

## **OBSCENELY SUBJECTIVE: ADJUDGING IP ELIGIBILITY OF OBSCENE INVENTIONS AND WORKS**

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Obscenity is a permissible restriction on the freedom of speech and expression in the interest of public decency and morality. Considering that it seeks to protect the public morality at large, it is only natural that what is obscene, and hence prohibited, should be a reflection of what the average person thinks is obscene. This is embodied in the 'community standards test', which is the applicable test for determination of obscenity as per the Supreme Court in *Aveek Sarkar v. State of West Bengal* [(2014) 4 SCC 257]. Since community perceptions are not static, what is obscene must also remain a fluid concept. It should be distinct from the standard of a vulnerable minor, a susceptible adult or even the romanticized morality of Indian tradition and values. Which is perhaps the reason that those of us who consider ourselves the average reasonable adult are often left flabbergasted by the perceptions of obscenity espoused by the Courts and more recently, the Patent Office.

Though, the Patent Act, 1970 does not mention 'obscenity,' Section 3(b) limits the concept of an invention as precluding, inter alia, any invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality. Unfortunately, the Patent Act does not lay down a threshold for what may be considered contrary to public order or morality leaving much scope for subjectivity. For instance, as per the decision on the application by Standard Innovation Corporation, pertaining to its 'sexual stimulating vibrator,' the invention was considered to be 'morally degrading' and 'obscene'.

Sex toys have been granted patents across jurisdictions for ages, albeit most Patent legislations do not create this exception of public morality. Even in India, sex toys are not per se illegal or obscene. The Calcutta High Court in the case of *Kavita Phumbra v. Commissioner of Customs Port* [2011 SCC Cal 2378], where the appellant had sought to import of sexual games which were seized as customs due to them being obscene, noted that considering the standard for the pictures, newspapers and articles being published and are freely available in the market, a discernible shift in the moral and

sexual standards is apparent over the years and the judiciary must take cognizance of it. Accordingly, the Court held that mere “*acquisition of knowledge for enjoyment of sex through various means is not by itself a prohibited activity, provided it is not done through obscene language or pictures. The concerned items are meant for adults and as such, their importation for restricted sale to adults only should not be considered to be on the wrong side of the law.*” Additionally, the Court also noted that considering that the Customs Act only prohibits the import of obscene goods but does not prescribe any parameter for adjudging the imported material as obscene, the failure to provide tangible and substantial reasons and merely stating something to be obscene would only be a reflection of the personalized and individualized value judgment of the Customs Official and hence, unsustainable. Drawing a parallel to the Patent Office’s decision, the Patent Officer did not review the prevailing standards of obscenity or rely upon the decision of any expert, instead relying on his own judgment and Section 377 to hold that sex toys were “*morally degrading in law.*” At the very outset, it must be clarified that Section 377 could not have been directly applied to sex toys since its scope is restricted to “*carnal intercourse against the order of nature with any man, woman or animal.*” Moreover, it arguably does not reflect contemporary community standards either. Under Section 377, ‘sex against the order of nature’ has been equated with non-procreative sex and the Supreme Court decision of *Navtej Singh Johar v. Union of India* [WRIT PETITION (CRIMINAL) NO. 76 OF 2016], has observed that this reflects the English morals of the colonial era and that considering that even marriages can no longer be equated with procreation, non-procreative sex is hardly against contemporary morality and cannot be considered unnatural.

Hence, it may be concluded that the sex toys are, in itself, not obscene unless accompanied by explicit pictures or manuals. Read with this decision of the Patent Office it creates an absurd dichotomy, where the sale and distribution of sex toys is not prohibited under Section 292 of the Indian Penal Code but at the same time a patent cannot be granted on it on the grounds of public morality and public order under Section 3(b).

The Supreme Court of India has continually held that obscenity under Section 292 of the Indian Penal Code may be exempted when the work in question is of literary or

artistic value to the society and entrusts the scrutiny of such value into the hands of the Court. However, may a work be charged as obscene yet still be eligible for copyright protection? Copyright is a statutory right defined within the four corners of the Copyright Act, 1957 (Copyright Act) and the Copyright Act only mandates the criteria of originality for copyright protection. Originality is understood distinct from novelty or literary merit. *University of London Press Ltd. v University Tutorial Press Ltd.* [(1916) 2 Ch. 601] interpreted 'literary work' to cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. Further, the Copyright Act does not bar works considered 'obscene' or against public morality. In consequence, a particular work may be copyright eligible yet guilty for obscenity under the IPC and thus, prohibited for sale or publication.

Justice Gautam Patel in his article titled *Content Legitimacy and Copyright*, further notes that nowhere in the Copyright Act does it mandate that a work must be necessarily 'lawful' to be eligible for copyright protection. In fact, creating an obscenity exception for copyright eligibility would frustrate the intention behind copyright protection to promote creativity and content creation. If authors of controversial, unpopular, or new material have to seek judicial validity for their works based on contemporary moral convictions of the society they live in, it would act antithetical to the aim of copyright and thus, it is advantageous to authors to not have a provision dealing with obscenity in the Copyright Act.

Unlike the Patents Act and the Copyright Act, the Trademarks Act, 1999, explicitly deals with the issue of obscenity and imposes an absolute prohibition on registration of trademarks comprising or containing scandalous or obscene matter, under Section 9 (2)(c). The proposed Trademarks Manual (Manual) sheds some light on the intended interpretation of 'obscenity', wherein it describes an obscene mark as a matter of fact, dependent on the class of goods and its audience. For instance, goods meant for children will be scrutinized strictly but goods for adults may be given more leeway while adjudging obscenity. Interestingly, the Manual states obscenity must be judged 'objectively' while providing vague instructions in achieving such objective scrutiny—objectivity is described as being neither out of date nor a trend setter; not setting some kind of moral standard but also not being insensitive to public opinion.

The Manual further clarifies that if a mark is merely distasteful, an objection under Section 9(2)(c) is unlikely to be justified; whereas if it would cause outrage or would be likely significantly to undermine religious, family or social values, then an objection will be appropriate. While the subjectivity of the above value judgement is an ongoing concern, it is more perturbing that the level of outrage to raise a valid objection is clarified to be either a higher degree of outrage amongst a small section of the public, or a lesser degree of outrage amongst a larger section of the public will also suffice. The former premise leads us to believe that even a small group of oversensitive petulant people may object to the registration of a trademark based on their perceptions and moral standards, thereby seemingly contradicting the community standards test. Whereas, the latter premise, by requiring a lower threshold of outrage, unreasonably interferes with the rights of a minority group and undermines their freedom of speech.<sup>1</sup> The Supreme Court in *Navtej Singh Johar v Union of India*, recently upheld that “*the veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.*” Similarly, in *S. Khushboo v Kanniammal*, the Supreme Court stated that while the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as ‘decency and morality’ among others, yet it is necessary to tolerate unpopular views in the socio-cultural space.

Thus, a balanced approach to the above conundrum maybe imposing a community standards test to oust the bias of the examining officer or judge, whilst also testing such grounds for objection against constitutional morality to ensure the minority is not arbitrarily denied their rights.

All human beings possess the equal right to be themselves instead of transitioning or conditioning themselves as per the perceived dogmatic notions of a group of people, as stated recently by the Supreme Court. Sexuality and sex represent a side of humanity and an expression of oneself, consequently, inventions, works or marks that manifest sex, sexuality or the like, cannot indiscriminately be termed as obscene.

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<sup>1</sup> Trademarks are considered as commercial expression, which was upheld by the Supreme Court to constitute a part of freedom of speech in *TATA Press v MTNL*, [1995 AIR 2438].

Despite no explicit prohibition on obscenity for patent or copyright protection, it is often seen that Examining Officers or Judges rely on the grounds of obscenity to justify their inherent bias or moral convictions. Even with regard to Trademarks, despite the Manual urging objective determination of obscenity, Examining Officers often impose their own value judgment or more worryingly, the value judgment of a small oversensitive group may also be sustained during trademark objections.

The inherent rationale for IP protection is to promote creation and innovation. Such creation and innovation must not be impeded by the subjective morality or value judgment of the examining Patent/Trademark Officer or the judge presiding over the case. Thus, if at all obscenity be a criterion while adjudging IP eligibility, it is imperative to uniformly apply the community standards test while also weighing constitutional morality, so as to balance the interests of all interested parties.