

Introduction to Intellectual Property Rights

Basic Reference Material

“Where the mind is without fear and the head is held high

Where knowledge is free

Where the world has not been broken up into fragments

By narrow domestic walls

Where words come out from the depth of truth

Where tireless striving stretches its arms towards perfection

Where the clean stream of reason has not lost its way

Into the dreary desert sand of dead habit

Where the mind is led forward by Thee

Into ever-widening thought and action

Into that heaven of freedom, my Father, let my country awake.”

~ Gurudev Rabindra Nath Tagore

© Rahul Dutta, Patent Attorney (December 1st, 2011)

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THE PROGRESS OF MANKIND REQUIRES THE FULLEST RESPECT FOR
THE INVENTORS AND AUTHORS BECAUSE THEY ARE WORTHY OF
PROTECTION AS EVERYONE IS FOR HIS OR HER FREEDOM, HIS OR
HER PRIVACY AND HIS OR HER INTEGRITY. INVENTIVELY AND
CREATIVITY ARE THE FEATURES OF ALL MANKIND, AND ALL
INDIVIDUALS MAY REQUEST AT ANY TIME TO ENJOY THE NATURAL
RIGHT TO HAVE AN EXCLUSIVE RIGHT IN THEIR INVENTIONS OR
WORKS OF ART.

~ French Declaration of Human Rights

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Prologue

*I*nnovations are celebrated at their best when they add value to our lives. Our lives in themselves are dependent on means of earning livelihood like agriculture and industry. Adding value to the means of meeting ends at all levels should be innovation oriented to celebrate the joy of innovation for adding value to the lives.

We have witness value addition in the lives by the means of green, blue and white revolutions. It is time for innovation revolution. The innovations in agriculture have the maximum probability of winning respect for innovation. This should be seen as the first reason for choosing agriculture as the focal point of integrating it with innovations. When we consider integrating agriculture with innovation, it is imperative to talk about intellectual property (IP). The IP has emerged as the most potential tool for wealth creation in the modern times. The swindling interest in agriculture and miseries of small farmers can be mitigated by the means of IP. The only condition is innovative use of IP with full sincerity for bringing wealth at the grass root level.

The challenge to secure respect for IP can be achieved only by embedding IP in our social fiber. India is a country of 6,38,596 villages; the inhabitants of which subsist on agriculture. It is said that India lives in her villages, is another reason for choosing 'Wealth Creation through IPR' theme with focus on agriculture for this workshop. Innovation is not limited to hi-tech fields. Take the example of the promise hold by biotech infused seeds industry to feed 6.7 billion people of the world. Each year 20 million population adds up in India alone. The pressure on land is mounting to accommodate growing population, division in agrarian land to provide space to floriculture and bio fuel plantation kind of cultivation and encroachment of agrarian lands by ever expanding towns. The burning issues like, depleting portable water resources, changes in monsoon pattern due to global warming, post harvest management in which India loose almost 10% of her crops and financial issues of small & marginal farmers need an innovative approach to meet the challenge to feed the growing population. Disturbing news of suicide by farmers in large number indicate that there are issues at farmers end which need urgent attention. When India secured independence, her 75% population was residing in villages and

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they were dependent on agriculture to meet their ends. Presently 70% population is living in villages of which only 10% population is required for agriculture. What rest 60% population does to sustain? In sum total brain storming in this workshop on agriculture may help to guide to sustain the food grain production-supply chain, earning opportunities in finding innovative products and processes and securing monopoly right in them. Promise of wealth generation through agriculture holds the prosperity key for India even at the grass root level.

Nobel Laureate Normal Borlaug, father of India's green revolution, says that there is plenty of new technology available to increase the food grain production. Development of new technologies needs investment in R&D, which needs strong IPR system, which needs respect for IP as property at the grass root level.

On the other hand Uttar Pradesh has a unique distinction perhaps the blessings of traditional knowledge that has propelled the tiny and small industries dealing in particular goods as the lifeline and economic backbone of the people of those towns. Towns like Moradabad, Kanpur, Agra, Firozabad and Saharanpur blister with handicraft industries of metal craft, leather, glass and wood respectively. These places have earned enormous goodwill as towns of excellence for their excellent craftsmanship but have neglected IP to translate the goodwill into business and prosperity.

The real stake holders of traditional knowledge are the artisans and craftsman who runs the handicraft based industries but most of them fight to meet their ends. The miseries and plight of the world famous Varanasi Silk Sarees weavers and rewound Lucknow Chikan artisans is known to all. The objective is to reach the tail end of darkness of poverty with the light of IP to bring prosperity into their lives.

The objective of this workshop is a maiden attempt to address the above issues with the novel approach to meet the challenge to bring prosperity for people and win wealth for our nation. The issues of WTO are going to affect our lives in a greater way in the time ahead. Does a farmer has right to select his crop buyer at the global level? Does a farmer has right to grow crop only for export purpose? India, as a sovereign State, has exercised her power to restrict or ban export of crops as and when felt required. India along with the other WTO member countries is going to participate in Ministerial Level talks at WTO forum to further broadening the scope of global trade including agriculture. Is

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India ready for such a challenging trade at the global level? We need through homework on these kinds of tough questions, as they affect the soul of our country.

I hope the participants would find the contents of this reference material useful to have at least the basic understanding of IPR and its toolkit. The purpose of this reference material is to create awareness for developing strong knowledge economy. I hope the esteemed readers of this reference material would find it useful. Nothing is perfect, so you may also find out a few errors in this material and many suggestions to improve it. Kindly excuse us for the errors and bring them to our notice to improve this material. Suggestions are welcome.

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Intellectual Property: A Toolkit for Wealth Creation

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Part I

Intellectual capability of human beings makes them the best creation of nature. This intellectual capability has played a great role in the development of human civilization. We owe our food and taste of food to the inventor of fire. We owe our modes of transportation to the inventor of wheel. The whole electric and electronic gadgets and the industries are based on the discovery of electricity by Benjamin Franklin. The list of valuable inventions is endless the result of which made our lives comfortable and more efficient. Every invention has two aspects- innovation aspect and the commercialization of the innovation. Hence development of a product indicates towards blessings of Goddess of intelligence and commercialization of the invention rests on the blessings of the Goddess of wealth. Truly, intellectual property is nothing else but blessings of Goddess of Wisdom and Goddess of Wealth. We learn from our experience of experiments made in the ether of our society. We made our contribution from our original learning and thus enrich knowledge base of our society. This was how societies were progressing. Knowledge was accessible to all. Hence it was called public knowledge domain. Gradually concept of property came in and proved herself a subject of privilege to her owner. This later on ignited a race for winning more and more property. The positive aspect of it was that though people started with physical capabilities, sooner or later realized importance of intellectual faculties in winning more and more property. Introduction of intellectual faculty started monopoly in knowledge and creation of private knowledge domains.

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Since private knowledge domains were oasis of wealth creation. The people who had no right to access to those private domains tried to steal the knowledge from private knowledge domains. This forced private knowledge domain owners to keep private knowledge as a secret. This stopped or slowed the flow of knowledge from private knowledge domains to the public knowledge domain. The individual contribution of knowledge was the only source of the public knowledge domain; that was fueling the progress of the civilization. The development of the private knowledge domains and secretly holding the private knowledge for economic gains hampered the growth of the public knowledge domain. We have seen that civilizations developed due to the enrichment of existing public knowledge domain. This situation halted the process of development of civilization. This created the requirement for development of legal system for protecting private knowledge domain in such a way that society at large could get benefits of the privately held knowledge and the private knowledge holders feel comfortable in sharing their confidentially held knowledge to restart the growth of the public knowledge domain.

One man's right is obligation for others to honor his right. It means creation of legal rights requires balancing rights-obligations equations. The challenge was to restore the flow of knowledge from private knowledge domains to public knowledge domain and bring an acceptable legal regime for protecting rights of private knowledge domain holders. It was solved by offering time bound monopoly over the new knowledge created by any one through intellectual labor to win economical benefits out of it and pass on the knowledge to the public knowledge domain after the expiry of monopoly time. Public at large was supposed to respect the monopoly knowledge rights because they in turn were exploiting the benefits of the

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knowledge by paying a fee for reaping the benefits of knowledge in the monopoly duration and later on after expiry of monopoly the knowledge was to be transferred into public knowledge domain. The monopoly owners were offered the exclusive rights to fetch economical benefits out of their knowledge by introducing the knowledge in public. This mechanism balanced the rights-obligations equations and became the jurisprudence of development of IP toolkit. The products of knowledge have various facets and seven of them have been accepted in the international IP regime. This system gave birth to patent, trademark, copyright, geographical indication, industrial design, trade secret and integrated circuit layout design. These seven tools form modern intellectual property rights tool kit.

Part II

Trade related aspect of Intellectual Property Rights (TRIPS) is an agreement which is a part of bundle of agreements which formed the world trade organization (WTO). The TRIPS agreement makes it mandatory for the WTO Member States to incorporate laws related to copyright, trademark, patent, geographical indication, trade secret, layout designs of integrated circuits and industrial design in their domestic laws with the minimum protection standards prescribed in the Agreement. These seven distinct tools form IP tool kit with the universal minimum protection of time bound monopoly.

The TRIPS Agreement has emerged as an international law of intellectual property rights laws. It is the first legal instrument drafted and accepted by the international community ever which has binding force at the international level for the all WTO Member Countries. The gravity of the TRIPS directions can be understood from the fact that India introduced the Geographical

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Indications of Goods (Registration and Protection) Act, 1999 and the Semiconductor Integrated Circuit Layout-Design Act, 2000 just to fulfill the TRIPS obligation. Since 1999 three amendments in the Patent Act have been made to comply with the requirement set in the TRIPS.

It is not that the TRIPS became instrumental only in India in giving birth to two new IP tools and three consecutive amendments in the Patent Act. The TRIPS Agreement harmonized IP laws across the political boundaries of the WTO Members countries. The TRIPS Agreement is perhaps the first international binding legal instrument which has recognized the fact that countries are at different stages of development. The members, though equal in status at the platform of WTO, were classified into developed countries, developing countries and the least developed countries. The developed countries were given a year's time from the date of TRIPS came into force, i.e. January 1, 1995 to make their domestic IP laws in total compliance with the TRIPS provisions. For the developing countries the deadline to make their domestic IP laws in compliance with the TRIPS was December 31st, 2004. The deadline, if not extended further, is December 31st, 2015 for the least developing countries to make their domestic laws in compliance with the TRIPS provisions. So it is expected that all the WTO member countries will have the basic minimum IP protection by the end of year 2015. It is not just that the least developing countries were left to come up a level at which they could honor the TRIPS Agreement. There are provisions in the TRIPS Agreement which bound the developed member countries to help the least developing countries in order to create a sound and viable technological base.

The beauty of the TRIPS agreement is that it sets the lower level of IP laws protection and leaves it open for the Member States to raise the IP protection level. This could be understood by its

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provisions which direct that the life of patent shall be at least 20 years and copyright protection shall not expire before life of the natural person/author plus 50 years after his death. The TRIPS provisions were behind introduction of product patent regime in India for pharmaceuticals, chemicals and food items through the third amendment in the Patent Act.

In its preamble the TRIPS Agreement declares that it is for reduction in distortions and impediments to international trade, to promote effective and adequate protection to IPR, and to ensure that measures and procedures to enforce IPR do not themselves become barriers to legitimate trade. To check and curb the abuse of IP monopoly there are ample provisions in the respective Acts and the Competition Act has also been promulgated to ensure fair play in the open market place and curb all kind of abuses of monopoly in the name of IP or whatsoever. This is an age of Knowledge economy where IP impetuses the process of wealth generation.

■ ■ ■

Monopoly in Inventions: Patent Rights

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Part 1: International Patent System

The Concept of Patent

A Patent is granted for an invention. A patent is a set of five rights, i.e. right to make, use offer for sale, sale and import reserved for the patentee. It is a negative right which prohibits all excluding the patentee, or those deriving rights from the patentee, in the national territory in which the patent is granted by the respective government. The patent rights can be enforced only after securing the patent. A patent is granted for both a product and a process. The Patent rights lock the functionality aspect and restrict the rights to the patentee. A Patent is a time limited monopoly which is granted from the date of the first filing for **twenty** years.

The patent specification could be either provisional or complete. To exploit the right to priority, the inventors prefer to file the provisional specification at the concept stage of the invention at the time when they feel confident to file the complete specification within twelve months time from the date of the provisional specification. The difference between the provisional and the complete specification is that in the provisional specification only the outline of the invention is given and thus a tentative domain of the invention is described; generally the claims part don't appear in the provisional specification but it is not binding. The claims, the patent rights subsists on this part, are must with the complete specification. The significance of the provisional specification is that it reserves priority for the applicant. However if the complete specification is

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not followed by the provisional specification in the stipulated time, the application automatically becomes abandoned.

The Concept of Priority

Priority is a very important part of patent system. It means that who has right to secure patent to the exclusion to the other applicants in any country. There are two concepts of priority. The first is the **first to file** concept and the other is **first to invent** concept. According to the first to file concept, the first applicant has the right exclusion to the others to secure patent. The most of the countries including India follow the first to file system. The first to invent concept says that the inventor who invented first has the right to secure the patent. This concept is followed by the US.

Patentable Inventions

There are three conditions, viz, **novelty, non-obviousness and industrial use**, for an invention to qualify as a patentable invention irrespective of any domestic patent law. Novelty means that the invention should be not be known anywhere before. An invention first practiced as a trade secret and later applied for patent does not qualify under this condition. Non-obviousness means that the invention should be such that it add-value to the existing knowledge domain. The teaching of the invention in the patent specification must not be obvious to anyone having knowledge in that particular domain of technology. The third condition makes it clear that patent is granted only for the applied science which has some industrial use. The invention should be either in the form of a product or a process which can be commercially exploited.

The Patent System

The Patent rights are territorial in nature and governed by the domestic patent law. It means that a patent right holder, say in the US, has rights only in the US territories. For securing the same rights, one needs to repeat the patent rights securing process in each country of the business interest from the prospective of commercialization of the invention.

To synchronize the domestic patent system at the international level gradually an international understanding developed for protecting industrial property in the nineteenth century when the industrialization was at its peak. The transition of the industrialization into knowledge economy melted the conventional understanding into an agreement which is acting as an international patent law. The international understanding on industrial property, which is another term used for the intellectual property minus copyright, is known as Paris Convention for the protection of Industrial Property. It was Paris Convention that brought twelve months priority to file the patent applications in other countries members to the Paris Convention. Since it was a convention, it lacked binding force. But it helped in designing the international patent law which came under the banner of the TRIPS Agreement, which has binding force. The binding force means that whatsoever is agreed upon at an international level is translated into the domestic laws of the signatory countries. Treaties and conventions are merely an understanding lacking binding the signatory countries to follow them. But TRIPS is an agreement having deterrence to force the signatory sovereigns to act up on the terms and conditions of the agreement.

Each inventor, either a part of the Paris Convention Union for protection of industrial property or the WTO Contracting country, has twelve months time from the date of the first/basic

application to decide and file an application for securing the patent rights in the other member countries. This right is known as priority right; without which each subsequent application in other countries must be either file at the same time and date else would have become prior art.

There is time buying system which helps in deferring the patent application filing in the other countries to the maximum of thirty months from the date of the filing the basic application. This system is known as Patent Cooperation Treaty (PCT) that is administered by the World Intellectual Property Rights Organization (WIPO). The PCT system also provides a single window access to file the national phase applications.

National Treatment and Most Favored Nation

The national treatment means that the foreigners would be given the same treatment as the nationals of a country. The TRIPS Agreement has borrowed the National Treatment concept from the Paris Convention. The TRIPS further added Most Favored Nation (MFN) concept in it; which means that any especial favor given by a country to a country will be applicable to rest of the member countries. The concepts of the national treatment and the MFN status provide equality before the laws of a member country to the foreign patent applicants and the IP owners.

Hence, there are two options for an applicant to file a patent application in a foreign country. The first one is Paris Convention and the second is exploiting the PCT route. The first route is advisable when an applicant wants to file the application without losing time in a few countries. The PCT route is advisable when the applicants wish to buy some time for any reason

to exploit the patent rights later without losing the priority. Both the options are open for both the Indian nationals.

Though the TRIPS Agreement directs its signatory countries to grant patent in all the technologies, there are a few exceptions to this direction in India. Similarly there is a fundamental difference in definition of invention. The US patent law includes both inventions and discoveries as a subject matter of patent but India, like most of the countries, accepts only inventions as a patentable subject matter. Another difference is in the treatment of the prior art. The US patent law accepts knowledge existing in some tangible format outside its territories for the consideration of knowledge forming prior art. The US accepts hear-say knowledge existing only in its territories. To the contrary, Indian law accepts all kind of information, whether hear-say or in some tangible form, existing anywhere as prior art.

Part 2: Securing Patent Rights in India

The Constitution of India starts with '*We the People of India..*' wordings and declares herself a Socialist Republic in the preamble itself. The Supreme Court of India in a case declared that Constitution is not to be construed as a mere law, but as the machinery by which laws are made. Though the patent law was framed and repeatedly amended in compliance with India's commitment to various international treaties, conventions and agreement, none of IP laws is above the Constitution of India. An attempt to make a fine balance between the social welfare commitment to the people of the nation and the rights of the patent owner can be seen in various provisions of the Indian patent law. India is a natural ally to the developing and least developed countries, who see and respect her as their leader. As a leader of the third world

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countries India has extended social responsibility towards their welfare. This responsibility is also reflected in the Patent Act.

India is a signatory country to the Paris Convention and the WTO. The foreigners draw right to file patent applications in the foreign countries under the provisions of the Paris Convention and the TRIPS Agreement. The foreign applicants have equal rights before the patent law of India and there is no discrimination based on nationality as agreed by India to the above-stated international instruments.

The first patent application is known as the basic application. A foreign national can file the basic application in India drawing rights under the Paris Convention or can file the national phase application in India within twelve months after filing the basic application either in his home country or elsewhere. The twelve month time to file the subsequent application is an international right and is known as Priority Right. By claiming the priority right, the applicant secures preference to other applicants who filed their applications any time later to the basic application filed by the first applicant. English is the official language for filing the application in India by the foreigners.

In case an application has been filed under the provisions of the PCT, it remains suspended for eighteen months from the date of the basic application filing and is not processed unless formally requested. The national phase applications rooting from the PCT application can be filed latest by thirty months from the date of the basic application filing. In case the national phase application is filed before thirty months which is the time deadline to enter into the national phase, the patent Office shall not start processing of the national phase application

before the expiration of thirty months from the basic application filing date; else otherwise formally requested to process under other provisions. Here it is important to mention that PCT application is just a time buying process to extend the priority to file the national phase applications. A PCT application in itself does not materialize into any patent; it is the national phase application which may ultimately yields patent.

When an application is made by virtue of an assignment of rights to apply for patent for the invention, the applicant needs to file the right to assignment in the prescribed form within six months from the date of the filing of the application in India. A declaration of inventorship is required to be filed with the complete application or within one month from the date of the filing of the complete application. Besides, the applicant needs to keep the Indian Patent Office update on other national phase applications for the same invention in the prescribed format in the prescribed time.

After expiration of the thirty months period from the basic application filing date, the application is processed and published in the Patent Journal. Under the normal process there is no need to apply for the publication of the application. There is a provision under the patent law for filing an early publication request. On and from the date of publication of the application the applicant shall have the like privileges and rights as if the application for patent has been granted, provided the applicant shall not be entitled to institute any proceedings for infringement until the grant of the patent.

After publication of the application, the applicant gets forty eight months time from the priority date of the basic application to file a request for an examination of the application. There is no

restriction to file a request for examination of the application, but it would be considered only after publication of the application. Ordinarily the first examination report (FER) is send within six months from the date of the examination request or six months from the date of publication, whichever is later.

India has adopted post-grant opposition procedure without loosing her old pre-grant opposition procedure. When a patent application is published but the patent has not been granted, any person in writing may oppose the application on any of the prescribed grounds. Similarly, any person, at any time after the grant of the patent but before the expiry of one year from the date of publication of grant of the patent may give a notice of opposition to the Controller in the prescribed manner.

When the application is found to be in order for the grant of patent complying with the Patent Act, a patent is granted.

The life span of a patent is twenty years starting from the date of the filing of the patent application. For the international applications filed under the Patent Cooperation Treaty (PCT) the twenty years shall be counted from the international (PCT) application filing date.

The patent requires to be renewed each year by paying the renewal fee. In absence of non-renewal of patent, the rights are lapsed. The applicant can file for renewal of the lapsed patent within eighteen months from the date on which the patent has ceased to have effect. There is no right during the suspension of patent due to non-renewal.

Enforcement of the Patent Rights

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The district court has the jurisdiction to try an infringement suit. Provided that where a counter-claim for revocation of the patent is made by the defendant, the suit is transferred to the respective High Court for decision. In an infringement suit the court may grant an injunction and at the opinion of the plaintiff either damages or account of profit. The court may also order for the forfeiture and destruction of the infringing goods without any compensation. The appeals to the orders and decisions of the Controller and all cases of revocation of patent other than on a counter-claim in a suit for infringement and rectification of register pending before any High Court shall go to the Intellectual Property Appellate Board (IPAB).

To balance the monopoly patent rights granted to a parson, there is a complete chapter titled 'working of patents, compulsory licenses and revocation' to safeguard the socialist commitment of India. Another chapter titled 'use of inventions for purpose of Government and acquisition of inventions by central Government' is an attempt by India not to find her into tight spot to honor a patent against her national or social interests.

Points to Remember

- Life of a patent is 20 years.
- Patent are granted only for inventions.
- Patent rights are to be renewed each year by paying the renewal fee.
- There is nothing like a global patent; patent rights are territorial in nature; no international body grants patents, they are granted only by the countries.

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Introduction & Concept

None of us is without a name in our society and perhaps cannot survive without a name. This is just an opposite of Shakespeare's famous quotation *what is in name*. Similar is the fact with the products in market. Potatoes in any vegetable market are just potatoes and are generic product sold in bulk without any competitive pricing. But the same potatoes after processing in the shape of potato chips becomes a commodity in a trademarked packing like *Uncle Chips* or *Lays* with a value addition of 30 to 50 times. The potatoes in potato chip shape in a trademark packaging become distinct and earn goodwill of the customers in the same manner people earn goodwill and become prominent. So do the branded products earn market value and branding is nothing but strategy of promoting trademarks. So, names hold value in the market place too for legal entities, products and services.

Trademarks are distinct signs and wordings used for making distinction in goods or services among same or similar goods or services. Trademarks also directly connect the prospective buyer to the product ensuring the consistency in quality. A trademark ensures consistency of quality among same or similar goods or services. It also reflects one source of origin of goods or services for which it is applied. The sign, logo, packaging or wordings used for getting identified among their competitors offering the same product or service in an open market. It can be identified that that the established trademarks are engrossed in the goods or services they identify. A trademark develops a communication and recognition with prospective buyers for the goods or services they are used for. A trademark helps a prospective buyer to identity to a product or services

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in a market place. Mind it a trademark is independent of the manufacturer or services provider in respect of its communication with the prospective buyers in the market place. An established and popular mark independently interacts with the prospective buyers who treat them as independent from their manufacturers. For most of the top brands people don't know who owns them but as a loyal customer they find it comfortable to be ensured of the quality and consistency of characteristics of the product. So a trademark makes their independent place in a market.

A sign used as trademark is known as a logo, label and word mark. There is another class of trademark known as 'trade dress'. The trade dress is the getup of the whole product. For branding a product the objective is to reach out all class of people and for that the goal remains to make the product more and more identifiable. The trade dress is the total get up of the product package that makes it distinctive and identifiable. In modern times if you peel off the label of a soft drink plastic bottle and change the cap on which the brand name is generally mentioned, the product even in that condition remains distinctive because of the unique shape of the bottle and brand centric customers would take no time to identify the product without its identity mark, the trademark.

We all see different kind of trademarks each day like most of us start their day with tooth paste like 'Colgate' then read newspaper like 'The Times of India' sipping tea like 'Taj Mahal' then wearing a business suit of 'Park Avenue' and then driving a car 'Toyota Corolla' to office. The wordings 'Colgate', 'The Times of India', 'Taj Mahal', 'Park Avenue' and 'Toyota Corolla' are the examples of word marks; the color scheme used by the Colgate on its tooth paste tube and its cover are examples of its trade dress and the stylized way of writing Colgate in a particular style may be their registered logo. One may wonder how come 'Taj Mahal' tea brand may co-exist with famous hotel chain 'Taj Mahal'. Well, the goods and services have been placed in 34 and 11 classes respectively in the Trademarks Act, 1999 and for two goods in different classes a same trademark can be registered and used without creating any confusion in the minds of the customers. With the latest amendment in the Trademarks Act with respect from September 2003, the registration of the trademarks for the services like chartered accountant's firm, non-

government organization, business management, different kind of consultancies, transportation, catering, hospitality, schools, colleges, engineering and medical services have become admissible for registration. Therefore a mark registered under a class may be open for registration under a different class as an independent trademark unless it is a well known mark that has acquired reputation beyond its class.

Trademark Types

The classification of trademark divides marks into trademark, collective mark and certification mark. Like trademark, the collective mark and the certification mark are also applied for goods or services but serves slightly different purpose. A common mark used by a commercial guild on products manufactured by anyone among them signifying that the product is originating from a member of the guild is an example of collective mark. ISO marks, ISI mark and vegetarian or non vegetarian food mark are a few examples of certification marks that ensure some quality and assurance of contents in the product.

A trademark can be applied for any goods or services proposed to be used in trade. There is no such condition that the trademark should be in trade before making an application for securing registration of a trademark.

Selection of a Trademark

The timing of the trademark selection and its integration with the respective product or services is very important. The trademarks are not limited to just products/goods. A trademark also applies to the business house names like 'TATA'. The stylized 'T' is the logo of TATA group. The TATA group has a company of budget hotels known as 'GINGER' Hotels. The TATA is the top brand name of the TATA group and companies like GINGER form an umbrella of TATA companies. Then some of the companies may have different product lines like TATA Group's TATA Motors has a range of cars like Safari, Vista, Indigo etc. The trademarks like Indigo and Vista are examples of a particular product and marks like Ginger are known as service marks. All the marks under the TATA brand name like Vista, Ginger, Titan, Voltas and West Side get recognition, draw strength and win admiration derived through their top brand name TATA.

The word marks that are coined words are considered as the best trademarks. The trademark like Apple Computer where apple has nothing to do with computer is also a good example of a word mark. The well known marks like Sony, Intel, Coco-Cola have grown out of their respective classes and the idea to try them for a class in which they are not registered by the third parties is always a bad idea from the business point of view. Similarly vulgar marks, family names, country, state or city names, international organizations names or names or signs of any Government or Government agency are also bad for applying for trade mark registration.

The uniqueness is very important for a mark to exist and get identified without any confusion by even an illiterate buyer. Once selecting a trademark, it is always advised to opt for its search in the registered trademark and also in the open market so that it could be ensured that the selected mark does not exist in the market and in the trademark register in the same class. Once securing a positive report, it is important to quickly apply for its registration. The law permits to apply for the trademark registration for both products and services yet to be launched. The task of making a trademark popular is a costly affair. So withdrawing a trademark because of objection from a third party is a very costly affair because it may include litigation cost and re-aligning the customers to the same product with a different brand name in comparison to doing the things diligently.

The goodwill earned by a trade name may become larger than the size of its owner and may hold tremendous financial value at its own. So a small investment in designing a trade name, its logo and its registration may provide financial strength.

Registration

A trademark used for some goods or services may or may not be registered. There is no compulsion to secure trademark registration. But violation of non-registered trademark amounts to only 'passing-off' which is a civil wrong.

Since trademark provides monopoly over the logo or the wording, logo or wordings reflecting the characteristic, quality or ingredients of the goods or services for which they are applied for are not accepted for granting trademark registration. The invented words form the best quality

of trademarks. The second best trademarks are words or marks having no relationship with the product/goods or services for which it is applied for. 'Zee' and 'Apple Computers' are the examples of best and second best kind of trademarks. While designing a trademark it should be kept in mind that it should neither phonetically nor alphabetically similar to wording of the goods or services for which it is applied for.

The registered trademarks need their renewal after every ten years. The life of a trademark depends upon its use in trade and payment of renewal fee in time. So a sound trademark may remain a monopoly in perpetuity.

Registration Process

It is always advisable for initiating a new business house, product or services to check if the name is in free domain and securing a trademark search in the particular class and an opinion of the trademark attorney on the search report should be given due weight for finalizing the name. The same applies to domain names and since domain names registrations are secured on first come first serve basis, they should be applied for immediately after finalizing the name.

The registration process starts with filing a trademark application. The trademark application is examined by the trademark examiners who conduct search of the registered trademarks to see if same or similar marks have been registered or applied for prior to the application under examination. On the basis of the examination, if required, the First Examination Report (FER) is generated. The applicant needs to reply to the objections raised in the FER to the satisfaction of the examiner. After acceptance of the application passing the FER, the application is advertised in the trademark journal. The publication of an application has the purpose to inform the world about the application. Anyone having any interest in the mark applied for may approach the Trademark Register to file his notice of opposition to the application within three months from the date of the advertisement which may further be extended to one more month. If any notice of objection comes, the applicant is informed accordingly to meet out the objection else once the time expires to accept the opposition, the trademark is registered and published in the trademark journal accordingly.

Infringement of Trademark

The violation of a registered trademark amounts to an infringement of the same and may invoke both civil and criminal action against the infringer. In India fine between Rs. 50,000 to Rs. 2 lakhs with imprisonment between six months and three years is imposed for the infringement of a registered trademark.

Transaction in Trademarks

The registered trademarks are assignable to the third parties with or without goodwill of the business concerned. For the assignment of certification marks the consent of the Registrar in writing is necessary. The license of the trademark can be given to the third parties. The trademark registration is territorial in nature; so for business interest in different countries territories, it is preferable to secure trademark registration in those countries.

A political border-free business network has also come up in the last few years that is known as the internet. The web presence is represented by the domain name. The domain names have added another dimension to the trademarks. The domain name registration is based on first come, first serve basis. For the web presence, it is advisable to secure the domain name of choice as soon as finalizing the business brand name. The use of trade marks on a website of a business house needs due diligence as it may be infringing a third party's rights in the same mark in a different country.

International Arrangement

There is an international instrument known as Madrid Agreement which provides six months priority over others to file trademark application before the Madrid Agreement signatory countries from the date of filing the basic application before the home country. Madrid Agreement and Madrid Protocol are collectively called as Madrid System. India is intended to become a member to Madrid System in near future.

Latest on Trademark

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Recently Parliament passed Trademark Amendment Bill 2009 to incorporate the provisions of Madrid Protocol which deals with the international trademark registration under Madrid system. The Madrid system for the international registration of marks works under the Madrid Agreement (1891) and Madrid Protocol (1989). The trademark laws are territorial in nature and in each country a separate trademark registration process is required to be initiated. The Madrid System provides a single window facility resulting in multiple registrations among the Madrid System member countries subject to meeting certain parameters. The Madrid System provides a single window system for securing trademark registration in 18 months time.

In another development the number of the classes in the services sector has been increased from 8 to 11. The trademark applications can now be filed online and the trademark registry data can be searched online.

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Copyright

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Introduction

Copyright is a negative right which prohibits others to the exclusion of copyright owner to make copies of the copyrighted work without the permission of the copyright owner. Copyright is granted for *original expression* of thoughts recorded in a tangible format. There is no copyright to ideas. The original expression of an idea is a subject matter of copyright. An original performance by an artist provides him performer right. Indeed, the originality of expression is the condition for claiming copyright.

The collective artistic efforts are best reflected in movies on which copyright is claimed under the cinematograph category by the movies producers. A movie is a very typical example from the point of view of the copyright and wealth generation through it. In a movie story, dialogues, screen play, lyrics, music all are subject matter of copyright. The creator holds the first copyright therefore these subject matters are individually vested with writers, composers, lyricists and musicians. Generally it is the producer to whom the collective copyrights in a cinematograph vests by transferring the economic rights in the respective works by different contributors for a consideration.

The original expression could be in literary, dramatic, artistic and musical work. Work under these four categories includes computer programs, computer generated compilations, tables, broadcasting, painting, sculpture, drawings, photographs, work of architecture *et all*. Translation and transformation of work from one form to another is also covered by copyright under the adaption work and translators and transformers of original work needs permission from the original work copyright owner. The copyright

also grants protection to original broadcasting and performers for their performance in public. Photographs are also subject matter of copyright subject to fulfilling the condition of originality in expression. The copyright is expressed with © mark before the name of the copyright owner; ideally it should be followed by the year of first publication.

The objective of copyright is to limit the social and economical benefits to those who originally created it. The statute also shows greater respect towards the personal rights than the rights of the legal entities; like performers rights lasts in fifty years but broadcasting rights lasts in twenty-five years. The copyright is a legal instrument for encouraging the original expression of thoughts to promote progress in literature, drama, music *et al*.

Copyright Subject matter

There is no copyright for an idea; it is exclusively for the original expression in a tangible format. So, the idea, the subject matter, is independent of copyright and is available for all to make their own original expression. There is no quality or quantity test for securing a copyright. The only condition is original expression in a tangible medium. Here it is very important to note that consent of the owner of the work is very important for publishing the work. A work shall not be deemed to be published or performed in public if published or performed in public without the consent of the owner of copyright.

The copyright is granted for literary work like novel, stories, poems; engineering works like computer programme and architectural drawings; dramatic works like scripts, dialogues, scenes; musical work like lyrics and musical composition; performers rights in presentations like stage performance, cinematographs and even in sports; photographs; artistic work like paintings and

sculpture; broadcasting television, radio programs and even contents published on websites and work derived from all kind of copyrighted works like translation of a literary work into another language and converting a novel into a screen play or vice-versa.

Copyright Life Line

The creator holds the first copyright. Therefore the creator has been bestowed with the longest copyright term, life of the author plus sixty years after death. The copyright term for photographs, cinematograph, sound recordings, Government work and public undertaking or international organization is sixty years. The term for performer's right shall subsist for fifty years from the beginning of the calendar year next following the year in which the creation/performance is made. The broadcaster reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made. At this point it is necessary to define what constitutes publication of a copyright work. Publication means making a work available to the public by issue of copies or by communicating the work to the public. Hence the requirement of giving a tangible shape to an expression of thought has not been carried forward for defining it as published. An article written on a blog published over the internet does qualify the definition of publication or communicating to public without making anyone available any physical copy of the article.

Copy Right Components

There are two kinds of rights under copyright; economic right and moral right. The economic rights are transferable rights and the moral rights are non-transferable rights. Both kinds of rights born together; the economic right lasts with the copyright term but the moral right

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subsists till the work subsists. An author may transfer economic rights in his work to a publisher for the consideration of royalty to permit him to publish his work but the publisher secures rights only to publish the work not to replace or struck down author's name.

In *Amarnath Sehgal v Union of India, 2005 (30) PTC Delhi* the Court held that when an author creates a work of art or a literary work, it is possible to conceive of many rights which may flow. The first and foremost right, which comes to one's mind, is the 'Paternity Right' in the work i.e., to right to have his name on the work. It may also be called 'identification right' or 'attribution right'. The second right which one thinks of is right to disseminate his work i.e., the 'divulgence or dissemination right'. It would embrace the economic right to sell the work for valuable consideration linked to paternity right a third right, being the right to maintain purity in the work can be thought of. There can be no purity without integrity. It may be a matter of opinion, but, certainly, treatment of a work which is derogatory to the reputation of the author, or in some way degrades the work as conceived by the author can be objected to by the author. This would be the moral right of 'integrity'. Lastly, one can conceive of a right to withdraw from publication ones work, if author feels that due to passage of time and changed opinion it is advisable to withdraw. This would be the author's right to 'retraction'. The court further held that Authors are an integral part of the cultural heritage of any nation. The authorship is a matter of fact. It is history. Knowledge about authorship not only identifies the creator, it also identifies his contribution to national culture. It also makes possible to understand the course of cultural development in a country. Linked to each other, one flowing out from other, right of integrity ultimately contributes to the overall integrity of the cultural domain of a nation. Language of section 57 does not exclude the right of integrity in relation to cultural heritage.

The cultural heritage would include the artist whose creativity and ingenuity is amongst the valuable cultural resource of a nation. Through the telescope of section 57 it is possible to legally protect the cultural heritage of India through the moral rights of the artist.

Infringement: Violation of Copyright

There is no screening for testing a subject matter before registering the work for copyright and granting a copyright certificate. The onus is left up to the applicant/owner to establish the original expression of thought in dispute for retaining his copyright. In case of the non-registered copyright, the person claiming ownership has to establish that he was the first one to make the claimed original expression.

The violation of copyright is known as infringement and is a cognizable offence amounting to fine which shall not be less than Rs. Fifty thousand and may extend to Rs. two lakh along with imprisonment for a term not less than six months but which may extend to three years. Police has been granted power to seize infringing copies even without warrant. However there is provision for enhanced punishment and fine for second and subsequent convictions for infringement.

The infringement of copyright is a cognizable offense and police holds power to seize all the infringing copies without warrant with goods used for making the infringing copies. The software infringement is punishable with imprisonment of not less than seven days but extendable to three years with fine between Rs fifty thousand and Rs two lakh.

Power of Copyright

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The power of copyright can be understood with the mere fact that even the owner cannot know how many copies of his work exist at a point of time after publishing his work. It is next to impossible for a copyright owner who is holding an infringing copy of his copyright protected work or how many people are having infringing copies to his work. It may happen that infringer holds the exact replica of the work without the copyright owner losing his original copy. This is the reason breach of copyright is known as infringement of copyright, not theft! It also reflects the power to multiply the copyright against all who owns a copy of the work. Simply it is liberation from two or three dimension of tangible property or rather addition of time dimension the existing dimensions of property.

International Arrangement

Copyright is the only tool of the IPR toolkit which is free from multiple territorial registrations. Once created and registered, copyright in a work is respected, honored and exercised almost in all countries in the world without any formality anywhere to establish or get recognized the copyright. It would not be incorrect to say that international copyright law has emerged out of the long international conscience making process triggered with the Berne Convention 1886.

The Berne Convention which is known for the following three principles established the minimum standards for the protection of literary and artistic work:

- Principle of National Treatment: Works originating in one of the contracting States must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals.

- Principle of automatic protection: Such protection must be unconditional, without compliance of any formality.
- Principle of Independence of Term of Protection: Such protection is independent of the existence of protection in the country of origin of the work. If, however, a contracting State provides for a longer term than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases in other countries.

The rights of performers came much later with the Rome Convention 1961. This convention is known as the advocate of protection in performances of performers, phonograms of producers of phonograms and broadcasts of broadcasting organizations. Finally these conventions found inroads to the text of the TRIPS Agreement which finally established international law for intellectual property copyright of which is an integral part.

The Challenges Ahead

Law is an ever evolving process with the voyage of civilization. The dynamic nature of law is an indication of progress of civilization. Telecommunication revolution in the last two decades has created a spur in the copyright law as breach of the same has become so easy even without intention to infringe copyright. The concept of copyleft and limiting the copyright by relinquishing most of the economic rights has added new dimensions to the copyright law. The Wikipedia in which writers add new text and edit the existing text without claiming any right has given a new dimension to the free knowledge domain. The same has been witnessed by free software movement which has produced best of the software ever developed without claiming

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any copyright. Well in both the above mentioned cases technically copyright concept in itself is helpless. No one claims even moral right in developing a text in Wikipedia or coding computer programme. The free access to the source code for amending, editing and adding new code for all has helped in developing best of the free software which have created a question mark on the survival of the proprietary software. But as of now both exist and sustain. The freedom of expression and to reach public has been revolutionized by the internet. The blogs, twitters and personalized websites have provided new modes of expression and their rapid growth and popularity show their acceptance in the society. Although the blogs, twitter and web pages originate at a source but their presence in the number of hard drives and random access memory (RAM) of the computers increase with the number of visitors to the contents. The publishers of the contents, who are generally the authors of the contents, instead of bothering the electronic copying of their contents on other computers feel pride in growing number of visitors of their web pages. Perhaps reach to more and more people is becoming more important than to reap economic benefits by controlling the right to make copies. This trend is reflected in an author's comment who said that in place of signing a million dollars contract for writing a book for a publisher, he would prefer to be read by a million people.

No doubt new trends are emerging in expression of thought expanding the public knowledge domain at the cost of shrinking the private knowledge domain. The concept of copyright is going to sustain and live a long life as most of the private original creations of expressions are sure to remain evolving with both development of new trends and new methodologies for infringing copyright.

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Industrial Design: Aesthetic Aspect Protection

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Beauty always appeals to eyes. Beautiful designs of goods play a major role in making decisions for buying the goods. When we have a choice to select a thing among a bunch of the same kind of things the design aspect of the thing makes a major part in the selection. The design is invariably so important in our routine life that we perhaps do not realize how it is going to make a difference in our selection and choice decisions. The most of the goods have competitive products in the market with nearly the same or similar qualities and features and the competition rests on branding and aesthetic appearance of the products. So designs in product designing are very important.

One may wonder at the need of a separate tool for protecting design aspect of a product when copyright tool covers the designs. Well, the answer to this is that when a design is reproduced more than fifty times through an industrial process it comes out of the copyright protection and such designs need protection under the Industrial Design Act from the very beginning of the creation of a new design. The novelty, originality and utility are the only conditions for securing a design under the Industrial Design Act.

Industrial Design tool is for products. It is for aesthetic satisfaction as it is an element of appearance. Any design on any article means features of shape, configuration, pattern, ornament or composition of lines or colors whether in two dimensions or three dimensions. These are the designs that are incorporated into mass produced products with the aim to attract the prospective customers by sheer appearance. The object of design is distinctive feature of

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the goods on which it is applied. In most of the mass produced products distinctive design features enables the customers to pin point them in the heard of similar or same products.

The industrial design can be understood by an example of soft drink bottles. There are at least three cola brands in India and all have distinctive trademarks and peculiar flavor. The innovation in distinction has gone further in giving distinctive shapes to the soft drink bottles. With the peculiar shape of the bottle the buyer can find out the particular product. These shapes of bottles are subject matter of Industrial design although the protection is also available under the trade dress under the Trademarks Act.

The foundation of most of the IP laws of India is such that multiple protections under various IP tools is not appreciated and when such a condition arrives, the IP owner has to choose an option to protect his IP. There are provisions in various IP Acts that reflect the principle of one tool for one IP aspect protection. The design falls under such a category under which protection under copyright, trademark and industrial design tools is possible but the aesthetic aspect of the design is to be protected under only one IP tool.

The condition for registration of an industrial design is that it should be new and original, has not been disclosed to public prior to the application date and it should be significantly distinct from the known designs.

The process of securing registration of industrial design starts with filing an application. The application is examined by the industrial design registry on the basis of the data available with them. If they found something same or similar, the objection is raised on the application and the applicant has to reply accordingly. The convincing reply results in acceptance of the application

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else it is rejected. Once the application is accepted, it is advertised in the Journal that means an open invitation for all to object the application on the basis of prior existence of the applied design. If an opposition comes, the applicant faces the opposition else the design is registered. The goods for industrial designs have also been divided into thirty-two. The term of industrial design is ten years which may be extended to five more years.

At one hand the domain of industrial design touches the periphery of copyright, on the other side it resembles with the patents. The first test for securing patent for an invention is its novelty. The same is the test for securing industrial design registration. The patents are granted for functional aspects of an invention and industrial designs are granted for original designs without consideration of their functional aspect.

For the global protection and unification of procedure for securing industrial design protection in different countries there is Hague Agreement. Hague Agreement has 56 contracting countries and India is not a Hague Member country. Hague Agreement provides Hague System for the international registration of industrial design.

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The Protection of Plant Varieties and Farmers' Rights

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Before beginning this subject matter, it is important to mention that this tool is a *sui generis* law and there is no obligation under the TRIPS Agreement to make such a law but this tool provide protection to those inventions that are not patentable under the Patent Law and protects the rights of the farmers. So at one hand it fulfills the constitutional duty to ensure the social welfare of the people by securing the farmers rights and on the other hand it fulfills the gulf created by denying patent rights in most of the agriculture related sector to the TRIPS commitment to provide patent protection to all aspects and domains of inventions.

The US patent law divides patents in design, utility and plant categories. The Article 27(1) of the TRIPS Agreements says that patents shall be available for any invention in all fields of technology meeting the patentability conditions. But Sections 3(h) and 3(j) of the Indian Patent Act say that method of agriculture or horticulture and plants and animals in whole or any part thereof other than micro-organism but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals are not patentable. When we combine the previous three sentences, we find that US patent law is in conformity with the Article 27(1) of the TRIPS Agreement but Indian law does not have anything like plant patents of US and thus Indian Patent Law is not in conformity with the Article 27(1) of the TRIPS Agreement. This shortcoming has been meted out by the means of a *sui generis* law for the protection of plant varieties and farmers and breeders rights in India to safeguard the rights of

the majority of the agrarian population without diluting the rights of the innovators in the plants sector.

The IP generated in plants and seeds have been provided protection under the Protection of Plant Varieties and Farmers' Rights Act, 2001 in India. This law provides protection to the new plant varieties and breeders and farmers for their innovative contribution in conserving, improving and making available plant generic resources for the development of new plant varieties. An applicant may make an application before the Plants Varieties and Farmers' Rights Authority for registration of any variety mentioned genera and species or which is an extent variety or which is a farmers' variety confirming the criteria of novelty, distinctiveness, uniformity and stability. The beauty of this law is that it makes it mandatory for the applicant to assign a distinct denomination (name) to the variety for which he has filed the application. The registration for trees and vines is for nine years and six years in case of other crops. The term may be reviewed and renewed for another term of nine years.

The registered owner of a plant variety under this law shall have an exclusive right to produce, sell, market, distribute, import or export the variety. The rights granted under this law are transferable in nature. Similar to the breeders, farmers who had bred or developed a new variety shall be entitled for registration.

The beauty of this law subsists in the farmers' right to save, use, sow, re-sow, exchange, share or sell his farm produce including seeds of a variety protected under this law. When the promises of the breeder in respect of his registered variety fail in the field, the farmers have right to secure compensation. The rights of the farmers under this law extend further as they are not

liable to pay any office fee in any proceeding before the Plant Varieties Authorities or Registrar or the Tribunal or the High Court under the provisions of this law.

Alike Patent, this law also has a provision to grant compulsory license at any time after three years of registration in case it is established that the reasonable requirements of the public for seeds of other propagating material of the variety have not been satisfied or that the seed or other propagating material of the variety is not available to the public at a reasonable price.

The infringement of the rights granted under this law includes those who uses, sells, exports, imports or produces any other variety but give their variety similar or deceptively similar denomination. The remedy for violation of rights may include both fine and punishment with imprisonment.

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Trade Secret

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A secret which is practiced in trade to earn advantage over others is known as a trade secret. Perhaps trade secret is the toughest IP tool to practice which has the maximum wealth yielding capability. The TRIPS in Article 39 explicitly says that the Member Countries shall protect undisclosed information and data submitted to the Government and Government agencies. It says that natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices for information satisfying the following three conditions:

- Information that is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- Information that has commercial value; and
- Information that has been subject to reasonable steps under the circumstances, by the person lawfully in control of information, to keep it secret.

These three points are interlinked. The first defines the trade secret, the second restricts it to commercial value for being secret and the third makes it mandatory for the owner of trade secret to make reasonable efforts to keep it secret.

The issue of trade secret is very complicated as per designing a legal instrument is concerned. It is a kind of monopoly which may have life as long as the information becomes generic and loose

its competitive advantage in the open market. The US is one country which has a distinct legal instrument for protecting undisclosed information. In most of the countries including India, it has been left at the mercy of the drafting skills of the lawyers drafting trade secret agreements. Most of the WTO Member Countries feel that through contract law undisclosed information can be protected. The Article 39(2) specifically uses the word 'possibility' of preventing information lawfully within their control to practice in trade. The word 'possibility' provides room to the reluctant Member countries to design a distinct legal tool for trade secret.

Perhaps when undisclosed information is looked at in isolation, most of the WTO Member countries having the view that contract law is already there to take care of the securing rights in undisclosed information. But when we see undisclosed information from the point of view of anti-competitive trade practices, an issue comes out from undisclosed information: data protection. In the digital age data is getting very vital property having independent commercial value. Independently raw data in itself has commercial value and it is very difficult to protect data through contractual tools.

A school of jurist is of the opinion that there should not be any law for protecting trade secret. The rationale behind their opinion is that since the trade secret owner does not share the information to public, he should be left at his own capabilities to keep the information secret while practicing the same in open market. Since he wins advantage in trade due to his trade secret, public is free to do reverse-engineering kind of any exercise without making any illegal attempt to steal trade secret from the personal possession of the trade secret owner. When there is no monopoly on a product having trade secret components, it would be unfair to public to make it obligatory to recognize and respect a right which just forces them to pay extra. The

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natural human right to quench the thirst to know the unknown would be deeply wounded. This view depends on the jurisprudence of IP, which says that time bound monopoly should be granted as compensation for enriching the public knowledge domain by transferring private knowledge in it. The jurists of opposite school see trade secret, protection of undisclosed information, data protection and control of anti-competitive practices in commerce and trade in *toto*. Together this forms an industrial property deserving protection. When we see this gray area of industrial property with goodwill, we come to a conclusion that there are kind of intellectual properties which are still out of intellectual property regime.

When we keep a tab on patent limitations for granting a patent, a big chunk of inventions fall in a domain for which technically a patent cannot be granted for one reason or the other. But the development of such an invention has consumed time, money, time and human intelligence, just like in a patentable invention. No one would like to share such undisclosed information with his competitors in an open market. The remedy for him is to reach the market in some way keeping the things secret to maintain competitive advantage in open market. Just like a patentable invention, his non-patentable invention has commercial value and has consumed equal resources to come to reality. It ought to be protected. This reasoning highlights the limitations of the IP toolkit to protect different facets of IP. Indeed, it reflects the urgent need to develop new tools to protect that facet of IP which is not protectable by the existing IP tools.

Here it should be remembered that it is mandatory for the Member countries to provide protection to the data presented before them which in itself has commercial value against unfair commercial use.

Another aspect is that in an open global market system do we need too many IP tools creating different kind of monopolies? Will not that lead towards the apprehension expressed in the preamble of the TRIPS which says that the measures and procedures to enforce IP rights do not themselves become barriers to legitimate trade?? Perhaps different views to such questions provide frictions among the questions to generate energy to give shape of future tools.

With the acceptance of IP rights-obligation equations in social fabric, the IP laws are tending towards penal provisions for infringement of IP rights or perhaps in the time ahead infringement would be replaced by the theft kind of wording to apply criminal law provisions, which is till date limited to copyright and trademark.

The crux is that in India, like most of the WTO Member countries, there is no legal instrument for protecting trade secret. The revolution in telecommunication and digitalization of data has though forced the countries to develop measures to protect data and curb anti-competitive practices in contractual licenses. Perhaps this issue will secure momentum when the proposed Competition Act would come into force.

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An Introduction to Geographical Indication

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We all have seen small stickers on fruits in fruits vendors' shops. For an example, it is very common to see stickers on apples mentioning 'Washington Apple', 'Australian Apple' and 'Kashmir Apple'. One may wonder at the significance of putting stickers on each apple.

Well, it was not long back when we use to buy apples just by their size, smell, color or price. There was no other alternative to buy the same quality of apples which one relished last time. These stickers inform the source of origin and thus help to select the apples one likes the most. The time is not far away when one may start demanding apples from a particular geographical origin. To let the world know the source of origin of a particular product or produce and subject to liking of the same by the consumers creating demand for the produce or goods originating from that very source or origin is the objective of geographical indication. Yes, as its meaning suggests a geographical indication educates and advertises the source of origin of the produce or goods. The beauty of this unique tool of IPR is that the right to use the source of origin logo/sticker vests with all the producers of the product origin subject to conditions. The power of the geographical indication (GI) grows exponentially with entire guild as the registered user of GI. The GI is a collective monopoly of a particular guild that can sustain as long as the guild sustains in the market and keeps the GI renewed.

One may wonder how come the same logo/mark/sticker may be used by the entire guild. Well, this is not a trademark which is an exclusive monopoly of an individual or an entity. There is a

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vast difference between a GI and a trademark though both appear in the form of a name or a logo. The GI registration takes place in two steps. In the first step, the guild itself applies for the GI registration and the same is registered as a proprietors' registration. The GI owner/proprietor does not practice the trade for which the GI is secured but holds guild members collective interest; this is a condition for being an applicant for GI registration. Once the GI is registered, it opens the way for the members of the guild to secure user group registration. Thus those actually use GI in the market place are registered users of GI not the proprietor.

In face a trademark also ensures consistency in the source of origin. But a trademark denotes origin of the good of a producer only. When a group of producers produce the same product, gradually with the surge of the goodwill of the product the number of the producers also grow. To reap the benefits collectively and to make a distinction by restricting the producers of a particular geographical location, collective monopoly is created through GI.

Let us take the example of Lucknow Chikan. The producers outside the Lucknow district also sell their product with the same punch line like 'Lucknow Chikan'. Even the Lucknow Chikan goods sellers outsource the Chikankari work to the remote villages for economic reasons. There are no defined boundary lines of a particular district for outsourcing the work and then selling the same by in cashing the goodwill earned in the name of Lucknow Chikan. This makes the Lucknow Chikan wording open to be used by all manufacturers of all places diluting the goodwill and thus the economic benefits of Lucknow chikan craft owners. The further enhancement of the popularity of the product tempts others in other towns to join in producing/manufacturing the same product and use the same punch line like 'Lucknow Chikan' to sell their product. Well some may argue, what's wrong in it? Then, What about extending the manufacturers working in

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foreign countries like China or Vietnam making the same stuff and using the same 'Lucknow Chikan' wording to sell their product in the international market banking upon the goodwill and reputation earned by Lucknow based Chikan industry? It should melt the orthodox thinkers to find some measures to restrict the use of goodwill ambassador 'Lucknow Chikan'. The restriction of goodwill to the geographical area is achieved by GI. The GI restricts the use of goodwill carrier wordings/logo in the geographical limits. This enhances the potential of business for the producers/manufacturers based in the real source of origin of the product. This restricts the use of GI to the genuine users as violation of the same amounts to a cognizable offense and punishment is imprisonment up to three years and fine up to Rupees two lakh.

The source of origin is the broadest term used for GI. We all are aware of 'Made in India' or 'Made in Japan' kind of mark which indicates the source of origin of the product on which these wordings are inscribed. This kind of source of origin is macro in nature. It instigates competition among countries and good products from a country bring immense reputation and goodwill to the country of origin. The GI brings down this source of origin to micro level. This once again instigates competition within the country and perhaps between the different geographical locations within the country. This can further be elaborated by an example. In our country there are several places having metal craft industries. Moradabad is one of them, well-known as *Peet Nagri* (Brass City). When metal craft goods are exported from India, the international buyer come to know that it is coming from India. That's it. This provides room for the less known places to use the goodwill earned by other towns as a spring board for passing-off their goods/products. The GI informs the buyer about the source of origin, restricts the competition to the geographical location among the registered GI users for the buyer looking for a product

having reputation for great products. Indeed in the beginning the GI works only as an educator to a buyer who has little idea about the goodwill of the place known for making/producing such products. But it makes it easy for the well informed buyer to make his choice with confidence. Here comes the role of maintenance of quality and standard of the products. The good products build lasting relationship between the buyers and the place of their origin. The old buyers become loyal buyers and new buyers keep on adding to grow the business of the entire guild in the geographical area of origin of the products.

The origin of Geographical Indication exists in Lisbon Agreement. The Lisbon Agreement did not appeal to the world and the union created by the Agreement remained a small union confined to a few countries. Perhaps, the credit to introduce this community based very different IPR tool goes to the TRIPS Agreement. It was the contractual obligation of the TRIPS Agreement that compelled most of the WTO member countries to draft and enact Geographical Indication law in their respective territories.

There is a series of aberration that continued from Lisbon agreement via TRIPS to the Indian Geographical Indication Act, 1999. Lisbon Agreement talks exclusively about appellations of origin. TRIPS Agreement used wording Geographical Indication for *a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*. The need for drafting and enacting the Geographical Indication Act originated from the TRIPS Agreement and name was taken as Geographical Indication. In the Act, the domain of the Act was broadened to include *manufactured goods*.

The inclusion of manufactured goods in the domain of naturally produced goods has created a sort of crack in the legal framework provided for protecting geographical appellation/indication. In dealing with naturally produced goods, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin, environment play the role in determining the quality of the good. So, no quality check was required for appellation of origin. But including manufactured goods broadened the domain, hence quality control has become a must to live up to the reputation of the goods.

Geographical Indication is the only tool that creates IP for a certain class of people or for a guild. The other tools create exclusive rights for individuals or a single entity. No individual can register for geographical indication ownership. The registered owner has to register all producers/manufacturers of the same geographical location for securing right to use the geographical indication after meeting certain conditions and formalities.

GI is a very special IP tool. Instead of confining wealth for an individual, it has capability of creating wealth for a community. By broadening the domain of geographical indication the Government has provided a very promising wealth creation tool to the manufactures known for their goods by their geographical location.

It is very unfortunate that in Uttar Pradesh GI registrations for Varanasi Silk Sarees, Bhadhoi Carpets, Malhiabad Dashehari Mangos, Allahabad Guava and Lucknow Chikan have been secured but the real stake holders are unaware about the GI registration and thus this powerful wealth creation tool has been left alone as a mere GI registration certificate paper.

For the benefits of the Uttar Pradesh based industries, the State Government has taken the initiative for securing GI registration for the well-known crafts of the State. The GI applications for Moradabad metal craft, Firozabad Glassware, Kanpur Saddlery, Kannauj Attar, Saharanpur Wood Craft, Khurja Pottery and Varanasi Glass Beads have been filed. So Uttar Pradesh is gearing up its industry ready to face the challenge of globalization successfully. But the long path still waits for a determined journey to achieve prosperity for people and wealth for the State.

■ ■ ■

Legal Remedies for the Infringement of IP Rights

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Before going into the legal provisions for the legal remedies for the infringement of IP rights, it is essential to know what constitutes an infringement and why the violation of IP rights is infringement not theft or dacoity. The violation of IP rights is an infringement because the IP rights are beyond the tangible limits. A producer's rights in a movie may be violated by 'n' number of people irrespective of the fact that the producer may be possessing the movie in his possession and he may not be knowing that 'n' number of people have already violated his copyright (IP) in the movie. The definition of theft and dacoity in the Indian Penal Code (IPC) are limited to tangible property and thus don't apply for the IP. This is the reason violation of IP is termed as an infringement. This is the reason why IP is so precious, important and needs special attention. The poor IP owner despite of owning the physical passion ruins of his valuable rights without knowing and without any economic benefits. The IP finds life only in market place, so coming to market with one's IP is an obligation of an owner. There is no physical locking system to safeguard the IP while ensuring its presence in the market place. These are a few reasons why IP rights preservation and enforcement needs special attention. This is the reason why the Hon'ble Supreme Court in *Bajaj v TVS* case has directed the courts below to complete the trial of IP infringement in four months time.

Before securing IP rights in a country, it is very important to know about the kind of deterrence is prescribed for enforcing IP rights.

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Indian copyright and trademark laws have provisions for penal provisions (Criminal provisions) for the infringement of IP rights. This is in conformity with the TRIPS Agreement which makes it mandatory for the Signatory Countries to have penal provisions for the infringement of copyright and trademark laws.

The Copyright Act, 1957 has both civil and criminal remedies for the infringement of copyright. In case of infringement of copyright, the copyright owner is entitled to all remedies by way of injunction, damages, share in accounts of profit and otherwise as are conferred by law for the infringement of a right. The infringement of copyright is an offence and punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall be between fifty thousand rupees and two lakh rupees. There is also a provision for enhanced penalty on second and subsequent convictions. In case of infringement of copyright, police can raid without warrant and seize all infringing copies.

The Trade Marks Act, 1999 prescribes relief in any suit for infringement of trademarks. It may include an injunction and at the option of the plaintiff, either damages or an account of profit, together with or without any order for the delivery-up of the infringing labels and marks for destruction or erasure. The order of injunction may include an *ex parte* injunction or any other interlocutory order for discovery of documents, preserving of infringing goods, documents or other evidence which are related to the subject-matter of the suit. The order may also restrain the defendant from disposing of or dealing with his assets in a manner which may adversely affect plaintiff's ability to recover damages, cost or other pecuniary remedies which may finally be awarded to the plaintiff. The infringement of trademark are punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with

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fine which shall be between fifty thousand rupees and two lakh rupees. There is also a provision for enhanced penalty on second and subsequent conviction.

For the rest of the IP tools, i.e. patent, industrial design, geographical indication and IC layout designs, Indian laws have provisions only for civil remedies for their infringement.

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IP: Beyond the means of IP Tools

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Indeed, the IP tools helps a lot in launching the products in market safe. But do the IP tools safeguard all the aspects of IP? The answer to this question is quite complicated and contains both yes and no to hang a computer but not to a human brain.

The pitch of the noise from the pharmaceutical industry is getting higher and higher with time for securing their drug testing data. There is a provision in the TRIPS Agreement that directs the signatory countries to make provisions for protecting data. This provision is used by the pharmaceuticals industry as the pressing tool for securing data protection. The data protection is not limited to the clinical trial of drugs data. Even the data generated in financial sectors like banks and insurance has become very crucial from confidentiality point of view. Even the land line phone numbers data protection has become important. The time has gone when most of the people want their name getting published in the local telephone directory. So the work to classify the data for protection is in itself a tough task. This aspect of IP is beyond any tool to protect with. The developed world that is having stringent data protection laws have tried their best to restrict the data transfer for the processing in the off-shore back offices in the third world countries where there is no legal means to protect the data.

The personal goodwill is another dimension that is still waiting for a kind of tool for protecting its IP in the shape of goodwill. The goodwill earned by professionals and politicians help them to manage their means of earning.

Traditional knowledge is another subject matter. The traditional knowledge holder community feels cheated when someone use their common knowledge to earn by packaging it in a private monopoly shape. India is a big country with the thousands of centuries old civilization. India is rich in tradition knowledge of dances, folk songs, designs, herbs, methods of treatment and crop cultivation and so on. There are two vital questions in relation to traditional knowledge that needs through research to align it with the IP regime. The traditional knowledge is not based on the concept of private ownership. This at one hand helps in fueling the race of development of

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the civilization and on the other hand lacks claiming ownership in its traditional knowledge. This conceptual shift helps people to have a free ride on traditional knowledge in the process of making their own private monopoly without sharing their private rights with anyone.

There is a section of our society that feels that there should be less stringent conditions for protecting innovations leaving inventions for patent protection. The innovation they mean is incremental technological up gradation that is not tested for non-obviousness. Such tools are available in a few countries and are known as petty patents. India needs to introspect for adopting this tool into its system.

When we exclude copyright, the rest of the IP tools are known as Industrial Property. Industry is a part of a bigger domain that includes market and society. The ownership of Industrial property is mostly rests with Industry and the society lefts with the fruits of industrial production and obligation to respect the industrial property. Here the indication is towards those artisans and craftsmen who give their blood for fueling the cottage and small scale industries. This section of our society is used for their skills and traditional knowledge without recognition and without dividends of their contribution in enhancing and creating knowledge based products. They are the real stake holders of the traditional knowledge. It is time to reach out them with due recognition and just share in prosperity brought by them for their employers. It will ensure the consistent flow of traditional knowledge transmission from one generation to the next generation. The misbalance of rights and obligations is mainly responsible for dishonoring the industrial property rights. The innovative means to create industrial or intellectual property rights for the consumer segment of the society should help in mitigating the mismatch in the rights and obligations equation bringing more parity in respect for both intellectual and industrial property. The utopia looking situation would create an ideal ambiance for the firming the knowledge society base in true sense. The creation of firm knowledge society is the most promising way to create an equitable, just and wealthy system for our State, Nation and the Global Village.

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The service of India means service of millions who suffer, it means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to whip every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over.

**~ Pt. J.L.Nehru, First Prime Minister of India
(August 14th, 1947)**