

# CRIMINAL LIABILITY FOR INFRINGEMENT OF COPYRIGHT AND TRADEMARK IN INDIA VIS-À-VIS CHINA

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## ABSTRACT

India and China '*the Tiger vs. the Dragon*' - are always in head on to one another in every aspect of day-to-day activities. In the current era the Intellectual Property Rights is ruling the world and its presence are found in almost everything. The duo India and china have boomed as the prominent hubs for IPR and have always been the tough competitors to the whole world. While China on the other hand is the fastest booming economy and is one of the toughest competitors to the whole world as evident from its ranking of 14th position in the Global Innovation Index comparing to the 48<sup>th</sup> rank of India. It is to be viciously noted that China leads in the Special 301 Report prepared by the USTR, while India ranks 3<sup>rd</sup>. The legislations governing IPR in these two nations are rigid as well as flexible to some extent because of the need to comply with the growing demands globally. This automatically paves way for the similarities of provisions in these countries' legislations to various extents, but in case of Criminal Liability for Infringement of Copyright and Trademark there are huge differences, thereby the Researcher concentrates on this area with the light on their remedies available. Therefore, the Researcher observes that one country has much stricter legislations and the other has the legislations which are slightly flexible and both the countries face instances of complexities in implementing the rules and legislations.

**Keywords:** Intellectual Property Rights (IPR), Copyright, Trademark, India, China, Sections 22 to 29, 51, 52 (1)(a), 63 to 70 of the Copyright Act, 1957; Sections 103, 104, 105 of the Trademark Act, 1999; Sections 19, 93, 115, 156 of the Code of Criminal Procedure, 1973; Section 420 of the Indian Penal Code, 1860; Articles 21, 48 of The Copyright Law of the People's Republic of China, 1990; Articles 3, 57 of The Trademark Law of the People's Republic of China, 1982; Anti Unfair Competition Law, 2019; Copyright Owner, Trademark Owner, Registered Trademark, Infringement, Criminal Liability, Damages, Imprisonment, Fine.

## DIFFERENCES BETWEEN COPYRIGHT AND TRADEMARK IN RESPECT TO INDIA AND CHINA

India and China have implemented the laws from the western countries and being signatories to most of the International Conventions and Agreements, the basic rules and regulations in safeguarding the rights of the Copyright and Trademark Owners are almost similar to a larger extent<sup>i</sup>. Therefore, the Researcher feels it is relevant to highlight the Differences between Trademark and Copyright which has been pointed below:

### *Differences - Copyright*

S.NO	India	CHINA
1.	The Copyright Act, 1957	The Copyright Law of the People's Republic of China, 1990
2.	The Act was <i>amended</i> in 1983, 1984, 1992, 1994, 1999 and 2012	The Act was <i>amended</i> in 2001, 2010 and latest amendment was made in November 2020 <sup>ii</sup> which will be effective from June 2021
3.	The <i>Term of Protection</i> for Copyright <sup>iii</sup> is Author's life plus 60 years; With respect to cinematograph films, sound recordings, photographs,	The <i>Term of Protection</i> for the work is the life time of the author and fifty years after his death, expiring on December 31 of the fiftieth year after his death;

	posthumous publications, anonymous and pseudonymous publications, works of government and works of international organizations, the 60-year period is counted from the date of publication	In case of cinematographic, television, video-graphic or photographic works the TOP shall be fifty years expiring on December 31 of the fiftieth year after his death; <sup>iv</sup>
4.	Registration of Copyright in India is not mandatory to enjoy the copyright. <sup>v</sup>	Copyright Registration in China too is not mandatory, however when comes to issues involving the claim for copyright, if the work is registered, the registration is used as a prima facie evidence for solving.
5.	India follows the principle of <i>Fair Dealing</i> as per the provisions of Section 52(1) (a) of the Copyright Act, 1957 <sup>vi</sup>	China follows the principle of <i>Fair Use</i> like the USA <sup>vii</sup> .

### Differences - Trademark

S.NO	India	China
1.	The Trademark Act, 1999	The Trademark Law of the People's Republic of China, 1982
2.	The 1999 Act was <i>amended</i> in 2002, 2010	The 1982 trademark law was amended in 1993, 2001, 2013 and 2019
3.	The registration of trademark is based on First to use	The registration is based on First to File
4.	Registration of trademarks in the regional language apart from English is not required in India	However, it is always safe to Register trademarks in English as well as Chinese languages in china in order to stop from

		violation of mark in the regional language
5.	According to the World Intellectual Property Indicator Report (WIPI) <sup>viii</sup> India ranks third globally with respect to Trademark registration with 2 Million applications	The WIPI Report Indicates that China leads in Trademark registration with 25.2 Million applications <sup>ix</sup>

## CRIMINAL LIABILITY FOR INFRINGEMENT OF COPYRIGHT

### *Copyright Infringement and Criminal Liability in India:*

Sections 63 to 70<sup>x</sup> of the Copyright Act, 1957 deals with the Criminal Liabilities by sentencing imprisonment from 6 months to 3 years and imposing fine ranging from Rs. 50,000 to 2,00,000. These Copyright provisions has to be applied along with the Information Technology Act, 2000 and the CrPC, 1973 only then there will be clear cut effect in penalizing the offences involving copyright infringement. In *Jitendra Prasad Singh vs. State of Assam*<sup>xi</sup>, the court held that the offences under Section 63 of the Copyright Act is both Cognizable and Non Bailable and also the Police officer conducting the search must not be below the rank of Sub Inspector of Police and he is entitled with the absolute power to seize, infringe copies without warrant. The court also reiterated the necessity to file an FIR under Section 420 of the Indian Penal Code<sup>xii</sup> in order to facilitate a speedier remedial action against the offenders. In *Anurag Sanghi vs. State and Other*<sup>xiii</sup> wherein the Appellants filed a petition to quash the FIR filed under the Section 63 and 65 of the 1957 Act because of the breach of Agreement by infringing the products of Knit Pro, leading to the dispute. The Delhi High Court confirmed that the offence under Section 63 is Bailable by reiterating the decision laid in *Jitendra Prasad Singh's case*<sup>xiv</sup>.

The biggest drawback of these provisions is that though there are severe punishments there is a lacuna which is limiting its scope. It is a sad reality that unlike in China, the criminal provisions apply only to rights conferred by the Indian Copyright Act and they cannot be applied anywhere.

### ***Copyright Infringement and Criminal Liability in China:***

As mentioned in the previous paragraph the copyright protection for authors in china is automatic and is almost similar to that of India. But the recent changes that this nation is bringing to curb copyright violation are more rigid and strong. As per the Copyright Law, 1990 the following elements are to be established while proving Infringement:

1. Whether the acts committed are controlled under the Copyright Law?
2. Are the acts prohibited by the Copyright Owner?
3. Whether the infringing acts are against the provisions of the Copyright Law, 1990?

There are three ways where the affected copyright owner can seek legal protection

1. By filing a case against the infringer thereby requesting to pass an order for termination of infringement, preservation of property and also present a primary evidence to prove that the Defendant is committing or about to commit Copyright infringement;
2. To file a complaint with the Local Administration Department requesting an enforcement of order to curb the infringing activities;
3. In case of Criminal Liability, the Copyright Owner has the right to file a complaint to the police<sup>xv</sup>.

As mentioned above the Copyright Law was amended twice in 2001 and 2010 and the latest in November 11, 2020 which will be implemented on June 11 2021<sup>xvi</sup> focuses more on the penalties with respect to the Copyright Infringement and also have brought changes to the existing law by granting more power to the Authorities in confiscating documents and illegal income, destroying violative copies, issue of warning etc. In regard to the Monetary Damages, this law has set forth a new bench mark by issuing lots of new guidelines and introducing punitive damages. The 2021 amendment has brought new and clear-cut guidelines for calculating damages wherein it gives the option to the copyright holder to choose the compensation based on actual losses he suffered or the illegal income earned by the infringer. This automatically leads to the increase of compensation amount paid to the owner ranging from 1 to 5-fold the amount incurred illegally and the compensation shall not be less than RMB 500 and not more than RMB 5 Million. This latest amendment is the first of its kind to impose penalties up to RMB 250,000 when there is serious harm caused to the public interest.

The recent decision of **LEGO vs. LEPIN**<sup>xvii</sup> highlights the effectiveness of the implementation of Copyright law and Anti Unfair Competition Law. The decision rendered in this case is a blow to LEPIN which is a serious violator of Lego's well-known marks and designs. Even after its losses against LEGO, LEPIN haven't stopped its infringing activities. The Shanghai Third Intermediate Court on September 2, 2020 delivered a landmark decision by sentencing 6 years Imprisonment to 9 individuals from LEPIN and imposing a fine RMB 13 Million.

## **CRIMINAL LIABILITY AND INFRINGEMENT OF TRADEMARK**

### ***Infringement of Trademark and Criminal Liability in India:***

The Indian Trademark regime is not as rigid or imposes huge fines or rigorous imprisonment as China. However, the Indian laws grant criminal, civil, judicial remedies and also commercial benefits such as monetary claims and rendition of account of profits to the Trademark owner if the violation is proved. Sections 103<sup>xviii</sup>, 104<sup>xix</sup> and 105<sup>xx</sup> of the Trademark Act, 1999 these provisions have to be utilised along with the Provisions of the Code of Criminal Procedure (CrPC), 1973. The provisions of the 1999 Act provide for an imprisonment from 6 months to 3 years and a fine ranging from 50,000 INR to 2 Lakhs INR. However, in order to make use of these provisions more effectively the trademark owner have to apply the provisions of CrPC. Section 115 of the CrPC<sup>xxi</sup> grants power to the Police officers not below the rank of Superintendent of Police after getting certificate of opinion from the registrar of copyrights for search and seizure of documents in case of violation. There are lots of instances where there is a delay in getting certificate of opinion because of lack of evidences and databases, in order to prevent this delay and mishap in collecting evidences the Trademark owner has to file a criminal complaint under Section 156 of CrPC<sup>xxii</sup> to file FIR or initiate criminal action and issue and along with it the Trademark owner has to file a complaint before the magistrate under Section 19 of CrPC, 1973<sup>xxiii</sup> directly before the magistrate court and by applying Section 93, CrPC<sup>xxiv</sup> the aggrieved party can obtain the search warrant by directly approaching the magistrate court against the offenders.

In *Nippon Steel & Sumitomo Metal Corporation v. Kishor D. Jain & Anr*<sup>xxv</sup>, in this case the Pipes are being manufactured by the third party and the Defendants affixed the Trademark seal



of the Appellant and forged signature of Nippon Steel logo and exported to a company based in Saudi Arabia. It was them who complained to the Appellants and when the Appellants came to know about the forgery and violation of their registered Trademark, they filed a suit against the Defendants. The Bombay High Court held the Defendants liable for their actions and by applying the civil remedy passed an ex parte order to stop the defendants from infringing the registered trademarks and imposed a fine of 5 Crores to the Defendants.

### ***Infringement of Trademark and Criminal Liability in China:***

In China, infringement of Trademark may lead to a criminal offence and be charged if stimulated by the criminal procedural law. There are three type of criminal offence in respect to infringement of the Registered Trademark<sup>xxvi</sup> namely:

1. Using counterfeited Registered Trademarks;
2. Selling commodities bearing Registered Trademarks;
3. Illegally Manufacturing or selling of illegally manufactured Registered Trademarks<sup>xxvii</sup>.

The criminal proceedings apply to certain Trademark Infringement acts which are considered serious and heinous. The victims can file a complaint at the local Public Security Bureau (PSB) or People's Prosecutor for starting of investigation procedure and also, they can initiate private prosecution proceedings in a civil tribunal which move the dispute to the criminal tribunal. The recent 2019 amendments to the Trademark Law and the Anti Unfair Competition Law, 2019<sup>xxviii</sup> brought important changes in the claiming of damages there by increasing the Statutory Damages from Rmb 3 Million to Rmb 5 Million and the damages for severe violations have been raised to fivefold the violation if the violator's actions involve:

1. Actual losses of the trademark rights holder;
2. Profits gained by the Infringer or a rational manifold of the relevant Trademark License fees when it is hard to settle on the losses suffered by the Trademark owner or the profits enjoyed by the Infringer.

Along with the provisions for monetary claiming of damages, the calculation of imprisonment is based on:

1. If the conditions are serious and there is a considerable good number of sales, the violator can be punished with the imprisonment up to 3 years or detention and or fine;

2. If the conditions are grave and extremely serious and the violators have earned huge profits then the imprisonment is from 3 to 7 years.

The above provisions are strictly followed by the courts and in the recent 2020 decision of *Bordeaux case*<sup>xxix</sup> wherein the people's court of Shanghai Pudong New Area delivered a criminal judgment against the defendant for infringing the geographical Collective Trademark 'BORDEAUX' by imposing an imprisonment for 18-months and also laying down a fine of 100,000 RMB for the company involved along with the 50,000 RMB which has to be paid by the guilty individual, for faking of the Plaintiff's registered trademarks.

Also, in *Bayer Consumer Care Holdings LLC and Bayer Consumer Care AG v. Li Qing*<sup>xxx</sup>, the Appellant's design was registered earlier in 2011 than the Defendant's pirate design and Bayer did not oppose for the registration of the Defendant's pirate design. But the Defendant started opposing for the Appellant's well-established mark forcing the distributors of the Appellants to stop the Business. Then the pirate company offered to sell their mark to Bayer. The Appellants clearly noted that there is a prior usage of mark as per Articles 30 and 31 of the Trademark Law and also there is no violations done by them and also, they sent a warning letter to the Defendant. The Defendant ignored all these activities and continued to do what they did before. This resulted in Bayer filing actions against the Defendant. The Hangzhou court ruled in favor of the Appellant by pointing out that there is clear cut known misrepresentation of the mark and there is absolute bad faith on the part of Defendant there by ordering a fine of Rmb 700,000 to be paid as damages to the Appellant.

## CONCLUSION

In the light of the above discussed cases and provisions it is evident that there is a face-to-face clash in the laws between the two most populous countries in the world. The population in these two countries plays a dominant role for increase of violations in IP Sector. The IP regime of China is more complex and involves strict rules and regulations and more severe punishments and huge fines in accordance to the nature of infringement committed. Also, when there is infringement, the owner of the registered goods and work have the absolute right to remove the infringer's listing from the e-commerce platform and permanently stopping the



infringer from involving in any business activity. This is not the case in India, even though the laws of the Subcontinent impose fine and sentences imprisonment there are very rarest instances that these punishments have created an impact among the infringers to stop violations. The above discussed Indian Cases of are the best instances even though they are landmark judgments the outcome created is completely Nil rather there is a reverse outcome of increase in copyright infringement and trademark violations in real and virtual world to a considerable extent. Same is the case in China even after laying down stringent regulations and imposing larger sum as fine, the IP infringement is still a menace. Therefore, to conclude, the main pivotal reason which the Researcher feels for the increase in infringement with regard to China is because of the too much complexities involved in approaching the governmental organs for infringement claims and in case of India the laws are too flexible that the flaws are visible paying way for the Infringer to easily escape. And thus, it is *defacto* that the more the implementation and adaptation of new rules and regulations both internationally and domestically, the more there will be a tussle between India and China as to who leads in the race.

**ENDNOTES**

- <sup>i</sup> Bochańczyk-Kupka, D., 2016. 'A comparative analysis of intellectual property rights protection in China and India in the XXI century'. *Journal of International Studies*, 9(1);
- <sup>ii</sup> 'China: Third Amendment to China's Copyright Law', <https://www.mondaq.com/china/copyright/1023682/third-amendment-to-china39s-copyright-law> Last visited February 8, 2021;
- <sup>iii</sup> Chapter V, Sections 22 to 29 – Term of Copyright, The Copyright Act, 1957;
- <sup>iv</sup> Article 21, The Copyright Law of the People's Republic of China, 1990;
- <sup>v</sup> *Sanjay Soya Pvt Ltd vs. Narayani Trading Company* in Interim Application (L) No. 5011 of 2020 in Commercial IP Suit No. 2 of 2021, decided on March 9, 2021. The Single Judge Bench of G S Patel of the Bombay High Court held that "the 1957 Copyright Act grants to the first copyright owner enormous bunch of rights and privileges without requiring advance copyright registration of his work". <https://www.livelaw.in/news-updates/registration-of-copyright-not-mandatory-for-seeking-protection-under-copyright-act-bombay-high-court-171192>. Last Visited March 17, 2021;
- <sup>vi</sup> Section 52(1) (a), The Copyright Act, 1957: Certain acts not to be infringement of copyright;
- <sup>vii</sup> Wang, J. and He, T., 2019. To share is fair: The changing face of China's fair use doctrine in the sharing economy and beyond. *Computer law & security review*, 35(1), pp.15-28;
- <sup>viii</sup> WIPI Indicators Report, December 7, 2020, [wipo.int/portal/en/](http://wipo.int/portal/en/) Last Visited February 7, 2021;
- <sup>ix</sup> *Ibid*;
- <sup>x</sup> Chapter XIII - Offences (Sections 63-70) , The Copyright Act, 1957;
- <sup>xi</sup> 2003 (26) PTC 486 (Gau);
- <sup>xii</sup> Section 420, Indian Penal Code, 1860 - Cheating and dishonestly inducing delivery of property
- <sup>xiii</sup> Judgment dated 25.11.2019 in W.P. (CRL) 3422/2018;
- <sup>xiv</sup> *Supra note 11*
- <sup>xv</sup> Article 48, The Copyright Law of the People's Republic of China, 1990– Investigation of Criminal Liabilities in accordance with the Laws;
- <sup>xvi</sup> *Supra note 2*;
- <sup>xvii</sup> The LEGO Group wins final decisions in major intellectual property lawsuits against LEPIN manufacturer in China – <https://www.lego.com/en-us/aboutus/news/2020/January/lepin-case> - Last Visited February 8, 2020;
- <sup>xviii</sup> Section 103, the Trademark Act, 1999 - Penalty for applying false trademarks, trade descriptions, etc;
- <sup>xix</sup> Section 104, the Trademark Act, 1999 - Penalty for selling goods or providing services to which false trade mark or false trade description is applied;
- <sup>xx</sup> Section 105, the Trademark Act, 1999 - Enhanced penalty on second or subsequent conviction;
- <sup>xxi</sup> Section 115, The Code of Criminal Procedure, 1973 - Power to dispense with personal attendance;
- <sup>xxii</sup> Section 156, The Code of Criminal Procedure, 1973 - Police officer' s power to investigate cognizable case;
- <sup>xxiii</sup> Section 19, The Code of Criminal Procedure, 1973 - Subordination of Metropolitan Magistrates;
- <sup>xxiv</sup> Section 93, The Code of Criminal Procedure, 1973 - When search warrant may be issued;
- <sup>xxv</sup> Notice of Motion (L) No 810 of 2019 in COMIP (L) No 383 of 2019;
- <sup>xxvi</sup> Article 3, The Trademark Law of the People's Republic of China, 1982: Registered Trademark;
- <sup>xxvii</sup> Article 57, The Trademark Law of the People's Republic of China, 1982: Infringement of the exclusive right to use a Registered Trademark;
- <sup>xxviii</sup> Cynthia S. Wang, 2019. 'China's Anti-Unfair Competition Law: Cracking Down On Malicious Infringement In Advertising'. [www.mondaq.com/china/x/860774/Antitrust+Competition/Chinas+Antiunfair+Competition+Law+cracking+down+on+malicious+infringement+in+advertising](http://www.mondaq.com/china/x/860774/Antitrust+Competition/Chinas+Antiunfair+Competition+Law+cracking+down+on+malicious+infringement+in+advertising). Last Visited February 22, 2021
- <sup>xxix</sup> *Conseil Interprofessionnel du Vin de Bordeaux vs. Shanghai Feitong Trading Co., Ltd.*, June 4, 2020
- <sup>xxx</sup> 2018.