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UNPACKING THE ROLE OF INTELLECTUAL PROPERTY IN EMPOWERING THE MSME SECTOR OF INDIA

DR. ANKIT SINGH* & MS. PALAK RAJPAL**

ABSTRACT

Micro, small, and medium enterprises [“MSMEs”] have a substantial impact on India’s economy, contributing over 29% to the country’s Gross Domestic Product [“GDP”]¹. They are the backbone of developing economies worldwide, fostering innovation, and competition and driving development. The primary factor that can distinguish them from large multinational corporations is protecting their intellectual property. The authors, through this paper, attempt to navigate and explore the significance of various intellectual property rights [“IPRs”] in giving an edge to MSMEs in the market through exclusivity cultivated by IPR. The paper aims to highlight how IPR protection boosts profitability and promotes investments in research and development, encouraging innovation. Recognizing the importance of IPRs for MSMEs, the government of India has also significantly contributed by introducing programs and schemes for IPR promotion in MSMEs. However, in India’s rapidly changing dynamic market, most of the innovative endeavors of MSMEs and their brand identities are vulnerable and at risk of exploitation.

The paper, therefore, further acknowledges the challenges that are exclusively faced by MSMEs when it comes to the incorporation of intellectual property rights in their business operations. It underscores the overall role played by IPR in MSMEs and the challenges faced by them in leveraging and implementing IPR as a tool for growth and development. The authors attempt to consolidate the issues and challenges and suggest viable solutions to address and overcome these IPR-centric challenges in MSMEs not only in India but across the Indian subcontinent.

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¹ *What is MSME and its role in Indian Economy*, BAJAJ FINSERV (Sept. 14, 2023), <https://www.bajajfinserv.in/what-is-msme-and-impact-on-the-indian-economy>.

I. INTRODUCTION

MSMEs play a very vital role in sustaining the economy of a nation. Especially for the developing economies, their overall contribution has been of immense value. A World Bank report highlights that MSMEs are the backbone of the global economy, contributing over 50% of jobs and constituting around 90% of all businesses.² The supply and distribution chains, not only in India but also abroad, revolve around MSMEs. Intellectual property rights over time have become an inalienable part of businesses, big or small, because of technological change, reduction of the product cycle, competition, and increased investment in research and development [“R&D”], to name a few. Therefore, one method that can be used by MSMEs and startups to gain an advantageous position over others, is through the effective utilization of IPRs.³

IPRs play a pivotal role in safeguarding the fruits of such R&D endeavors. By securing patents, trademarks, and other relevant forms of IPR protection, MSMEs can prevent unauthorized imitation and exploitation of their intellectual assets. This not only incentivizes further innovation but also enables them to command fair market value for their unique offerings, ultimately contributing to their global competitiveness and market share expansion.⁴ Intellectual property is the creation of the mind, which includes within its ambit inventions, literary works, artistic works, designs, etc.

IPRs are rights granted to authors, creators, or inventors for their work. MSMEs more than often are based on unique ideas, creative concepts, and one-of-a-kind innovations, this uniqueness is a result of the human intellect, which can be protected through IPR.⁵ This means the competitive edge that an MSME has over other competitors in the market is protected by IPR.

MSMEs in India: Per a notification dated June 1st, 2020, the definition of MSMEs was updated by the Ministry of Micro, Small & Medium Enterprises.⁶ It classified the MSMEs based on investment in plant, machinery, or equipment & turnover as follows:

² Nayan Rawal, *Cheers Indian MSME For Intellectual Property*, INDIALAW LLP (June 22, 2021), <https://www.indialaw.in/blog/intellectual-property-rights/cheers-indian-msme-for-intellectual-property-ip/>.

³ P. Paramashivaiah & D N, *Role of Intellectual Property Rights for Transformation of MSMEs in Post COVID-19 Era* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789874.

⁴ Vinod Kapoor & Priya Nagpal, *Intellectual Property Rights and Small Medium Enterprises (SME's)*, 1 INT J. L. & LEGAL JURIS. STUD.

⁵ Ip Solution Advocates And Ip Attorneys, *The Importance of Intellectual Property Rights (IPR) for MSMEs: How it Can Benefit Your Business*, LINKEDIN (June 27, 2023), <https://www.linkedin.com/pulse/importance-intellectual-property-rights/>.

⁶ *What's MSME?*, MINISTRY OF MICRO, SMALL & MEDIUM ENTERPRISES, <https://msme.gov.in/know-about-msme>.

BASIS OF DIFFERENCE	MICRO ENTERPRISES	SMALL ENTERPRISES	MEDIUM ENTERPRISES
Investment	Not More than 1 cr.	Not More than 10 cr.	Not More than 50 cr.
Annual Turnover	Not More than 5 cr.	Not More than 50 cr.	Not More than 250 cr.

Source: Ministry of Micro, Small and Medium Enterprises⁷

MSMEs in India contribute significantly to the economic progress of the country. Nearly 40% of the labour force in India is employed by MSMEs and 20% of these MSMEs are based in the rural areas of the country.⁸ Apart from this, as per a 2017 report by the Ministry of MSMEs, there was a contribution of 30.74% to the GDP of MSMEs in India.⁹ In 2021, India was the third largest ecosystem concerning start-ups, with 21 unicorns.¹⁰ Hence, for India, the growing significance of the MSME sector is not new. But the question is whether the IP of these enterprises is accorded due significance or not.

To survive amidst the present cutthroat competition, they need to stand out. This can be done with the help of IPR. IPRs help keep rivals at bay, as IPR protection makes it difficult to copy or mimic the products and services of a company. It also opens up a new market ready to be accessed and empowered upon. This paper highlights the importance of IP in MSMEs and the present scenario of the same in India.

II. SIGNIFICANCE OF INTELLECTUAL PROPERTY IN MSMEs

There is a range of benefits that arise with proper identification and management of IP in MSMEs. They play a vital role in the expansion of businesses, and more than often it is advised that their IP is protected to open up opportunities of licensing to corporations in the future.¹¹ The importance of IP for MSMEs is as follows:

Exclusivity: In the competitive market, it is important to protect all assets. When it comes to intellectual property, there is always a chance of copying or reverse engineering. Protecting IP

⁷ *Id.*

⁸ Sonia Mukherjee, *Challenges to Indian Micro Small Scale and Medium Enterprises in the Era of Globalization*, 8 J. GLOB. ENTREP. RES. 28 (2018).

⁹ *Id.*

¹⁰ PTI, *India 3rd largest startup ecosystem; home to 21 unicorns: Ambassador to US*, BUSINESS TODAY (Jan. 6, 2021), <https://www.businesstoday.in/latest/economy-politics/story/india-3rd-largest-startup-ecosystem-home-to-21-unicorns-ambassador-to-us-283714-2021-01-06>.

¹¹ Sanjana, *Role of Intellectual Property Rights in Micro, Small and Medium Enterprises (MSMEs)*, IIPRD (Aug. 13, 2021), <https://www.iiprd.com/role-of-intellectual-property-rights-in-micro-small-and-medium-enterprises-MSMEs/>.

helps reduce the possibility of potential copying and IP thievery.¹² Corporations invest an enormous amount of money to get a monopoly in the market and earn maximum profits out of it. Similarly, for profit-gaining and expansion of business, MSMEs should plan and invest in intellectual property identification and management. In case an unauthorized party attempts to make use of the IP, there will be legal remedies available, given the IP has been protected by the enterprise. IP exclusivity directly leads to business growth.¹³ By having exclusive rights to use and commercialize certain products, businesses have the advantage of creating a barrier for competitors to enter the market. Exclusivity not only gives a monopoly in the market but also generates prospects of licensing & franchising.

Market Value: IP enhances the value of a brand or product in the market to a significant extent. It is a parameter which influences major sectors that make up a business unit including trade, transmission, and technology transfer.¹⁴ IPs affect the entire supply chain of any business. Big brands can attract customers and scare of imitation, these brand names are a form of intellectual property protected through trademarks and copyright. IP helps increase the total worth of businesses by contributing to the value of the brand and product. They facilitate gaining the required capital and assets crucial for surviving in the market in the present times when competition is at its peak. This safeguard benefits both the proprietor and the sector, while also offering encouragement for private companies to invest in their projects.¹⁵

Marketing: Various components make up the marketing campaign of a company. A strong marketing strategy helps boost product sales like no other tool. A significant number of these components are eligible for IP protection.¹⁶ These include (1) Commercial identity: which means the brand identity, i.e., brand name, logo, product name, etc. (2) Promotional Constituents: this includes the custom advertisements, original and unique designs of print ads and web pages, etc. (3) Other Creative Elements: like photographs, paintings, artworks, literary works, etc.¹⁷ Marketing includes a wide range of intellectual property rights like trademarks, copyrights, designs and, in a few cases, patents too. This also applies in another way, which involves incorporating IPs for

¹² Amrit Bidya Ventures LLP, *Why Intellectual Property Rights (IPR) play a pivotal role in any industry and the potential consequences if IPR is not registered on a case-by-case*, LINKEDIN (Aug. 14, 2023), <https://www.linkedin.com/pulse/why-intellectual-property-rights-ipr-play-pivotal-any-ventures-llp/>.

¹³ *Intellectual Property Rights Exclusivity And Business Growth*, IP BULLETIN (May 12, 2022), <https://ipbulletin.in/intellectual-property-rights-and-business-growth/>.

¹⁴ Rajnish Kumar Singh, *Role Of Intellectual Property Rights For SMEs: Need To Manage Knowledge*, 6(1) DLR 25 (2014).

¹⁵ IP Bulletin, *supra* note 13.

¹⁶ *Intellectual Property and Marketing: How Compliant Is Your Ad Campaign?*, ABOUT NAJA INTELLECTUAL PROPERTY (June 3, 2020), <https://abounaja.com/blogs/intellectual-property-and-marketing>.

¹⁷ *Id.*

marketing purposes. A new patented technology, a famous trademark or a unique artistic work has the potential to increase the sales of products and more than often benefits enterprises to a great extent.¹⁸ For instance, a trademark helps a company reap the benefits of the valuable goodwill that comes with it. Once a place is established for the trademark it takes roots in the minds of the public, helping in the growth of the business and sales of products associated with the mark.

Importance of Geographical Indication Protection for MSMEs: In developing countries like India, more than often Geographical Indication products ["GI"] are produced & preserved by local communities, except for a few world-famous GI products that are specially catered by statutory bodies established by the government, like Darjeeling tea.¹⁹ A GI tag on the product can work miracles for a product to gain popularity and demand. Quite often, GI ensures that the quality of the product is maintained, and people are ready to pay a premium price for the protected product.²⁰ MSMEs working with GI products are likely to benefit greatly from the reputation of the product. For instance, the incense market in India was mostly based in rural areas. However, the All-India Agarbatti Manufacturing Association realized the potential in 2005 and applied for a GI. Now, the current turnover of the association is increasing rapidly.²¹ It might not be an MSME, but nothing stops MSMEs from following the same path. Recognizing the potential of GIs and getting them registered is certainly a great way to expand businesses and enhance profits.

Investment: A company is valued for its present and future assets. Intellectual property works two ways: it attracts investments, and it also acts as an investment for the future. IPs can attract potential investors. It can be done by giving stakes to the investors in the profits that might arise from the monopoly and exclusivity that is ensured by an IP. A strong IP portfolio has a 75% higher probability of attracting investments.²² IP plays a crucial role when deciding upon an investment opportunity. IPs are themselves an investment too, for instance, probable patents are nothing but an investment for the company's progress.²³

¹⁸ Jodie Byass, *Why Intellectual Property is Crucial to your Brand's Marketing Success*, SIMPLE, <https://www.simple.io/blog/intellectual-property-crucial-brands-digital-marketing-success>.

¹⁹ Stseo, *Geographical Indication (GI) Protection Darjeeling Tea*, SOURCE TRACE SYSTEMS (2016), <https://sourcetrace.com/blog/protecting-gi-darjeeling-tea/>.

²⁰ *Why Geographical Indications Matter to SMEs*, WORLD INTELLECTUAL PROPERTY ORGANISATION, <https://www.wipo.int/sme/en/geographical-indications.html>.

²¹ Mini Tejaswi, *India's Incense Sticks Industry Expects 15% Growth in Exports, Domestic Sales*, THE HINDU (Sep. 28, 2021), <https://www.thehindu.com/news/national/karnataka/indias-incense-sticks-industry-expects-15-growth-in-exports-domestic-sales/article36708555.ece>.

²² Eduardo Fischer, *IP Strategy For Startups That Want To Attract More Investments*, LINKEDIN (Oct. 20, 2023), <https://www.linkedin.com/pulse/ip-strategy-startups-want-attract-more-investments-eduardo-fischer-ykxxe/>.

²³ Rajnish Kumar Singh, *supra* note 14.

Robust IP protection is vital for MSMEs to succeed and make a place for themselves in the market. They facilitate growth and ensure profits. With the growing importance of IPR in the commercial world, MSMEs must adopt strategies to protect their IP. However, various issues are unique to MSMEs when it comes to IP protection. The next part of the paper discusses the same.

III. INITIATIVES BY THE GOVERNMENT

The Government of India realized the importance of IP for MSMEs and has diligently worked on improving its condition. For instance, the Ministry of Electronics and Information Technology has always promoted and supported innovation, understanding its need and significance for businesses. The ministry acknowledges and invests in measures encouraging research and development.²⁴ There are multiple initiatives that the Ministry has taken to help incorporate IP in small businesses:

- 1) Establish a Centre that excels in studies and research relating to intellectual property rights.
- 2) Scheme providing financial support in IP filing to start-ups and SMEs.
- 3) Awareness Programs.

Further, in 2010, as a part of the National Manufacturing Competitiveness Program there were guidelines by the Government of India for the “Implementation of the Scheme Building Awareness on Intellectual Property Rights for Micro, Small and Medium Enterprises”. This aimed towards improving competition in the MSME sector and expanding the market for these enterprises through the inclusion of Intellectual Property.²⁵

Another important scheme is the MSME Innovative (IPR), which aims to improve a comprehensive IP-driven culture, spread awareness, and protect ideas and innovation.²⁶ Under this, “Intellectual Property Facilitation Centers” were established. Fees for registration for IP are reimbursed to MSMEs, among other benefits. MSMEs if registered under Udyam, can claim assistance up to 5 lakhs rupees depending upon the type of IP and kind of registration they seek – national or international.²⁷ Udyam registration is a compulsory certificate awarded by the MSME Ministry when an MSME signs up on the official government portal. An Udyam registration

²⁴ *IPR Initiatives*, MINISTRY OF ELECTRONICS & INFORMATION TECHNOLOGY, <https://www.meity.gov.in/ipr-initiatives#:~:text=Some%20of%20the%20major%20initiatives,Filing%20through%20SIP%20DEIT%20Scheme.>

²⁵ *Id.*

²⁶ *About Scheme*, MSME INNOVATIVE (IPR), <https://innovative.msme.gov.in/Home/AboutIpr.>

²⁷ *Id.*

certificate can prove to be beneficial while securing loans and benefits provided under government schemes targeted to benefit MSMEs.²⁸

IV. CHALLENGES FACED BY MSMEs REGARDING IPRs

Innovation gives MSMEs a distinct standing in the market and hence, it becomes important to safeguard their intellectual property. However, it is not achieved easily, multiple challenges are faced by MSMEs when dealing with IPR. Good management requires technical support and experts from the department to get effective results.²⁹ The following challenges are specific to IP and are faced by MSMEs:

Identification of Different Intellectual Properties: MSMEs are heterogeneous groups, which means that they are often involved in various activities ranging from production to distribution. The type, quality, and quantity of work done by each differs from place to place. Their innovative capabilities also differ vastly, they develop and produce different results.³⁰ In the areas of commerce that deal with technical sectors, most of the MSMEs highly rely on licensed patents for either future research & development or production of their products.³¹ It takes these enterprises a lot of time to come up with their own patents. In such situations, it becomes necessary to give equal importance to other intellectual properties.³² However, more often than not, MSMEs are not aware of them or do not consider them as important as patents. Intellectual properties such as trademarks, copyrights, and designs that can give the required competitive edge are not given the due importance that they deserve. Neither are these IPs identified, nor protected, therefore failing to be of any use to the businesses.³³

Lack of Awareness: This is the most common issue faced by MSMEs irrespective of the sector to which they belong. Businesses can fail to realize the importance of intellectual property, causing them to overlook chances to boost profits, expand their market presence, and diversify their risk.³⁴ Many small and medium enterprises [“SMEs”] in India are reportedly losing millions in revenue

²⁸ *Udyam Registration Certification: Benefits, Eligibility & Guidelines*, IIFL FINANCE (May 27, 2024), <https://www.iifl.com/blogs/business-loan/what-is-udyam-registration-and-its-benefits>.

²⁹ Sati-Salmah Sukarmijan & Olivia De Vega Sapong, *The Importance of Intellectual Property for SMEs: Challenges and Moving Forward*, 1 UMK PROCEDIA 74 (2014).

³⁰ Rajnish Kumar Singh, *supra* note 14.

³¹ *Id.*

³² Vinod Kapoor & Priya Nagpal, *supra* note 4.

³³ *More than just 'Patent Protected': How Intellectual Property (IP) can fuel collaboration and growth*, HGF (May 2024), <https://www.hgf.com/news/more-than-just-patent-protected-how-intellectual-property-ip-can-fuel-collaboration-and-growth/>.

³⁴ *Top 10 Intellectual Property Challenges Businesses Face in 2022*, ABOU NAJA INTELLECTUAL PROPERTY (Feb 2, 2023), <https://abounaja.com/blogs/intellectual-property-challenges>.

due to a lack of understanding about IPRs. India receives approximately 40,000 IP applications every year, with 85 percent of these being filed by multinational corporations and a significant number being filed by SMEs.³⁵ Some enterprises simply do not file for registration as they are not aware of the benefits that it might seek or think that the registration prices might be high. Registration prices for MSMEs and startups have already been reduced by the government, yet they are not aware of these benefits, making it difficult for them to value and use their IP effectively.³⁶

Lack of Experts: One of the main obstacles that emerging MSMEs face in relation to intellectual property is the absence of experts within their teams. Developing effective IP strategies and managing intellectual property requires a range of specialized skills, including legal expertise, scientific knowledge, human resource management, support from relevant institutions, and technical assistance. These elements collectively form the foundation of these MSMEs, but they often lack proficiency in these areas, creating a significant challenge. As a result, the financial resources needed to fill this gap become unattainable for these MSMEs.³⁷ Most of the processes involved, from identification of IP to applying are not a layman's work, a thorough understanding of the area is required. For instance, it has been observed that MSMEs in India have a low patenting rate, one of the reasons being the lack of experts.³⁸

Combating Piracy and Counterfeiting: Entrepreneurs often face significant challenges in addressing the issues of counterfeit goods and piracy. Counterfeiting and piracy have a detrimental impact on commerce and public welfare, as well as eroding trust in the quality of branded products, leading to substantial losses in revenue, investment, future sales, and growth opportunities.³⁹ Furthermore, they also adversely affect legitimate businesses and the employees who are integral to creating, producing, distributing, and selling authentic products. Moreover, infringing products are frequently of inferior quality, posing various risks to consumers, including serious threats to their health and safety.

³⁵ Komal Amit Gera, *Low IPR Awareness Costing Indian SMEs Heavily*, BUSINESS STANDARD (Aug. 6, 2013), https://www.business-standard.com/article/sme/low-ipr-awareness-costing-indian-smes-heavily-113080500984_1.html.

³⁶ Priyal Dhandhukia, Ujwal Prabhakar Nandekar, *Problems Faced By Small And Medium-Scale Enterprises in Terms Of Intellectual Property Rights*, 10(2) IJMA 310 (2021).

³⁷ *Id.*

³⁸ Madhav Kulkarni, *Low patenting by MSMEs in India: Possible reasons and solutions*, LINKEDIN, <https://www.linkedin.com/pulse/low-patenting-MSMEs-india-madhav-kulkarni/>.

³⁹ Sati-Salmah Sukarmijan, *supra* note 29.

V. PEOPLE TREE V. CHRISTIAN DIOR: A CASE STUDY

MSMEs are exploited and looted more easily than one might realize by big giants in businesses. The case study of *People Tree v. Christian Dior*⁴⁰ is one such example, where the lack of knowledge and expertise led to the exploitation of a small business. People Tree does not fall under the definition of MSME but rather is a small business the copying of whose design showcases how small businesses in India are exploited by business giants.⁴¹

In 2018, the owner of People Tree, which is a socio-cultural commercial initiative, took to Twitter to tell the world how a big brand had copied its design. The brand was Christian Dior, which, when it released its latest collection in 2018 and showcased it in the magazine Elle, had Sonam Kapoor wearing a block print dress designed by the People Tree Organization.

There was no case filed against the brand, however, there was an outside court settlement and a non-disclosure agreement in the picture.⁴² The art was protected through copyright and if registered, would have been protected by designs too. But the organization did not think of it. Another prospective intellectual property that would have helped the Organization is GI. The Bagru block print from Jaipur has a GI⁴³ and the same could have been applied for the block printing technique by the organization. This would not only have safeguarded them from exploitation but would also have enabled them to claim a premium price. However, the lack of knowledge and expertise led to the copying of the design and the absence of a legal remedy for People Tree.

VI. CONCLUSION: THE WAY FORWARD

The significance of IP is well understood and acknowledged now by the Indian government, which can be seen through the efforts made by them. The issues have come to light and the government has taken measures to resolve the same. The proposal for increasing awareness about intellectual property rights was introduced to help Indian MSMEs become more competitive in the global market. This is a significant example, but the actual effects are still not evident.

⁴⁰ Shreyoshi Guha, *People Tree v. Dior: IP Infringement, Cultural Appropriation or Both?*, SPICYIP, <https://spicyip.com/2018/02/people-tree-v-dior-ip-infringement-cultural-appropriation-or-both.html>.

⁴¹ Karuna Ezhara Parikh, *In Delhi, a People's Victory in Global Fashion*, THE WIRE (May 30, 2018), <https://thewire.in/culture/people-tree-christian-dior-settlement>.

⁴² Harshita Mukarama, *Dior and People Tree reach Settlement after Plagiarism Row*, THE QUINT (May 29, 2018), <https://www.thequint.com/lifestyle/fashion/delhi-based-people-tree-accuses-dior-of-plagiarism>.

⁴³ *Bagru Hand Block Print*, NATIONAL BANK FOR AGRICULTURE AND RURAL DEVELOPMENT, <https://www.nabard.org/gi/GIProductDetails.aspx?Id=18#:~:text=This%20art%20was%20recognised%20with%20GI%20tag%20in%202011.>

Awareness concerning all the IPs must be promoted rather than just focusing on patents. There should also be an overall integration of intellectual property rights in the working mechanisms of MSMEs like marketing, advertising, etc. For instance, Australia has established a marketing department focusing on training SMEs, which includes seminars on IP awareness at regular intervals and the inclusion of business advisors of SMEs as they hold the actual power of influencing.⁴⁴ Therefore, an all-encompassing approach focused on business advisors and decision makers shall be encouraged.

There is rarely any importance given to human expertise in human resources in small businesses. More than often, the value of human expertise is not even realized. Empirical studies done in the area of human resources in SMEs show that one of the most prominent factors that leads to the detriment of these companies is human resources.⁴⁵ To keep up with the competition in the market, it becomes important to invest in local and indigenous workforce. A prominent concern in India is regarding lower levels of productivity and below-margin capabilities of workers at MSMEs.⁴⁶ This acts as a constraint for the overall development and growth of enterprises. This lack of expertise is visible not just in IP but also in other sectors.

Different government sectors can come together to bridge the gap between awareness, economic growth, and competitiveness for the MSMEs. Many nations across the world have adopted this and the results can be seen. For instance, in Korea, the “Korean Intellectual Property Office” is in close cooperation with the Chambers of Commerce and the SME support agency⁴⁷ making it an effective method of improving the conditions of SMEs.⁴⁸ Apart from this, there should also be adoption of ICT in the day-to-day workings of MSMEs, which will not only make work easier but also help in keeping them aware of the latest developments through the electronic medium. ICT infrastructure will also help in the promotion of innovation and facilitate interoperability.⁴⁹ An efficient ICT system, if incorporated in the MSMEs, will help them keep up with the competition

⁴⁴Sati-Salmah Sukarmijan, *supra* note 29.

⁴⁵Zimyo Marketing, *Role of Human Resources in SMEs: The One Who Takes the Lead in Helping Businesses Mind Their Business*, ZIMYO (3 May, 2021), <https://www.zimyo.com/resources/insights/human-resources-in-smes-who-takes-the-lead-in-helping-businesses-mind-their-business/>.

⁴⁶*Key Issues Impacting Growth in MSMEs*, LENDINGKART (Sep. 28, 2023), <https://www.lendingkart.com/blog/major-challenges-faced-by-the-msme-sector-their-impacts/>.

⁴⁷Eulsoo Seo, *Overview of the National IP Policies and Services in Korea and Presentation of their Best Practices*, WIPO (2022).

⁴⁸*Id.*

⁴⁹Buteau S., *Roadmap for digital technology to foster India's MSME ecosystem opportunities and challenges*, 9 CSIT 233 (2021), <https://doi.org/10.1007/s40012-021-00345-4>.

in the market and maintain global standards. The introduction of new technology will take them a long way.⁵⁰

Thus, with the effective incorporation of IP in the functioning of MSMEs, it can be ensured that they flourish in the future. There are active steps that the government is taking, and an active response from the MSMEs aligned with the same course can help secure a permanent place for the Indian MSME industry in the global market.

⁵⁰ *Id.*

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DR. JAYANTA GHOSH*

ABSTRACT

This study examines the important role that Geographical Indications [“GIs”] play in advancing Sustainable Development in India, considering its socio-economic and cultural contexts. GIs play a crucial role in protecting and promoting the distinct products linked to certain regions. This, in turn, helps boost local economies, preserve cultural traditions, and promote environmental sustainability. This study conducts a thorough examination of GIs in India, comparing them to international models, in order to evaluate their influence on promoting sustainable behaviors. The research is based on a thorough examination of existing literature that highlights the role of GIs as instruments for promoting rural development and preserving the environment. The study also examines case studies of well-known Indian Geographical Indications, such as Darjeeling Tea and Kanchipuram Silk, to assess their economic, social, and environmental effects. These case studies demonstrate how GIs have effectively stabilized local economies by ensuring higher price for products, preserving biodiversity, and safeguarding traditional knowledge and skills. Furthermore, this study analyses the current policy framework that regulates GIs in India, along with evaluating its effectiveness and compatibility with sustainable development objectives. The analysis identifies significant regulatory gaps and constraints which potentially impede the effective application of GIs to achieve sustainable effects. The study assesses how changes in policy approaches can enhance the effectiveness of GIs using qualitative analysis. Ultimately, this study suggests specific measures to improve policies in order to boost the role of GIs in promoting a sustainable society. The text advocates for the implementation of comprehensive policy measures, which encompass strengthened legal safeguards, augmented government assistance for geographical indication registration, and intensified public awareness initiatives. The findings aim to contribute to the discussion on policy measures that not only safeguard intellectual property rights but also advance socio-economic and environmental sustainability.

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I. INTRODUCTION

Geographical Indications are not only a mark of authenticity but also a crucial economic tool that can propel regions towards sustainable development.¹ By defining the unique qualities of products that are inherently linked to their geographical origin, GIs help in preserving cultural heritage, enhancing local economies, and promoting sustainable practices.² The purpose of this study is to explore the intricate relationship between GIs and sustainable development within the Indian context, emphasizing how they are integrated into policy frameworks to support economic and social growth across diverse regions.

In India, GIs have become pivotal in promoting sustainable development by providing economic incentives for local communities to preserve their traditional crafts and natural resources.³ For instance, products like Darjeeling Tea, Assam Silk, and Kanchipuram Silk have gained international recognition, thereby requiring premium pricing in global markets which directly benefits the local artisans and farmers.⁴ Furthermore, GIs encourage the use of natural resources in a way that maintains ecological balance.⁵ The production processes defined within GI frameworks often include traditional methods which are less harmful to the environment, as compared to industrial production methods. These practices not only help in sustaining the environment but also ensure

¹ Adebola (2024) discusses how branding is a pivotal strategy for promoting the export of geographical indications (GIs) from Africa, fostering sustainable development. The study emphasizes branding's role in enhancing the global competitiveness of African GIs, thereby contributing to economic growth and sustainability in the region. *See* Tolulope Adebola, *Branding as a Tool to Promote Geographical Indication Exports and Sustainable Development in Africa*, in THE ELGAR COMPANION TO INTELLECTUAL PROPERTY AND THE SUSTAINABLE DEVELOPMENT GOALS 499-521 (Edward Elgar Publishing 2024).

² Giovannucci, Barham, and Pirog (2010) analyze the potential for using Geographical Indications (GIs) to market and define local foods in the United States. They explore the implications of GIs for promoting regional products and their authenticity, discussing how GIs can enhance market visibility and support sustainable local economies. The study highlights the benefits and challenges of adopting GIs in the U.S. context, contrasting with more established systems in Europe. *See* Daniele Giovannucci, Elizabeth Barham, & Richard Pirog, *Defining and Marketing "Local" Foods: Geographical Indications for US Products*, 13 J. WORLD INTELL. PROP. 94 (2010).

³ The study by Rao et al. (2003) emphasizes the critical role of Indigenous Ecological Knowledge (IEK) in conserving biodiversity and promoting sustainable development in the Central Himalayas. It highlights how local knowledge systems contribute to effective environmental management and sustainable utilization of resources, stressing the integration of traditional wisdom with modern conservation efforts to achieve ecological and socio-economic stability. *See*, K.G. Saxena et. al., *Indigenous Ecological Knowledge, Biodiversity and Sustainable Development in the Central Himalayas*, 44 TROPICAL ECOLOGY 93 (2003).

⁴ Lalitha and Vinayan's 2019 study explores the impact of Geographical Indications (GIs) on rural livelihoods in India. The research highlights how GIs can enhance the market visibility and profitability of regional products, contributing to the economic sustainability of rural communities. The study, published by Oxford University Press, provides empirical evidence supporting the significance of GIs in preserving cultural heritage and boosting local economies through increased recognition and consumer trust. *See* N. Lalitha & Soumya Vinayan, *REGIONAL PRODUCTS AND RURAL LIVELIHOODS: A STUDY ON GEOGRAPHICAL INDICATIONS FROM INDIA* (Oxford University Press 2019).

⁵ Chen, Li, and Wang (2009) introduce a GIS-based methodology to map and quantify the direct use value of ecosystem services at a county level. Their approach provides detailed spatial insights that can significantly enhance local environmental management and policy-making, emphasizing practical implications for sustainable ecological economics. *See* Chen Nengwang, Li Huancheng, & Lihong Wang, *A GIS-Based Approach for Mapping Direct Use Value of Ecosystem Services at a County Scale: Management Implications*, 68 ECOLOGICAL ECONOMICS 2768 (2009).

that the skills and knowledge are passed down through generations, preserving cultural identities.⁶ This alignment with both economic and environmental pillars of sustainability make GIs a powerful tool for fostering regional development.⁷

In India, the Geographical Indications of Goods (Registration and Protection) Act, 1999 is the main legislation that regulates the safeguarding and advancement of GIs.⁸ This legislation establishes a legislative structure that simplifies the process of registering and enhancing the safeguarding of geographical indicators associated with products. The government has created the Geographical Indications Registry, which operates under the authority of the Office of the Controller General of Patents, Designs and Trade Marks. This registry is in charge of managing the registered Geographical Indications.⁹

Policies are also in place to support GI holders through initiatives that promote awareness and marketing both domestically and internationally.¹⁰ For example, the establishment of the GI logo and tagline by the Indian government helps to increase visibility and consumer awareness. Additionally, the Department for Promotion of Industry and Internal Trade [“DPIIT”] has taken active steps to promote GIs as a part of India’s rich heritage and as a significant component of the “Make in India” initiative.¹¹

⁶ Bihari’s 2023 study underscores the importance of cultural heritage and indigenous knowledge, advocating for the revival of traditional practices to enrich future generations. Highlighting the role these elements play in sustainable development within SAARC countries, the work calls for integrating indigenous wisdom into modern frameworks to address contemporary challenges and opportunities. See Sunil Bihari, *Cultural Heritage and Indigenous Knowledge: Reviving Traditions for Future Generations*, in SUSTAINABLE DEVELOPMENT GOALS IN SAARC COUNTRIES: KEY ISSUES, OPPORTUNITIES AND CHALLENGES 1, 24-32 (Edward Elgar Publishing 2023).

⁷ Jonathan Ball, *Towards a Methodology for Mapping ‘Regions for Sustainability’ Using PPGIS*, 58 PROGRESS IN PLANNING 81 (2002).

⁸ Kundan Kishore, *Geographical Indications in Horticulture: An Indian Perspective*, 23 J. INTELL. PROP. RTS. 159 (2018).

⁹ Dwijen Rangnekar’s 2002 analysis “Geographical indications: a review of proposals at the TRIPS Council” explores various proposals submitted to the TRIPS Council concerning the protection of geographical indications (GIs). This work, commissioned by UNCTAD, delves into the complexities and strategic significance of GIs within international trade, particularly focusing on the implications for developing countries. Rangnekar discusses the challenges of extending GI protection beyond wines and spirits, which was a major point of contention. His analysis critically examines how enhanced GI protections could benefit agricultural and rural development in developing nations by adding value to region-specific products. See, Dwijen Rangnekar, *Geographical Indications: A Review of Proposals at the TRIPS Council* (United Nations Conference on Trade and Development (UNCTAD) 2002).

¹⁰ Marie-Vivien and Biénabe (2017) provide an extensive review of how states around the world engage in the protection of Geographical Indications (GIs). They argue that the state plays a multifaceted role, not only in enforcing legal frameworks and regulations that safeguard GIs but also in supporting the economic and cultural interests of local communities. Their analysis highlights the diversity of approaches in different jurisdictions, emphasizing the balance between protecting local traditions and integrating into global markets. The study also discusses the challenges and opportunities in harmonizing international standards for GI protection, underscoring the state’s role in navigating these complexities to benefit producers and consumers alike. See, Delphine Marie-Vivien & Estelle Biénabe, *The Multifaceted Role of the State in the Protection of Geographical Indications: A Worldwide Review*, 98 WORLD DEV. 1 (2017).

¹¹ Pradip Manchikanti, Sukumar Datta & Tapan K. Bandopadhyay, *Foodstuffs and Geographical Indications in India: An Analysis*, in GEOGRAPHICAL INDICATION PROTECTION IN INDIA: THE EVOLVING PARADIGM 105, 105-40 (Springer Nature Singapore 2022).

Despite the robust framework, GI holders in India face several challenges that hinder their ability to fully capitalize on the benefits of GI registration.¹² One of the primary challenges is the lack of adequate marketing and branding strategies that align with the global standards. Many GI products are unknown outside their local regions due to insufficient marketing support and branding.¹³

Another significant challenge is the enforcement of GI rights. Infringements are common and local producers often lack the resources and knowledge required to undertake legal action against violators. This situation is exacerbated by the limited scope of legal protection outside India, which is crucial for combating unauthorized use of GIs in international markets.

Lastly, there is a need for more substantial support in terms of infrastructure and technology transfer.¹⁴ Many GI products are produced using traditional methods that, while sustainable, may not meet the productivity and quality standards demanded by global markets. Enhancing these aspects through appropriate technology interventions can help in scaling up production without compromising the ecological and cultural integrity of the GI products.

This study aims to provide a comprehensive analysis of how GIs are pivotal in fostering sustainable development in India.¹⁵ By addressing the existing policy frameworks and identifying the

¹² In the article “Prospects and Challenges of Geographical Indications in India” by K. Das (2010), published in *The Journal of World Intellectual Property*, the author extensively discusses the potential benefits and existing hurdles associated with the implementation of Geographical Indications (GIs) in India. Das highlights the significant role GIs can play in enhancing the economic prosperity of local communities by safeguarding region-specific products, thus adding value to cultural heritage and traditional knowledge. However, challenges such as lack of awareness, inadequate legal protections, and the need for more robust enforcement mechanisms are identified as major impediments to fully leveraging the potential of GIs in India. The article provides a comprehensive analysis, suggesting that effective management and strategic promotion are essential for overcoming these challenges. See Kamal Das, *Prospects and Challenges of Geographical Indications in India*, 13 J. WORLD INTELL. PROP. 148 (2010).

¹³ Sharma, R.W., and Kulhari, S. (2015) discuss the marketing of Geographical Indication (GI) products and their commercial potential in their study conducted by the Centre for WTO Studies at the Indian Institute of Foreign Trade. They emphasize that GI products, which often include traditional crafts and agricultural goods unique to specific regions, hold significant untapped market value. Their analysis suggests that effective marketing strategies and robust legal protections are crucial for enhancing the global reach and profitability of these products. The study highlights the need for increased awareness and consumer education to differentiate GI products from their non-GI counterparts, thereby supporting the economic development of local communities involved in producing these goods. See R.W. Sharma & S. Kulhari, *Marketing of GI Products: Unlocking Their Commercial Potential*, Ctr. for WTO Studies, Indian Inst. of Foreign Trade (2015).

¹⁴ Hoekman, Maskus, and Saggi (2005) explore various policy options for technology transfer to developing countries, highlighting both unilateral and multilateral strategies. They discuss the effectiveness of these strategies in enhancing technological capacities in less developed nations, emphasizing the need for policy frameworks that support knowledge dissemination and address intellectual property rights issues effectively. See B.M. Hoekman, K.E. Maskus & K. Saggi, *Transfer of Technology to Developing Countries: Unilateral and Multilateral Policy Options*, 33 WORLD DEV. 1587 (2005).

¹⁵ A. Rahman, *Application of Remote Sensing and GIS Technique for Urban Environmental Management and Sustainable Development of Delhi, India*, in APPLIED REMOTE SENSING FOR URBAN PLANNING, GOVERNANCE AND SUSTAINABILITY 165-97 (Springer Berlin Heidelberg 2007).

challenges faced by GI holders, this research seeks to offer insights into the measures needed to strengthen the GI system in India. The ultimate goal is to ensure that GIs not only serve as symbols of geographical authenticity and cultural heritage but also as catalysts for sustainable economic and social development.¹⁶

II. BACKGROUND AND CONTEXT

GIs serve as a pivotal element in the nexus of trade, culture, and intellectual property rights, safeguarding the names of products that have a specific geographical origin and possess qualities, reputation, or characteristics essentially attributable to that origin.¹⁷ The legal recognition of these indications provides a framework through which unique product qualities linked to specific regions are acknowledged and protected, thus preventing misuse and unauthorized adoption globally.¹⁸ A GI operates under a dual layer of protection: at the national as well as international level. Internationally, the Agreement on Trade-Related Aspects of Intellectual Property Rights [“TRIPS”], administered by the World Trade Organization [“WTO”], mandates all member countries to provide a broad level of protection to GIs.¹⁹ This agreement ensures that member states establish legislation that recognizes and protects GIs to prevent misleading practices and to

¹⁶ The study by Petti, L., Trillo, C., and Makore, B.N. (2020) explores the potential alignment between cultural heritage conservation and sustainable development goals within a European context. It suggests that integrating cultural heritage into sustainability strategies can enhance regional development while preserving cultural identity, providing a multifaceted approach to sustainable progress. See L. Petti, C. Trillo & B.N. Makore, *Cultural Heritage and Sustainable Development Targets: A Possible Harmonisation? Insights from the European Perspective*, 12 SUSTAINABILITY 926 (2020).

¹⁷ Raustiala, K. and Munzer, S.R. (2007) discuss the global conflict surrounding geographic indications (GIs) in their study published in the *European Journal of International Law*. The paper analyzes how GIs, which designate products based on their geographical origin, are a significant economic and cultural asset. It delves into the tension between countries that seek strong protections for GIs under international law (like many in the European Union) and those preferring weaker protections, like the United States. The authors explore the implications of these protections for trade, legal frameworks, and cultural heritage, emphasizing the challenges of reconciling different international approaches to GI protection. See K. Raustiala & S.R. Munzer, *The Global Struggle over Geographic Indications*, 18 EUR. J. INT'L L. 337 (2007).

¹⁸ In K. Simchenko's 2023 doctoral dissertation at Mykolo Romerio University, the focus is on the protection against misuse, imitation, or evocation of Geographical Indications (GIs). The dissertation emphasizes the critical importance of safeguarding GIs to maintain the authenticity and economic value derived from region-specific products. It highlights the legal mechanisms and international agreements that support GI protection, discussing how they prevent unauthorized use and help preserve local heritage and consumer trust. This study also examines case studies where GI protections have successfully deterred infringements and supported regional economic development. The dissertation contributes to a deeper understanding of the global implications of GI protection. See K. Simchenko, *Protection Against Misuse, Imitation or Evocation of Geographical Indications* (Ph.D. dissertation, Mykolo Romerio Univ. 2023).

¹⁹ In his analysis within “The World Trade Organization: Legal, Economic, and Political Analysis,” Thomas Cottier delves into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). He provides a comprehensive examination of how TRIPS integrates intellectual property law into the global trading system, highlighting its impact on trade and innovation across different economies. Cottier discusses the balancing act TRIPS performs between protecting inventor rights and promoting public health, especially in developing countries. The chapter critically assesses the enforcement mechanisms of TRIPS and its influence on international standards of intellectual property protection, illustrating key challenges and debates that shape the current and future landscape of global IP regulations. See T. Cottier, *The Agreement on Trade-Related Aspects of Intellectual Property Rights, in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* 1041-120 (Springer US 2005).

promote fair competition.²⁰ The protection schemes can vary from sui generis systems, which involve specific GI protection laws, to systems that incorporate GIs into existing trademark laws.²¹

Historically, the concept of GIs can be traced to have its deep roots in India, often linked with ancient trade practices.²² References to specific Indian craft and produce can be found in historical texts, indicating the early recognition of the region-specific nature of these goods. The formal system, however, began shaping up significantly post-India's accession to the WTO in 1995, with the subsequent drafting and enactment of the GI law in 1999. Since the registration of Darjeeling Tea as the first Indian GI in 2004, over 300 products have been registered, showcasing India's rich diversity in agriculture, handicrafts, foodstuff, and more.²³ Each registered GI has bolstered local industries, protecting the economic interests of artisans and farmers against exploitation through counterfeit practices.²⁴ The development of GI laws in India represents an evolving narrative of recognizing and valuing the linkage between place and identity.²⁵ It highlights the country's

²⁰ In the 2012 article by M. Gragnani, "The Law of Geographical Indications in the EU," published in the Journal of Intellectual Property Law & Practice, the author explores the European Union's legal framework regarding Geographical Indications (GIs). Gragnani discusses the significance of GIs in protecting regional products, enhancing local economies, and maintaining cultural heritage within the EU. The article analyzes the complexities and challenges of enforcing these protections across diverse legal systems within EU member states. It also highlights case studies demonstrating the application of GI laws and the impacts on local producers and stakeholders, offering insights into the evolving nature of intellectual property rights in a globalized economy. This work is crucial for understanding the broader implications of GI protections in promoting authenticity and quality in regional products. See M. Gragnani, *The Law of Geographical Indications in the EU*, 7 J. INTELL. PROP. L. & PRACTICE 271 (2012).

²¹ In his 2020 work, Dev Gangjee discusses the nature of geographical indications (GIs) and explores whether they should be protected under a sui generis (unique) system or integrated into existing intellectual property frameworks. Gangjee analyzes the complexity and uniqueness of GIs, which protect products specific to a particular geographical region, underscoring their cultural and economic significance. He argues for a tailored approach that recognizes the distinctiveness of GIs compared to other forms of intellectual property, such as trademarks. This discussion is pivotal for understanding how GIs contribute to local development while fostering global trade relationships. See Dev S. Gangjee, *Sui Generis or Independent Geographical Indications Protection*, in THE CAMBRIDGE HANDBOOK OF INTERNATIONAL AND COMPARATIVE TRADEMARK LAW 256, Irene Calboli & Jane Ginsburg eds., Cambridge Univ. Press (2020).

²² Sahay (1998) explores the implementation of Geographic Information Systems (GIS) technology in India, highlighting the unique challenges related to temporal and spatial factors. The study delves into how these factors influence the adoption and effectiveness of GIS across various sectors in India. Key issues discussed include the socio-political context that affects technological integration and the practical implications of adapting GIS within Indian organizational settings. The paper also examines the alignment of this technology with local practices and the need for customization to address specific regional challenges in managing geographic data efficiently. See, S. Sahay, *Implementing GIS Technology in India: Some Issues of Time and Space*, 8 ACCT. MGMT. & INFO. TECH. 147 (1998).

²³ R.W. Sharma & S. Kulhari, *Marketing of GI Products: Unlocking Their Commercial Potential* (Research Study, Centre for WTO Studies, Indian Inst. of Foreign Trade 2015).

²⁴ In her 2021 doctoral dissertation at the University of Missouri-Columbia, E. Lee explores the influence of geographical indications (GIs) and fair-trade knowledge on female consumers' purchase intentions of fair-trade textile and clothing handicrafts. The study integrates these factors into a brand equity model, assessing how they impact the perceived value and attractiveness of these products. Lee's research highlights that both the awareness of fair-trade practices and the presence of a GI significantly enhance consumer trust and perceived authenticity, which in turn, positively affect purchase intentions. This suggests that educating consumers about fair-trade benefits and the specific origins of products can be crucial for marketers in the fair-trade sector. See, E. Lee, *Female Consumers' Purchase Intention of Fair-Trade Textile and Clothing Handicrafts: The Roles of a Geographical Indication and Fair-Trade Knowledge in a Brand Equity Model* (Ph.D. dissertation, Univ. of Missouri-Columbia 2021).

²⁵ D.S. Gangjee, *Geographical Indications and Cultural Heritage*, 4 WIPO J. 92, 92-102 (2012).

proactive approach to integrating traditional knowledge and cultural expressions with global markets, ensuring that economic development does not come at the cost of cultural dilution.²⁶ The ongoing challenge remains in balancing effective legal protections with the practical application and enforcement of these rights, ensuring that the benefits of GI registration are tangible and widespread among the communities that cherish and sustain these traditions.²⁷ Age old Traditions which supplement the GI requirements directly or indirectly also help us understand the sustainable nature of the products that get recognised through GI certification.

In essence, GIs are not just legal tools but are vital to the socio-economic and cultural tapestries of regions they represent.²⁸ They encapsulate a holistic approach to protecting the intellectual property rights of communities, ensuring their traditions and practices are preserved and respected globally while fostering economic growth and sustainability. As such, they are pivotal in the global dialogue on cultural preservation, economic development, and international trade.

III. DIFFERENT CONTEXTUAL REVIEW OF LITERATURE

The concept of GIs has become increasingly significant in global trade and local development, impacting economic and environmental sustainability.²⁹ GIs are essentially intellectual property rights on names that signify the quality, reputation, or other characteristics of products that are essentially attributable to their geographical origin.³⁰ This review delves into the global perspectives on the implications of GIs and offers a deep dive into the Indian context by examining several case studies.

²⁶ Correa's 2001 report on "Traditional Knowledge and Intellectual Property" highlights the challenges and policy options related to the intersection of traditional knowledge (TK) and intellectual property rights (IPR). He discusses the increasing recognition of TK's value and the need for effective protection mechanisms within the IPR framework. The report addresses the potential conflicts and synergies between TK and global IPR systems, emphasizing the importance of developing policies that protect the rights of indigenous communities while promoting fair use and access to knowledge. This work also considers the implications of biopiracy and the commercial use of TK, advocating for equitable benefit-sharing arrangements. See C.M. Correa, *Traditional Knowledge and Intellectual Property* 17 (The Quaker United Nations Office 2001).

²⁷ M.T. Islam & M. Ansari, *Cross-Border GI Protection: Challenges and Ramifications for Bangladesh*, in WIPO-WTO COLLOQUIUM PAPERS (Nov. 2017).

²⁸ D. Rangnekar, *Geographical Indications and Localisation: A Case Study of Feni* (ESRC Report 2009).

²⁹ In his 2011 presentation at the WIPO Worldwide Symposium on Geographical Indications in Lima, Peru, Charles Bramley reviewed the socio-economic impacts of Geographical Indications (GIs) on developing countries. His research highlights how GIs can enhance local development by protecting native products and boosting their market value. Bramley discussed the potential of GIs to contribute to regional development through increased recognition and demand for authentic local products. He emphasized that for GIs to be effective, robust legal frameworks and awareness among producers and consumers are crucial. This, in turn, can lead to premium pricing, preservation of cultural heritage, and stimulation of tourism in developing regions. See C. Bramley, *A Review of the Socio-Economic Impact of Geographical Indications: Considerations for the Developing World*, 22(1) WIPO WORLDWIDE SYMPOSIUM ON GEOGRAPHICAL INDICATIONS 1-22 (2011).

³⁰ E. Gutierrez, *Geographical Indicators: A Unique European Perspective on Intellectual Property*, 29 HASTINGS INT'L & COMP. L. REV. 29 (2005).

Globally, GIs have been identified as catalysts for socio-economic development and environmental stewardship. According to research, GIs provide a premium to producers and can enhance local economies by securing higher market prices for regional products, thereby contributing to rural development and poverty reduction.³¹ For instance, the Parmigiano Reggiano cheese in Italy not only enjoys a price premium but also supports traditional farming methods that contribute to biodiversity and sustainable land use.³² This is reflective of a broader European context where GIs are utilized extensively, and are supported by robust policies that integrate GIs into rural development strategies. Studies in these regions have documented how such integration fosters community cohesion and preserves cultural heritage, alongside promoting environmentally friendly practices.

Turning to the Indian scenario, the impact of GIs has been profound yet varies widely across different sectors. Darjeeling Tea was among the first products in India to receive GI status and serves as a prime example of how GIs can enhance brand recognition and fetch premium prices globally.³³ This has not only improved the livelihoods of local tea growers but also promoted sustainable agricultural practices in the region. Similarly, Basmati Rice holds a GI tag, which has helped secure its market internationally as a high-quality product, thereby benefiting farmers in specific regions of North India.³⁴ Moreover, Kanchipuram Silk is another example where GI status has helped preserve ancient weaving techniques while ensuring economic benefits to the local weavers by safeguarding their market from cheap imitations.

³¹ Vecchio et al. (2020) explore the role of Geographical Indications (GIs) in strengthening rural economies through a case study in Ghana. The study highlights how GIs can enhance product differentiation, protect traditional knowledge, and increase market value. By focusing on local agricultural products, GIs help to build economic resilience in rural communities by linking them to more lucrative markets and enhancing sustainability. The research emphasizes that for GIs to be effective, they must be supported by robust legal frameworks and local capacity building to ensure compliance and to foster community engagement. This approach underlines the potential of GIs to contribute to sustainable development in rural areas. See Y. Vecchio et al., *Geographical Indication to Build Up Resilient Rural Economies: A Case Study from Ghana*, 12 SUSTAINABILITY 2052 (2020).

³² S.G. Solecki, *A Tale of Two Cheeses: Parmesan, Cheddar, and the Politics of Generic Geographical Indications (GGIs)* (Ph.D. dissertation, Univ. of Warwick 2014).

³³ T.K. Datta, *Darjeeling Tea in India*, in QUALITY LINKED TO GEOGRAPHICAL ORIGIN AND GEOGRAPHICAL INDICATIONS: LESSONS LEARNED FROM SIX CASE STUDIES IN ASIA 113 (A. Lecoent, E. Vandecandelaere & J. Cadilhon eds., Food & Agric. Org. of the U.N., Regional Office for Asia & the Pac. 2010).

³⁴ Jena and Grote (2012) assess the socio-economic impacts of traditional Basmati rice cultivation under the Geographical Indications (GI) framework in Uttarakhand, India. Their study reveals that GI status significantly enhances the welfare of local farmers by providing premium prices and greater market access. The research highlights the importance of GI in safeguarding traditional knowledge and practices, while also promoting sustainable agricultural methods. The findings suggest that the GI label not only boosts economic gains for farmers but also contributes to regional development by improving livelihoods and preserving cultural heritage. See P.R. Jena & U. Grote, *Impact Evaluation of Traditional Basmati Rice Cultivation in Uttarakhand State of Northern India: What Implications Does It Hold for Geographical Indications?*, 40 WORLD DEV. 1895, 1895-1907 (2012).

Despite these successes, there are gaps in the current research, especially concerning the detailed impacts of GIs as a tool for sustainable development within India. Few studies have systematically addressed how GIs influence sustainable agricultural practices or how they contribute to environmental conservation. There is also a lack of comprehensive analysis on the policy effectiveness concerning the management and promotion of GIs. The integration of GIs into broader developmental policies or their role in achieving the Sustainable Development Goals [“SDGs”] offers another area ripe for exploration. Furthermore, while the economic benefits are often highlighted, less is understood about the social dynamics and community engagement processes fostered through GI initiatives.³⁵

Additionally, while the protection of GIs is well-noted, the enforcement mechanisms, particularly in remote and rural areas, are not well-documented. Documentation towards establishing quality of GI Products, historical evidences with the traditional prospects, as well as the environmental root of every products which helps to justify the products sustainable nature is lacking. Challenges such as lack of awareness among consumers and producers about GI benefits, limited marketing and branding initiatives, and the need for greater technical and financial support to GI holders are areas that need more focused attention.

GIs have shown potential in promoting local products and supporting sustainable practices globally and in India, the effectiveness of these initiatives could be greatly enhanced by filling the existing research gaps. More comprehensive studies are needed to fully understand the multi-dimensional impacts of GIs, particularly in fostering not only economic but also social and environmental sustainability. This would involve a closer look at policy frameworks, implementation strategies, and the overall integration of GIs into national and international market systems. Addressing these areas can help maximize the benefits of GIs, ensuring they contribute effectively to sustainable development in India and beyond.

IV. INTEGRATED POLICY ANALYSIS

Under the Geographical Indications of Goods (Registration and Protection) Act, 1999, the registered owner of GI and authorized GI logo user has the stake to mainly to maintain the sustainability. But at the same time the misuse of the available policy is rampant. The quality

³⁵ Borgi et al. (2020) highlight social farming as an effective tool for enhancing mental health and fostering social inclusion. The study emphasizes its potential to engage communities actively, promoting comprehensive wellness through therapeutic interactions with agriculture and nature, signifying a notable shift towards community-centered mental health interventions. See M. Borgi et al., *Social Farming as an Innovative Approach to Promote Mental Health, Social Inclusion and Community Engagement*, 56 ANNALI DELL' ISTITUTO SUPERIORE DI SANITÀ 206-14 (2020).

assurance is intended to prevent unauthorized use of a registered geographical indication by others while promoting economic prosperity in rural areas associated with specific products.³⁶

To preserve the cultural heritage GI is instrumentally essential. As well as the socio-economic aspects are in line with the specific requirement of SDGs. The GI Act aligns with sustainability goals by supporting rural economies and preserving cultural heritage, which is inherently linked to SDGs particularly those focused on responsible consumption and production (SDG 12), reduced inequalities (SDG 10), and decent work and economic growth (SDG 8). However, there are gaps, such as the lack of provisions that directly address environmental sustainability or the enforcement difficulties in remote areas, which can undermine the effectiveness of this protection.

A. Economic Impact

GIs have significantly impacted local economies³⁷ across various regions in India.³⁸ By providing a legal framework for the protection of region-specific products, GIs have helped in fetching premium prices for products in national and international markets.³⁹ For instance, the Darjeeling tea GI has enabled growers in the Darjeeling region to obtain premium prices, thereby substantially increasing their income levels.⁴⁰ Similarly, the Basmati rice GI has contributed to the prosperity of agricultural communities in Punjab and Haryana.⁴¹

³⁶ Josling (2006) discusses the intense disputes between the US and the EU regarding geographical indications (GIs), exploring their impact on transatlantic trade. The paper analyzes how GIs, which protect regional products, can lead to conflicts by affecting trade negotiations and market access, highlighting differences in regulatory approaches and the broader implications for global agricultural trade. See T. Josling, *The War on Terror: Geographical Indications as a Transatlantic Trade Conflict*, 57 J. AGRIC. ECON. 337, 337-63 (2006).

³⁷ Yadav, A. and Singh, R., 2024. Geographical Indication As A Tool For Revitalizing Endangered Traditions And Sustaining Livelihoods. *Educational Administration: Theory and Practice*, 30(2), pp.1071-1081.

³⁸ Bowen's 2010 study in "Rural Sociology" discusses how geographical indications (GIs) can be utilized as a territorial development strategy. It emphasizes embedding localities into global markets by highlighting GIs' role in promoting local products and cultures, thus fostering economic development and preserving cultural heritage within rural societies. See S. Bowen, *Embedding Local Places in Global Spaces: Geographical Indications as a Territorial Development Strategy*, 75 RURAL SOCIOLOGY 209, 209-43 (2010).

³⁹ Echols' "Geographical Indications for Food Products" offers an in-depth analysis of the international legal frameworks and regulatory perspectives on geographical indications (GIs). The book explores how GIs protect regional food products, ensuring authenticity and quality, and examines the economic, cultural, and legal implications of GIs in global trade. See M.A. Echols, *Geographical Indications for Food Products: International Legal and Regulatory Perspectives*, KLUWER LAW INT'L BV (2016).

⁴⁰ Datta's study highlights the significance of Darjeeling Tea, focusing on its unique geographical origin, which contributes to its high quality and distinctive flavor. The paper examines the benefits of geographical indications (GIs) in protecting and promoting regional products, using Darjeeling Tea as a key case study in Asia, emphasizing sustainable agricultural practices and market differentiation. See T.K. Datta, *Darjeeling Tea in India*, in QUALITY LINKED TO GEOGRAPHICAL ORIGIN AND GEOGRAPHICAL INDICATIONS: LESSONS LEARNED FROM SIX CASE STUDIES IN ASIA 113 (A. Lecoent et al. eds., Food & Agric. Org. of the U.N., Regional Office for Asia & the Pac. 2010).

⁴¹ Singh et al. (2018) discuss the genetic enhancement of Basmati rice using molecular breeding techniques. The study highlights advancements in genomic approaches, including marker-assisted selection and gene editing, to improve traits such as yield, disease resistance, and grain quality. The integration of these technologies aims to transcend traditional breeding limitations, fostering the development of superior Basmati rice varieties. See A.K. Singh et al.,

These designations also attract investment into regions, improving infrastructure and creating employment opportunities in rural areas.⁴² The branding of GI products encourages tourism, which provides a secondary income stream for local communities.⁴³ Moreover, GIs help in the stabilization of markets and prices for these products, reducing volatility and ensuring steady income for producers.

B. Social Impact

The protection of GIs has considerable social benefits.⁴⁴ One primary advantage is the preservation of traditional knowledge and cultural heritage.⁴⁵ For instance, the production processes involved in creating Channapatna toys or Kanchipuram silk are preserved through GI tags, which involve skills passed down through generations.⁴⁶ This not only helps in maintaining cultural identity but also supports community cohesion as these activities are often communal.

Additionally, GI protection helps in reversing rural-urban migration by creating jobs and viable economic opportunities in rural areas.⁴⁷ This supports social stability and reduces the pressure on urban infrastructures. The recognition and pride associated with producing GI-tagged goods also enhance social capital, fostering a sense of belonging and community pride.

Genetic Improvement of Basmati Rice: Transcendence Through Molecular Breeding, in BIOTECHNOLOGIES OF CROP IMPROVEMENT, VOLUME 3: GENOMIC APPROACHES 179, 179-97 (2018).

⁴² D. Baldock et al., *The Nature of Rural Development: Towards a Sustainable Integrated Rural Policy in Europe* (Synthesis Report 2001).

⁴³ R.W. Sharma & S. Kulhari, *Marketing of GI Products: Unlocking Their Commercial Potential*, Centre for WTO Studies, Indian Inst. of Foreign Trade (2015).

⁴⁴ D. Rangnekar, *The Socio-Economics of Geographical Indications*, UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 8, at 13-15 (2004).

⁴⁵ David R. Downes, in his 2000 article "How Intellectual Property Could Be a Tool to Protect Traditional Knowledge," discusses how intellectual property (IP) rights can safeguard traditional knowledge by recognizing and compensating indigenous communities for their contributions, preventing unauthorized exploitation, and fostering sustainable development. He emphasizes the need for tailored IP mechanisms that respect and integrate traditional knowledge systems. See, D.R. Downes, *How Intellectual Property Could Be a Tool to Protect Traditional Knowledge*, 25 COLUM. J. ENVTL. L. 253 (2000).

⁴⁶ Sengupta, N. and Sengupta, N. (2019) discuss the preservation and promotion of Traditional Cultural Expressions (TCEs) and folklore within modern India. They explore mechanisms for ethical access and benefit-sharing, emphasizing the need for protective measures to safeguard cultural heritage against exploitation while promoting its continued relevance and adaptation in contemporary contexts. See N. Sengupta & N. Sengupta, *Traditional Cultural Expressions, Expressions of Folklore*, in TRADITIONAL KNOWLEDGE IN MODERN INDIA: PRESERVATION, PROMOTION, ETHICAL ACCESS AND BENEFIT SHARING MECHANISMS 127-52 (2019).

⁴⁷ T. Lacroix, *Migration, Rural Development, Poverty and Food Security: A Comparative Perspective* (2011).

C. Environmental Impact

GIs also contribute to environmental sustainability.⁴⁸ Many GI products are produced using traditional methods that are environmentally friendly and sustainable. For instance, the production of Kodagu Arabica coffee under GI tags involves shade-grown coffee cultivation that supports biodiversity⁴⁹ and reduces the carbon footprint compared to non-shade coffee cultivation methods.⁵⁰ Moreover, the sustainable harvesting methods prescribed in the GI standards for products like the Nilgiri tea promote the conservation of local flora and fauna.⁵¹ The cultivation practices for many GI-tagged agricultural products often forbid the use of harmful pesticides and chemicals, encouraging organic farming practices that enhance soil health and biodiversity.

GIs in India play a critical role in shaping economic, social, and environmental landscapes.⁵² By safeguarding the uniqueness of various products, GIs help in fostering economic development, preserving cultural identities, and promoting environmental sustainability.⁵³ While the current policy framework provides robust economic and social benefits, there is a need for more direct integration of environmental goals into the GI policy to enhance its alignment with broader sustainability objectives.⁵⁴ This would ensure that GIs not only contribute to economic and social well-being but also to the ecological health of the regions they represent, thus supporting a more holistic approach to sustainable development.

⁴⁸ The study by Vandecandelaere et al. (2021) presents a framework for assessing and monitoring the sustainability contributions of geographical indications (GIs). This framework emphasizes a participatory process involving local stakeholders to ensure that GIs support environmental, economic, and social sustainability. The approach aims to balance traditional knowledge with modern sustainability goals, promoting biodiversity, fair trade, and cultural heritage. The authors highlight the importance of continual monitoring and adaptation to maintain the relevance and effectiveness of GIs in contributing to sustainable development. This participatory method ensures that GIs not only protect local products but also foster overall community well-being and environmental health. See E. Vandecandelaere et al., *The Geographical Indication Pathway to Sustainability: A Framework to Assess and Monitor the Contributions of Geographical Indications to Sustainability Through a Participatory Process*, 13 SUSTAINABILITY 7535 (2021).

⁴⁹ M. Leroy et al., *Thinking the Future: Coffee, Forests and People. Conservation and Development in Kodagu* (2011).

⁵⁰ C. Solér et al., *How Can High-Biodiversity Coffee Make It to the Mainstream Market? The Performativity of Voluntary Sustainability Standards and Outcomes for Coffee Diversification*, 59 ENVTL. MGMT. 230, 230-48 (2017).

⁵¹ N. Lalitha & S. Vinayan, *GIs for Protecting Agrobiodiversity and Promoting Rural Livelihoods: Status, Strategies and Way Forward*, 37 J. RURAL DEV. 3, 479-500 (2018).

⁵² R.J. Coombe & S.A. Malik, *Transforming the Work of Geographical Indications to Decolonize Racialized Labor and Support Agroecology*, 8 UC IRVINE L. REV. 363 (2018).

⁵³ R.J. Coombe, S. Ives & D. Huizenga, *Geographical Indications: The Promise, Perils and Politics of Protecting Place-Based Products*, in SAGE HANDBOOK ON INTELLECTUAL PROPERTY, 207-23 (2014) (Thousand Oaks, CA: Sage Publications).

⁵⁴ Hodge, I., Hauck, J., and Bonn, A. (2015) in their paper "The alignment of agricultural and nature conservation policies in the European Union," published in *Conservation Biology*, discuss the interplay between agricultural policies and nature conservation within the EU. They highlight the challenges and opportunities in harmonizing these policies to achieve sustainable land management. Key points include the need for integrated policy frameworks, the role of agri-environment schemes in promoting biodiversity, and the importance of stakeholder collaboration. The authors emphasize that aligning these policies can enhance ecosystem services, support sustainable agriculture, and contribute to conservation goals. See I. Hodge, J. Hauck & A. Bonn, *The Alignment of Agricultural and Nature Conservation Policies in the European Union*, 29 CONSERVATION BIO. 996, 996-1005 (2015).

V. CASE STUDIES

GIs have been instrumental in fostering sustainability across various dimensions economic, social, and environmental.⁵⁵ By examining a few select GIs from India, we can better understand their impact and the factors contributing to their success. This section provides an in-depth analysis of three notable Indian GIs: Darjeeling Tea, Chanderi Fabric, and Malabar Pepper, followed by a comparative analysis to draw insights across different regions and sectors.

A. Darjeeling Tea: Economic and Environmental Sustainability

Darjeeling Tea, recognized globally for its unique aroma and taste, was granted GI status in 2004.⁵⁶ This GI is a prime example of economic sustainability driving environmental stewardship. The Darjeeling tea industry has helped stabilize the local economy by securing premium prices globally.⁵⁷ Economically, this GI status has protected the livelihoods of over 20,000 workers employed in about 87 tea gardens spread across the Darjeeling region. Small-scale farmers and larger estates alike benefit from the premium prices that GI status ensures on international markets.⁵⁸

Environmentally, the strict cultivation standards required for GI certification have encouraged sustainable farming practices.⁵⁹ These include restrictions on the use of synthetic fertilizers and pesticides, which has led to widespread adoption of organic farming methods. This shift has not only improved soil health and biodiversity but has also enhanced the quality of the tea, further solidifying its unique identity. For the farmers and workers, the certification ensures that their product is not misrepresented or diluted in quality by imitation products. By guaranteeing that only tea produced under specific conditions in the Darjeeling region can carry the prestigious “Darjeeling Tea” label, the GI certification provides a level of economic protection and market exclusivity that has allowed the local industry to flourish. The direct result has been an increase in foreign exchange earnings and the stabilization of incomes for tea growers, workers, and the surrounding communities. Small-scale tea growers, often marginalized in competitive markets,

⁵⁵ L. Cei, E. Defrancesco & G. Stefani, *From Geographical Indications to Rural Development: A Review of the Economic Effects of European Union Policy*, 10 SUSTAINABILITY 3745, 3745 (2018).

⁵⁶ S. Besky, *The Labor of Terroir and the Terroir of Labor: Geographical Indication and Darjeeling Tea Plantations*, 31 AGRICULTURE AND HUMAN VALUES 83, 83-96 (2014).

⁵⁷ T.K. Datta, *Darjeeling Tea in India*, in QUALITY LINKED TO GEOGRAPHICAL ORIGIN AND GEOGRAPHICAL INDICATIONS: LESSONS LEARNED FROM SIX CASE STUDIES IN ASIA, Bangkok: Food and Agricultural Organization of the United Nations, Regional Office for Asia and the Pacific 113 (A. Lecoent et al. eds., 2010).

⁵⁸ *Id.*

⁵⁹ T. Gomiero, D. Pimentel & M.G. Paoletti, *Environmental Impact of Different Agricultural Management Practices: Conventional vs. Organic Agriculture*, 30 CRITICAL REV. IN PLANT SCIS. 95, 95-124 (2011).

now enjoy increased financial security and better opportunities for investment in their farming techniques due to the premium prices the GI label commands.

The environmental impact of this shift is profound, as it has led to healthier soil conditions, increased biodiversity, and the preservation of the fragile Himalayan ecosystem where the tea is grown. Organic farming, now prevalent in Darjeeling's tea estates, has allowed tea growers to improve the quality of the soil, fostering a healthier environment for tea plants to thrive without compromising the natural landscape. This approach aligns with the growing global demand for organic and sustainably produced products, further enhancing the market appeal of Darjeeling Tea and strengthening its identity as a high-quality, environmentally friendly product.

In addition to soil health, sustainable practices implemented as a result of GI certification have helped combat erosion in the steep slopes of the Darjeeling region. Given the mountainous terrain, traditional farming methods could often lead to soil degradation and loss of fertility. However, with sustainable farming practices in place, the ecosystem's integrity is maintained, benefiting not only the tea industry but also the broader environment and biodiversity. The shift to organic methods has improved the overall health of the ecosystem, protecting water sources and ensuring that future generations can continue to cultivate tea in this unique region. Moreover, the environmental benefits are not just limited to the local ecosystem. Sustainable practices in Darjeeling Tea cultivation have had a ripple effect on global environmental sustainability. As consumers become more conscious of their environmental footprint, products like Darjeeling Tea, produced with strict adherence to ecological standards, meet the growing demand for goods that do not contribute to environmental degradation. This helps to position Darjeeling Tea not just as a premium product in terms of taste, but also as an environmentally responsible choice for consumers. The GI status of Darjeeling Tea is an exemplary model of how economic and environmental sustainability can work in tandem. The economic benefits of the GI status have empowered the local community, providing them with a stable income and safeguarding their unique product. At the same time, the environmental standards required for GI certification have promoted sustainable farming practices, improving soil health, preserving biodiversity, and fostering long-term environmental stewardship. Darjeeling Tea's success story is a reminder that protecting traditional products through mechanisms like GI certification can deliver profound benefits, not only to the economy but also to the environment, ensuring that future generations can continue to enjoy both the product and the land from which it originates.

B. Chanderi Fabric: Social and Cultural Sustainability

Chanderi Fabric, known for its lightweight and luxurious feel, obtained GI status in 2009.⁶⁰ Located in Madhya Pradesh, the production of Chanderi fabric is a cultural tradition that dates back to the 13th century. The GI status has revitalized this traditional craft, ensuring its transmission to future generations and maintaining cultural identity.

Socially, the Chanderi fabric industry supports the entire community involved in the fabric's production.⁶¹ From weavers to dyers, and marketers, GI status has brought better wages and improved working conditions, contributing to a sustainable livelihood model. Additionally, the preservation of unique weaving techniques has fostered a sense of pride and cultural continuity among the local communities, reinforcing social cohesion and community identity.

C. Malabar Pepper: Economic and Social Impact

Malabar Pepper, often referred to as "Black Gold", was among the earliest commodities to receive GI recognition in India.⁶² Cultivated on the Malabar coast of Kerala, this GI has significantly impacted the local economy, and the social structure of the farming communities involved.⁶³

Economically, Malabar Pepper's GI status has allowed farmers to command higher prices, distinguishing their product from non-GI counterparts.⁶⁴ This economic uplift has enabled substantial investments back into the community, improving infrastructure and educational facilities. Socially, the GI has enhanced the social standing of farmers, who are recognized not just as agricultural workers but as custodians of a legacy that dates back over 2000 years. This recognition has helped preserve agricultural knowledge and practices that are environmentally sustainable and culturally significant.

⁶⁰ R.W. Sharma & S. Kulhari, *Marketing of GI Products: Unlocking Their Commercial Potential*, CENTRE FOR WTO STUDIES, INDIAN INSTITUTE OF FOREIGN TRADE (2015).

⁶¹ A.M. Basu, S.S. Ravi & C.N. Ray, *Assessment of Cluster Development Initiative: Case Study of Chanderi Handloom Cluster*, Rural Planning and Management, Faculty of Planning and Public Policy, CEPT University (2011).

⁶² Parthasarathy, V.A., Sasikumar, B., Nair, R.R., and George, K.J. (2007) provide a comprehensive review of the botany and horticulture of black pepper (*Piper nigrum*) in their article published in *Horticultural Reviews*. The essential points include the detailed botanical characteristics of black pepper, its growth habits, and environmental requirements. The authors discuss the various propagation methods and the importance of selecting high-quality planting materials. They also cover cultivation practices, including soil management, irrigation, pest and disease control, and harvesting techniques. Additionally, the review highlights the economic significance of black pepper in the spice trade and its therapeutic properties. See V.A. Parthasarathy, B. Sasikumar, R.R. Nair & K.J. George, *Black Pepper: Botany and Horticulture*, 33 HORTICULTURAL REV. 173 (2007).

⁶³ P. Laxmilatha, S. Thomas, P.K. Asokan, V.G. Surendranath, M.P. Sivadasan & N.P. Ramachandran, *Mussel Farming Initiatives in North Kerala, India: A Case of Successful Adoption of Technology, Leading to Rural Livelihood Transformation*, 14 AQUACULTURE ASIA 9, 9-13 (2009).

⁶⁴ N. Lalitha & S. Vinayan, *REGIONAL PRODUCTS AND RURAL LIVELIHOODS: A STUDY ON GEOGRAPHICAL INDICATIONS FROM INDIA* (Oxford University Press 2019).

VI. COMPARATIVE ANALYSIS

The case studies illustrate that successful GIs often result from a synergy between economic incentives and socio-environmental benefits. In Darjeeling, economic benefits are closely tied to environmental sustainability, while in Chanderi, the social impact underscores cultural preservation.⁶⁵ In Malabar, the GI status bolsters both social structure and economic prosperity. Factors Contributing to Success of GIs are:

Community Involvement: Active participation of local communities in maintaining the quality and uniqueness of the GI product. The people who produce the GI-protected goods are often the custodians of the knowledge, skills, and traditions that give these products their unique identity. For example, in Darjeeling, the tea farmers take pride in the traditional methods of tea cultivation that have been passed down through generations. By engaging local communities in maintaining product quality and uniqueness, the authenticity of the GI product is preserved, fostering a sense of ownership and pride among producers. Community involvement ensures that the production process remains rooted in the region's heritage, adding intangible value to the product.

Government Support: Effective legal protection and marketing support from government bodies. In India, government agencies like the Tea Board have provided Darjeeling Tea with legal protections against counterfeiting, ensuring that only genuine products can use the GI tag. Additionally, governments often offer financial and promotional support, which helps local producers gain visibility in both domestic and international markets. Without the active support of regulatory frameworks and government initiatives, the protection and promotion of GIs would be significantly more challenging, especially when dealing with issues like misappropriation and misuse of the GI label in global markets.

Global Market Access: Establishment of global market links that help fetch premium prices. Products that receive international recognition, such as Darjeeling Tea or Malabar Spices, can command premium prices due to their exclusivity and perceived quality. For instance, the GI status of Darjeeling Tea allows it to compete on a global stage, where the brand value and premium associated with the GI enable farmers to secure higher incomes. Global market access not only provides financial benefits to local producers but also enhances the visibility and prestige of the product, creating a virtuous cycle where demand reinforces both the economic and cultural importance of the GI.

⁶⁵ K. Das, *Prospects and Challenges of Geographical Indications in India*, 13 J. WORLD INTELL. PROP. 148, 148-201 (2010).

Sustainability Practices: Integration of sustainable practices in the production process that appeal to eco-conscious consumers globally. Consumers are more aware of the environmental impacts of their purchases and often prefer products that are produced sustainably. In Darjeeling, the GI certification enforces strict environmental guidelines, encouraging organic farming methods that protect the region's fragile ecosystem. Similarly, in Malabar, sustainable spice cultivation practices ensure soil health and biodiversity, making the GI product more attractive to international buyers. Sustainability practices help safeguard the environment, improve product quality, and align with consumer preferences, ensuring the long-term viability of GI products.

Each region's success with GIs suggests that while the local context determines the specific benefits, the underlying principles of community involvement, sustainability, and effective marketing and legal frameworks are universally applicable.⁶⁶ These insights can guide future policy recommendations for other regions aiming to develop GIs as a tool for sustainable development.

VII. INTERPRETATION OF FINDINGS

The research into the role of GIs in promoting sustainable development within India reveals several critical insights.⁶⁷ Firstly, GIs have demonstrated significant potential in fostering economic sustainability by boosting the local economies. Products certified with GIs typically command higher prices on both national and international markets, providing a financial uplift to the producers and artisans involved. This economic benefit is not only limited to the producers but also stimulates local economies by encouraging ancillary industries such as tourism and local crafts.⁶⁸

Moreover, GIs have been instrumental in preserving cultural heritage and traditional knowledge, which are often at risk of extinction in the rapidly globalizing world.⁶⁹ By securing a legal recognition and protection framework for products deeply rooted in specific locales, GIs help maintain cultural diversity and sustain the unique identities of local communities. This aspect of

⁶⁶ C. Bramley & E. Biénabe, *Why the Need to Consider GIs in the South?*, 1 DEVELOPING GEOGRAPHICAL INDICATIONS IN THE SOUTH: THE SOUTHERN AFRICAN EXPERIENCE 1-14 (2013).

⁶⁷ Á. Török, L. Jantyk, Z.M. Maró & H.V. Moir, *Understanding the Real-World Impact of Geographical Indications: A Critical Review of the Empirical Economic Literature*, 12 SUSTAINABILITY 9434, 9434 (2020).

⁶⁸ L. Kong, *Culture, Economy, Policy: Trends and Developments*, 31 GEOFORUM 385, 385-90 (2000).

⁶⁹ H.M. AM, *Emerging Trends in the Generation, Transmission and Protection of Traditional Knowledge*, 30 INDIGENOUS POLY J. 1, 1-15 (2019).

GIs contributes to social sustainability by reinforcing community ties and ensuring that traditional skills and knowledge are passed down through generations.⁷⁰

Environmental sustainability is another crucial area impacted by GIs.⁷¹ Many GI products are produced using traditional methods that are environmentally sustainable and compatible with local ecosystems. The protection of such products often involves preserving the natural methods of production, which in turn helps in maintaining biodiversity and managing landscapes sustainably.⁷²

However, the research also identifies several challenges. These include the limited awareness among producers about the benefits of GI registration, bureaucratic hurdles in the registration process itself, and a lack of marketing support for GI-tagged products. Additionally, the enforcement of GI rights is not robust enough to prevent unauthorized use, which dilutes the value of the GI tag and discourages producers.

VIII. POLICY RECOMMENDATIONS

Given the above findings, some policy recommendations can be proposed to enhance the role of GIs in promoting sustainable development:

Enhanced Awareness and Education: Government agencies should implement targeted programs to raise awareness among producers about the benefits of GI registration. Educational campaigns can be conducted in collaboration with local industry bodies and NGOs to reach a broader audience.

Streamlining the Registration Process: Simplifying the GI registration process can encourage more producers to apply for GI tags. This could involve reducing the number of required documents, decreasing the fees associated with registration, and speeding up the overall process through better administrative efficiency.

Marketing and Branding Support: Post-registration, GI products often struggle with market recognition and premium pricing. Government and industry bodies should collaborate to develop

⁷⁰ A. Wali, D. Alvira, P.S. Tallman, A. Ravikumar & M.O. Macedo, *A New Approach to Conservation: Using Community Empowerment for Sustainable Well-Being*, 22 *ECOLOGY & SOC'Y* (2017).

⁷¹ R. Aspinall & D. Pearson, *Integrated Geographical Assessment of Environmental Condition in Water Catchments: Linking Landscape Ecology, Environmental Modelling and GIs*, 59 *J. ENVTL. MGMT.* 299, 299-319 (2000).

⁷² S.J. Scherr & J.A. McNeely, *Biodiversity Conservation and Agricultural Sustainability: Towards a New Paradigm of 'Ecoagriculture' Landscapes*, 363 *PHIL. TRANS. R. SOC'Y B: BIOLOGICAL SCI.* 477, 477-494 (2008).

branding and marketing strategies that highlight the unique qualities of GI products. This can include subsidies for participating in national and international trade fairs, as well as digital marketing support.

Strengthening Enforcement Mechanisms: Robust enforcement is crucial to prevent the misuse of GI tags. This can be achieved by setting up dedicated enforcement units that have the power to take swift action against GI infringements. Additionally, setting up a centralized online system for reporting violations can enhance the effectiveness of enforcement.

International Collaboration: To harness the full economic potential of GIs, international collaborations and agreements can be promoted to secure recognition and protection in foreign markets. This involves not only bilateral agreements but also active participation in international forums dealing with intellectual property rights.

Sustainable Production Incentives: Policies that encourage and financially support the adoption of sustainable practices in the production of GI-tagged products can be highly beneficial. These incentives can include tax rebates, subsidies on sustainable technologies, and grants for research into sustainable practices related to GI products.

Local Stakeholder Engagement: Finally, engaging local communities and stakeholders in the management and promotion of GIs ensures that the benefits of GIs are distributed equitably. Establishing local GI councils can provide a platform for stakeholders to participate in decision-making processes related to the marketing, regulation, and enforcement of GIs.

While GIs have shown a promising potential in promoting sustainable development in India, there is a substantial need for strategic enhancements in policy and practice. Addressing the identified challenges through comprehensive policy reforms can strengthen the GI framework, making it a more effective tool for economic, cultural, and environmental sustainability. These efforts will not only benefit the local communities directly involved but also contribute to broader national and global sustainability goals.

IX. CONCLUSION

This research has revealed significant insights into how GIs can bolster sustainable development across various dimensions. Primarily, the findings underscore the pivotal role GIs play in promoting economic stability, protecting cultural heritage, and encouraging environmental conservation. Economically, GIs have proven effective in enhancing market visibility and profitability for regional products, thereby supporting local industries and communities. Culturally, GIs help preserve unique traditional practices and knowledge systems, which are integral to maintaining the cultural identity of a region. Environmentally, the promotion of GIs aligns with sustainable agricultural practices and biodiversity conservation, emphasizing the importance of utilizing natural resources responsibly. One of the major findings of this research is the positive correlation between GI registration and enhanced socio-economic outcomes for local producers. GIs serve as a badge of quality and authenticity, which can command premium prices on both national and international markets. This economic uplift not only improves the livelihoods of local communities but also encourages the preservation of traditional crafts and production methods that might otherwise succumb to industrial pressures.

Despite the successes, the research also identifies several areas where the current policy framework could be improved to maximize the benefits of GIs. There are notable gaps in the enforcement of GI regulations and a need for greater awareness among consumers about the value of GI products. Additionally, the infrastructure supporting GI registration and marketing needs to be further strengthened to better support the small-scale producers and artisans. Looking ahead, the study suggests several directions for future research. One area involves a deeper examination of the impact of GIs on women and marginalized groups, exploring how these communities can be more inclusively integrated into the benefits that GIs offer. Another research direction could focus on the comparative analysis of GI impacts in different states or regions within India, to understand the variable factors that contribute to successful GI implementation. Further studies could also evaluate the international implications of India's GI policies, especially in terms of trade relations and global market access.

Lastly, an in-depth analysis of the environmental impacts of GIs could provide a clearer picture of how these designations contribute to sustainable natural resource management. This would involve tracking changes in agricultural practices and assessing biodiversity outcomes in GI-tagged regions over time. This research highlights the significant potential of Geographical Indications to contribute to a more sustainable society in India, emphasizing the need for a strengthened policy

framework that can fully harness this potential. By addressing the identified gaps and exploring the suggested future research directions, policymakers and stakeholders can better leverage GIs as powerful tools for sustainable development. These efforts will ensure that GIs not only safeguard cultural and natural heritage but also pave the way for robust economic growth and environmental sustainability in India.

STRIKE(-ING) OUT FREE SPEECH: EXAMINING COPYRIGHT AS A TOOL FOR ONLINE CONTENT CENSORSHIP IN THE USA AND INDIA

RISHUBH AGARWAL*

ABSTRACT

In the realm of copyright, the notice-and-takedown provision is increasingly being used as a tool in political strategy to curb dissent, manipulate public opinion and create a narrative that aligns with the ruling political forces. Parallely, content moderation, which was previously done manually at the behest of government agencies, is now undergoing a worrisome transition to becoming fully automated. The cumulative impact is that copyright takedowns have increased manifold, and the users are often left remediless due to a lack of transparency and accountability of online platforms while removing such content. The research analyses the legal standards pertaining to copyright and free speech, highlights the inadequacies of the current legal frameworks and offers recommendations for balancing the rights of content holders with the duty of online platforms to remove infringing content while preserving digital freedoms.

I. INTRODUCTION

The internet has transcended international boundaries and assumed almost a ‘supra-human’ role in the Digital Age.¹ With the advent of Social Media Intermediaries [“SMIs”] and the increase in instances of online copyright infringement, the existing copyright frameworks of various countries have proven ineffective and undermined the internet’s long-standing values of freedom, creativity, and innovation. The aim of the research is to understand how copyright takedown notices are employed as a tool to stifle dissent. Under the garb of copyright infringement,² these notices are used to pull-down discourse that is critical of the current majoritarian viewpoint. In the subsequent section, the use of algorithmic filters by social media intermediaries is examined and an argument is made that automated systems are inadequate to conduct a fact-specific enquiry which is the standard in law to determine fair use and/or copyright infringement. The concluding analysis addresses the tussle between fair use (fair dealing in India) and the fundamental right to freedom

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¹ Aakanksha Kumar, *Internet Intermediary Liability for Contributory Copyright Infringement in USA and India: Lack of Uniformity as a Trade Barrier*, 19 J. INTELL. PRO. RTS. 272 (2014).

² David Sohn, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, CTR. FOR DEMOCRACY AND TECH. (2010), https://cdt.org/wp-content/uploads/pdfs/copyright_takedowns.pdf.

of speech and expression. Recommendations are proposed to reform the existing legal frameworks to safeguard these rights more effectively while ensuring the integrity of copyright enforcement mechanisms.

II. THE LAW IN INDIA AND THE USA – ISP LIABILITY FOR INTELLECTUAL PROPERTY VIOLATION

The Digital Millennium Copyright Act 1998 [**“DMCA”**] is a US federal law that was legislated to protect copyright holders from unlawful distribution or reproduction of their online works. The DMCA, under Section 512,³ provides right holders with an expedited “notice-and-takedown” system that warrants them to request search engines and social media intermediaries to remove content on grounds of copyright infringement. The eligible internet service providers can avoid liability for copyright infringement based on the content posted by their users by virtue of the ‘safe harbor protection’ in exchange for swiftly removing content and upholding the exclusive rights of the copyright holders.⁴ The DMCA’s safe harbor provision protects online platforms from liability for user-uploaded content, as long as they act promptly to remove the infringing content/material when notified. Section 512 of the DMCA elucidates four categories of internet service providers who qualify for safe harbor protection. The safe harbor provisions of the DMCA can be applied if the service provider participates in one or more of the related activities listed hereinafter: (a) acting as a conduit for the automated online transmission of content as instructed by third parties (a “mere conduit”); b) temporarily storing content that is being automatically transmitted over the internet from one third party to another [“caching”]; c) storing content on an online service provider’s [**“OSP”**] system or network at the user’s request [“hosting”]; or d) directing users to online websites using information location tools, like a search engine [“linking”].⁵ The nature of the activity determines whether an OSP qualifies for a certain safe harbor.

With the widespread dissemination of online content becoming the driving force of the internet, the necessity to safeguard the intellectual property rights of content creators is now felt globally. The World Intellectual Property Organization Copyright Treaty [**“WIPO”**] 1996 requires WIPO member states and signatories to safeguard the copyright of any work generated by inhabitants of

³ Digital Millennium Copyright Act, 17 USC § 512 (1998).

⁴ A safe harbour protection is a provision in law which provides for protection from liability or significantly reduces liability if certain conditions are met. It is envisaged under Section 512 of the Digital Millennium Copyright Act 1998 and Section 79 of the Information Technology Act 2000.

⁵ United States Copyright Office, *Section 512 of Title 17 – A Report of the Register of Copyrights* (May, 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

a foreign country within their respective jurisdictions.⁶ The treaty essentially suggests that the DMCA will be applicable in and treated at par with every member country's domestic copyright law. The Government of India acceded to the WIPO Copyright Treaty in 2018, thus granting DMCA the same legal enforceability in India as the domestic copyright law.⁷ As a result, internet users in India are governed not only by Indian intellectual property laws, but also by the Digital Millennium Copyright Act, 1998, i.e. the law that applies to content originating in the United States. The DMCA, being a pertinent part of the United States' copyright framework, is applicable to websites hosted in the United States. Interestingly, all major platforms like Meta, WhatsApp, Instagram, X and YouTube are based out of the US and are bound to work within the confines of the DMCA.⁸ It is asserted that the United States plays a significant role in the international trade agenda, thereby compelling countries in the Global South to adapt their internal laws and regulations to U.S.-based standards to establish uniformity and facilitate improved business relations. Consequently, copyright infringement recognized on any such platform will incur the wrath of the DMCA for any offender, regardless of geographical location as most of these platforms are owned by Silicon Valley firms that are subject to the DMCA.

Parallel to the United States' framework, the rights of copyright holders in India are protected under the Copyright Act of 1957. The rights and liabilities of internet service providers are protected under the Information Technology Act, 2000 supplemented by the IT (Intermediary Guidelines and Digital Media Ethics) Code, 2021. Section 51 of the Copyright Act sets out that a copyright is infringed *inter alia* when any person does anything, the exclusive right to do which is conferred on the copyright holder.⁹ There are certain exceptions to copyright infringement known as the principles of "fair dealing" envisaged in Section 52 which entails specific, statutorily demarcated circumstances wherein a protect work can be used without a license or permission.¹⁰ An "intermediary"¹¹ defined under Section 2 (1)(w) of the Information Technology Act, 2000, shall be exempted from liability for any third-party information, data or communication made available or hosted by it under Section 79(1) of the IT Act, 2000. This is called the safe-harbor provision and is subject to certain conditions laid down in subsection (2) and (3) of Section 79 of the Information Technology Act, 2000.

⁶ The World Intellectual Property Organization Copyright Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997).

⁷ Press Information Bureau, *Cabinet approves accession to WIPO Copyright Treaty, 1996 and WIPO Performance and Phonograms Treaty, 1996*, GOVERNMENT OF INDIA (04 July, 2018), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=180389>.

⁸ Digital Millennium Copyright Act, 17 USC § 512 (1998).

⁹ The Copyright Act 1957, No. 14 Acts of Parliament, 1949, § 51 (Ind.).

¹⁰ *Id.*, § 52

¹¹ The Information Technology Act 2000, No. 21, Acts of Parliament, 2000, § 2(w) (Ind.).

III. THE LAW WEAPONIZED

Social critics Edward Herman and Noam Chomsky, in their book *Manufacturing Consent*, contend that the State's bureaucracy holds "monopolistic control over the media" which results in authorized monitoring and censorship.¹² In response, a propaganda model is suggested, one which focusses on unequal distribution of wealth and power and explicates how money and power influences mass-media choices, curbs dissent, manipulates public opinion and upholds the interests of the elite class.¹³ Chomsky discusses how media outlets, through selective news reporting, create a narrative that aligns with dominant political and economic forces.¹⁴ In an interview with Alan McLeod,¹⁵ Chomsky asserts that the propaganda model can be transfused into the information age. He highlights the power of targeted advertising and how social media algorithms may feed into "echo chambers" and fortify existing beliefs, thus further altering public discourse.¹⁶ Herman and Chomsky's theories, albeit in the political-economic sense, bear a striking resemblance to the systematic suppression of political critique and dissent. The main argument made herein is that the disingenuous use of copyright law leads to stifling of dissent, or in turn, takedown of content which is critical of the prevailing political standpoint. It is argued that content takedowns under the Indian and American laws are error-prone and violate the constitutional guarantee of the freedom of speech and expression coupled with the freedom of the press. The two main reasons which facilitate the incorrect application of copyright laws are:

- 1) The overreach and misuse of copyright law for silencing criticism and dissent;¹⁷
- 2) Increased automation in content moderation (which includes the incapacity of AI to conduct a fact-specific enquiry on a case-to-case basis).¹⁸

According to Google's Monthly Transparency Report of November 2023,¹⁹ 97.1% of the content removed from Google and YouTube was related to copyright claims. The graph showing the reasons for content removal is given below:

¹² EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988).

¹³ *Id.* at 61.

¹⁴ ALAN MACLEOD, *PROPAGANDA IN THE INFORMATION AGE: STILL MANUFACTURING CONSENT* (Routledge 2019).

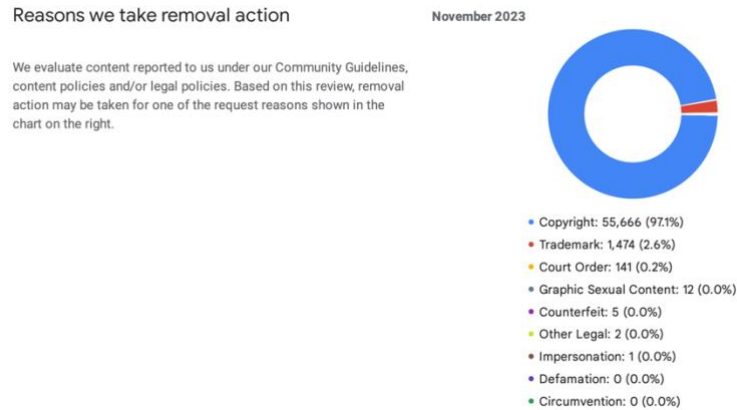
¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sep. 2010), https://cdt.org/wp-content/uploads/pdfs/copyright_takedowns.pdf.

¹⁸ Dan L. Burk, *Algorithmic Fair Use*, 283 THE UNIV. CHI. L. REV. (2019).

¹⁹ Google, *Monthly Transparency Report, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* (2023), https://storage.googleapis.com/transparencyreport/report-downloads/india-intermediary-guidelines_2023-11-1_2023-11-30_en_v1.pdf.



Copyright law creates opportunities for mala fide actors who want to stifle free speech under the garb of copyright protection. A video showing President Trump lamenting George Floyd’s death and warning about the “violence and anarchy” from radicals was taken down from Twitter over alleged copyright infringement.²⁰ Another example from India is the removal of the BBC documentary on the Indian Prime Minister, Narendra Modi which investigates his role in the 2002 Gujarat riots. A Meta representative was quoted saying, “the content was removed due to copyright claims by the rights holder”.²¹ A Lumen database report confirms that in January 2023, at least fifty tweets were taken down at the direct request of the Indian government through the Ministry of Information and Broadcasting.²² Journalists from *The Intercept* (an award-winning adversarial journalism organization) have averred that Elon Musk has failed to ‘stand up to the authoritarian governments’ and eventually caved to unprecedented demands.²³ Even tweets by actor John Cusack linking to *The Modi Question* have been blocked in India, however, they remain visible to American audiences.²⁴ The impact of India’s over-censorship of anti-majoritarian content is clearly reflected in BBC’s copyright claims and the consequent removal of the documentary on the Prime Minister. These takedowns serve as a disconcerting reminder of the powers enjoyed by the government, which are often abused to curb dissent, suppress legitimate content and manipulate public opinion to uphold the views of the ruling (elite) class.²⁵ At this juncture, we shall delve into

²⁰Jonathan Easley, *Twitter Removes Trump Campaign Tribute to George Floyd Claiming Copyright Complaint*, THE HILL, <https://thehill.com/homenews/campaign/501270-twitter-removes-trump-campaign-tribute-to-george-floyd-claiming-copyright>.

²¹Russell Brandom, *Why Is the Modi Documentary So Hard to Find? Some Blame Lies with the BBC*, REST OF WORLD (2023), <https://restofworld.org/2023/why-is-the-modi-documentary-so-hard-to-find-some-blame-lies-with-the-bbc>.

²²Ministry of Information and Broadcasting, *Legal Request for Twitter from India*, LUMEN DATABASE (Jan. 20, 2023), https://lumendatabase.org/file_uploads/files/5097820/005/097/820/original/Legal_Request_for_Twitter.pdf?1674320467&access_token=Vbprc_ia6fmjek5G0sunAg.

²³Murtaza Hussain & Ryan Grim, *Elon Musk Caves to Pressure from India to Remove BBC Doc Critical of Modi*, THE INTERCEPT (Jan. 24, 2023), <https://theintercept.com/2023/01/24/twitter-elon-musk-modi-india-bbc>.

²⁴@JohnCusack, TWITTER, <https://twitter.com/johncusack/status/1616019439014617090>.

²⁵Edward S. Herman & Noam Chomsky, *supra* note 12.

case studies from three different jurisdictions in support of the first argument hereinabove i.e. the misapplication of copyright law to silence criticism:

A. Overly aggressive copyright claims during US Presidential campaigns

In 2020, California-based band Linkin Park issued a cease-and-desist notice against Donald Trump for unauthorizedly using their copyrighted music, i.e. featuring a cover version of the band's infamous song "In the End" in a political campaign video. Subsequently, Machine Shop Entertainment, the business arm and management company of Linkin Park, filed a DMCA takedown notice seeking removal of the video claiming infringement of copyright.²⁶ Pursuant to the copyright complaint, the tweet enclosing the campaign video put up by Mr. Trump's campaigners and retweeted by Donald Trump, was taken down "in response to a report by the copyright owner", as the takedown notice read.²⁷ In the same year, a viral anti-Trump video was produced by the Lincoln Project, a group of Republican strategists who opposed Trump's re-election. The video titled "Mourning in America" depicted the United States declining and struggling under the weight of the pandemic, unemployment and economic downturn, all of which was attributed to Trump's leadership.²⁸ In response, the Trump campaign claimed that the video used footage and materials that were copyrighted, particularly from Trump's rallies and other campaign related events, and filed a copyright complaint.²⁹ Pursuant to the complaint, platforms hosting the video including Twitter were asked to takedown the controversial video. The Lincoln Project contested the takedown arguing that their use of the footage fell within the domain of "fair use" which allows the legitimate use of copyrighted content for the purposes of criticism, commentary, news reporting, or parody – contexts that could apply to the "Mourning in America" video. Fair use is a legal principle that allows the use of copyrighted material without permission/authorization from the author. The doctrine of fair use attempts to strike a delicate balance between the rights of the authors of copyrighted works with the right of the public to access the said works in limited circumstances.

Similar instances of political stifling under the garb of copyright-related actions include the takedown of an advertisement publicized by CBS news anchor Katie Couric commenting on

²⁶ Daniel Kreps, *Linkin Park Issue Cease and Desist After Trump Retweets Campaign Video Set to "In the End"*, ROLLING STONE (July 19, 2020), <https://www.rollingstone.com/music/music-news/linkin-park-cease-and-desist-trump-video-1030886/>.

²⁷ *Id.*

²⁸ The Lincoln Project, *Mourning In America*, YOUTUBE (May 04, 2020), https://www.youtube.com/watch?v=t_yG_-K2MDo.

²⁹ CNN Politics, *Donald Trump just broke the most basic rule of politics*, CNN (May 05, 2020), <https://edition.cnn.com/2020/05/05/politics/lincoln-project-ad-donald-trump/index.html>.

Barack Obama's "lipstick on a pig" remark during John McCain's 2008 campaign,³⁰ and the takedown of a Mitt Romney campaign video³¹ which was used to highlight Barack Obama's relationship with lobbyists.³²

The takedown of politically sensitive content exemplifies how copyright law can be used as a tool in political strategy, especially in efforts to limit the distribution of critical or opposing viewpoints during a highly polarized election.

B. Copyright as a weapon of censorship under Ecuadoran President Rafael Correa's regime.

The ubiquitous growth of digital technology has added a newfound layer of complexity to the relationship between copyright and censorship. Rafael Correa, who served as the Ecuadorian President from 2007 to 2017, was infamous for his position on media regulation and limiting free access to news and information. In October 2013, Pocho Alvarez, a filmmaker, found that his nine-minute video, "*Assault on Íntag*" pertaining to the harassment suffered by an indigenous community was taken down from his YouTube account.³³ The video included President Correa's photos and voice saying, "Let us see who is causing these problems" implying that residents of the area were obstructing construction.

The Ecuadoran government under President Correa is one of the finest examples of systematic suppression of political dissent. President Correa allegedly invested "millions of dollars of public funds" to remove content that was deemed anti-majoritarian. DMCA notices were issued to remove "unauthorized content" from the state-operated TV channel ECTV.³⁴ A critical documentary by Santiago Villa, titled "*Rafael Correa: retrato de un padre de la Patria*" was also pulled down due to a copyright infringement claim.³⁵ Moreover, the government accused the investigative news website *La Fuente* of copyright infringement and claimed that the owners were illegally

³⁰ Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sep. 2010), https://cdt.org/wp-content/uploads/pdfs/copyright_takedowns.pdf.

³¹ The Telegraph, *US election: Barack Obama and Mitt Romney campaign ads depict different realities*, YOUTUBE (May 01, 2012), <https://www.youtube.com/watch?v=RBn7rK7QUtc>.

³² Lizbeth Hasse, *President or Pirate? The DMCA Takedown War of the Presidential Campaigns*, CREATIVE INDUSTRY, <https://www.cilawyers.com/president-or-pirate-the-dmca-takedown-war-of-the-presidential-campaigns>.

³³ José Miguel Vivanco, *Censorship in Ecuador Has Made It to the Internet*, HUMAN RIGHTS WATCH (2014), <https://www.hrw.org/news/2014/12/15/censorship-ecuador-has-made-it-internet>.

³⁴ Claudio Ruiz, *Copyright as a Tool to Censor Political Dissent in Latin America*, CREATIVE COMMONS (2017), <https://creativecommons.org/2017/01/20/copyright-tool-censor-political-dissent-latin-america>.

³⁵ Claudio Ruiz, *Copyright as a Weapon of Censorship*, DERECHO DIGITALES (Oct. 21, 2014), <https://www.derechosdigitales.org/8125/ecuador-copyright-weapon-censorship>.

publishing confidential information.³⁶ However, Ecuador's excessive content regulation and a deplorable free speech record leads us to believe that the real intention behind such acts was to silence whistleblowers and prevent allegations of corruption within Correa's administration.

In the last two decades, copyright has served as an effective means of regulating the dissemination of information; this, in turn, has broadened the scope of government censorship in Latin America where it is now used to restrict access to information and silence anti-majoritarian discourses and critical speech. The aforementioned instances highlight how copyright law can be misused in politics by leveraging aggressive takedown notices to limit the distribution of critical or opposing viewpoints. Mala fide takedowns exemplify the propaganda model and the suppression of political discourse, as suggested by Herman and Chomsky in their book *Manufacturing Consent*.³⁷ By claiming infringement on campaign materials or content, political entities can temporarily suppress unfavorable media, stifling public discourse and potentially influencing the narrative in their favor even if the usage of the content might otherwise be protected under fair use.

C. Copyright as a weapon of structured political stifling in India

1. Doordarshan, Prasar Bharati's copyright takedowns

Amid the recent controversies, India has been on the forefront of systematic political stifling. In 2023, Abhisar Sharma (former employee at Zee, ABP, BBC and NDTV) who is now an independent journalist, received two copyright notices from Doordarshan, Prasar Bharati which is the government's broadcasting channel that has the exclusive rights to cover the Parliament.³⁸ The subject matter of the copyright notices was the use of Prime Minister Modi's sound bites over which Prasar Bharati (allegedly) owned copyright. The two videos in contention were:

“Modi avoids answering questions! Sansad turned into a Chunaavi Sabha! Opposition's Rahul ridiculed”; and

“Rahul Gandhi's harshest comment on BJP-RSS | Rahul Gandhi | NDA Vs INDIA”.³⁹

Prima facie it is evident that these videos were on matters of public interest. Interestingly, Prasar Bharati's website states that their mission and objective is “to safeguard the citizen's right to be

³⁶ Freedom House, *Freedom on the Net – 2020*, FREEDOM HOUSE, <https://freedomhouse.org/country/ecuador/freedom-net/2020>.

³⁷ Edward S. Herman & Noam Chomsky, *supra* note 12.

³⁸ Vallari Sanzgiri, *Prasar Bharati sends YouTube news channels copyright strikes for clips of Parliament, PM speeches*, SCROLL (Sep. 25, 2023), <https://scroll.in/article/1056536/prasar-bharati-sends-youtube-news-channels-copyright-strikes-for-clips-of-parliament-pm-speeches>.

³⁹ *Id.*

informed freely, truthfully and objectively on all matter of public interest, and to present a fair and balanced flow of information including contrasting views...’’⁴⁰

When questioned about the copyright claims, Mr. Sharma stated that the biggest impact of such takedown requests is a hit on channel’s revenue.⁴¹ It must be borne in mind that independent journalists earn majorly through platforms like YouTube and Twitter. Malicious takedown requests under the garb of copyright infringement not only affect video monetization, but also impede the free flow of information in public interest. The video uploaded by Abhisar Sharma was subjected to a copyright notice on the pretext that “a copyright owner has claimed some material in his video”.⁴² Although the video remained live, the notice read that the video is now either being monetized by the original copyright owner, or the owner has chosen to receive analytics about it. According to Section 28 of the Copyright Act, 1957, the government is the first owner of copyright in case of ‘government works’. Thus, the government can regulate, restrict or allow the use of said works. However, an exception is carved out under Section 52(1)(a)(iii) for the reporting of current events and current affairs, including the reporting of a lecture delivered in public. A cumulative reading of the provisions indicates while the government holds the exclusive rights to reproduce, distribute and display these works, reporting of current events and current affairs is protected squarely by the fair dealing defense.

An interesting question to be raised at this juncture is – why are videos of public relevance not allowed to be used, critiqued, or reviewed by independent journalists? The researcher asserts that parliamentary proceedings should be made available in the public domain. The Indian government, by authorizing only authorized journalists to use footage of the G20 event, violated another provision of the Copyright Act, 1957 – Section 52(1)(za) which permits the communication to the public of an official ceremony held by the Central Government or the State Government or any local authority. In this regard, not a single independent journalist was allowed to cover the United States’ President Joe Biden’s meeting with the Indian Prime Minister. Resultingly, the only photographs that will enter the history books from this meet would be the ones taken by official government photographers.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

2. *TV Today – Newslaundry dispute*

In another instance from 2021, YouTube froze News Laundry's (an independent journalistic organization) channel for alleged copyright violation after TV Today (the parent company of the Aaj Tak-India Today group) reported it multiple times. Since its inception in 2012, Newslaundry has been infamous for having critical opinions, pieces, reportage and satirical commentary about the various organs of the government. The Newslaundry channel takedown reflects the larger issue of overly aggressive copyright strikes purported to handicap independent journalists. The Internet Freedom Foundation ["IFF"] in a letter to Google India⁴³ wrote that the practice of 'complaint bombing'⁴⁴ leads to the takedown of journalistic critique. The IFF termed this malicious practice as "weaponization of intellectual property",⁴⁵ a trend which is now increasingly employed by huge media conglomerates and political parties to serve their unscrupulous interests.

TV Today preferred an application before the High Court of Delhi seeking mandatory injunction, permanent injunction and damages against Newslaundry on the ground that the content of the programmes of the Defendants was formed majorly out of the content produced by the Plaintiff.⁴⁶ Arguing the application, the Defendants (Newslaundry) contended that their use of the Plaintiff's content constituted "transformative use" and should be squarely covered by Section 52 of the Copyright Act, 1957 inasmuch as they give due credit to the plaintiff and in no manner, try to show that the content is owned by the Defendants. The Delhi High Court, in its order dated 29th July 2022⁴⁷ corrected YouTube's grave error of taking down the videos uploaded by Newslaundry by dismissing the application under Order XXXIX Rule 1 and 2 moved by TV Today against Newslaundry. The High Court opined that at the interim stage, the Defendants were successful in establishing a *prima facie* case and the balance of convenience would tilt in favor of the Defendants in the event that they are able to establish fair comment, justification (defenses against defamation) and fair use.⁴⁸ While dismissing the application, the Hon'ble Court held that no irreparable loss or injury will be caused to the Plaintiffs if the interim injunction is not granted. The High Court held, "It would definitely be in the public interest that every broadcaster has the right of fair comment on current events and of criticism and review, including the programme created by others."

⁴³ Anandita Mishra, *IFF Writes to Google India about Recent Instances of YouTube Copyright Strikes*, INTERNET FREEDOM FOUNDATION (Oct. 18, 2021), <https://internetfreedom.in/iff-writes-to-google-india-about-recent-instances-of-youtube-copyright-strikes>.

⁴⁴ Complaint bombing refers to the act of sending a large number of takedown requests in an attempt to moderate and censor legitimate speech.

⁴⁵ Anandita Mishra, *supra* note 43.

⁴⁶ Code of Civil Procedure, 1908, Order XXXIX, rr. 1-2 (India).

⁴⁷ *T.V. Today Network Limited v. News Laundry Media Pvt. Ltd. and Others*, (2022) SCC OnLine Del 4899 (Ind.).

⁴⁸ *Id.*

Pertinently, as aforementioned, the Court left the issues of “justification”, “fair comment” and “fair dealing” open for trial.

The Newsland order is as a progressive step and comes as a sigh of relief for advocates of independent journalism and those holding anti-majoritarian views. It reinforces the stance that news reporting falls under the criticism and review net of Section 52. Notably, the Court held that the fair use inquiry is a “question of fact”.⁴⁹ At this juncture, it is vehemently argued that AI systems are incapable of conducting a fact-specific inquiry to determine fair use because determination of fair use requires taking into account the purpose and character of use, the nature of the copyrighted work, the amount and substantiality of the portion used in respect of the copyrighted work, and the effect of the use on the potential market or value of the copyrighted work.⁵⁰ While AI *may* prove efficient in mapping the allegedly infringing material onto the copyrighted works in its database, the accurate, fact-oriented determination of the four-factor fair use test remains a big hurdle for AI systems to learn and implement.

For now, readers may find solace in reading Dr. DY Chandrachud, CJI’s opinion in *Madhyamam Broadcasting Limited v. Union of India*.⁵¹

“An independent press is vital for the robust functioning of a democratic republic. Its role in a democratic society is crucial for it shines a light on the functioning of the state. The press has a duty to speak truth to power, and present citizens with hard facts enabling them to make choices that propel democracy in the right direction. The restriction on the freedom of the press compels citizens to think along the same tangent. A homogenized view on issues that range from socio-economic polity to political ideologies would pose grave dangers to democracy. The critical views of the Channel, Media-One on policies of the government cannot be termed, ‘anti-establishment’. The use of such a terminology in itself, represents an expectation that the press must support the establishment. The action of the Ministry of Information and Broadcasting by denying a security clearance to a media channel on the basis of the views which the channel is constitutionally entitled to hold produces a chilling effect on free speech, and in particular on press freedom. Criticism of governmental policy can by no stretch of imagination be brought within the fold of any of the grounds stipulated in Article 19(2).”

⁴⁹ *Id.*

⁵⁰ Copyright Act of 1976, 17 U.S.C. § 107.

⁵¹ *Madhyamam Broadcasting Limited v. Union of India*, (2023) SCC OnLine SC 366.

A perusal of these case studies highlights a slow, but worrisome progression from active human moderation (for political purposes) to automated content monitoring and censorship. The overuse of copyright law by government agencies to stifle dissent has slowly withered and has been overtaken by ‘super-intelligent’ content moderation algorithms. It is argued that the evolution of super-intelligent AI poses a real and imminent threat of - what British computer scientist and Professor at University of California, Berkeley Stuart Russel calls, the ‘gorilla problem’.⁵² Russell, in his book *Human Compatible* states, “the biological lineage leading to contemporary humans was inadvertently created ten million years ago by the ancestors of the present-day gorilla.”⁵³ What are the gorillas’ thoughts on this? The destiny of their species is ultimately restricted to what humans choose to permit.⁵⁴ He compares this notion to how humans could (and are most likely to) face a similar gorilla problem, or “the question of whether humans can maintain their primacy and autonomy in a world which comprises of machines with substantially greater intelligence.”⁵⁵

IV. THE LIMITATIONS OF AUTOMATED CONTENT MODERATION

At this point, it is critical to submit that content moderation algorithms are insufficient to conduct fact-specific inquiries which are imperative in determining instances of online copyright infringement. A comprehensive fair use analysis is necessary before taking down any content which cannot be fit into a straitjacket formula for these algorithms. For example: judicial scrutiny is indispensable in determining the nature, character and purpose of the use of any copyright work rather than trying to reduce the test to an executable computer code.

Algorithmic systems are intended to balance the rights of content owners while limiting the liability of intermediaries. The purpose of fair use is to define the contours of infringement and to allow for free expression relating to artistic creativity and public discourse.⁵⁶ However, the biggest problem with fair use is that it is context-sensitive and is fraught with *ex-ante* uncertainty.⁵⁷ The uncertainty problem can be overcome by incorporating context-specific fair use standards into copyright-policing algorithms to prevent illegitimate takedowns. The paramount question for legal scholars, lawyers, judges and computer scientists is – can a personalized, fact-specific inquiry like the fair use analysis, be incorporated into a machine-driven algorithmic system?⁵⁸ In the United

⁵² STUART J RUSSELL, HUMAN COMPATIBLE: ARTIFICIAL INTELLIGENCE AND THE PROBLEM OF CONTROL, 132 (2019).

⁵³ *Id* at 132.

⁵⁴ *Id* at 132.

⁵⁵ *Id* at 132.

⁵⁶ *Id* at 284.

⁵⁷ *Id* at 284.

⁵⁸ *Id* at 285.

States, a finding of fair use requires an adjudicatory consideration of four factors, viz. the nature of the work, the amount and substantiality of the work used, the effect of the use on the potential market and the purpose and character of use.⁵⁹

Another difficulty arises when automated takedowns are rarely challenged due to significant cost asymmetries. A DMCA takedown can prove cumbersome for individuals and organizations lacking the financial wherewithal to defend themselves in litigation. This may give rise to a “chilling effect” on the freedom of speech and expression, thus discouraging individuals from openly expressing dissent due to the fear of facing costly legal repercussions. It must be noted that unlike full-blown legal and institutional intervention, algorithmic identification and removal is relatively inexpensive. Users, service providers, and content owners have all lowered their expectations in light of the fact that most takedown decisions judgments are final.⁶⁰ Fair use factors are not considered by automated systems and the removal or takedown decisions are effectively deemed final before and *if* the dispute reaches any court or tribunal where a fair use inquiry might be conducted.⁶¹

V. ASSESSING THE LEGAL IMPACT

The interplay between automated content moderators and fair use was highlighted in the judgments mentioned hereinafter. In *Lenz v. Universal Music Corp.*,⁶² the US Ninth Circuit Court considered a question of whether copyright holders have been abusing or misusing the extrajudicial takedown procedures provided for in the DMCA by declining to first evaluate whether the content qualifies as fair use.⁶³ The Court unequivocally held that copyright holders must first conduct a fair use analysis⁶⁴ before issuing a takedown notification. The facts leading to the present appeal were – in 2007, Stephanie Lenz uploaded a video of her children dancing in the kitchen, in which the song “Let’s Go Crazy” by Prince can be heard playing in the background for approximately twenty seconds.⁶⁵ She shared the video on YouTube to “share it with (her) family and friends”.⁶⁶

⁵⁹ The Copyright Act of 1976, § 17.

⁶⁰ Roger Brownsword, *Lost in Translation: Legality, Regulatory Margins, and Technological Management*, 26 BERKELEY TECH. L.J. 1321 (2011).

⁶¹ Burk, *supra* note 18 at 290.

⁶² *Lenz v. Universal Music Corp.*, 815 F.3d 9th Cir. 1145 (2016).

⁶³ *Id.*

⁶⁴ Fair use is evaluated along four metrics: (1) the “purpose and character of the use,” with consideration to whether the purpose is commercial or nonprofit; (2) the nature of the copyrighted piece; (3) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”; and (4) the effect of the use on the copyrighted work’s market value.

⁶⁵ Stephanie Lenz, *Let’s Go Crazy #1*, YOUTUBE (February 8, 2007), <https://www.youtube.com/watch?v=N1KfJHFWhQ>.

⁶⁶ *Id.*

The recording label Universal Music Corporation sent a DMCA takedown notice alleging copyright infringement and demanding the video to be removed. Consequently, YouTube removed the video, and Lenz filed a DMCA counter-notification pursuant to Section 512(g)⁶⁷ claiming fair use. After the video was reinstated, Lenz filed a suit against the recording label claiming misrepresentation and that Universal did not have a “good faith belief” in demanding the video to be removed.⁶⁸ The Ninth Circuit Court held that a fair use inquiry is necessary before considering a takedown request.⁶⁹ The court elaborated that the “good faith requirement” as envisaged under 7 U.S.C. §512(c)(3)(A)(v) necessitates a subjective, rather than an objective analysis.⁷⁰

In the Indian context, the “good faith belief” standard is reflected in Section 51 (a) (ii) of the Copyright Act, 1957. The provision lays down the requirement of “actual knowledge” of infringing material and carves out an exception that “a defendant would not be held liable for infringement if he was not aware and had no reasonable ground for believing that communication to the public would lead to infringement of the copyright”.⁷¹ The scope of Section 51 as well as the concept of intermediary liability were dealt with, extensively, in the landmark judgment of *My Space Inc. v. Super Cassettes Industries Ltd.*⁷²

In *MySpace*, an appeal was filed by the Defendant [**“MySpace”**] against an interim injunction granted in favor of the Plaintiff, Super Cassettes Industries Ltd [**“SCIL”**]. In the original suit, SCIL sought a permanent injunction and damages from MySpace for infringement of the copyright owned by it in cinematograph films, sound records, and literary and musical works.⁷³ SCIL argued that they had sent several legal notices outlining the nature of infringing works to MySpace. In addition to listing each and every work owned by SCIL, without an iota of indication whether it was accessible on the website of the appellant, the list provided by SCIL was vague and arbitrary and presented two impossibilities: first, it completely disregarded the defense “fair use”. Second, it failed to identify specific works or the location where the works could be accessed. Thus, the Delhi High Court concurred with MySpace’s contentions to hold that SCIL had a duty to list the works specifically for which it has a copyright. Giving a blanket list enlisting all content owned by

⁶⁷ Digital Millennium Copyright Act 1998 § 512 (g), 17 U.S.C. §1201.

⁶⁸ *Lenz v. Universal Music Corporation*, 815 F.3d 1145 (9th Cir. 2016).

⁶⁹ *Id.* at 1153.

⁷⁰ *Rossi v. Motion Picture Association of America*, 391 F.3d 1000 (9th Cir. 2004) 1000.

⁷¹ The Copyright Act No. 14 of 1957, Acts of Parliament, 1949, § 51 (India).

⁷² *Myspace Inc. v. Super Cassettes Industries Ltd.*, (2016) SCC Online Del 6382.

⁷³ *Super Cassettes Indus. Ltd. v. Myspace Inc. & Another*, (2011) 48 PTC 49.

the organization would run against the longstanding principles of copyright law. A Division Bench of the Hon'ble Court made the following significant observations:

(a) The essential element under the Copyright Act and IT Act is “actual” knowledge and not mere suspicion or general awareness.⁷⁴ Mere exercise of a certain degree of control over the uploaded content would not amount to having “actual knowledge”.

(b) Section 79⁷⁵ and Section 81 of the IT Act, 2000⁷⁶ and Section 51 (a) (ii) of the Copyright Act, 1957⁷⁷ must be read harmoniously.⁷⁸ Section 81 of the IT Act, 2000 contemplates an overriding effect of the Act over other laws meanwhile Section 79 guarantees the safe harbor protection to intermediaries. Section 51(a)(ii) of the Copyright Act provides that the copyright in a work would be infringed when any person permits for profit the communication of the work to the public *unless* he was not aware and had no reasonable ground for believing that communication to the public would lead to infringement of the copyright.

The *MySpace* and *Lenz* cases highlight the global limitations of algorithmic content moderation. It is clear that the current systems are insufficient in conducting case-specific, fact-oriented analysis of the multifactor test before removing infringing content. Without a comprehensive assessment of fair use, users are often left perplexed (and effectively remediless) when faced with an arbitrary “*your post has violated community guidelines*” takedown. Perusing *MySpace*, the contention herein is that despite the level of progress in the field of AI, the requirements of ascertaining “actual knowledge” and the “exercise of due diligence” cannot be accurately addressed through algorithmic content moderation by online intermediaries.

VI. PERSPECTIVES OF AI SCIENTISTS AND IP PROFESSORS

What flows from the previous section is that in essence, the determination of fair use may not always be reasonable or accurate, however, an analysis of the multifactor test to determine fair use is necessary. In *Fair Use Infrastructure for Rights Management Systems*,⁷⁹ Professor Dan Burk and Professor Julie E. Cohen argue that fair use standards cannot be translated or programmed into executable computer code, and thus, human oversight is crucial. It is asserted that notions like “educational use”, “classroom use” and “news reporting” are complex ideas and might be

⁷⁴ Myspace Inc. v. Super Cassettes Industries Ltd., (2016) SCC Online Del 6382.

⁷⁵ The Information Technology Act No. 21, Acts of Parliament, 2000, § 79 (Ind.).

⁷⁶ The Information Technology Act No. 21, Acts of Parliament, 2000, § 81 (Ind.).

⁷⁷ The Copyright Act No. 14 Acts of Parliament, 1949, § 51(a)(ii) (Ind.).

⁷⁸ Myspace Inc. v. Super Cassettes Industries Ltd., (2016) SCC Online Del 6382.

⁷⁹ Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 41 HARV. J.L. & TECH. 55 (2001).

extremely difficult to get programmed into an automated, technical protection system.⁸⁰ Accordingly, the likelihood of deploying “a judge on a chip” is questionable.⁸¹ While it is true that algorithmic copyright regulation might result in lower costs associated with copyright infringement determination, such automation will not completely eliminate costs. For example, the cost of constantly maintain and updating automated systems, tailoring and retailoring according to predicted uses⁸² and ensuring compliance to pertinent laws and regulations by obtaining licenses and addressing privacy concerns, would simply lead to what Professor Burk calls a “reallocation of costs”.⁸³

To identify potentially infringing content based on elaborate standards, tests, or patterns, automated systems employ algorithms, heuristics and abstractions. While algorithms can detect certain forms of copyright infringement with substantial accuracy, it is arguable that they have the context and complexity required to evaluate fair use or protected speech. Stuart Russell, in his book *Human Compatible*, describes this as the “problem of context”.⁸⁴ Russell argues that artificial intelligence systems struggle to comprehend and interpret the context in which they operate, leading to potential oversights and incidental outcomes.⁸⁵ Other potential issues involving the use of AI, particularly in creative industries, include unauthorized use of copyrighted material by AI models, difficult in attributing authorship or ownership of content and large-scale replication of content quickly amplifying the risk of spreading infringing material. Navigating these risks requires meticulous attention to data sourcing, usage rights, and emerging laws around AI and copyright. The sweeping intensity with which automated systems have come to the fore makes the time ripe to examine the inherent tension between automated content moderation and constitutional guarantees of free speech and expression.

VII. COPYRIGHT-FREE SPEECH DEBACLE: “A LARGELY IGNORED PARADOX?”

Intellectual property is often perceived as both a positive and a negative right, i.e., it protects the author’s work from potential infringement, but at the same time places an undue monopoly over creative expression by granting the right to a single person or entity. As a result, judges and lawmakers are expected to delicately balance the creators’ exclusive rights with expressive freedoms. The freedom of speech and expression is protected under the First Amendment of the

⁸⁰ Burk, *supra* note 18 at 292.

⁸¹ Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 HARV. J.L. & TECH. 49 (2006).

⁸² Burk, *supra* note 18 at 294.

⁸³ *Id* at 293.

⁸⁴ Russell, *supra* note 52 at 132.

⁸⁵ *Id.* at Ch. 5

Constitution of the United States and under Article 19 of the Constitution of India. The right to freedom of speech and expression includes the right to publish and circulate one's ideas and includes the right to circulate opinions and views on social-media platforms.⁸⁶

Copyright has been described as “an engine of free expression” by the United States’ Supreme Court.⁸⁷ This role as an “engine of free expression” is subverted when copyrights seek to restrict the form expression might take by prohibiting the free use of copyrighted content. Famous legal school Melville Nimmer has termed this conflict a “largely ignored paradox”.⁸⁸ In his book, *Copyright’s Paradox*, Nimmer argues that the overuse of copyright law has undercut free speech and expression by silencing criticism and ossifying highly biased distributions of power.⁸⁹ Nimmer contests that copyright is often perceived as an ‘undue burden on expressive autonomy and liberty’.⁹⁰ Recently, democratic states have been trying to shape the boundaries of public discourse in line with their constitutional vision and agenda.

VIII. THE WAY FORWARD: MITIGATING OVER-DETERRENCE THROUGH AUTOMATED CONTENT MODERATION

The ever-evolving nature of copyright law and fair use ends up becoming a challenging endeavor especially considering the amount of content available on social media platforms. The preceding sections seek to call attention to the weaponization of copyright by government agencies and poses questions such as why videos of public relevance are not allowed to be used, critiqued or criticized by independent journalists (perhaps, due to Herman and Chomsky’s ideas of monopolistic control over the media to create a narrative that aligns with dominant political forces!).⁹¹ The unfolding of artificial intelligence in content moderation has cultivated newer problems such as the insufficiency of modern-day algorithms in conducting an analysis which should primarily be judicial in nature.

To strike an all-encompassing balance between the rights of content holders, rights of online platforms and the freedom of speech and expression, it is imperative to consider the limitations of automated content moderation and to ensure that human oversight is incorporated into the decision-making process before removing infringing content. Considering the legal uncertainty as

⁸⁶ Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842.

⁸⁷ Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

⁸⁸ Melville Bernard Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1969).

⁸⁹ NEIL NETANEL, *COPYRIGHT’S PARADOX*, (Oxford Univ. Press 2008).

⁹⁰ *Id.* at 8.

⁹¹ Edward S. Herman & Noam Chomsky, *supra* note 12.

regards copyright content moderation over the internet, it is recommended that national legislators must clearly recognize “user rights”, incorporate complaint and redressal safeguards in the takedown processes and define the contours of permissible content filtering. It is further recommended that online platforms and creators of artificial intelligence systems incorporate the ‘Santa Clara Principles on Transparency and Accountability in Content Moderation’ [**“the Santa Clara Principles”**], a set of guidelines which promote transparency and accountability for internet platforms over the removal of legitimate content.⁹² Principle 1 of the Santa Clara Principles necessitates that companies should use automated processes to identify or remove content only when there is “sufficiently high confidence in the quality and accuracy of those processes”.⁹³ This principle envisions the consideration of human rights, more particularly the rights to freedom of speech, expression and non-discrimination, and stresses upon the importance of due process while developing such automated systems. Interestingly, the Santa Clara principles provide for an appeal against removed posts and suggest that “a meaningful appeal should include human review by a person or panel of persons that was not involved in the initial decision”.

In an open letter written to Mark Zuckerberg, the group of civil society organizations who put forward the Santa Clara Principles recommended Facebook to incorporate the following content moderation policies and practices: (a) clearly notify users why their content has been removed/restricted; (b) provide users a chance to appeal automated content moderation decisions; and (c) issue regular transparency reports.⁹⁴ In response, it was stated that Facebook has introduced the option of “re-reviewing individual pieces” that were removed for nudity, sexual activity, hate speech, or graphic violence, bullying, harassment and spam.⁹⁵ The author’s suggestion is to extend the ability of seeking re-review of content removals to copyright – related takedowns since algorithms are more likely to overlook the intricacies of fair use/fair dealing, a problem which can be easily corrected through human oversight. Presently, the need for human oversight in content moderation is a compelling necessity as human moderators can effectively evaluate the nuances of fair use and determine the validity of infringement actions which cannot be accurately assessed by automated systems

⁹² *The Santa Clara Principles on Transparency and Accountability in Content Moderation*, SANTA CLARA PRINCIPLES, <https://santaclaraprinciples.org>

⁹³ *Id.*

⁹⁴ *An Open Letter to Mark Zuckerberg*, SANTA CLARA PRINCIPLES, <https://santaclaraprinciples.org/open-letter/>.

⁹⁵ *Id.*

**ART AND ANONYMITY: CAN BANKSY BANK ON COPYRIGHT TO PROTECT HIS
CANCELLED TRADEMARKED WORKS?**

DHRUVI AGARWAL*

“Copyright is for Losers”

~ Wall and Piece (2005)

Bank\$y

ABSTRACT

When the right of a brand to use publicly available artistic works clashes with the rights deemed to be held by an artist, it is the form of art that matters. The world’s most famous street artist, Banksy, was deprived of the right to hold a trademark over one of his most prominent works, “The Flower Thrower.” Earlier, Banksy had mentioned in his book that “copyright is for losers.” However this disdain for intellectual property laws was not taken by the court to be a reason strong enough to revoke trademark protection, rather, what led to the revocation of his trademark was improper usage of the trademark, and the court declared it to be a case of “bad faith” filing. As a result of this revocation, companies like ‘Guess’ capitalized on well-known Banksy pieces like ‘Flower Thrower’ and launched a comprehensive campaign in partnership with ‘Brandalised’, a group notorious for commercially exploiting Banksy’s artwork. This campaign featured merchandise adorned with Banksy’s murals, all without obtaining permission from the artist himself. In response, Banksy called for shoplifting at the Regent Street store of Guess which led the brand to partially close down the store. This paper traces the background of the Banksy-Guess dispute, highlights the issues in protecting an artistic work under trademark as opposed to copyright in various jurisdictions, and analyses the reasoning given by the court in the case relating to ownership over Banksy’s iconic ‘Flower Thrower’ mural. In conclusion, the author discusses how Banksy, a pseudonym for an anonymous artist, can protect his artistic work under a trademark even though he does not support the commercial use of such work.

I. INTRODUCTION

The advent of street art across the globe has sparked many conversations, one of which relates to the ownership of artistic works created on streets, over the property of others, without taking their permission. While the method of creating such art is considered illegal, brands capitalize on this

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illegality, to commercially exploit the work of anonymous street artists, who struggle to protect their work under intellectual property laws. The world-famous anonymous street artist, Banksy, recently failed to protect one of his most iconic murals, ‘The Flower Thrower’, in a trademark battle. The questions that the author has attempted to answer in this paper are (i) whether an artistic work that gets cancelled as a trademark, can be protected under copyright, even when the origins of such work remain illegal, and (ii) how far can the anonymity of a street artist hinder his ability to protect his artistic work, and does that allow for commercial exploitation of his murals without taking his permission? These issues have arisen on account of commercial exploitation of the work of street artists by brands, without taking permission from the artist to use such work.

II. WHAT IS STREET ART?

Street art is a form of artistic expression in which the artists create the artwork without any authorization, wherein illegal use of public or private property is made for such artistic expression.¹ Street art provides a character and life to the spaces that surround us, reimagining bleak and impersonal environments that stand unrelated to the events of the world.² This re-conceiving of the public realm and making everyday streets enjoyable and thought-provoking is the objective with which street artists undertake such projects. Street art can be differentiated from graffiti, which is usually done when there is “gang-related territorial marking” in urban spaces and it normally lacks any significant meaning.³ Graffiti is not made with the object of spreading awareness, nor does it convey any social message, and its target audience is limited to those who understand the marking conveyed via the graffiti, that is the members of the groups for whom the graffiti is made. However, as opposed to graffiti, there are certain characteristic features of street art, since it is usually made with an object and a purpose, which have been identified by Nicole Riggle as, “the material and the immaterial requirement.”⁴ The material requirement is fulfilled when the street itself is used as an artistic resource, and the immaterial requirement is fulfilled when the street plays a role in the making of the art.⁵ The line between the two often gets blurred when murals are observed in countries like India, where street art ranges from political messaging to the promotion of upcoming Bollywood movies.⁶ However, since globally, street art is

¹ Cathay Y.N. Smith, *Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property’s “Negative Space” Theory*, 24 DEPAUL J. ART TECH & INTELL. PROP. L. 259 (2014).

² Sondra Bacharach, *Street Art and Consent*, 55 BRIT. J. AESTHET. 481-95 (2016).

³ Stephano Bloch, *Graffiti has undergone a massive shift in a few quick decades as street art gains social acceptance*, THE CONVERSATION (Aug. 31, 2024) <https://theconversation.com/graffiti-has-undergone-a-massive-shift-in-a-few-quick-decades-as-street-art-gains-social-acceptance-196995>.

⁴ Nicholas Alden Riggle, *Street Art: The Transfiguration of the Commonplace*, 68 J. AESTHET. & ART CRIT. 243-57, 246 (2010).

⁵ Sondra Bacharach, *supra* note 2.

⁶ Aparajita Bhasin, *The Evolution of Street art and Graffiti in India* 4 SAUC JOURNAL (2018).

recognized as a form of artistic expression that conveys a deeper message about the state of affairs in that area or the world, its perception stands in marked contrast to bare posters or symbols that lack a profound meaning. Thus, consequently, with the globalization of street art, and the recognition of it by members of the public, the artists involved in this form of art have also started gaining popularity in the art circles, and cities like London, New York, Rio, and Bethlehem now routinely attract tourists for their unique and vibrant street art culture. At the same time, street art has begun to be sold in galleries, giving it recognition alongside formal art and fetching millions.

However, one artist whose work gets recognized instantly is a Bristol-based artist named, Banksy. His simple yet aesthetically innovative stencil-based murals and sketches have created what is known as “The Banksy Effect” since innumerable copies of his style have been seen in streets around the world.⁷ It is in this context that the author has used Banksy’s works to drive home the point that street art today is a global phenomenon, whose biggest star is Banksy. When he loses the copyright over his work, it changes the perception of the public regarding street art, which has largely been one where it enhances the cultural landscape of the communities in which it stands located, and with such adverse rulings now gets shifted to the question of ownership over the street art on account of its illegal nature.

III. WHEN ART IS IN ANONYMITY: CAN AN ANONYMOUS PERSON ASK FOR ENFORCEMENT OF THEIR COPYRIGHT?

The charm that surrounds Banksy is in his anonymity. He has successfully managed to keep his identity private, even when his artworks are being sold for record prices at galleries around the world.⁸ His work is often a sardonic take on the social, political, and cultural events taking place around the world, which have led to several conversations and attempts at preserving the sites where the original Banksy mural was painted. Some of his most famous works are ‘Mobile Lovers’ and ‘Flower Thrower’. However, two issues have highlighted Banksy’s troubles in getting his work protected from commercial exploitation under Intellectual Property laws. These are: (1) Banksy is a pseudonym for an artist whose identity is unknown. He has an office that deals with his official communication and verifies his artwork known as “Pest Control Office Ltd.” [“**Pest Control**”]. However, the office has only claimed protection of Banksy’s work under a trademark that they hold on behalf of Banksy. This has led observers to comment that Pest Control has been holding

⁷ Mary Elizabeth Williams, *Part I: Who Owns Street Art?*, CENTRE FOR ART LAW (2013), <https://itsartlaw.org/2013/03/25/part-i-who-owns-%20street-art/>.

⁸ Katherine Brooks, *Banksy Mural Sells: ‘Slave Labour’ Fetches \$1.1 Million at Private London Auction*, HUFFINGTON POST (Feb. 7, 2024), https://www.huffpost.com/entry/banksy-mural-sells-slave-labour-fetches-millions-at-london-auction_n_3378755.

on to trademarks over Banksy's works when they should have been protected via copyright, and therefore such trademarks have been filed in "bad faith," and (2) Banksy's anonymity acts as a hindrance in protecting his work under copyright, since even though copyright vests with the author the moment the work is created, if the identity of the author is itself in question, then such copyright cannot subsist.

IV. REQUIREMENTS FOR PROTECTING ARTISTIC WORKS UNDER TRADEMARK

Trademarks act as a protection against counterfeits of the original work and give assurance to the consumer that they have access to the original work of the author, and there are both registered and unregistered trademarks available in the market. Trademarks, across jurisdictions, are granted based on various indices such as multiple levels of mark distinctiveness and categories of what may be considered a mark in the first place.¹⁰ The author has analyzed the protection of trademarks to artistic works in three major jurisdictions, namely, the US, EU, and India.

A. Trademark Protection in the US

Trademark protection for artistic works in the US has a constitutional basis under the Commerce Clause.¹¹ This is because a trademark is distinct from copyrights and patents, as its objective is to promote "fair and efficient competition" and is more consumer-centric than the other two protections, which fall under the Intellectual Property Clauses of the US Constitution.¹² Thus, trademarks assist not in the promotion of progress, but in the promotion of fair "competition, trade, and commerce." The Lanham Act of the US provides guidelines for applying for registration of trademarks.¹³ The requirement for acceptance of an application for the protection of an artistic work under trademark is that there must be "bona fide" use of the work that is protected under trademark, and it should not be protected under this category, merely to reserve a right in a mark.¹⁴ This is a crucial component in deciding whether an artistic work that has been protected under a trademark by the office of an artist, such as in the present case, wherein Pest Control claimed to hold the trademark over Flower Thrower on behalf of Banksy, will continue to enjoy such protection depending on the level of use they have made of the mark. Further, it is also seen whether such protection was sought merely to reserve a right or if any actual commercial use of

⁹ Enrico Bonadio et. al., *From the Flower Thrower to the Monkey, and beyond; Banksy's trademarks' battle continues*, 45(3) E.I.P.R. (June 5, 2023).

¹⁰ BARTON BEEBE TRADEMARK LAW, AN OPEN-SOURCE CASEBOOK 34-35 (Barton Beebe 2020).

¹¹ U.S CONST. Art. I, § 8, cl. 3.

¹² Shelly Kurland, *Trademark Thrower: Using Banksy's Recent EU Trademark Misadventures to Assess Why Copyright is Not "For Losers"*, 36 EMORY INT'L L. REV. 585 (2022).

¹³ The Lanham Act of 1946, 15 U.S.C. § 1051 (1946).

¹⁴ The Lanham Act of 1946 § 1127, 15 U.S.C. § 1051 (1946).

such a mark has been made. Thus, had this case been filed in the US, the trademark would likely have been cancelled due to a lack of “bona fide” use of the mark by Pest Control.

B. Trademark protection in the EU

The European Union follows a first-to-file system wherein whoever applies for registration of a trademark first, will get the right over it irrespective of whether it has been in use by other players in the market or not. The impact that a first-to-file system has when it comes to protecting artistic works under trademarks is that brands and organizations that do not intend to make commercial use of the works that they seek to protect can get the trademark over it simply on account of being the first movers. This aspect is significant when it comes to understanding how Pest Control, which is the office that communicates on behalf of Banksy, secures his works by applying for trademark protection for them instead of copyright with the European Union Intellectual Property Office [“**EUIPO**”]. Ultimately, the reason for cancellation of Pest Control’s trademark over Flower Thrower by EUIPO was due to a concept known as “bad faith” filing in trademarks, which has been explained in detail in Chapter VI of the paper.

C. Trademark Protection in India

In India, artistic works are protected under the Copyright Act, 1957.¹⁵ However, copyright exists as soon as the work is created by the author of the work. Here, to claim copyright over a work, it is not essential to get it registered; however, it is necessary to claim authorship, in which case identity plays a crucial role. However, a trademark needs to be registered in India under Section 23 of the Trademarks Act, 1999 for it to be legally protected.¹⁶ Further, trademark holders are given certain rights concerning commercial exploitation and rights against unauthorized use and infringement under Section 28¹⁷, which may help artists prevent brands from using their artistic works for commercial purposes without their permission. In the case of *St+Art India v. Acko General Insurance* [“**St+Art case**”]¹⁸, the Delhi High Court directed Acko General Insurance to take down all hoardings and social media posts that contained the use of a wall mural by Mexican artist Paola Delfin Gaytan without her permission. This mural titled “humanity” was painted on a wall in Mumbai’s Sassoon Dock as part of the initiative taken by The St+Art India Foundation, the

¹⁵ The Copyright Act No. 14 of 1957, Acts of Parliament (Ind.).

¹⁶ The Trade Marks Act No. 47 of 1999, Acts of Parliament, §23 (Ind.).

¹⁷ The Trade Marks Act No. 47 of 1999, Acts of Parliament, §28 (Ind.).

¹⁸ *St+Art India Foundation v. Acko General Insurance*, (2023) SCC Online Del 7277.

Mumbai Port Authority, and Asian Paints.¹⁹ This order has been seen as a significant step in protecting the rights of street artists in India, however, the Court did not comment on whether the wall mural was a protected work, which has left ambiguity regarding the status of protection accorded to street art in India.

V. BANKSY V. GUESS: WHO WAS IN THE WRONG?

Banksy's recent dispute with the global fashion giant Guess has cast a spotlight on the question of ownership over Banksy's work in light of him claiming trademark over his work, used by Guess without his permission.²⁰ In November 2022, Guess announced a new collection titled "Brandalised," based on Banksy's stencil-based murals, which were universally recognizable by street art lovers. However, Guess did not take permission from Banksy or his office, Pest Control, before launching this campaign, which led Banksy to post the following message via Instagram on his account: "*Attention all shoplifters. Please go to Guess on Regent Street. They've helped themselves to my artwork without asking, how can it be wrong for you to do the same to their clothes?*"

The world-famous artist had incited shoplifting at the Regent Street store of Guess, which led the concerned authorities at the brand to cover their signboards and partially close the doors of their Regent Street store. Interestingly, Banksy did not file an infringement suit, but this incident presented several unique challenges before the world of art, which were, (A) whether Banksy had the right to stop Guess from infringing his trademark, which he did not hold as it had already been previously revoked by the court; (B) whether he simultaneously held a copyright over his work, despite being anonymous; and (C) whether his previous statements showing disdain for copyright protection for his work and his desire for the public to have free access over it allow for commercial reproduction of the same without his permission. In the subsequent chapters, the author has examined the requirements for trademark and copyright protection in light of Banksy's anonymous status, particularly referring to the EUIPO's ruling in the dispute with Full Color Black, the company that supplied Guess with images of his artwork. Moreover, the author has also assessed whether statements such as "*copyright is for losers*" by authors of artistic works should be considered by courts while pronouncing judgements in disputes regarding ownership over such works, and can disdain for intellectual property protection by artists lead to their work being commercially exploited by brands without taking permission from the artists themselves?

¹⁹ Vandana Menon, *IP Rights over street art? Mexican artist's mural sets off a legal battle in India*, THE PRINT (Aug. 31, 2024) <https://theprint.in/ground-reports/ip-rights-over-street-art-mexican-artists-mural-sets-off-a-legal-battle-in-india/1882214/>.

²⁰ Sam Dillon, *Banksy's Complicated Relationship with Intellectual Property*, HARPER MACLEOD LLP (Jan. 9, 2023) <https://www.harpermacleod.co.uk/insights/banksy-ip/>.

VI. EUIPO RULING ON BANKSY'S TRADEMARK

The intriguing aspect of the present case, where Banksy incited shoplifting at the Regent Street store of Guess, was why then did Banksy not file an infringement suit against Guess for using his artistic work without his permission? It was because the EUIPO had already cancelled Banksy's iconic mural *Flower Thrower*'s trademark in 2020 on account of "bad faith" filing.²¹ *Flower Thrower* is one of Banksy's most famous works²² which he has personally also used in the past on merchandise released by him, and it was the same picture displayed by Guess on their store hoarding, featuring the Brandalised campaign. This ruling by EUIPO was on account of a suit previously filed by a photograph company named, "Full Colour Black", against Pest Control Ltd., also known as Banksy, to get the trademark over Flower Thrower revoked. Full Colour Black was also the company that supplied Guess with the images for their "Brandalised" campaign. After Banksy's call for shoplifting and the subsequent partial shutting down of the Guess store, Full Colour Black proceeded to sue Banksy for £ 1.3 million for defamation, since they claimed that Banksy had given the false impression on his post that he owned the artwork that was used in the present campaign by Guess, even though his trademark for the same had been revoked by the EUIPO.²³

A. "Bad Faith" filing in Trademarks

The Banksy-Guess dispute is a fine example of the limits that the courts impose on artistic freedom of expression, especially if it involves being nonchalant or dismissive of the need to protect works under Intellectual Property laws. Banksy has always promoted the free expression and use of his works to ignite conversations and develop artistic points by followers of his work; however, his popularity has led brands to capitalize on this open-ended freedom he had given to the public to use his work the way they liked. In the suit previously filed by Full Colour Black against him, his trademark over *Flower Thrower* was challenged on four grounds namely: (A) that he had never made use of it for commercial purposes and that there was no commercial exploitation that was made of the registered trademark; (B) that even though Pest Control Ltd, which is Banksy's office, had opened a store named "Gross Domestic Product" containing his merchandise, it was not open to public and Banksy himself cited the reason for opening of the store as the "least poetic reason to

²¹ Case Cancell. No. 33 834 C, Full Colour Black Ltd. v. Pest Control Off. Ltd., EUIPO (Sept. 14, 2020).

²² Cecile Martet, *Artwork in the Spotlight: Rage, The Flower Thrower, Banksy*, RISE ART (Aug. 31, 2024), <https://www.riseart.com/article/2571/artwork-in-the-spotlight-rage-the-flower-thrower-banksy#:~:text=Rage%2C%20the%20Flower%20Thrower%2C%20by,poetic%20as%20it%20is%20political.>

²³ Tirstan Kirk, *Banksy sued for £1.3m over 'grave damage' of Instagram post about fashion store*, THE STANDARD (Oct. 6, 2023) <https://www.standard.co.uk/news/uk/banksy-sued-instagram-post-guess-full-colour-black-b1111802.html>

open a store” which was to protect his trademark²⁴; (C) that Banksy is an artist and that the work that he creates should be protected under copyright and not trademark and by authorizing his office to hold the trademark on his behalf, so that he can successfully conceal his identity, he is using trademark to do copyright’s job and lastly; (D) Banksy had himself stated in his book that, “copyright is for losers” and such statements were reflective of the artists’ desire to allow his work to be used by the public and that he could not later stop entities from using his work without his permission. The court ruled in favor of Full Colour Black, which had challenged the trademark of the *Flower Thrower* and highlighted the problem with affording protection to Banksy’s office on behalf of Banksy when he sought to remain anonymous.²⁵

B. Bad Faith in EUTMR

Article 59(1)(b) of EUTMR²⁶ deals with “bad faith” filing and is an “autonomous concept” in the EU law, and it is to be uniformly applied in all cases, notwithstanding the complication that it has nowhere been defined or described in any way.²⁷ It was proposed that it may be defined in terms of the conduct that the party that files for recognition of their trademark exhibits, and if it stands departed from “accepted principles of ethical behavior” or is a breach of “honest commercial and business practices,” then it may amount to “bad faith” filing. The idea behind prohibiting a trader from filing for a trademark in “bad faith” is to prevent him from defeating the objective of the legislation itself. which is to promote “ethical commercial and business practices.” Further, the EUIPO, while ruling in favor of Full Colour Black also held that “bad faith” filing would not be attracted only when the rights of a third party have been breached by an entity that has filed for trademark protection in a competitive market where it does not intend to use that mark, it would also be attracted when the objective of the proprietor is not to target a specific third party but to obtain an exclusive right for purposes other than those that fall within the objectives of a trademark.

²⁴ Rebecca Anderson-Smith, *Banksy’s ‘Flower Thrower’ trademark cancelled for bad faith*, MEWBURN ELLIS (Sep. 18, 2020) <https://www.mewburn.com/news-insights/banksys-flower-thrower-trade-mark-cancelled-for-bad-faith>.

²⁵ Vandana Menon, *supra* note 19.

²⁶ *Regulation (EU) 2017/1001 of the European Parliament and of the Council, 2017, art. 59(1)(b)* 2017 O.J. (L 154) 1 (June 14, 2017).

²⁷ Vandana Menon, *supra* note 19 at page 12.

C. Can a trademark do copyright's job?

Artistic works are protected under copyright, which exists the moment the artist creates an artistic work.²⁸ However, the dilemma that the EUIPO grappled with in the present dispute is whether it would be fair to ask Banksy to seek protection of his artistic work under copyright, as Banksy's persona right, along with a major portion of the charm that surrounds him, which generates more business interest in his work, is in his ability to maintain anonymity. The EUIPO did not go into the need for him to do so to protect *Flower Thrower* but made a general observation that "to protect the right under copyright law would require him to lose his anonymity, which would undermine his persona rights. The author argues that to ask him to reveal himself so that he can protect his work from commercial exploitation does not appear to justify the principles of fairness, especially when he has allowed the public to use his work for academic, research, and activism purposes with the caveat that they may not use it for commercial exploitation. This is the entire philosophy behind the global street art movement, wherein street artists do not seek to earn great profits by selling their work, rather, they seek to inspire and promote greater artistic discourse over social, cultural, and political problems plaguing society. But such moral considerations stem from a shaky pedestal when the very basis of street art is using another person's property without their permission to make the desired artwork.

In this case, if an artist chooses to stay anonymous, then ownership over such artwork becomes questionable, even though a Banksy mural today is worth millions and could potentially raise the value of the street in which such art stands located. What the EUIPO said with regards to whether Banksy could seek protection under EUTM was that taking into account the existing legal position taken by Banksy, which was that he did not want to protect his work under copyright as it would be at the cost of him losing his anonymity in the present case, the filing of a trade mark cannot be upheld when the function that is served is not being fulfilled by the proprietor, and it cannot simply be reduced to a protection that may be sought when one cannot get their work protected under copyright laws.

VII. "COPYRIGHT IS FOR LOSERS": HOW MUCH HAS THE STATEMENT COST BANKSY?

Banksy's anti-establishment stance was more pronounced at the beginning of his career, and the same can be gauged by going back to some of his earliest works. He published a book titled *Wall and Piece*²⁹ in which the opening line reads, "Copyright is for losers." While this book was published

²⁸ Dr. Sunanda Bharti, *Copyright in Unpublished Works: What Constitutes Publication?*, SPICYIP (April 10, 2021), <https://spicyip.com/2020/04/copyright-in-unpublished-works-what-constitutes-publication.html>.

²⁹ BANKSY, *WALL AND PIECE* 3 (Century 2005).

in 2005, since then, Banksy has grown tremendously. With every move of his being tracked by art observers, a statement that he made almost twenty years ago comes back to haunt him every time he seeks to protect his work under Intellectual Property laws.³⁰ The interplay between freedom of expression and the right to claim copyright protection can be understood by observing three factors: (A) aversion to Intellectual Property Laws does not take away any validly acquired rights, irrespective of whether it is a copyright or a trademark³¹, (B) although freedom of expression is one of the most protected rights and finds backing in the founding documents of nations, however, whenever there exists, a legitimate legal interest in another statute, such a freedom can be restricted³² and (C) Freedom of expression would require access to and use of some copyrighted material however, the allowances made in copyright law are sufficient for the protection of free speech.³³

When these three factors are applied in the case of Banksy and his statements, it becomes clear that there cannot be a reliance on such statements to nullify an existing right of the author in his artistic work. However, when an applicant challenges the protection of works by artists who have earlier shown disdain for intellectual property law enforcement, it creates a “negative space” for that artist to seek the protection of his work from commercial exploitation as (1) the competent authority will have to see evidence of whether the artist has allowed for his work to be used by the public, before and after filing for protection, and to what extent and (2) in most cases, it would lead to the result that the authorities would be able to determine if the artist has sought protection under copyright, then if commercial exploitation of the same with his knowledge has taken place with no measures taken by the artist to prevent it, for example in the case of Banksy where the applicant was able to show commercial use of his work which was in his knowledge, his copyright claim over the derivative would fail since the new work would be a derivative work authored by another artist³⁴ and if the protection has been granted under the trademark, then it would stand at the threshold of being revoked on account of “bad faith” filing.

³⁰ Enrico Bonadio, *Banksy's copyright battle with Guess- anonymity shouldn't compromise his legal rights*, THE CONVERSATION (Nov. 25, 2022), <https://theconversation.com/banksys-copyright-battle-with-guess-anonymity-shouldnt-compromise-his-legal-rights-195233>.

³¹ Vandana Menon, *supra* note 19 at pg 14.

³² Branka Marusic, *Limitations on Copyrights Based on Freedom of Expression and Information*, 69 GRUR INT'L 768-72 (2020).

³³ ALEXANDRA COUTO COPYRIGHT AND FREEDOM OF EXPRESSION: A PHILOSOPHICAL MAP (Palgrave Macmillan 2008).

³⁴ Rich Stim, *Copyright Ownership: Who Owns What?*, STANFORD COPYRIGHT AND FAIR USE (April 4, 2013), <https://fairuse.stanford.edu/overview/faqs/copyright-ownership/>.

VIII. CLAIMING COPYRIGHT PROTECTION AFTER LOSING A TRADEMARK: CAN IT BE DONE?

In Banksy's own words, he believed that "Copyright is for Losers" and subsequently proceeded to lose the trademark to some of his most famous and iconic murals. Thus, ideally, he should now be seeking protection under copyright laws. However, a work that is sought to be protected as a trademark by an artist also has to be used for commercial purposes, which is not the intention or the objective of Banksy. He wants to create street art, on the property of others, without seeking their permission, but wishes to remain anonymous and also does not want to commercially exploit his work, nor does he want brands to do it. In such a scenario, a trademark will most likely get cancelled since it cannot be used as a replacement for a copyright. Therefore, if the work created by the artist automatically vests the copyright in him, then the copyright of Banksy's works should vest with him irrespective of whether they are protected via a trademark or not. However, if Banksy continues with his anonymity, it will not be possible to determine who the author of the work is and even copyright protection might not be available.

One way in which such protection can be sought is by entering into a "work made for hire" contract. Banksy already has an office that communicates on his behalf, The Pest Control Office Ltd., and he could claim for it to be an employer under whose instructions his work was created. For a work to qualify as a work made for hire under EU laws, only two requirements need to be met, namely, (1) that the work was created in the course of employment by an employee and (2) that the work was created by an independent contractor on the specific commissioning by a client.³⁵ Here, it could be easily asserted by Pest Control that Banksy was an employee who created work on their behalf during the course of employment, in which case, the copyright would vest with the owner of such work, which would happen to be Banksy's employers, i.e., Pest Control. This would also be taken affirmatively since Pest Control already holds the trademarks on behalf of Banksy, and once copyright protection is afforded to his works, then protecting them under trademark laws would also get easier as the question of Banksy's identity would no longer need to be the focal point while deciding whether he should be acknowledged for his works or not.

³⁵ Dunlap Bennett and Ludwig *Copyright Law: The "Works Made for Hire" Doctrine*, DUNLAP BENNETT & LUDWIG PLC (March 12, 2021), <https://www.dblawyers.com/copyright-law-the-works-made-for-hire-doctrine/#:~:text=Once%20a%20work%20is%20considered,work%20of%20the%20independent%20contractor.>

IX. CONCLUSION

While there are several differing opinions on whether ownership over street art that is made illegally should be with the artist or the property owner, no one has denied that when it comes to the application of copyright laws, the universal rule will always vest the right to claim authorship and ownership of such work in the artist. The protection accorded to street art in countries like India has been limited to the passing of injunctive orders, as seen in the St+Art case, as the courts are reluctant to grant ownership over wall murals to artists even when the work has been commissioned by government authorities. This problem gets exacerbated when the artist is himself an anonymous entity, as it becomes difficult to grant protection, since it cannot be verified who the real artist is. In such a scenario, a trademark cannot do the job of a copyright, as it is not an additional protection under Intellectual Property laws but is rather used to promote “fair and efficient” competition in the market by making marks distinguishable. When an artist does not commercially exploit the work over which he has claimed a trademark, then such trademark is liable to be cancelled on account of “bad faith” filing. But when a trademark gets cancelled, it does not mean that such work will not be afforded protection under copyright laws. The only difficulty in the present case against Guess is that Banksy’s persona is in his anonymity, and he vehemently protects his right to continue to remain anonymous. Therefore, even though copyright does subsist in the artist over the artistic work that they have created, it does not extend over the property on which it is created when permission for such work is not taken, and consequently, enforcement of it seems improbable, especially in light of Banksy’s previous statements showing disdain for copyright itself. A probable solution suggested by the author is that Banksy could enter a “work made for hire” agreement with his own office, The Pest Control Office Ltd., and allow Pest Control to claim copyright over such work as being the owners, when they have already been defending Banksy’s trademarks all over the world.

**INK, SPRAY & COPYRIGHT: PROTECTION OF STREET ART'S IP & THE
PALETTE OF COMMERCIALIZATION**

AADITYA BAJPAI* & GEETIKA RAJKUMARI**

ABSTRACT

Graffiti or Street art, in the midst of the teeming fabric of urban landscapes, stands out as a vivacious testament and a vibrant dialogue with a social-cultural milieu. These artists, through every stroke of paint, with each ethereal design of stencil, and every exuberant flourish of a graffiti tag, embellish walls and streets by soaking them in narratives that transcend beyond the conventional artistic notions. There is a two-fold perspective to street art, wherein one aspect shows the creativity entailed in them, and the other aspect is about the constantly increasing growth of such form of art and how this growth acts as a beacon for various issues. One of the biggest complexities associated with street art is that of IP and its commercialization. Literature does indicate that street art is subject to copyright, albeit not entirely. However, the lacunae are that street art, despite fulfilling the components of copyrightability, still doesn't attract the same protection as museum-art paintings. Why would it be difficult to give and enforce legal protection for street art if it fits the standards for such protection? Maybe it's because street art is usually illegal, or maybe it just doesn't fit the traditional definition of "fine arts".

These lacunae and conundrums surrounding street art are the subject of discussion throughout this paper. This research paper endeavors to explore the nexus of copyright and street art by providing a comparative analysis of different domestic laws and delving into the question as to what happens when the art is illegal, will it still, to some extent, be provided with copyright protection? The paper further deals with other aspects regarding the same such as the de minimis principle, along with certain case studies. The paper further delves into the commercialization issue with respect to street art and copyright, dealing with aspects relating to author's permission, "droit de suite", transformative use and fair use doctrine, and also the rights of artists in case of illegal street art. By its findings, this research attempts to add to the current discourse about street art's IP conundrum and commercialization aspect while also advocating certain suggestions for better regulation.

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I. INTRODUCTION

“Street Art is like good fiction, it speaks out on behalf of everyone, for us all to see”.

– Carla Krueger¹

Working against the clock and frequently against the law, they breathe life into the drab black and grey of the streets and fill them with hues and patterns in the middle of the night, when the rest of the world has already given in to slumber. Some refer to it as vandalism, and some as an artistic endeavor. In the midst of the bustling fabric of urban landscapes, street art stands out as a lively testimonial and a vivid engagement with the social-cultural setting. Street art has been a portrayal of a lot many ideological tenets. It could be a piece of poetic literature unravelling the artistic excellence that is even celebrated worldwide, for example, the Southend-on-Sea Art Festival, which happened recently and was reported to be the biggest street art festival in Europe, attracting more than 200 artists all over the world who are expected to paint over 100 walls, including a collection of cube installations at Warrior Square.²

On the other hand, street art could also be used as a tool for political uprising. The example of the London Street Art Wall in Brick Lane could be taken here, wherein the wall was found to be covered with slogans extolling Chinese Communist Party ideology.³ Similarly, the extensive lineage of murals and other public art in Iran has a fresh chapter added to it because of the country's current surge in feminist activism⁴ that symbolized defiance, resistance and resilience, taking roots from Mahsa Amini's death⁵ in police custody.

Street art has the underlying potential to illustrate societal, socio-economic, political, cultural predicaments, and create communities. *“When I finish my art piece, it doesn't belong to me anymore. It belongs to the street, and it belongs to the people”*, said Oumeme Bosuassida⁶ while explaining how street art evolved her life, while sharing her story with The Irish Times. Street art has been revolutionary, life-changing and inspirational for a vast majority of people. An example could be taken from the

¹ *Street Art Quotes*, GOODREADS, <https://www.goodreads.com/quotes/tag/street-art>.

² Anglia, *South-End City Centre Transformed Thanks To Europe's Largest Free Street Art Festival*, ITVX (Sep. 3, 2023), <https://www.itv.com/news/anglia/2023-09-02/city-centre-awash-with-colour-thanks-to-europes-largest-street-art-festival>.

³ Ivana Kottasova, *Chinese Propaganda Slogans Turn London Street Art Wall Into A Protest Site Against Beijing*, CNN WORLD (Aug. 8, 2023), <https://edition.cnn.com/2023/08/08/china/chinese-political-slogan-brick-lane-london-intl-hnk/index.html>.

⁴ Jo Adentunji, *Iran's Street Art shows defiance, resistance and resilience*, THE CONVERSATION (Aug. 30, 2023), <https://theconversation.com/irans-street-art-shows-defiance-resistance-and-resilience-209678>.

⁵ Narges Bajoghli, *“Woman, Life, Freedom”: Iran's Protests Are a Rebellion for Bodily Autonomy*, VANITY FAIR (Sep. 29, 2022), <https://www.vanityfair.com/news/2022/09/mahsa-amini-irans-protests-rebellion-bodily-autonomy>.

⁶ Sally Hayden, *Graffiti artist finds her freedom in Tunisia's streets*, THE IRISH TIMES (Sep. 2, 2023), <https://www.irishtimes.com/world/africa/2023/08/30/graffiti-artist-finds-her-freedom-in-tunisiastreets/>.

street artist from Melbourne named “Man of Darkness”, who himself faced issues because of his talent as it was then majorly seen as a clandestine affair, but now he has undertaken the task of providing his talent to the youth of Melbourne, through a city programme called the Signal, which aims at inspiring the developing talent in the youth to never give up on their talent of art.⁷ In March 2023, the Lodhi District in Delhi, India, was named the first Art District in India, entailing more than 65 beautiful and breath-taking murals by both domestic and global artists, who have emphasized one major message that streets are where the people are, and street art has the power to shape people’s perspectives.⁸

Now that there has been a major shift with regards to the legality of street art, the perspectives of artists have also evolved, which hasn’t reduced their intent to create art, rather it has developed in them the thought of getting their art protected from being copied. The legal status of street art still falls under the category of ‘uncertain’. The problem associated with the legality of street art is the fact that it, to some extent, qualifies as vandalism because it is done on street walls which is either public or private property. For example, in France, Article 322-1 of the Criminal Code⁹ labels property distortion as misdemeanor. Similarly, every state has its law regarding the right to one’s property, however, what increases the problems further is when a state specifically stands against street art. For example, in San Francisco, the government has in place a strict “no-graffiti” policy.¹⁰ Nevertheless, street art, specifically graffiti, is being termed as the 21st century heir to pop art.¹¹

The major conundrum here is with regards to the fact that due to the ever-increasing likeness towards graffiti and other street art, it usually acts as a beacon for plenty of gallery heads, publishers, filmmakers, and so on, to lay claim over the same somehow.¹² Hence, the quandary of intellectual property and its relationship to commercialization is one of the most challenging aspects of street art. Although not totally, according to literature, street art is protected by copyright. The flaw is that, despite meeting the requirements for copyrightability, street art doesn’t

⁷ Michael Georgiou, *Man of Darkness provides lightness to Melbourne youth through street art*, NEOS KOSMOS, (Sep. 5, 2023), <https://neoskosmos.com/en/2023/09/05/life/arts/man-of-darkness-provides-lightness-to-melbourne-youth-through-street-art/>.

⁸ Shreya Agrawal, *‘Streets art where the people’: Artist underscore the power and potential of street art in India*, THE INDIAN EXPRESS (Mar 31, 2023), <https://indianexpress.com/article/lifestyle/art-and-culture/street-art-power-potential-india-lodhi-festival-murals-8518469/>.

⁹ Code pénal [C. pén.] [Criminal Code] art. 322-1 (Fr.).

¹⁰ Louise Carron, *Street Art: Is Copyright for “Losers”? – A Comparative Perspective on the French and American Legal Approach to Street Art*, NYSBA (Jan. 11, 2019), <https://nysba.org/street-art-is-copyright-for-losers-a-comparative-perspective-on-the-french-and-american-legal-approach-to-street-art/>.

¹¹ Apurva Sontakke, *Art in the 21st century: Street Art and Graffiti*, RETHINKING THE FUTURE, <https://www.rethinkingthefuture.com/architectural-community/a10481-art-in-the-21st-century-street-art-and-graffiti/>.

¹² David Diallo, *From the Street to Art Galleries: How Graffiti Became a Legitimate Art Form*, REVUE DE RECHERCHE EN CIVILIZATION AMÉRICAINNE (Sep. 5, 2024), <http://journals.openedition.org/rcca/601>.

enjoy the same level of protection as artworks that are displayed in galleries. Street art, particularly that which is categorized as sculptural, is likely to conform with copyright rules, which makes it eligible for protection. This is especially true for urban art.¹³ Why, if street art meets the requirements for legal protection, would it be challenging to grant and enforce that protection? Perhaps it's because street art is typically prohibited or because it doesn't adhere to the conventional notion of what "fine art" is.¹⁴ The major issues of copyright and ownership surrounding street art involve firstly the unauthorized reproduction/use of street art by means of certain other methods of expression or showcase, such as cinematographic film, books, clothing, television shows, etc.¹⁵

There have been a variety of cases wherein third parties have made an unauthorized attempt to showcase the murals and street art from various places through their medium without the permission of the artists and this has given rise to a lot of conflicts, which shall be dealt with in the paper. Then next point of dispute comes related to the preservation and ownership of physical graffiti works. There have been, again, instances for example the 5 Pointz building in Long Island New York, whose walls have been home to a variety of graffiti designs. However, disputes arose in 2013 when the owner of the building decided to demolish the same and this sparked a huge number of street artists who then petitioned against this demolition together.¹⁶ This dispute ultimately resulted in the US court finding in favor of the graffiti artists and awarded a compensation of \$6.7 Million to a total of 21 graffiti artists because of their murals were destroyed due to the demolition.¹⁷

The subject of this paper's discussion is the gaps and challenges that surround street art's copyrightability. This research paper seeks to look into the relationship between copyright and street art by comparing and contrasting various domestic laws and exploring the issue of whether copyright protection will still be granted to the art despite the fact that it is illegal. The research also addresses pertinent topics, including the de minimis principle and other case studies. The paper further explores the commercialization dilemma in relation to street art and copyright,

¹³ Sidhant Singh, *Navigating Copyright And Ownership Complexities In Street Art: An In-Depth Analysis*, MONDAQ (Jan. 24, 2024), <https://www.mondaq.com/india/copyright/1415796/navigating-copyright-and-ownership-complexities-in-street-art-an-in-depth-analysis>.

¹⁴ Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U J. INTEL. PROP. & ENT. L. 295, 302 (2013).

¹⁵ Pascale Chapdelaine, *Graffiti, Street Art, Walls and The Public in Canadian Copyright Law*, 123 U. WINDSOR 126 (2019).

¹⁶ *Id.* at 304.

¹⁷ Alan Feuer, *Graffiti Artists Awarded \$6.7 Million for Destroyed 5 Pointz Murals*, THE NEW YORK TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html>.

addressing areas such as author's permission, "droit de suite", transformative use, and fair use doctrine, as well as the rights of artists in the event of unlawful street art. This research paper endeavors to contribute to the ongoing conversation regarding the IP Conundrum and Commercialization of street art by presenting its findings and also pushing for specific recommendations for effective governance.

II. AN INSIGHT INTO GRAFFITI: ETHEREAL ART OR AESTHETIC VANDALISM

A. Writings on the Wall: A Peek into a City's Soul

Street art means broadly covers many forms of art including, but not limited to, writings on the wall, spray paintings, stencils, stickers, mosaic tiling, wood blocking, dance, structures, posters, video projections, etc.¹⁸ Graffiti is a kind of street art which is made by individuals on public spaces, primarily by the use of spray paints. This form of art is usually made in public view, but without the proper authorization or permission from the concerned authorities.¹⁹

Here, it is pertinent to highlight that graffiti is not some modern form of art; rather, it is something which can be traced back to the Roman Empire, ancient Greece, and ancient Egypt.²⁰ The term most widely used to describe such art is "graffiti", evolving from the Italian word "graffiato" (to scratch), which in turn has been extracted from the Greek term "graphein" (to write).²¹ It was used in pottery to make designs by scratching off a layer of the surface to reveal another, as well as in cave paintings in ancient times by carving on the cave walls using a sharp object. Broadly, graffiti can be classified into two – (i) tagging which mostly consists of writing names on the wall), and (ii) mural art which is of more elaborate and complex in nature.²²

Moreover, graffiti art is significant to preserving culture.²³ For instance, it was only upon the examination of the graffiti (inscriptions on walls and rocks) found in Syria, Jordan, and Saudi

¹⁸ CRAIG CASTLEMAN, *GETTING UP: SUBWAY GRAFFITI IN NEW YORK* (The MIT Press, Cambridge, Massachusetts, 1984).

¹⁹ C. HUNDERTMARK, *THE ART OF REBELLION – WORLD OF STREET ART* (Ginko Press, 2003).

²⁰ Ileana Nicoleta Salcudean, *Art and Vandalism: Crossbreeding of Street Art (re)interpretation of Street Art from a Sociological, Aesthetical, and Interactivity Perspective*, 12 J. MEDIA RSCH. 45, 48 (2012).

²¹ Ramesh Sampui, *Graffiti Art: A Modern Approach to Address Social Concern*, 9(7) J. RSCH. HUMAN. & SOC. SCIS. 42, 47 (2021).

²² Iliana Mercier, *Graffiti and Neighborhood Change: From Vandalism to Street Art*, BACHELOR'S THESIS, UNIVERSITY OF ARIZONA, TUCSON, USA 1, 13 (2022).

²³ Lynn Van Matre and Peter Baniak, *Question of Mural Integrity*, CHICAGO TRIBUNE (Mar. 26, 1995), <https://www.chicagotribune.com/1995/03/26/question-of-mural-integrity/>.

Arabia that an ancient Arabic language (Safaitic) was recovered.²⁴ In the classical era, graffiti carried a different connotation wherein it was used to portray “phrases of love declarations, political rhetoric, magic spells, curses, famous quotes, and simple words of thought as compared to today’s popular messages of social and political ideals.”²⁵ So, graffiti gives the future generations a peek into the lives led by the past generations.

Further, the role of graffiti is significant as an effective tool for the achievement of political and social goals within the society by way of spreading awareness and addressing issues.²⁶ In areas where there are some ongoing conflict or strife, graffiti acts as a mode of expression of the voices of the people.²⁷ It allows them a platform for communication in conditions where these same people are oppressed by institutional means. This is of extreme importance for persons belonging to social, ethnic, and racial minorities. In the 1970s²⁸, graffiti became popular in the U.S. as angry and anti-authoritarian individuals flooded the walls and subways as a medium to express their anger.²⁹ They voiced their demands arising from racism, poor environment, violence, poverty, neglect, and homelessness.³⁰ So, in the backdrop of a fragmented social fabric, the cities became an open art gallery.

B. Graffiti in India

In India, similar to the examples found in the other parts of the world, some of the oldest murals can be found in the Ajanta caves in the form of cave paintings in Maharashtra, which have been traced back to 200 B.C³¹. Likewise, paintings on the walls of the houses belonging to tribes exist as part of their tradition. In the contemporary times, graffiti has seeped into various fields and has evolved further in the forms of “hand painted Bollywood posters, typographic sign boards, truck art, images of Gods painted along sidewalks, tiles fixed to prevent people from urinating in public, painted advertisements by small businesses, political graffiti, etc.”³²

²⁴ David F. Graf, *Language and Lifestyle as Boundary Markers: The North Arabian Epigraphic Evidence*, 16 MEDITERRANEAN ARCHEOLOGY 27, 28 (2003).

²⁵ Kritika Verma, *Historical Background of Graffiti and Street Art in India*, ABIR POTHI (Mar. 6, 2023), <https://abirpothi.com/historical-background-of-graffiti-and-street-art-in-india/>.

²⁶ Andreea-Loreta Cercloux, *Graffiti and Street Art between Ephemerality and Making Visible the Culture and Heritage in Cities: Insight at International Level and in Bucharest*, 12(5) SOCIETIES 129, 137 (2022).

²⁷ Lori L. Hanesworth, *Are They Graffiti Artists or Vandals? Should They Be Able or Canned?: A Look at the Latest Legislative Attempts to Eradicate Graffiti*, 6(2) DEPAUL J. OF ART. TECH. & INTELL. PROP. L. 225, 226 (1996).

²⁸ Elizabeth G. Gee, *City Walls Can Speak: The Street Art Movement and Graffiti's Place in First Amendment Jurisprudence*, 20 JEFFREY S. MOORAD SPORTS L. J. 209, 213 (2013).

²⁹ Lori L. Hanesworth, *supra* note 27 at 227.

³⁰ Elizabeth G. Gee, *supra* note 28 at 213.

³¹ Aparajita Bhasin, *The Evolution of Street Art and Graffiti in India*, 2 CHANGING TIMES: RESILIENCE 112, 114 (2018).

³² Kritika Verma, *Street Art and Graffiti in Indian Public Spaces*, ABIR POTHI (Jun. 1, 2023), <https://abirpothi.com/street-art-and-graffiti-in-indian-public-spaces/>.

Some of the cities where graffiti on the walls is prevalent are Kolkata, Delhi, and Mumbai.³³ Among other Indian graffiti artists such as Yantra and Zine, one notorious graffiti artist that started off in 2008 was Daku, who mostly acted in Delhi and commented on social and political issues going on in the city. Notably, he made “Mat Do” signs during the 2014 elections, and added graffiti to the Stop signs to address the topics of rape and consumerism.³⁴

C. Criminality of Graffiti

The issue concerning with graffiti art arises because it is considered to be illegal in most countries. There is a clash between the graffiti artists and the owners of the property as well as the civic authorities, who perceive graffiti art to be plain vandalism or defacement of the property.³⁵ It is viewed as a problem in the urban areas, which stems from the use of graffiti by gangs to “mark their territories.”³⁶ One prime example is the New York City subway station that has been plastered with a bunch of graffiti, which is widely considered as a nuisance and eye-sore to both the authorities and the general public.³⁷

The question of illegality of graffiti exists in the first place because of its location, alongside factors such as permission and permanency.³⁸ Protection may be contemplated for graffiti that is made on public property, or on private property where permission has been given. “The law does not distinguish between aesthetic styles, artistic media, and the subcultural groupings of practitioners.”³⁹ Generally, in countries where graffiti is given protection to some extent, the graffiti artists retain the rights of reproduction and preparation of its derivatives, whereas the owner of the property retains the rights of displaying and selling the artwork.⁴⁰ So, the subsequent rights and obligations are split between the owners of the property and the graffiti artists, regardless of whether the graffiti itself is considered to be legal or illegal.

³³ Ar. Kiran Rathi, *The Rise Of Graffiti in India: 15 Street Stories*, THE ARCHITECT’S DIARY (Jan. 11, 2024), <https://thearchitectsdiary.com/the-rise-of-graffiti-in-india-15-street-stories/>.

³⁴ Ramesh Sampui, *supra* note 21 at 43.

³⁵ Enrico Bonadio, *Street Art, Graffiti and the Moral Right of Integrity: Can Artists Oppose the Destruction and Removal of Their Works?*, 1 NUART JOURNAL 17, 18 (2018).

³⁶ Alethea B.T. Barbaro et. al., *Territorial Developments Based On Graffiti: A Statistical Mechanics Approach*, 392 PHYSICA A: STATISTICAL MECHANICS AND ITS APPLICATIONS 252, 260 (2013).

³⁷ Chelsea Kim, *An Examination of Graffiti Protection and the Social Obligation Theory of Property*, 36 EMORY INT’L L. REV., 539, 549 (2022).

³⁸ TIM CRESSWELL, THE CRUCIAL “WHERE” OF GRAFFITI, IN PLACE/OUT OF PLACE: GEOGRAPHY, IDEOLOGY, TRANSGRESSION 13 (UNIV. OF MINN. PRESS 1996).

³⁹ Alison Young, *Criminal Images: The Affective Judgment of Graffiti and Street Art*, 8(3) CRIME MEDIA CULTURE: AN INTERNATIONAL JOURNAL 297, 299 (2012).

⁴⁰ Brittany M. Elias and Bobby Ghajar, *Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection*, 7 LANDSLIDE 1, 5 (2015).

Now, the response of the government is what determines the legality of graffiti. (i) In China, in contrast to the general belief, there is minimal police interference with graffiti artists as long as it does not concern any political party or any religious sentiment.⁴¹ (ii) In Taiwan, a similar lenient nature of the authorities can be observed. The government has taken steps to grant concessions to graffiti artists.⁴² They have been allowed to freely display their artwork on certain sections/areas. However, a fine may be imposed if graffiti is made in places other than these designated areas. (iii) In Hong Kong, there is a famous graffiti artist named Tsang Tsou Choi who makes calligraphy graffiti. Some of his works are officially preserved, and he has even gone to the extent of claiming ownership over the area. Contrary to that, in case of a graffiti artist painting a Chanel logo above the banner of an Armani showroom,⁴³ the Court ordered for the payment of millions of dollars as damages to the property owner. (iv) In Singapore, however, a student charged with vandalism of expensive cars was sentenced to 4 months in jail, a fine of USD 2,233, and 6 strokes of caning.⁴⁴ Similar to its tag of being a litter-free city, the same attitude flows into how graffiti is treated in Singapore.⁴⁵ (v) In South Korea, during the G-20 Summit in 2011, Park Jung-Soo spray painted the word rat on the posters, which was prosecuted to be a derogatory statement against the then President of the State. It was held to be part of “an organized criminal activity”, and he was fined. Moreover, some other forms of punishments, which can serve as an alternative to caning, can be imposition of fine, revocation of driving license, mandatory community service.⁴⁶

From a socio-economic perspective, it has been argued that graffiti should be decriminalized as a matter of justice because vandalism or trespass, strictly, refers to violation of rights over a private property whereas graffiti art is what is drawn on public property.⁴⁷ It further reflects the contention to privatize such public spaces which would, in turn, become a pragmatic benefit for the graffiti artists.

⁴¹ Kao Chien Hui, *Tattoos on Shared Social Skin: The Art and Laws of Street Murals and Graffiti*, ASIA ART ARCHIVE (Dec. 1, 2011), <https://aaa.org.hk/en/like-a-fever/like-a-fever/free-art-vs-public-law-tattoos-on-shared-social-skin-the-art-and-laws-of-street-murals-and-graffiti>.

⁴² Cindy Sui, *Taiwan Opens Up To Graffiti Artists*, BBC NEWS (Sept. 3, 2016), <https://www.bbc.com/news/av/world-asia-36947305>.

⁴³ Kao Chien Hui, *supra* note 34.

⁴⁴ Rujun Shen, *Two Germans To Be Caned, Jailed For Singapore Train Graffiti*, REUTERS (Mar. 5, 2015), <https://www.reuters.com/article/idUSKBN0M10DK/>.

⁴⁵ T.C. Chang, *Writing on the Wall: Street Art in Graffiti-free Singapore*, 43(6) INT’L J. URB. & REG’L RSCH. 1046, 1050 (2018).

⁴⁶ Marisa A. Gomez, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art From Graffiti Vandalism*, 26 UNIVERSITY OF MICHIGAN JOURNAL OF LAW 636, 666 (1993).

⁴⁷ Daniel J. D’Amico and Walter Block, *A Legal and Economic Analysis of Graffiti*, 23 HUMANOMICS 29, 33 (2007).

Even from a criminological perspective, it has been analyzed that graffiti would not qualify as a crime upon applying most of the criminological theories.⁴⁸ The neutralization theory implies that deviants i.e., the graffiti artists, are simply justifying their actions by providing alternative definitions. However, the strain theory implies that they are disappointed or frustrated by their surroundings, and are clearly announcing their intent to bring a change, whereas the rational choice theory implies that they have weighed the means & ends, costs & benefits, and made a rational choice to proceed.⁴⁹ Then, from a capitalistic viewpoint, graffiti poses a threat to, “not only the economic value of private property, and the political control of property and space, but also the sense of ordered style, the aesthetic of authority that is intertwined with them.”⁵⁰ Some also argue that illegality of graffiti is its essence because it portrays the audacity, danger, and risk and addressing issues which would otherwise be banned.⁵¹ So, sanctioned art would be censored art.

III. THE NEXUS OF COPYRIGHT PROTECTION AND STREET ART

As discussed above, the major issue with regards to street art is that of its ownership violation, be it by means of unauthorized reproduction or use of the street art by means of other mediums such as film, photograph, painting, clothing, and so on, or be it the issue concerning ownership and preservation of physical graffiti works. Thus, the street art society has definitely felt the urge for seeking protection of ownership for the art that they themselves created. There have been many cases wherein copyright of street art artists has been infringed, and they have been pro-active about approaching the courts for the same.⁵² However, that has acted as a missed opportunity for the courts to establish jurisprudence around street art and copyright, because majority of the cases got settled outside courts.

A. The Copyright Uprising & Courts' Wasted Potential

The famous book, titled “*Tattooed Walls*” which was published by Peter Rosenstein, a photographer and graffiti aficionado, was an anthology of a plethora of photographs of street art and murals that he had taken over a span of 10 years. He published the same and didn't take authorization from any of the artist whose work was in the book.⁵³ This act caused a spark which led to the creators

⁴⁸ Zeynep Alpaslan, *Is Street Art a Crime? An Attempt at Examining Street Art Using Criminology*, 2(1) SCIENTIFIC RESEARCH – ADVANCES IN APPLIED SOCIOLOGY 53, 57 (2012).

⁴⁹ *Id.*

⁵⁰ JEFF FERRELL, *CRIMES OF STYLE: URBAN GRAFFITI AND THE POLITICS OF CRIMINALITY* (Garland, New York, 1996, 179).

⁵¹ Tony Chackal, *Of Materiality and Meaning: The Illegality Condition in Street Art*, 74(4) THE JOURNAL OF AESTHETICS AND ART CRITICISM 359, 365 (2016).

⁵² Sondra Bacharach, *Street Art and Consent*, 55 THE BRITISH JOURNAL OF AESTHETICS 483, 495 (2015).

⁵³ Jo Adetunji, *Graffiti copyright battles pitch artists against advertisers*, THE CONVERSATION (Aug. 9, 2014), <https://theconversation.com/graffiti-copyright-battles-pitch-artists-against-advertisers-30291>.

of those murals to file for compensation, to which Peter Rosenstein replied that he didn't deem necessary to take the permission of the artists because their works were on public spaces, and hence were covered under the fair use doctrine.

However, the US court didn't agree with the same, and eventually the parties reached a settlement, and the book was discontinued.⁵⁴ Another instance of unauthorized use of a street art in print form was by Pearson Education, also known as Brady Publishing, who, in their book titled "*Tony Hawk's Pro Skater 2 Official Strategy Guide*" had mimeographed the graffiti work of a Chicago based artist named Hiram Villa, without his consent. Initially, the court ordered that there couldn't be any protection given since Villa's work lacked copyright. Post that, Villa got his work registered at the Copyright Office, and then again filed a suit for infringement against the publishers, as a reaction to which the publishers filed for the dismissal of the complaint. However, the events weren't in the pockets of the publishers this time as the court rejected their move.⁵⁵ Regardless, this was another wasted potential because the parties resorted to a settlement, before the court could delve into the intricacies of the matter and establish the jurisprudence.⁵⁶

Despite being a missed chance for the court to establish something substantial within the sphere of copyright and street art, the Villa case did act as a beacon for many other street artists to enter the race for getting their work protected. For example, in 2014, a Miami based street artist, David Anasagasti, had initiated proceedings against American Eagle Outfitters,⁵⁷ because they had, without his authorization, reproduced his work on their apparel advertisement programs. However, once again this case was settled as well, of which the settlement details were kept confidential.⁵⁸ In another instance, the America based artist Maya Hayuk had filed a lawsuit against pop star Sara Bareilles,⁵⁹ Epic Records, Sony Music and the luxury brand Coach, because they had, without her consent, used her "*Chem Trails NYC*" mural in their advertisement and promotional campaigns.⁶⁰ To add to the dismay again, this case was settled as well.

⁵⁴ David Gonzalez, *Walls of Art for Everyone, but Made by Not Just Anyone*, THE NEW YORK TIMES (Jun. 4, 2007), <https://www.nytimes.com/2007/06/04/nyregion/04citywide.html>.

⁵⁵ Villa v. Pearson Education, 03 C 3717.

⁵⁶ Nathan Cole & Joanna Liu, *Unchartered Territory: Enforcing an Artist's Rights in Street Art*, HHR ART LAW, (Jan. 11, 2017), <https://www.hhrartlaw.com/2017/01/unchartered-territory-enforcing-an-artists-rights-in-street-art/>.

⁵⁷ Anasagasti v. American Eagle Outfitters, Inc., Case No. 1:14-cv-05618 (S.D.N.Y. July 23, 2014).

⁵⁸ Carlos Suarez De Jesus, *Abolsniffsglue, American Eagle Outfitters Reach Settlement in Copyright Lawsuit*, MIAMI NEW TIMES (Dec. 2, 2014), <https://www.miaminewtimes.com/arts/aholsniffsglue-american-eagle-outfitters-reach-settlement-in-copyright-lawsuit-6497593>.

⁵⁹ Rich Calder, *Artist sues Sara Bareilles for using her work in concert ads*, PAGE SIX (Aug. 21, 2014), <https://pagesix.com/2014/08/21/artist-sues-sara-bareilles-for-using-her-work-in-concert-ads/>.

⁶⁰ Hayuk v. Coach Servs., Inc., No. 1:14-cv-06668 (S.D.N.Y. Aug. 19, 2014).

Another major event that contributed to the rise of street art and copyright issues was the case filed by street artist Cali Killa against Urban Outfitters. The case involved the company using her signature artwork on their t-shirts without permission, but it ultimately resulted in wasted potential as the courts failed to develop any jurisprudence on the matter. However, before anything more could be said, the parties reached out a settlement between them.⁶¹ Another major instance, although this time involving unauthorized use of an artist's graffiti in a commercial, was between a group of artists called the Tats Cru and Fiat plus Jennifer Lopez. Although, in this case as well, a settlement between the parties were reached.⁶²

B. Street Art's Shield of Copyright: Comparative Analysis

Street art's copyright conundrum varies as we cross domestic borders. Some of the major street art dominant nations like the UK, Germany, and France, all have different regulation mechanisms with regards to Street art's copyright. Hence, a comparative analysis of these nations shall be useful.

1. The United Kingdom

The emergence of graffiti artworks can be traced back to the urban landscapes of London and Bristol during the early 1980s.⁶³ These artistic expressions experienced rapid growth and evolution throughout the subsequent decade of the 1990s. The narrative of the graffiti movement in England has been enriched by the artistic contributions of notable writers such as Robbo, Eine, Drax, Elk, and Oker in London.⁶⁴ The street and graffiti art found within the confines of the British landscape is presently being produced in accordance with the prevailing legal framework. The local governing bodies frequently provide access to communal areas where artistic expressions are permitted, and the displayed artworks undergo periodic alterations. One notable example is the renowned Leake Street situated in the Waterloo region of London, which is commonly referred to as the Graffiti Tunnel.⁶⁵ However, irrespective of the street art welcoming nature as described above, issues actually arise with the unauthorized making of street art, because the UK law is strict on that part.

⁶¹ Hrag Vartanian, *Street Artist Triumphs Over Urban Outfitters in Copyright Case*, HYPERALLERGIC (Sept. 20, 2011), <https://hyperallergic.com/36016/cali-kill-a-urban-outfitters/>.

⁶² Don Kaplan, *Fiat settles claim with Bronx graffiti artists over J. Lo ad*, NEW YORK POST (Nov. 30, 2011), <https://nypost.com/2011/11/30/fiat-settles-claim-with-bronx-graffiti-artists-over-j-lo-ad/>.

⁶³ Sarah Doyle, *Art in Bristol, England, Moves Beyond Museum Walls*, THE NEW YORK (DEC. 23, 2015), <https://www.nytimes.com/2015/12/27/travel/bristol-england-street-art.html>.

⁶⁴ Luke Dickens, *Placing Post-Graffiti: The Journey of the "Peckham Rock"*, 15 CULTURAL GEOGRAPHIES 471, 478 (2008).

⁶⁵ ENRICO BONADIO, STREET ART, GRAFFITI AND COPYRIGHT: A UK PERSPECTIVE, THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI (Cambridge University Press, 2019).

In the UK, Section 4 of the Copyright, Designs and Patent Act 1988 [“CDPA”] states that art forms as placed in the street such as paintings, posters, mosaics, urban knitting and so on, fall within the ambit of artistic works, and hence are subject matter of copyright. With regards to the copyrightability of street art in UK, the first element is its ephemeral nature. Courts initially did rule that if an art cannot establish its permanent nature, it isn’t subject to copyright protection.⁶⁶ However, such jurisprudence hasn’t been given acceptance by courts unanimously. For example, in the case of *Metix (UK) Ltd. v. G.H. Maughan*⁶⁷ it was stated by the court that despite the fact that an ice sculpture isn’t permanent, it’d still be copyrightable because it’s a 3D work created by the hands of an artist.

Another point of focus here is the copyrightability of the sketch drawn by an artist before putting that sketch art prototype on the streets. This means that most artists, if not all, draw their art in a sketch before actually drawing it on the walls of the streets. So, the question is whether this sketch could be copyrighted? The courts in UK have held that making a preliminary artwork before a final piece doesn’t strike down the originality of the final artwork, and hence both are subject to copyright protection.⁶⁸ The provision of copyright for the preliminary sketches play a huge role for artists to protect their art if the same is termed illegal. This is because the law under section 171.3 of CDPA clearly prevents or restricts copyright enforcement on public interest grounds. This was upheld by the court in *Hyde Park Residence Ltd. v. Yelland*⁶⁹ that this provision of the act is aimed to prevent enforcement of copyright over any illegal form of street art. Therefore, in instances where it is held that copyright pertaining to illegal street art cannot be upheld, it is still plausible to content that the copyrightable initial sketches do serve as the foundation for the artists to assert enforcement rights, and hence protect their illegal street art from exploitation.⁷⁰

2. Germany

Germany boasts a vibrant and prospering street art and graffiti milieu, captivating the attention of both scholars and enthusiasts alike.⁷¹ This artistic subculture has permeated the urban landscape, leaving an indelible mark on the cultural fabric of the nation. In the realm of urban artistic expression, Berlin undoubtedly emerges as a paramount subject, owing to its status as Germany’s

⁶⁶ *Merchandising Corporation of America v. Harpond*, [1983] FSR 32.

⁶⁷ *Metix (UK) Ltd. v. G.H. Maughan*, [1997] FSR 718.

⁶⁸ *Biotrading and Financing OY v. Biohit Ltd.*, [1997] FSR 393.

⁶⁹ *Hyde Park Residence Ltd. v. Yelland*, [2000] 3 W.L.R. 215.

⁷⁰ Melanie Dulong de Rosnay & Pierre-Carl Langlais, *Public Artworks And The Freedom Of Panorama Controversy: A Case Of Wikimedia Influence*, 6 INTERNET POLY REV. 1, 4 (2017).

⁷¹ Simon Thomas, *The Heritage of Berlin Street Art and Graffiti Scene*, SMASHING MAGAZINE (Jul. 13, 2011), <https://www.smashingmagazine.com/2011/07/the-heritage-of-berlin-street-art-and-graffiti-scene/>.

preeminent hub for street art and graffiti.⁷² Moreover, it is imperative to acknowledge that Berlin's prominence in the realm of copyright is unparalleled when compared to other urban centers in Germany. Numerous incidents that delve into the intricate nuances of copyright pertaining to street art predominantly revolve around the significant canvas known as the Berlin Wall.⁷³ The Berlin Wall is a profound influence on the artists, as it is the representation of the city's illustrious past, from the city's division to its momentous unification, that has led to the city's present-day reputation as an unparalleled epicenter for artistic expression.

Section 2(1) of the German Authors Rights Act,⁷⁴ in German: Urhebergesetz, [**UrhG**] is the ruling regulation that states the categories of works that fall within the subject matter of copyright. However, unlike many other nations, Germany's copyright law has adapted the "*open list system*" wherein in order to be eligible for copyright, it isn't necessary for a work to fall within the categories as mentioned in the act.⁷⁵ This wide scope of the German Copyright law falls in favor of street art, thus enabling them for copyright protection. Section 2(2) of the UrhG mandates that there should be an author's personal intellectual originality in his work. In the Wall Pictures decision⁷⁶ by the German Federal HC, i.e., *Bundesgerichtshof* [**BGH**], it was held that images of faces on the Berlin Wall and its elements would fall within the ambit of copyrightability as they are personal creation of the author's own intellect.

Even with regards to commissioned work, the copyright of the work, pursuant to Section 7 of UrhG,⁷⁷ falls on the creator of the artwork, and the exclusive right can only be transferred by means of a contractual arrangement between the parties. This is again a unique feature of this legislation, because unlike Germany, UK's copyright law is not having any express provision that gives the ownership and authorship rights to the actual creator in commissioned works.

Specifically with regards to illegal street art, the conundrum in the German jurisprudence is that it brings about a clash between the IP law and the property law of the nation. It is nevertheless clear that the maker of the art still possesses the ownership of the art, however, he/she shall not possess

⁷² Mallika Bhagat, *Writing On The Wall: The World's Most Captivating Street Art Destinations*, THE INDIAN EXPRESS, <https://indianexpress.com/article/et-al-express-curated/writing-on-the-wall-the-worlds-most-captivating-street-art-destinations-8882582/>.

⁷³ MARC MIMLER, STREET ART, GRAFFITI AND COPYRIGHT: A GERMAN PERSPECTIVE, ENRICO BONADIO, THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI 188 (Cambridge University Press, 2019).

⁷⁴ Urheberrechtsgesetz [UrhG] [Copyright Act], § 2(1), Sept. 9, 1965, BGBL I at 1273 (Ger.).

⁷⁵ Nishant Thakur & Sandra Anil Varkey, *Closed list approach versus open-ended approach in subject matter copyright*, SCC ONLINE BLOG (Mar. 28, 2021), <https://www.sconline.com/blog/post/2021/03/28/copyright-2/>.

⁷⁶ *Wall Pictures*, IIC 282 (BGH) (1997).

⁷⁷ Urheberrechtsgesetz [UrhG] [Copyright Act], § 7, Sept. 9, 1965, BGBL I at 1273 (Ger.).

ownership of the physical body on which the art is made.⁷⁸ The property law of the German Civil Code states that when a movable good (which in case of street art is the paint by which it is made) becomes an essential part of the property to which it is attached, then the ownership of the property shall also include the movable good.⁷⁹ This creates an overlap between the IP law and the property law. This was dealt with in the *Mauer-Bilder* decision⁸⁰ by the BGH wherein it held that in case when the work is legitimate, the owner of the property cannot claim right over the artwork on the property, as the same shall be exclusive to the artist. However, if the case involves illegal street art, then the fundamental right to property enshrined in German Basic Law⁸¹ shall prevail to the extent that the property owner can destroy the art piece, but in no way can he monetize by commercializing the contended art piece, as the economic rights shall persist with the copyright holder.

However, in the Berlin wall case the issue persisted regarding the jurisdiction because the wall was just inside the border, i.e., it was barely on the territory of GDR. Therefore, West Berlin's government had no jurisdiction. The BGH ruled that the writers could not have abandoned their economic rights since they did not intend for their work to be commercially exploited when it was created. Unlike graffiti and street art, the creators have not kept their identities hidden. Instead, they have accepted their copyright and been credited as writers in publications on the murals. German copyright law does not allow for the abandoning of property rights, similar to dereliction in real property. The court clarifies that there is no "ownerless" copyright.⁸²

Thus, it can be said that the German copyright jurisprudence with regards to street art is very well established, as it has answered a lot of questions associated with street art's copyrightability.

3. France

France has a very long-standing history with respect to street art, for graffiti can be traced back to pre-historic times as substantiated by the cave drawings on the walls at the Lascaux Caves.⁸³ And today, when it comes to street art, France has been seen as the most prolific bastion of the

⁷⁸ Marc Mimler, *supra* note 73 at 195.

⁷⁹ Bürgerliches Gesetzbuch (BGB) § 93 (1900).

⁸⁰ *Mauer-Bilder*, 1995 GRUR 673, 675 (BGH).

⁸¹ Grundgesetz [GG] art. 14 (Ger.).

⁸² Marc Mimler, *supra* note 73 at 196.

⁸³ Precious Rongmei, *Lascaux Caves in France has completed some prehistoric tales to tell*, TIMES TRAVEL (Aug. 29, 2023), <https://timesofindia.indiatimes.com/travel/destinations/lascaux-caves-in-france-has-some-prehistoric-tales-to-tell/articleshow/103173754.cms>.

movement.⁸⁴ With regards to copyright of street art, firstly there is no requirement under the French Law that the works must be fixed, i.e., even short-term works may also be protected.⁸⁵ With regards to commissioned works in France, as per the perusal of Article L.111-1,⁸⁶ it is evident that the copyright in such cases vests initially upon the artist. And that the only way to acquire these rights by the assignment giver could be by way of a contract.⁸⁷ In the Intellectual Property Code of France, there isn't any express provision deliberating upon the fact as to whether illegal works are protected or not. However, on a perusal of Article 16 of the Civil Code, it comes to light that the works which violate human dignity won't be protected by copyright. Illegal street art calls a question on the conflict between the property rights and IP rights. An effort to reach a balance of interests between these rights was made by the Tribunal of Grande in the case of *Benjamin Aichouba et autres v. Francis Lecole*.⁸⁸ This case involved a mosaic on the wall and the court had ordered the mosaic artists to remove it within a specified time frame, and if they didn't then the property owner shall have the right to with it as per his wish. Irrespective, in the French jurisprudence, a better clarification is the need of the moment.

4. India

Art in public spaces is approximately a 2000-year-old tradition in India, with the oldest evidence of the same can be traced back to the cave paintings in Ajanta, Maharashtra.⁸⁹ The tradition in India is such that street art is majorly commissioned in India and hence the objection of it being illegal is seldom seen. Irrespective of this, the copyright law of India is unclear with regards to the street art regulation.⁹⁰

The Copyright Act 1957 in India, under Section 2(c)⁹¹, defines artistic work. As per the letter of the law, artistic work includes a painting, sculpture, drawing, engraving, architecture, and all of

⁸⁴ Ana Bambic, *History of Street Art in France: A Quick Overview*, WIDEWALLS (Oct. 5, 2014), <https://www.widewalls.ch/magazine/history-of-street-art-in-france>.

⁸⁵ Louise Carron, *Perspective On The French And American Legal Approach To Street Art*, NYSBA (Nov. 1, 2019), <https://nysba.org/street-art-is-copyright-for-losers-a-comparative-perspective-on-the-french-and-american-legal-approach-to-street-art/>.

⁸⁶ Code de la propriété intellectuelle [C. prop. intell.] [Intellectual Property Code] art. L111-1 (Fr.).

⁸⁷ SHANE BURKE, GRAFFITI, STREET ART AND COPYRIGHT IN FRANCE, ENRICO BONADIO, THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI 182 (Cambridge University Press, 2019).

⁸⁸ TGI Paris, 3e ch., Oct. 13, 2000.

⁸⁹ Avilash Kumbhar & Tanisha Das, *Art Meets Law: The Uneasy Tussle of Street Art and Intellectual Property Law*, FOX MANDAL SOLICITORS & ADVOCATES (Nov. 8, 2022), <https://www.foxmandal.in/art-meets-law-the-uneasy-tussle-of-street-art-and-intellectual-property-law/>.

⁹⁰ NANDITA SAIKIA, STREET ART, GRAFFITI AND INDIAN COPYRIGHT LAW, ENRICO BONADIO, THE CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI 271 (Cambridge University Press, 2019).

⁹¹ The Copyright Act, No. 14 of 1957, § 2(c).

them having artistic quality in them. A literal interpretation of this shall enable us to conclude that prima facie, street art does fall in the category of artistic work.

The Copyright Act is unclear on the position as to whether illegal or immoral work can be copyrighted or not. There is no reported Indian case law that could build jurisprudence on this matter. However, it has been presumed that removal of artworks or offering them for sale could not amount to copyright infringement when the art itself has been created illegally. Even when an art is anonymous, it would be difficult for courts to establish if the moral rights of the author have been violated.⁹² The Delhi HC in the case of *Amarnath Sehgal v. Union of India*⁹³ did recognize the need to interpret Section 57 of the Copyright Act 1957 in a way so as to widen its ambit in order to include art destruction in extreme form of mutilation in it, as this would prevent reputation damage of the artist. However, this decision has seldom been seen to be followed and folk art hasn't benefitted from it.⁹⁴ The law nowhere deals with the right enforcement of the artist specially in case of illegal work, hence the role here is that of the judiciary, which so far hasn't been able to establish any set of case laws to develop the jurisprudence.

C. The De Minimis Doctrine

The de minimis concept is very relevant, since the Indian Copyright Act includes specific exemptions to the strict framework of copyright protection. This legal doctrine allows for the use of copyrighted materials in trivial and negligible manners that do not amount to copyright infringement. Within the realm of street art and murals, this theory has great importance. The de minimis concept allows for flexibility due to the sometimes complex and subtle nature of modern art forms, which may use components of previous works or urban environments in a modest and inconspicuous way. Artists are able to get inspiration from their surroundings and cultural context without worrying about violating copyright laws, as long as the use is considered insignificant and inconsequential. This ideology acknowledges the unique challenges faced by street artists and promotes a creative atmosphere that thrives at the convergence of many components, while yet respecting the rights of copyright owners.⁹⁵

⁹² Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 THE JOURNAL OF LEGAL STUDIES 95, 100 (197).

⁹³ *Amarnath Sehgal v. Union of India*, (2005) MANU/DE/2016/2005.

⁹⁴ Shane Burke, *supra* note 87 at 282.

⁹⁵ King Stubb & Kasiva, *Street Art and Copyright In Indi: A Legal Perspective*, KING STUBB AND KASIVA (Nov. 8, 2023), <https://ksandk.com/intellectual-property-rights/street-art-and-copyright-in-india/#the-doctrine-of-de-minimis>.

A major product of the courts with regards to the nexus of street art and copyright is the principle of De Minimis. In essence, the courts do not uphold every infringement claim, particularly when they believe that the duplication that has occurred is too trivial to warrant a response. This is called the De Minimis Rule. An example of this can be taken from the case of *Gayle v. Home Box Office, Inc.*⁹⁶ In this case HBO's show "Vinyl" was in the ocean of distress because the show had a scene where artist Gayle's street art was captured. He claimed this to be unauthorized use of his art. The court rejected the claim stating that the artwork is too hard to be noticed as the camera focus is on the protagonist on screen. Hence, the court ruled this out stating it to be a de minimis case.

IV. THE COMMERCIAL CONUNDRUM

A. Commercialization of Graffiti

Now, as the world of graffiti is growing in popularity and as it is gradually being legitimized, there are growing concerns regarding the commercialization of graffiti.⁹⁷ For those who strive for mass coverage of their art and the message they carry, the recognition that they seek from the society would hardly be possible without some form of commercialization.

For instance, inclusion of graffiti in advertising campaigns by large MNCs is a form of commercialization which is gaining demand. One prominent example is when I.B.M. spray painted symbols of peace and heart along with the company's logo as part of its advertising campaign in the cities of San Francisco and Chicago back in 2001.⁹⁸ However, as a result of this campaign, I.B.M. had to pay punitive damages and costs for cleaning amounting up to USD 120,000 to the states. Reflecting on what happened in case of I.B.M, Sony decided to launch a similar advertising campaign in 2005 in the cities of L.A., Miami, Atlanta, Chicago, New York, and Philadelphia to promote its new PSP gaming system.⁹⁹ To avoid the dire repercussions faced by IBM., Sony made payments to the owners of the property beforehand in order to obtain rights from the owners to paint the said property.

One form of commercialization of graffiti is to display photographs and paintings of/inspired by graffiti in museums and exhibitions. This is a way of intermixing graffiti and high art. (i) In the

⁹⁶ *Gayle v. Home Box Office, Inc.*, No. 17-CV-5867 (JMF), 2018 WL 2059657 (S.D.N.Y. May 1, 2018).

⁹⁷ Claire Doyle, *Yield to Pedestrians: The Commercialization of Street Art*, THE GEORGETOWN VOICE (Feb. 10, 2015), <https://georgetownvoice.com/2015/02/10/yield-to-pedestrians-the-commercialization-of-street-art/>.

⁹⁸ James Nicolai, *IBM's Graffiti Ad Runs Afoul of City Officials*, CNN (Apr. 19, 2001), <https://edition.cnn.com/2001/TECH/industry/04/19/ibm.guerilla.idg/>.

⁹⁹ Rusty Kennedy, *Graffiti Ads for PSP Mark Controversy*, NBC NEWS (Dec. 30, 2005), <https://www.nbcnews.com/id/wbna10641138>.

1970s, Burhan Dogancay used pictures of graffiti to make paintings of his own, and he has mentioned graffiti to be a source of inspiration for his paintings. He has made a project out of such paintings called ‘Walls of the World’.¹⁰⁰ (ii) In the 1980s, there was an art exhibition in Manhattan that displayed graffiti which was curated by Fashion Moda.¹⁰¹ (iii) In 2006, there was an art exhibition in the Brooklyn Museum, wherein 22 graffiti of famous graffiti artists was also displayed as a form of art.¹⁰² Charlotta Kotik (the curator) mentioned that she hoped for the public to reconsider their preconceived notions about graffiti.¹⁰³

B. Artists’ Rights

1. *Economic Incentives*

There are also some opponents of commercialization of graffiti who contend that the graffiti artists are not at all concerned with economic incentives,¹⁰⁴ so it would just be like chasing fool’s gold. They argue that such artists do not work for any financial gain, and that their values lie in expressing their authentic thoughts, untainted by such materialistic desires. Accordingly, following the same argument, even providing IP protection of graffiti would have no meaning because it would primarily serve economic incentives by way of generating profits from their artworks.¹⁰⁵

However, a stark contrast can be seen if we take a look at the legal provisions which will show that the commissioned “less valuable” work is given strong legal protection, whereas the non-commissioned “more valuable” work is given no such protection.¹⁰⁶ Stripping the entire economic aspect out of graffiti serves no end. Regardless of highly we may attempt at putting the non-commissioned and authentic pieces, the reality remains that such speech will ultimately end up being driven out of social discourse. The society is built as such that, both the private and public bodies alike, will always favor establishing such rules that serve some prospect of economic gain.

¹⁰⁰ Paul Vitello, *Burhan Dogancay, Artist Inspired by Urban Walls, Dies at 83*, THE NEW YORK TIMES (Jan. 20, 2013) <https://www.nytimes.com/2013/01/21/arts/design/burhan-dogancay-artist-inspired-by-urban-walls-dies-at-83.html>.

¹⁰¹ Alya Sama, *The City as Canvas: The Underground Birth of Graffiti in New York*, SOTHEBY’S (Sept. 20, 2021) <https://www.sothebys.com/en/articles/the-city-as-canvas-the-underground-birth-of-graffiti-in-new-york>.

¹⁰² Ken Johnson, *When Aerosol Outlaws Became Insiders: Graffiti Art at the Brooklyn Museum*, THE NEW YORK TIMES (Jun. 30, 2006) <https://www.nytimes.com/2006/06/30/arts/design/30graf.html>.

¹⁰³ *Id.*

¹⁰⁴ Brittany M. Elias and Bobby Ghajar, *Street Art: The Everlasting Divide Between Graffiti Art and Intellectual Property Protection*, 7 LANDSLIDE 1, 7 (2015).

¹⁰⁵ Andrea Baldini, *Beauty and the Bebest: Distinguishing Legal Judgment and Aesthetic Judgment in the Context of 21st Century Street Art and Graffiti*, 65 RIVISTA DI ESTETICA 91, 101 (2017).

¹⁰⁶ Katya Assaf Zakharov, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1, 22 (2008).

It is not a necessity for graffiti to be criminalized for it to retain its authenticity. It merely provides them a larger platform and reach out to a larger audience to voice the same issues they were already addressing. It would be illogical to hope for continuous suppression to result in preservation of graffiti. “Sentencing some graffiti artists for vandalism while providing others with copyright protection, the legal system reflects the social attitude towards non-compensated creativity: we can only know it is art and not nonsense after it has gained commercial value and social recognition”.¹⁰⁷

2. *Rights in case of Destruction of Graffiti*

In the case of *Cohen v. G&M Realty L.P.*¹⁰⁸, wherein the Eastern District Court of New York delved into the question of whether graffiti was worthy of any protection at all, given its nature. It centered around the bunch of graffiti painted in the area of 5Pointz in NYC that had been destroyed by the owner of the property. The Court determined that the graffiti art was covered within the meaning of “visual art” protected under Section 106A of the VARA.¹⁰⁹ The Court awarded maximum damages to the graffiti artists, as per Section 504 of the VARA,¹¹⁰ totaling up to 6,75,000 in this case on the basis that these artworks received wide recognition.¹¹¹ So, it was determined that the property owners were the ones who had committed a willful violation on their part by destroying such artwork. The end goal, even for the society, is to prevent vandalism.¹¹² However, if all graffiti were to be labelled as vandalism, then it fails to take into consideration the actual cause (mischief) which motivated the graffiti artist to act in the first place.

This view has also been supported by stating that graffiti, even one made without consent of the property owner, is a form of activism/expression that is necessary for the audience to experience as part of the environment that they live in.¹¹³ There is still no solid or substantial legal framework on an international level regarding the protection of graffiti. The current framework provides the rights, liabilities, and procedure regarding copyright on an international level; but where graffiti itself is considered to be an illegal act, and there is dissonance between the views of different countries regarding criminality of graffiti, it becomes difficult to establish that graffiti is automatically covered under the traditional international framework. However, the Courts in some

¹⁰⁷ Katya Assaf- Zakharov, *Reading the Illegible: Can Law Understand Graffiti?*, 53(1) CONN. L. REV. 117, 137 (2021).

¹⁰⁸ *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212 (E.D.N.Y. 2013).

¹⁰⁹ Visual Artists Rights Act, 17 U.S.C. § 106A (1990).

¹¹⁰ Visual Artists Rights Act, 17 U.S.C. § 504 (1990).

¹¹¹ Drew Thornley, *The Visual Artists Rights Act’s “Recognized Stature” Provision: A Case for Repeal*, 67 CLEV. ST. L. REV. 351, 355 (2019).

¹¹² Ivy Clarice Estoesta, *Cohen v. G&M Realty L.P.: A Judicious Gentrification Of Graffiti*, STERNE KESSLER GOLDSTEIN & FOX P.L.L.C (Feb. 27, 2020), <https://www.sterneessler.com/news-insights/publications/cohen-v-gm-realty-lp-judicious-gentrification-graffiti/>.

¹¹³ Sondra Bacharach, *Street Art and Consent*, 55(4) BRITISH JOURNAL OF AESTHETICS 481, 488 (2015).

of the countries have started to take a more proactive approach towards the same. The focus is primarily on protecting the moral rights of the graffiti artists in order to prevent outright violation or destruction of their artwork. Such protection from destruction of graffiti becomes pertinent to facilitate commercialization of graffiti. Otherwise, if there is no such guarantee, then the interest of the graffiti artists is compromised.

3. *Rights in case of Commercialization without Permission*

Commercially making profits out of a graffiti artist's work without their permission is bound to offend such artist. For instance, a photograph of a Finnish graffiti artist's (named Psyke) work was published in a newspaper in 2020 without his permission.¹¹⁴ His graffiti was used as a background for an article. Expressing his displeasure upon the actions of the newspaper agency, Psyke stated that he is not seeking out for any compensation here; he was simply against the commercial use of his works without his consent.

Another scenario is where other fellow graffiti artists make copied versions of some original well-known graffiti by some other artist. Shepard Fairey took the chance to create a compilation out of all such bootleg versions of his graffiti and displayed them on a website.¹¹⁵ In this way, the upcoming artist is not put down, and at the same time, artists like Shepard gain influence and recognition by embracing such recreations of his work.

Such instances of commercialization without permission of the graffiti artist can be avoided by bringing in the aspect of copyright over the said graffiti. Drawing a parallel from the existing legal framework of copyright, even if unregistered, once the graffiti art is drawn onto a surface, such art can become subject matter of copyright, whereby the artist can also gain the right to file a suit for infringement of such right.¹¹⁶ The artwork is deemed eligible for protection once it is "fixed" in a physical medium, such as canvas or paper, within the realm of traditional art forms like painting, sculpture, or photography. As soon as a painting is completed, the artist is immediately awarded copyright protection, which enables them to safeguard their work against unlawful copying or sale. Although graffiti is often produced in public areas and may be seen as ephemeral or as vandalism, its artistic worth and the artist's ownership rights are not diminished. This would confer onto

¹¹⁴ Kritika Verma, *supra* note 19.

¹¹⁵ MOIRA FIONA HAMPSON, REBRANDING STREET ART: AN EXAMINATION OF STREET ART AND EVOLUTION INTO MAINSTREAM ADVERTISING, BRANDING, AND PROPAGANDA (May 25, 2018) (University Hons. Thesis, Paper 631, Portland State University).

¹¹⁶ Aaron B. Rabinowitz, *Criminal Prosecution for Copyright Infringement of Unregistered Works: A Bite at an Unripe Apple*, 49(3) SANTA CLARA L. REV. 793, 800 (2009).

graffiti artists the same entitlements as painters or sculptors, empowering them to oversee the replication, exhibition, or commercial exploitation of their artistic creations. Thus, ensuring the right against commercialization without permission of the artist also becomes an incentive for the artists to take an initiative in this regard to safeguard their artwork.

C. Anonymity: Protection of Artists or Hindrance of Commercialization

Graffiti artists remaining anonymous is a common phenomenon, which is usually done in order to protect their identities so as to avoid prosecution and charges. Nonetheless, this paper is primarily concerned with the question of whether commercialization of anonymous graffiti is a possibility or not. In fact, there is no bar to graffiti artists opting for anonymity, even for artworks that are legally allowed. Here, it must also be noted that German courts have ruled that some forms of graffiti, which are signed and fulfil particular durability and uniqueness standards, are eligible for copyright protection.¹¹⁷ Copyright eligibility is determined by two important factors – the work's originality and its fixing in a physical medium, such as a wall or other permanent surface. This includes graffiti artwork that goes beyond simple marks or signatures to show artistic expression. The court regarded the impugned graffiti as a valid work for copyright protection since it was signed, original, and permanent.¹¹⁸

One prominent graffiti artist who is infamous for remaining anonymous to this day is Banksy. His works are mainly centered around London, but his works have also been found in Palestine and L.A. Banksy focusses on using his art as a medium to highlight controversial cultural and political issues, while avoiding arrest by maintaining his anonymity.¹¹⁹ His works are always under fire for debates on whether graffiti is vandalism or art. The reaction to his works usually goes either of the two ways – receiving official protection, or being removed.

Similarly, Pixnit is yet another graffiti artist who chooses to remain anonymous.¹²⁰ However, as compared to Banksy's works,¹²¹ Pixnit's work has gained more acceptance as a form of art. It

¹¹⁷ Jan Bernd Nordemann, *The case law of the German Federal Court of Justice and other German courts in 2022 – Part II*, KLUWER COPYRIGHT BLOG (Mar. 18, 2024) <https://copyrightblog.kluweriplaw.com/2023/06/07/the-dawn-of-pastiche-first-decision-on-new-german-copyright-exception/>.

¹¹⁸ Susan Bischoff, *The dawn of pastiche: First decision on new German copyright exception*, KLUWER COPYRIGHT BLOG (Jun. 7, 2023) <https://copyrightblog.kluweriplaw.com/2023/06/07/the-dawn-of-pastiche-first-decision-on-new-german-copyright-exception/>.

¹¹⁹ Sondra Bacharach, *supra* note 113.

¹²⁰ ANELIESE K. DAR, *IDENTIFYING WITH THE GRAFFITI SUBCULTURE: THE IMPACT OF ENTERING AND EXITING THE GRAFFITI SUBCULTURE ON THE SOCIAL IDENTITIES OF GRAFFITI WRITERS* (2013) (MA Thesis, The University of North Carolina).

¹²¹ Will Ellsworth-Jones, *The Story Behind Banksy*, SMITH SONIAN MAGAZINE (Feb. 2013), <https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/>.

focuses more on design and beauty. She mostly makes graffiti in the urban areas of Boston, which primarily incorporates floral designs.¹²² The owners of shops and stores in these areas are usually present a more welcoming attitude towards her work, and even encourage others to do the same. So, in this case, it becomes easier for artists like Pixnit to commercialize their work, because there would already be an audience waiting to endorse her work and invest in them. Often, graffiti carries the connotation of crime, whereas terms such as “urban art” carry the connotation of cultural expression.¹²³

One solution that has been in discussion to balance the interest of the graffiti artists in maintaining anonymity and the commercialization of such graffiti art is to incorporate the aspect of NFTs (non-fungible tokens) within the framework.¹²⁴ When an NFT is minted, it is assigned a unique identifier and metadata that includes information about the asset it represents (i.e., the graffiti art).¹²⁵ Geo-tagging of graffiti art can help maintain a detailed chronological history,¹²⁶ and act as a bridge to connect the artists willing to commercialize their artwork with their target audience while maintaining their anonymity. Although there might still arise challenges when it comes to conflict resolution, if proper safeguards are formulated, this approach can be the starting point of providing a platform where anonymous graffiti artists can communicate and transact with their audience.

D. Murals to Beautify: India’s Vibrant Street Art Festivals

Before the introduction of Street Art Festivals, the graffiti artists painted locally with barely any engagement with the public. Gradually, there was an increase in the practice of organized street art in the form of street art festivals in India, such as the Shillong, Delhi, and Kolkata Street Art Festival, and the St+art India Foundation Festival, etc.

One of the first festivals, that was organized in 2012 by Matteo Ferraresi and Astha Chauhan,¹²⁷ was named the ‘Khirkee Extension’ which was held in Delhi.¹²⁸ The aim was to bring together people organically without any funding to display their art styles. It was meant to give the artists a

¹²² Aneliese K. Dar, *supra* note 120.

¹²³ Myra Taylor and Ida Marais, *Does Urban Art Deter Graffiti Proliferation: An Evaluation of an Australian Commissioned Urban Art Project*, 9 PAPERS FROM THE BRITISH CRIMINOLOGY CONFERENCE 57, 58 (2009).

¹²⁴ Eynat Mendelson-Shwartz, et al., *Protecting Street Art Rights Using an NFT-Based System*, 30(3) JOURNAL OF URBAN TECHNOLOGY 81, 82 (2023).

¹²⁵ *Id* at 89.

¹²⁶ M. Graf, *Facets of Graffiti Art and Street Art Documentation Online: A Domain and Content Analysis*, Doctoral Dissertation, University of Pennsylvania (2018).

¹²⁷ Aparajita Bhasin, *supra* note 24 at 112.

¹²⁸ Bhawna Chauhan, *The Impact of Social-Culture on the Acceptance of Graffiti Art in Delhi*, 6(6) INT’L J. RSCH. HUMAN., ARTS & LITERATURE 319, 323 (2018).

platform to express themselves freely.¹²⁹ Moreover, these organized acts also help revitalize the areas, as was the case in the creation of the Sassoon Dock Art and the Lodhi Art District in Mumbai and Delhi, respectively.¹³⁰

Delhi Street Art and St+art India Foundation are some of the organizations that have taken significant steps towards building a proper system of regulating street art.¹³¹ They collaborate with government organizations as well, such as the CPWD, NDMC, Ministry of Urban Development, DMRC.¹³² The focus was less on the propagation of religious, social, and political agendas and more on the aspect of beautification of properties and public spaces.¹³³ However, it can also be argued that such art lacks authenticity and meaning as it is under the control of the government to a large extent.

Organizing such festivals reflect a legal and positive approach towards graffiti, which poses the possibility of commercializing such art. The attendees and admirers of these festivals become a base market and audience who could potentially become the consumers of such graffiti. For instance, even the notorious graffiti artist Daku participated in the 2016 edition of the St+art India Festival that took place in the Lodhi Art District.¹³⁴ It reflects a shift of graffiti artists from practicing graffiti which most would question to be vandalism, moving towards sanctioned and commissioned works. In a sense, it is similar to creating an art gallery in the streets, exposing the art to a larger audience.

V. CONCLUSION

The fundamental potential of street art lies in its ability to depict social, socio-economic, political, and cultural predicaments, as well as its propensity to establish communities. For the great majority of people, street art has been innovative, influential, and life-changing. It has also been inspiring. The viewpoints of artists have also changed as a result of the significant change that has occurred

¹²⁹ Sonika Sandhu, *From Rock Art To Street Art- Caves To Walls: An Insight Into The Artistic Development Of Painted Wall Art From Prehistoric To Modern-Day In India*, 3(1) JOURNAL OF HISTORY, ART & ARCHAEOLOGY 85, 92 (2023).

¹³⁰ Bhawna Chauhan, *supra* note 128 at 325.

¹³¹ Chanpreet Khurana, *Art Out On The Streets*, LIVE MINT (Apr. 17, 2015), <https://www.livemint.com/Leisure/jatuIdIVDA8h3qlSPPx1DL/Art-out-on-the-streets.html>.

¹³² Suneet Zishan Langar, *This Street Art Foundation Is Transforming India's Urban Landscape – With The Government's Support*, ARCH DAILY (Aug. 8, 2017), <https://www.archdaily.com/876705/this-street-art-foundation-is-transforming-indias-urban-landscape-with-the-governments-support>.

¹³³ Steven, *The St+art of Something Big In India?*, URBAN KULTUR BLOG (Mar. 16, 2015), <https://urbankulturblog.com/2015/03/16/the-start-of-something-big-in-india/>.

¹³⁴ Niharika Lal, *Daku Casts His Shadow On This Lodhi Wall*, TIMES OF INDIA (Sep. 16, 2016), <https://timesofindia.indiatimes.com/city/delhi/daku-casts-his-shadow-on-this-lodhi-wall/articleshow/54347894.cms>.

concerning the legitimacy of street art. This has not resulted in a decrease in their intention to produce art; rather, it has resulted in the development of the perception that they want their work to be safeguarded from being imitated.

The Indian copyright law is not successful in protecting art, as demonstrated through this paper. There is a lack of a structure within the law that addresses illegal street art as well as street art itself. In the event of a disagreement, this will always cause injury to one of the parties involved. As a result of the fact that case laws do not result in the production of jurisprudence, the court has not made any constructive contributions. Should ownership be held by the artist or by the people that commissioned the work? There is a probability that illegal labour might be protected. They symbolize the pathway that Indian copyright law, and not Robert Frost, traversed.

For this reason, the juxtaposition that was indicated before is quite important. In light of the reality that it governs the bulk of problems about street art and graffiti by direct legislation and case law, the German Copyright Regime is consequently well-established. Since it covers street art in such a comprehensive manner, the Open List system in Germany has the potential to have an impact on the copyright law in India. Open lists are used by a number of other countries, including Canada. According to the legislation of Germany, compositions that have been commissioned belong to the copyright, which belongs to the artist. There are a great number of further examples that might serve as a source of inspiration for the Indian legislature to improve its copyright legislations.

For the purpose of illustrating the commercialization of intellectual property, it is reasonable to utilize street art festivals in India as examples. With this protection, writers are protected from legal action in the event that their works are used for commercial purposes or destroyed without their permission. Through the sale of prints and other types of digital art, graffiti artists have the potential to expand their audience reach and further their own business objectives.

GUARDIANS OF THE GAME: THE INTERPLAY BETWEEN INTELLECTUAL PROPERTY RIGHTS AND THE IPL

AVIRAL JAIN*

ABSTRACT

The Indian Premier League [“IPL”] stands as one of the most significant and exhilarating sporting phenomena in the modern world, providing the viewers with a thrilling journey of two months of action-packed matches witnessing almost 10 teams compete against each other to be crowned the next champion. However, IPL is not only characterized by its thrilling cricket matches but also by its intricate web of Intellectual Property Rights [“IPR”]. As the IPL gathers large viewing from audiences, both nationally and internationally, and the following for the teams and their players grows unparalleled, the implementation of rights and guarantees included under the IPR law regimes takes a toll raising serious challenges for its implementation.

I. INTRODUCTION

The Indian Premier League has become one of the most famous household names across the world, guaranteeing a full pack of exhilarating sporting phenomena. Taking the audience for a two-month thrilling ride, it witnesses a great reputation preceding itself for being one of the most viewed sporting events¹ to take place around the calendar. With almost 8 to 10 teams fiercely competing for the championship title, the event promises to be one of the most celebrated events indeed. However, having such a high reputation being tied to this event makes it prone to attacks upon its very existence - the format, the rules, the guidelines, the brand value, and everything in between. But the real question that hangs is - what makes it still intact even after so many years and editions?² The answer is the IPRs associated with the games.

The rules and regulations governing IPRs play a key role in defining the system which has remained one of the most viable sporting businesses in a country such as India. The provisions of the Copyright Act of 1957² and the Trade Mark Act of 1999³ aim to protect the very basis of the

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¹ BCCI, *Brand and Content Protection Advisory*, PUBLIC ADVISORY DOCUMENT (2023), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://bcciplayerimages.s3.ap-south-1.amazonaws.com/bcci/documents/1680174721009_Brand&ContentProtectionGuidelines.pdf.

² The Copyright Act, No. 14 of 1957 (Ind.).

³ The Trademarks Act, No. 47 of 1999 (Ind.).

concerned league. While IP Rights were initially associated solely with the manufacturing industry, it has now expanded its ambit to various industries, including the sporting industry, proving to be detrimental. The increased regulation and protection of the IP rights into the sporting industry, specifically, as will be discussed hereinafter, have led to protection of various parties involved into transaction, including the teams, sponsors, broadcasters, regulating body and the league itself, saving up to billions, hence the impact.

As a matter of fact, the protection so guaranteed under these acts and regulations and the increasing significance does highlights the need for versatility of the legislations under question. However, even though the said provisions are impacting the industry heavily, the question of the efficiency of the system so put in place to protect these rights remains unanswered.

The increasing interaction of the IPRs with the IPL business model presents us with a situation that needs to be tested for its ability to secure the system so in place and to examine if it fulfils the very basic promise of protecting the value so created by IPL. This paper delves deeper into the relation between the IPL and the legislation so in place protecting the intellectual property of the IPL. This paper would aim to comprehend and analyze the provisions and methodology so implemented to ensure the same. Along with that, this paper would also take into consideration the IP rules and regulations guaranteed to other sporting events and franchises. Through this paper, the author aims to provide an overview of the effectiveness and efficiency of the IP law regime in India and its interaction with IPL.

II. THE WHY: NECESSITY FOR PROTECTING THE IPR

It is rightly provided that a registered mark provides its owner with the exclusive right to use, license, or sell it in exchange for the goods and services. IPL, being one big brand itself, finds it necessary to invoke such rules and regulations and protect its identity against infringement. Over the time, various precedents have brought to the forefront the growing urgency of getting the brand and its ancillaries registered. Registration of a trademark forbids every other person from using the said mark or obtaining the registration of the same trademark or a confusingly similar trademark in relation to the same goods or services in relation to which the trademark is registered.⁴ Upon the protection being guaranteed under the said provisions, the brands have been able to realize the actual commercial prowess through maintenance of the brand exclusivity, preservation

⁴ *Id.*

of assets and encouragement of innovation. These aspects maintain the essential requirement of implementation of the IPR.

Following the data, one can easily devise the contention that the popularity of the league has opened up various business opportunities which has induced the brand managers to take cognizance of the importance of protecting the intellectual property of the brand and also those still in the imagination realm. The franchises, who benefit the most through participating in the league, direct their attention towards avenues such as protection of intellectual property rights, counterfeiting merchandise, and online piracy, since the franchises so participating are held by for-profit private organizations. Hence, it can be easily factored in that IPL since the very beginning was more than a sporting event and that the ulterior motives, which have so far remained behind the curtains, are the driving forces behind this league. IPL, through its public advisory⁵ too aims to highlight the very necessity of enforcing such rules and regulations, which is provided as:

“Also, in order to maintain the integrity of the IPL brand and to protect the dilution and damages to its reputation and prestige, it is vital that the IPL retains careful control of IPL IPR and their uses.”⁶

Since it has been very well established so far that this sporting league has become more than sports itself, it is worth witnessing the race amongst the franchises to claim the registration. So far, Mumbai Indians has filed for registration in the most classes so identified under the act with the aim of protecting all the aspects the franchises assumed to be beneficial for their brand.⁷ Interestingly the registrations by the teams have far exceeded the classes relating to either sports, clothing or even footwear. The teams are now venturing into various other fields, including tea, coffee, mineral as well as aerated water, establishing all these franchises into a well-established business.⁸ Taking into consideration the Mumbai based franchise, one of the leading American Business Magazines, The Forbes, has held it to be valued at \$ 1.3 Billion USD and amongst all the sources of the revenue, the team earns the most through media rights, sponsorships, stadium ticket sales as well as merchandise sale, all of which are protected under the appropriate forum of IPR.⁹ This being one amongst other teams, it can very easily deduced through these sources that such franchises, being valued in billions, need to be protected to ensure their growth.

⁵ BCCI, *supra* note 1.

⁶ *Id.*

⁷ BCCI, *supra* note 1.

⁸ *Id.*

⁹ CricTracker Staff, *IPL 2023: Mumbai Indians' Net Worth and sources of revenue*, CRIC TRACKER, (11 April, 2023), <https://www.crictracker.com/cricket-appeal/ipl-2023-mumbai-indians-net-worth-and-sources-of-revenue/>.

The concept of IPR has drastically changed over the last few years, which has induced the brands so created to take ample care of the non-sporting aspects of the business and hence keep an exclusive interference in these aspects.

III. IPL IPR

A. IPL IPR and the Trademark Act

Each year IPL releases a public advisory¹⁰ indicating the methodology so adopted by the IPL to protect the brand of the sporting league as well as the participating franchises in order to protect the exclusive rights and privileges in consideration and commercialize the intellectual property. The IPL IPR, terminology coined by the advisory¹¹ issued to protect the guidelines, names, marks, footage. and any other intellectual property so owned by whatever name called or described, arising out of IPL, reflects as to how considerably the sporting event aims to protect their rights. Having \$ 10.7 Billion¹² as standing valuation and being ranked among the top leagues across the world based on revenue, it becomes essential to provide a protective shield of intellectual property rights.¹³ With so much at stake, how enforcement of the rights comes in handy is the question that is bound to be raised, and which shall be addressed in the later part in this article.

The Trademark Act, 1999, is the legislation tasked with protecting the trademark and the ancillaries associated with IPL IPR, and forms the heart and soul of the very existence of the protective measures adopted by IPL to protect its brand. Provisions such as Section 29(2)(c)¹⁴ provides protection against the infringement of registered trademarks, which in the current situation include all the registered trademarks in the league ranging from the very name and logo of the league to every franchise participating herein, namely Chennai Super Kings, Delhi Capitals, Kolkata Knight Riders, Mumbai Indians, Punjab Kings, Rajasthan Royals, Royal Challengers Bangalore, Sunrisers Hyderabad, Lucknow Super Giants, and Gujarat Titans. Along with all the franchises, BCCI also aims at protecting the IPL and the brand it has created out of it in totality and hence provides for protection of all the associated names of the league along with the marks of the current as well as previous editions of the league.¹⁵

¹⁰ *Supra* note 1.

¹¹ *Id.*

¹² Shubham Singh, *In the big leagues now: IPL value grew more than 400% in 15 years!*, INDIA TODAY, (Mar. 23, 2024), <https://www.indiatoday.in/diu/story/in-the-big-leagues-now-ipl-value-grew-by-more-than-400-in-15-years-2518717-2024-03-23>.

¹³ Ayan, *Top 10 Richest Sports Leagues In The World Currently*, BUSINESS OUTREACH, (Aug. 29, 2023), <https://www.businessoutreach.in/richest-sports-leagues-in-the-world/>.

¹⁴ The Trademarks Act, No. 47 of 1999, §29(2)(c), (Ind.).

¹⁵ BCCI, *Supra* note 1.

IPL, over the time, has seen various infringement suits being filed for wrongfully using the trademark so registered, to piggy bank on the brand value so created amongst the general public. The case of 2008 filed by BCCI against Rediff.com¹⁶ formed a major groundbreaking case for IPL IPR, for it upheld the violations of infringement of the trademarks of IPL since they pursued to build an online fantasy game with a similar name and logo, and prohibited the respondent from using such marks. Another precedent of trademark infringement is that of *BCCI v. Grace India Sports Pvt. Ltd.*¹⁷, wherein the Bombay High Court banned GISPL for deceptively creating another league that the people perceived to be associated with the BCCI. Hence, such precedents clearly establish that courts tend to rely verbatim on the Trade Marks Act and the provisions protecting the marks and hence protect the league through wrongful infringements.

In the current league, as per the Public Advisory so issued, it provides protection to core trademarks associated with the league, which in turn further expands the ambit of the registered trademarks under the name of the parent company. The Advisory expands upon the protection of the trademarks of the previous editions of the IPL, the permutations of officially registered names bearing IPL, the trophies, names of the teams and their logos, also including the official websites, Having registered the trademarks across various classes of the Act as per the Trademark Registry and the publication in the advisory in consideration, the franchises and their parent companies avail the benefits of protection under the relevant IPR laws. Interestingly, these trade-marks are not only registered in classes and sub-classes related to sports, but also in various other classes with the aim of seeking exclusivity of the brand.¹⁸ Hence, accordingly, the IPL and associated brands invoke the protection so provided under the Trademark Act devised to ensure the fight against infringement. The advisory further provides that any infringement of the protected marks, are dealt with cautiously and that any unlawful imitation of any such aspect shall be sued for damages and injunctions in order to stop further impediment of the marks so protected.

B. IPL IPR and the Copyright Act

The Copyright Act, 1957 forms another critical aspect in protecting the rights of IPL and providing security against the infringement of the business model. Copyright is essentially protection of the original literary work and the person/entity/organization who creates this work aims to be protected as the rightful owner until the work is licensed.¹⁹ In IPL the original literary work has

¹⁶ Kavitha K. & Filma V., *Intellectual Property Protection and IPL*, MANUPATRA, (May 2011), <https://manupatra.com/roundup/336/Articles/Intellectual%20Property%20Protection.pdf>.

¹⁷ *BCCI v. Grace India Sports Pvt. Ltd.*, Commercial Suit No. 815 of 2017.

¹⁸ Shubham Singh, *supra* note 12.

¹⁹ Nitin J. Srinivas, *Role of Intellectual Property Rights in IPL: An Overview*, 2 IJLLR, (2022).

been described in a wide-ambit including, but not being limited to, website layout designs, team uniforms and jerseys, fixtures, published results, recorded visual representations, commentaries, photographs of the matches and events, rule books, reports and materials used by the administration, and the IPL Title Tracks along with those of the franchises.²⁰

It is noteworthy that the IPL Public Advisory²¹ summarizes all the relevant information on the necessary details protected under the Copyright Act, 1957 and the need for licensing to use the same. They have relayed the general guidelines to be adhered to while using any relevant piece so protected and also with the list of license-holders who are authorized to do the same. This further promotes the brand protection and pushes for proper management of the relevant aspects. It hence becomes necessary to adhere to all the guidelines in order to assess the licensing system, and to avoid breaching the same and being held guilty under S. 37²² and S. 31D²³ of the concerned Act. The interaction of the IPL and the Copyright Act²⁴ has so far bore the fruits, for they have not faced any relevant challenges along the way meanwhile, while also having been in a position to pull down more than 2400 unauthorized live-streaming feeds, over 6,700 unauthorized videos on the web, and over 1,300 pirated blogs and websites.²⁵ However, it is noteworthy that in 2015, the BCCI itself faced the repercussions for violating the relevant provisions of the Copyright Act for having breached the rights owned by the Indian Performing Rights Society [“IPRS”] while playing the music during the opening ceremony in that year’s edition. Following this incident, the BCCI became serious about the need to protect itself against any form of infringement and realized the inefficiency of the system in place, by being on the other side of the table for once.

Hence, analyzing the current regulatory regime, it can rightfully be stated that relevant provisions have come into play for protecting the brand and the value of IPL as a sporting league and the franchises taking part in it. It is owing to these factors in place that the league like such has stayed relevant even after so many years and that its fan following continues to grow. The IPL IPR in question has effectively protected the intellectual property of the league and has succeeded in fostering an environment pure of competition without any issues of infringement of the work and the rights.

²⁰ *Id.*

²¹ BCCI, *supra* note 1.

²² The Copyright Act, No. 14 of 1957, §37 (Ind.).

²³ *Id.*, §31D.

²⁴ *Id.*

²⁵ Arush Mittal, *Intellectual Property Rights in IPL*, IPLEADERS, (Mar. 23, 2020), <https://blog.ipleaders.in/intellectual-property-rights-in-ipl/>.

IV. IPL VS. OTHER SPORTING LEAGUES: EXAMINING THE IPR ASPECT

So far having analyzed the intellectual property rights in IPL and the aspects it aims to cover along with the safeguards being provided to the business, one thing which can be ensured through this is the safe environment it induces. However, it is equally important to consider the intellectual property rights implemented in other sporting leagues around the world and the environment it has so created around the league so as to analyze the efficiency of the system so followed in IPL. It is noteworthy that IPL, being the second largest league around the globe²⁶, is yet to achieve the level of safeguarding methods so adopted by other leagues. The National Football League [“NFL”], the biggest revenue generating league across the world, takes due care to ensure the protection of their intellectual property rights from infringement and counterfeiting. The league in consideration here heavily asserts its intellectual property rights through the court of law,²⁷ The NFL over the past few years has taken various bold steps to ensure their rights are not being infringed and has looped in central agencies to encourage the proper implementation of the laws in question. Considering the news²⁸ for central agencies seizing counterfeiting products worth millions, it can be very well asserted that the NFL takes the protection guaranteed to it seriously and that it has gone to lengths to ensure that their brand value does not take any hit.

The English Premier League [“EPL”], is another famous example of a league that looks after its intellectual property, and can prove to be an important case study for better analysis of the laws and regulations being used in the favor of those inclined to safeguard themselves. EPL, being the third-largest league by revenue, has adopted measures to protect the IP, and the figures so issued by the enforcement agency reflect how efficiently the system so in place is working in favor of the league and its system.

Upon analyzing the data and figures so presented by the leagues, one prospect that emerges is the enforcement of IP rights by the leagues and franchises themselves. The sporting leagues around the world have been providing viewers with entertainment for years and even centuries now, and over the time they have adopted patterns and behaviors that put them on defensive of their intellectual property, and the approach so adopted by these leagues to tackle the issue pertaining to the one in question makes them efficient enough to protect their brand value and grow

²⁶ US Immigration and Customs Enforcement, *NFL partner to prevent fake sports-related merchandise from reaching fans ahead of Super Bowl LVII*, IPRCENTRE, (February 8, 2023), <https://www.ice.gov/news/releases/ipr-center-nfl-partner-prevent-fake-sports-related-merchandise-reaching-fans-ahead>.

²⁷ Johnson, Eric E., *The NFL, Intellectual Property, and the Conquest of Sports Media*, 86 N. D. L. REV. (2010).

²⁸ US Immigration, *supra* note 26.

immensely. IPL, on the other hand, being one of the newer leagues, has gained immense popularity amongst the viewers, making it an overnight success story. However, being one of the most popular leagues in a country such as India, puts them in a situation wherein they are unable to effectively take the fight on against infringement of the rights, which can be further corroborated by the figures and the data so present for the public.

However, with time, the sporting league is graduating towards better enforcement of the rights. As the figures mentioned above provides how the league is progressing towards challenging the other leagues and how the franchises are grossing as multi-billion dollars business models, the intellectual property is seemingly being included as one of the reasons. With the increased IPR enforcement and actions being taken by the franchises as well the impugned league, along with the comprehensive guide over the protection of intellectual property as provided under the Public Advisory, has been seen as a step over increased enforcement of the protected rights. The precedents mentioned herein-above provides for the perfect indication as to how the BCCI is taking proactive measures in order to protect the essence of the sporting league and all the elements attached to it.

As compared to the sporting leagues around the globe, and their enforcement of the rights, one cannot shy away from appreciating the measures adopted by the BCCI and the IPL as a sporting league in itself along with the associated parties, ensuring the brand so created and the products associated to it being protected under the relevant provisions. It is just a matter of time, when the franchises realize the actual essence of the business that can be garnered through efficient protection, resulting in the growth of the league. Inspiring from the methods adopted by the IPL's global counterparts, it can easily be stated that the IPL is slowly treading towards the legal path. However, it is still far away from reaching the point where the legal domain of the sporting league shall be able to protect the brand altogether. The international leagues do form a perfect example for IPL to learn and implement, however, format them in a way to ensure the protection in geographical domain of the country such as India. Hence, starting to tread on the path of IP protection, IPL is still far away from the peak and one aspect which can be assured off is that it will be long and rocky path for the sporting league.

V. CONCLUSION

IPL is a growing concept, and it being a new phenomenon in the sporting league with developments taking place around the clock in the very league, it is imperative to factor in the

developing intellectual property rights legislation around this league. The increasing fandom of the said league along with unprecedented growth witnessed across the previous editions, has rendered the franchises in a volatile condition owing to increased chances of infringement and breach of the licensing system, and through the data and figures as compared to other sporting leagues. Thus, the one thing that can easily be deduced is that IPL is way far from achieving its potential in safeguarding the IP.

As franchises increasingly focus on registering and licensing their rights, they are adopting more effective safeguarding strategies. This proactive approach to protecting their intellectual property enables them to capture a larger market share and maximize their returns. As a result, franchises are experiencing unprecedented growth, which, in turn, drives the league to achieve record-breaking success.

However, to conclude, one thing that needs to be pondered upon is how efficiently the system in place is going to work and how far the league and the franchises are willing to go to ensure the protection of their intellectual property. So far, the IPL IPR has proven its worth, and the precedent so set does reflect that the parties in consideration take their intellectual property seriously, but the question still hangs as to how efficient and effective this system is going to be in the coming future, and that will they be able to learn anything from the sporting leagues around the world or will they just be let by their fate?