropriation?

'Cultural Appropriation' can be described as the act by a member of a relatively dominant culture of taking a traditional cultural expression and repurposing it in a different context, without authorization, acknowledgment, and/or compensation, in a way that causes harm to the traditional, cultural expression holders.

Three characteristics emerge from dissecting the elements of the definition, which are as follows:

- A change of cultural context;
- A power imbalance between the taker and the holder; and
- The absence of the holder's involvement.

Instances of Cultural Appropriation

• In 1994, Disney applied for a trademark on the Swahili language phrase 'Hakuna Matata,' which was eventually granted. In 2018, thousands of people signed an online petition, which decried the grant of this trademark as yet another act of cultural appropriation, colonialism, and robbery and termed it as "an assault on the Swahili people and Africa as a whole."

• American Sportswear Company Nike printed patterns from the traditional Samoan male tattoo called "pe'a" on women's workout leggings. Following a public uproar disapproving of the disparaging and offensive use of "pe'a," Nike withdrew the leggings from the sale and officially apologized.

- In May 2019, Nike's announcement to sell special edition 'Air Force 1 Puerto Rico' (as shown below) sneakers adorned with mola patterns originating in the Guna culture of Panama (and wrongly attributed by Nike to Puerto Rican culture) was fiercely opposed by representatives of the Guna people. Once again, this led to Nike canceling the launch of sports shoes.



- In 2015, UK fashion brand KTZ copied a traditional "Inuit" parka design (as shown below) onto a men's sweater with a steep price tag of USD 700. After criticism, KTZ took down the sweater from the sale and apologized for the unintentional offense but did not offer any financial compensation to the Inuit community that had developed the traditional parka design.



The Role of Trademark Law in Curbing Cultural Appropriation

The basic idea behind trademark law is to avoid consumer confusion about the source of product or service identified by the trademark and to protect the goodwill that the trademark owner has built in the mark. For being valid, a trademark needs to be distinctive enough to perform its two-fold identifying and distinguishing functions. A mark such as 'Kimono' cannot be registered for a traditional 'Kimono' dress since it is descriptive, i.e., it describes the goods. It is one kind of safeguard against the complete appropriation of cultural symbols in the form of trademark registration. However, variations and alterations of cultural names and symbols need some more protection apart from this.

Collective Marks and Certification Marks are tools under the trademark law when it comes to countering cultural appropriation. A collective mark is one that is used by the members of a group or organization and can either be an indication of membership in the organization or group or the products or services provided by the organization. A collective mark is owned by the group and can be used by its members. Importantly for affected groups seeking to contest cultural appropriation, the organization owning the mark need not offer goods or services identified by the mark but may be used by members to indicate membership in an organization.

A certification mark is used as a certification or guarantee of certain features, characteristics, or attributes of the goods or services it identifies. Certification marks are typically used in connection with a specific product type, regional context, or workmanship origin. By way of comparison, collective marks have an advantage over certification marks in that they need not act as a certification or guarantee of a standard or quality but can potentially act as trademarks. Certification marks, on the other hand, cannot function as trademarks but may be easier to register because they do not require proof of secondary meaning when used as an indication of geographic region or a cultural attribute.

In the US, the trademark law provides specific tools at the USPTO level and in courts for the affected groups to fight cultural appropriation, including opposition proceedings, cancellation proceedings, and infringement actions. The initiator of opposition or cancellation proceedings need not own or use the challenged mark. Affected cultural groups can bring challenges based on the trademark falsely suggesting a connection with persons, institutions, beliefs, national symbols, or the name, portrait, or signature of a living cultural individual. Such mechanisms are available in India as well.

So, the best option for safeguarding cultural elements from misappropriation in the form of trademark registration is to use tools under the trademark law itself, such as filing an opposition, cancellation, infringement suit, or collective mark according to the need of the particular case.

- Recently, celebrity Kim Kardashian received a wave of backlash on social media against the decision to name her new shapewear line 'Kimono,' which is also a traditional Japanese robe garment. Ultimately, she gave up the name and relaunched the brand with a different name.

- Urban Outfitters used the mark 'NAVAJO' and the tribal patterns of the Navajo tribe on a collection of clothing, jewelry, designs, amongst other things. Ultimately, a settlement was made, wherein both sides entered into a 'supply and license agreement.'



Nexus between Cultural Appropriation and Trademarks

In the trademark domain, culture and trademarks have always had a tricky relationship. Western and European-centric fashion labels have historically been alleged of copying traditional designs, music, dances, and hairstyles for their use and profit while the minority groups from whom they appropriated did not even get an acknowledgment. Thus, brands need to be more sensitive and conscious than they have ever been when it comes to applying trademark to a print, shape, design, slogan, or concept that is linked to a specific set of values, expressions, and/or ethos of a group of people.

Appropriating cultural symbols in the form of trademark registration has been attempted on several occasions. In the 90s, India had to contest a persistent battle against some American businesses to protect the name 'Basmati' rice despite the critical claims to GI-tagging. An American company managed to register trademarks 'Kasmati' and 'Texmati for "basmati type aromatic rice," and it took the Indian government a lot of legal expenditure and cross-country effort to protect Basmati rice. The words 'khadi' and 'yoga' have seen clashes as well. German company Khadi Naturprodukte almost secured an EU trademark on 'khadi,' and it took a huge legal battle to disprove the foreign company. The USPTO has reportedly registered 150 yoga-related copyright, 134 trademarks on yoga accessories, and 2,315 yoga trademarks.

Best Practices for Avoiding Cultural Appropriation

To avoid appropriation of culture, brands can still use cultural expressions with the help of the following practices:

- Understanding and respecting the holders of traditional cultural expressions;
- Respectful transformation and reinterpretation of traditional cultural expressions;
- Acknowledgment and recognition of the holders of traditional cultural expressions; and
- Engagement with the holders of traditional cultural expressions through requests for authorization and collaborative partnerships.

Instances of brands actively collaborating with holders of traditional cultural expressions are many; for instance, the luxury fashion brand Christian Dior presented the Cruise 2020 collection, which is a reflection of the growing awareness in the fashion world about respecting diverse cultures. The collection honored the creativity and skill of African creators of wax print fabrics made by Uniwax, a company based in Abidjan, Ivory Coast, which is one of the few fabric manufacturers still using traditional methods.

Canadian winter-clothing manufacturer, Canada Goose, launched a collection of exclusive parkas as part of its 'Project Atigi' collection (Atigi means "caribou parka with fur inside" in Inuktitut, the language of the Inuit). The collection features the designs of one-of-a-kind traditional parkas from fourteen Inuit seamstresses from nine communities across the four Inuit regions. The custom-made parkas are unique and made using traditional skills and designs combined with modern Canada Goose materials. The proceeds are intended to benefit the national Inuit representational organization Inuit Tapiriit Kanatami.

Therefore, the key takeaway for brands, celebrities, and entertainers is that choosing a name resultant from another culture involves more than just establishing whether it is available and registrable under a nation's trademark law. Deliberation should be given to cultural sensitivities and the probable reaction in the market to whether the name will be considered offensive or inappropriate and eventually bad for business. Further, if at all merchandise with cultural elements are launched, it should be a collaborative effort, giving due recognition and compensation to the culture without disrespecting it in any manner.

3:- THE SURFACING ISSUE OF SOCIAL MEDIA COPYRIGHTS AND THEIR INFRINGEMENT

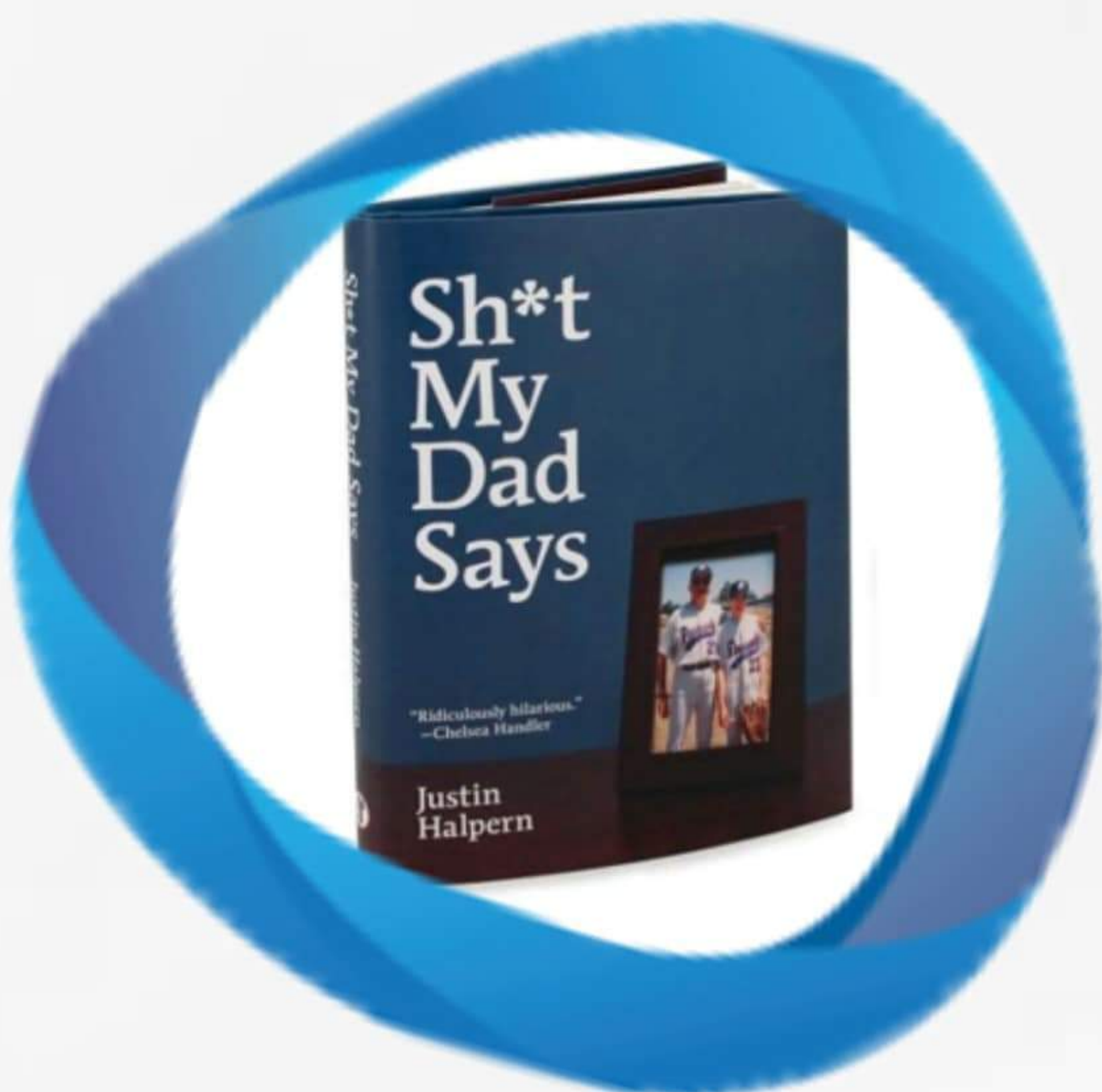


If there's one place where the world is, it's on social media. It is estimated that a total of 45 percent of the world's population utilizes social media, accounting for a minimum average of 136 minutes per day spent thereon. To define social media is a difficult task since it encompasses within itself dynamic platforms capable of rapid evolution. In most general terms, it is

an online app-based communication tool to share user-generated content. With the ever-changing nature of social media through continuous participation and majoritarian involvement, it becomes crucial to uncover the legal realities emerging out of such use since the traditional notion of 'publication' and 'circulation' has undergone a massive change.

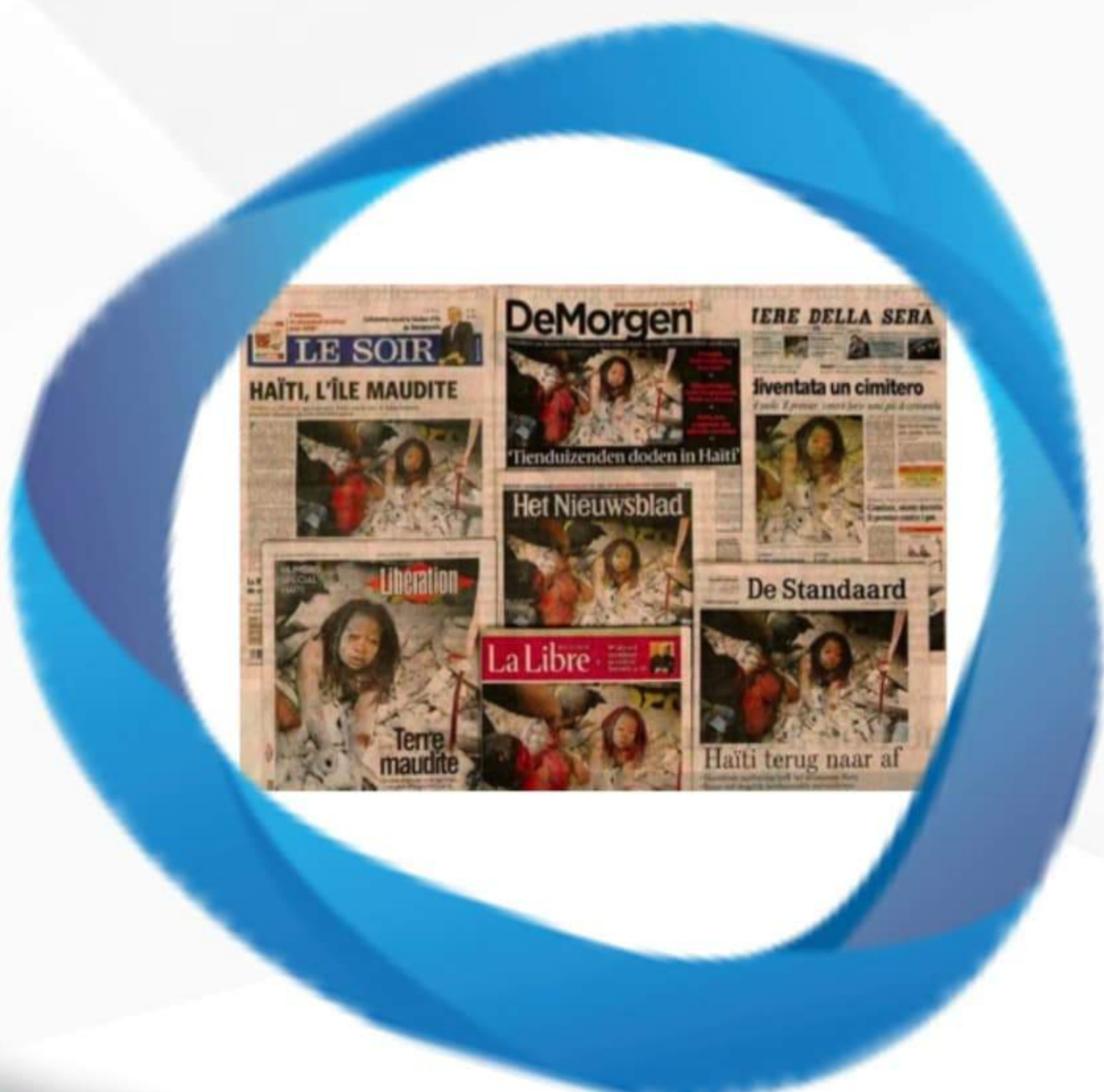
Who Owns the Content Uploaded on Social Media?

It is usually understood that everything accessible on social media is up for grabs since it lies on the internet, that is, a part of the public domain, which may, however, not always be true. The same is an important issue since there is an involvement of multiple parties; the viewer, the user, the author, and the intermediary. When an original content comprising of art, literature, photographs, music, or computer program is created, the authorship reigns in favor of the creator/ producer of the work. However, when the same is uploaded on social media, it could have varied implications since access to such platforms is generally regulated by the terms of service or licenses, which we often turn a blind eye to while clicking on the 'OK' tab when the agreement pops-up. These are usually "non-exclusive, royalty-free, transferable" in nature. Let us consider a few examples for further clarification.



The Infamous Twitterati and Copyright

Twitter imposes a strict word count of 280 characters (earlier 140), which is not as sizable as the content within a book or a magazine. Therefore, to seek copyright protection upon such tweets or strings of tweets may be difficult since they might not make up for the standard of 'originality' as may be needed since most of them comprise of facts and statement of realities. Thus, the threshold for proving the 'originality' of such content is very high; hence, as quoted, it may be arduous to seek copyright in this case; but, it isn't impossible. Examples of a few tweets that later took the form of books are Charlie McDowell's book, "Dear Girls Above Me," and Justin Halpern's book, "Sh*t My Dad Says."



Twitter's updated terms of service state that "The Content is the sole responsibility of the person who originated the Content." However, since Twitter is DMCA compliant (Digital Millennium Copyright Act), it withholds the right to remove the content that violates the User Agreement or which infringes upon the content of another suo motu or after the due filing of an online report. In a landmark case - Daniel Morel vs. AFP/Getty Images - the plaintiff's pictures of an earthquake struck area posted on Twitter were sold by the press agencies, without due accreditation and authorization of the author. The Federal Jury decided in favor of the photographer-plaintiff and ordered the agencies to compensate \$1,200,000 for the infringement caused by taking undue advantage of the content.

Pinterest: The World of Imagery & Copyright

Just like Twitter's terms of service, Pinterest also makes it amply clear that the user-generated content is the sole responsibility of the one who posts it. Also, Pinterest withholds the right to "remove or modify" and even "change the way it's used in Pinterest" for any reason, which opens the room for subjective interpretation. The same connotes to the fact that no social media provider acting as an intermediary or a facilitator is liable for the acts of its users since they bind the participants by a specific 'User Agreement.'

One aspect to keep in mind while using such platforms is that if the content you use by honest 'embedding' is breaching the copyright law, i.e., of an imposter of the actual author, then you too have infringed upon the copyright law. Therefore, careless embedding can also cost you handsomely.

Facebook & Instagram: The People's Place & Copyright

The 'Terms of Use' for Facebook and Instagram are the same, which give one the exclusive rights of ownership over his/her content but also grant a license to FB/Instagram to use it. This license is "non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content," which terminates when the content is deleted. Therefore, 'reframed' images do not amount to infringement as they are subject to the license. We shall be dealing with a recent judgment concerning how legally embedded content does not amount to infringement in the section dealing with fair dealing. Furthermore, Instagram may use the content as it wishes; also, it may license the content to third parties.

Since Facebook is one of the most used social media platforms, some issues have emerged from disproportional exploitation of Facebook. Much recently sprung a case in the Indian soils, namely Fairmount Hotels Pvt. Ltd. vs. Bhupinder Singh (2018), wherein Justice Manmohan Singh sided with the plaintiff. Here, the defendant had unethically utilized the pictures of the plaintiff's hotel in Manali to promote a new venture of his hotel by posting them on Facebook to lure innocent customers. The Honorable High Court granted a permanent injunction against the unauthorized use of the plaintiff's pictures and a cost of Rs. 50,000/- to be paid by the defendant. This judgment enhanced the scope of the provisions mentioned within the Copyright Act by including 'photographs posted online' within the purview of section 2(c) that defines the ambit of 'photographs.'

Snapchat Filters & Bitmoji

Snapchat's terms of using the platform lay down that its services shall not be used to violate another's rights, including the Intellectual Property Rights. It also clarifies that it is DMCA (Digital Millennium Copyright Act) compliant, and therefore, any activity contrary to the law shall result in 'reasonable steps' to terminate the user's account. It facilitates easy removal of content through an online tool, and alongside, it establishes a redressal mechanism through its designated agent with whom a notice may be filed; however, it shall incorporate all requisites mentioned in 17 U.S.C. § 512(c)(3).

Also, any commercial or exploitative use of Bitmoji, a feature for personalized cartoons, is not allowed as the rights are reserved on Snapchat. Although Snapchat allows screenshots, in its terms, it clearly states that a user shall not use (upload, post, send, store) the infringing content unless permission is obtained from the actual copy owner.

Permissible Use of Social Media Content - Fair Dealing

Copyright seeks to strike a balance between safeguarding the interest of the author of the work by granting commercial and moral rights on the one hand and securing public interest through capping these exploitative rights of the author and permitting fair dealing of the work on the other. Generally, the ambit of fair dealing is incorporated within the legislation, itself, like, in Section 52 of the Copyright Act, 1957, USC 17 Chapter 1, and S. 107 of the US Copyright Act, etc. to include the following as a list of exceptions to copyright infringement-



- Academic purposes (research, studying, and so on)
- Fair criticism or review
- Reporting (news reporting or of the like)
- Parody (comic or satire)

There are many factors, which need to be taken into consideration while determining whether or not a piece of work qualifies for the exclusion as 'fair dealing' of the copyrighted work. The court, in the case of Civic Chandran vs. Ammini Amma 1996 PTC 670 (Ker HC) 675-677, laid that the following points shall be considered by the court, and these points are in line with the four-factor test followed in the US:

- The quantum and value of the matter taken concerning the comments or criticism;
- The purpose for which it is taken; and
- The likelihood of competition between the two works.

The Berne Convention also throws light on the aspect of fair dealing of copyrighted works and fundamentally states that the exception is admissible subject to the following:

- "It covers special cases, it does not conflict with the normal exploitation of the work, and it does not unreasonably prejudice the legitimate interests of the author."

- Let us begin with a rather obvious suggestion. It is highly advisable not to make unauthorized use of the content generated by others.
- It is always imperative to verify the facts and legality while operating through a social media provider. To assume that everything falls in the public domain or to turn a blind eye on the subject-matter would not acclaim your innocence in court since ignorance of the law is no defense. The same stands true for social media intermediaries like FB, Instagram, Snapchat, amongst many others, as well. For instance, in the much recent legislation in the EU, i.e., the DSM Directive (Digital Single Market), in its article 17, imposes a licensing obligation on these providers to check their manner of self-regulation. One has to be aware of such legal nuances.
- If you do make use of another person's content, seeking permission is always a good option and comes in handy when acting in defense.
- Try to opt for authorized routes for using other people's content by 'embedding' links or at least giving due credit. It may not always help escape liability, but in an illustrative case of Sinclair vs. Ziff Davis, LLC (2020), the court sided with the infringer since he established that the case was of 'authorized embedding.' Here, even though Mashable (owned by Ziff Davis) tried to offer \$50 for a one-time use license, it was refused by Sinclair. Thus, he used the application programming interface (API) from Instagram to use the author's pictures under Instagram's authority. The sole reason behind the decision was that Sinclair was bound by the terms of service of Instagram, which allow unlimited sublicense. The judge acknowledged that

which allow unlimited sublicense. The judge acknowledged that in the absence of such terms, it would've been a case of outright infringement.

- While using another's content, check if the same is covered under a Creative Common (CC) License or not. Such works can be used without seeking permission for non-commercial endeavors, provided that the author is attributed, and no derivatives of the work follow from primary work, in which the CC License subsists.
- The defender of rights shall consider registration of his or her content for the copyright to extract maximum benefit since some jurisdictions require registration before perusing a suit for infringement, for instance, in the United States. Therefore, in the Gigi Hadid case, where she uploaded a paparazzi-clicked picture of herself on her Instagram handle, the paparazzi, Xclusive, failed to bring a suit against Hadid for her unauthorized use due to failure of registration of copyright. Earlier, Kim Kardashian had faced a similar issue.



Concluding Remarks

Since creativity emanating from social media is mostly technological-enabled creativity, the standard of originality is less. Therefore, it would be beneficial if courts prefer a higher threshold of originality to be proven in such cases to disallow frivolous copyrighting, which may stand against the fair-use principle. Considering the idea of ownership in such cases, where the content is composed of someone else and posted by another, the issue of ownership and joint ownership requires better elaboration, as we also observed in the Hadid case. From this article, it can be deduced that the copyright laws are sufficient to deal with the issues of social media; however, they may require a certain degree of the framework, extending especially in the domain of online media for better clarification of issues surrounding ownership and infringement.

The option of a click can open many doors; doorway to heaven or that of a prison cell. Therefore, to make an informed choice and equipping oneself with all the legalities of the issues that may originate from using social media platforms is nothing but essential. Social media is at the stage of infancy. Hence, its capabilities should be realized with careful and strategical use, considering the guidelines of its use and terms of liability that may spur from it.

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IP favors

IP Legislative Changes from Around the World - Featuring Mauritius



Here's what you might not be knowing about the 'IP Legislative Changes in Mauritius.'



MAURITIUS

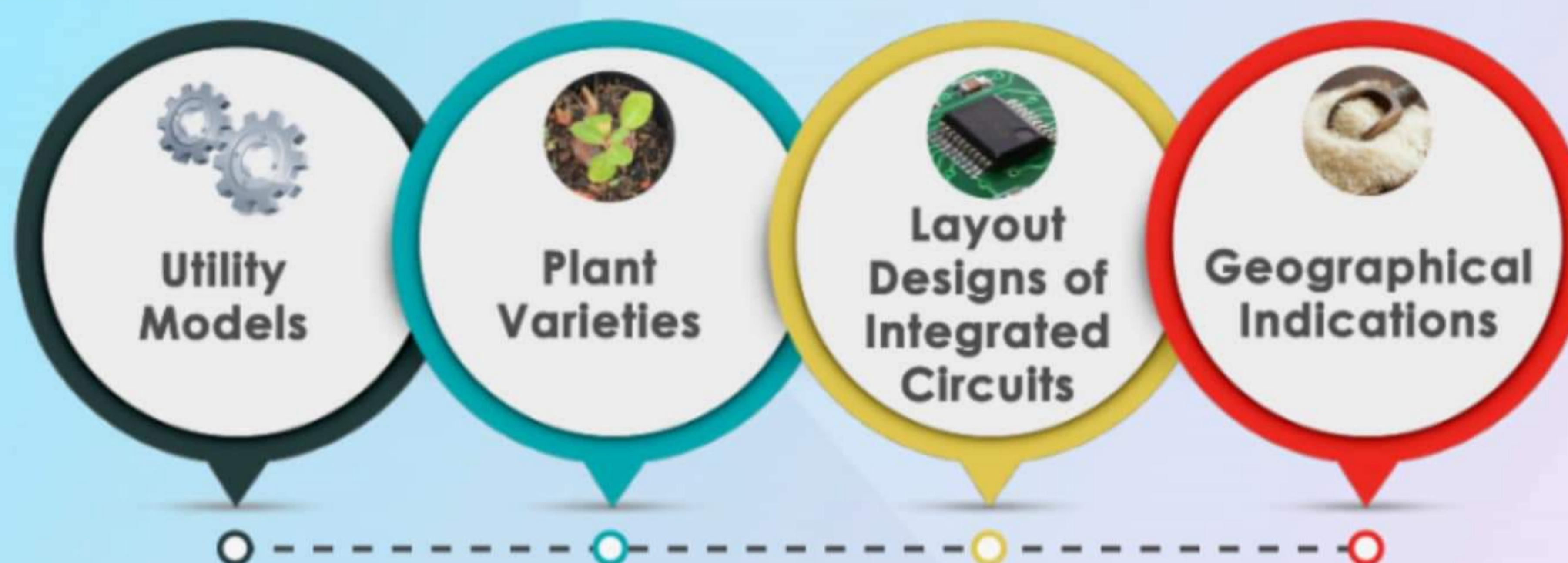


THE NEW INDUSTRIAL PROPERTY ACT OF 2019

The Mauritius Parliament passed the 'Industrial Property Act 2019' last year on 30th July, which received approval from the Interim President of the Republic of Mauritius on 9th August 2019.

The expected time frame for the enactment of the Act is January 2021.

For making the Mauritian Intellectual Property (IP) system more responsive to the needs of researchers, investors, and entrepreneurs, the Act extends protection to several new forms of IP, including:



The Act also makes provision for Mauritius to adhere to WIPO administered treaties, including:



Register with KIPG at mauritius@kashishworld.com for updates on the new Industrial Property Act 2019 (Mauritius).

KIPG Team will be pleased to extend the required assistance on all IP-related matters in Mauritius.

Follow us on LinkedIn for future updates on the Industrial Property Act of 2019 (Mauritius).

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FUN & GAMES

Motivational Quote of the Month

Intellectual property is the oil of the 21st century. Look at the richest men a hundred years ago; they all made their money extracting natural resources or moving them around. All today's richest men have made their money out of intellectual property.

-Mark Getty

How Well do you Know IP?

Test your IP knowledge by taking this 'True/False' quiz.

1. Industrial designs protect the IP created by artists.

A) True B) False

2. A trademark protects logos, names, and brands.

A) True B) False

3. Patents are usually granted for ten (10) years in most of the countries across the globe.

A) True B) False

4. Slogans aren't protected by copyright.

A) True B) False

5. Logos such as the 'Nike Swoosh' are protected by a trademark.

A) True B) False

6. Although IP assets have no value in the marketplace, they are still important for companies and firms as they are a result of human intelligence and inventiveness.

A) True B) False

7. Pirated CDs and DVDs fall under copyright infringement.

A) True B) False

8. Industrial design protection is automatic.

A) True B) False

9. Trademark protection can be legally obtained for sound, shape, colour, and motion marks.

A) True B) False

10. World Intellectual Property Day is celebrated on 27th April every year.

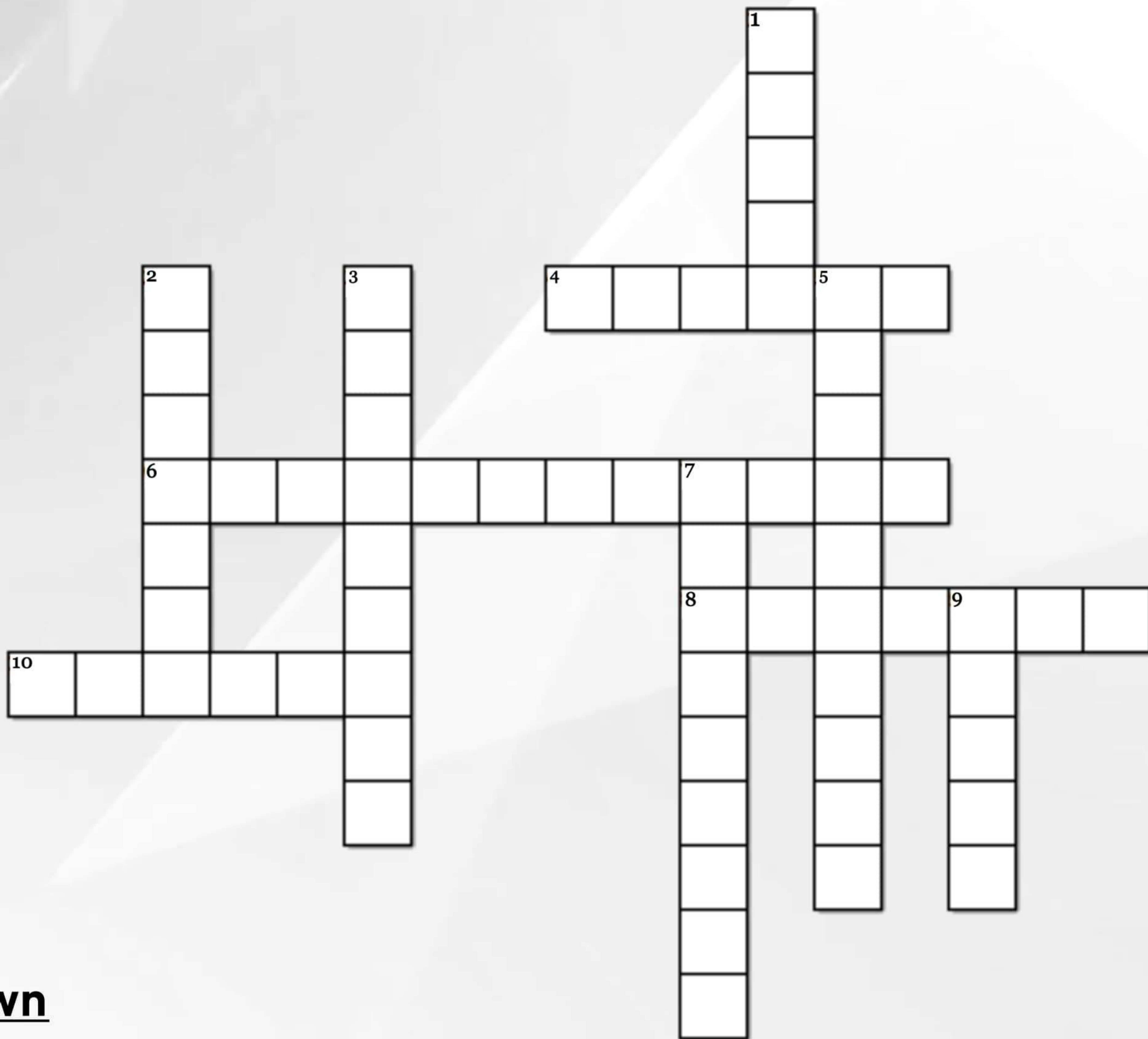
A) True B) False

11. IP audits should be conducted from time-to-time to make sure that the IP assets are well-protected and up-to-date.

A) True B) False

Crossword Puzzle on IP

Try to fill the crossword puzzle with the help of the clues given.



Down

1. The blue color of Tiffany and Co. is an example of _____ trademark.
2. Total duration of industrial design registration in India is _____ years.
3. If a company wishes to ensure that no individual or company can use its logo, it must apply for a _____.
5. A utility model protects _____.
7. If John comes up with a new novel, he'll most likely apply for a _____.
9. For an invention to be patentable, it must be _____.

Across

4. _____ System deals with international registration of trademarks.
6. The Coca Cola Company's formula for Coca Cola syrup is protected as a _____.
8. _____ usually last for twenty years.
10. The World Intellectual Property Organization (WIPO) has its headquarters in _____.



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