

# Intellectual Property

## Definition

Property that can be protected under federal law, including copyrightable works, ideas, discoveries, and inventions. Such property would include novels, sound recordings, a new type of mousetrap, or a cure for a disease.

In law, particularly in common law jurisdictions, intellectual property or IP refers to a legal entitlement which sometimes attaches to the expressed form of an idea, or to some other intangible subject matter. In general terms this legal entitlement sometimes enables its holder to exercise exclusive control over the use of the IP. The term intellectual property reflects the idea that the subject matter of IP is the product of the mind or the intellect, and that once established, such entitlements are generally treated as equivalent to tangible property, and may be enforced as such by the courts.

## Types

The most well known forms of intellectual property include

- ? copyrights,
- ? patents,
- ? trademarks, and
- ? trade secrets.

Patents and trademarks fall into a particular subset of intellectual property known as industrial property.

## Copyright

Copyright is a protection that covers published and unpublished literary, scientific and artistic works, whatever the form of expression, provided such works be fixed in a tangible or material form. This means that if you can see it, hear it and/or touch it - it may be protected. If it is an essay, if it is a play, if it is a song, if it is a funky original dance move, if it is a photograph, HTML coding or a computer graphic that can be set on paper, recorded on tape or saved to a hard drive, it may be protected. Copyright laws grant the creator the exclusive right to reproduce, prepare derivative works, distribute, perform and display the work publicly. Exclusive means only the creator of such work, not anybody who has access to it and decides to grab it.

## When does Copyright Protection begin, and what is required?

Copyright protection begins when any of the above-described work is actually created and fixed in a tangible form.

For example, my brother is a musician and he lives in the United States. When he writes new lyrics, he prints them out on paper, signs his name at the bottom with the Copyright © symbol to show that he is the author, places it in an envelope and mails it to himself without opening it. His copyright begins at the moment he puts his idea in a tangible form by printing the lyrics out on paper. He creates proof when he mails it to himself - the postmark establishes the date of creation. He then registers his copyright with the U.S. Copyright Office, which is a requirement in order to sue for monetary damages should a violation of his copyright, arise. However, if somebody copies and

redistributes his lyrics without permission before his copyright is registered, he still has the right to assert a copyright claim as the true author.

The above applies to digital art and graphics. Open a gif, jpg or png file that you created and look at the properties. It states the date that you saved it to your hard drive as the date of creation. If somebody copies a graphic from your web site, I assure you that the date of creation on your copy of the file is earlier than the copy taken off your web site. If that still doesn't feel like enough proof for you, save everything to a floppy disk and mail it to yourself via certified mail. Keep the envelope sealed, wrap it in protective plastic and put it in a safe place.

Somebody once asked if it was "illegal" to place the copyright © symbol next to your name if you have not registered your copyright. Unless you have stolen the work from somebody else and you are not the true author of the work, it is not illegal to place the copyright © symbol next to your name - it is your right to do so.

The proper way to place a copyright notice is as follows: Copyright © (first date of creation) (name of owner). Like this: Copyright © 2003 John Smith.

## **When does Copyright Protection end, or expire?**

If a copyright statement reads, "© Copyright 1998, 1999 John Smith." does that mean that John Smith's copyright expired in 1999. The dates that you see in a copyright statement do not refer to the dates that the owner's material will expire and become public domain - they actually refer to the dates that the material was created.

When you see several dates in a copyright statement, it simply means that certain things were created in one year and modified later. It could also mean that new things were created and added in a later year. It most definitely does not refer to the date that a copyright will expire. Expiration of a copyright actually takes place much later, and this period of validity begins from the date that you see in the copyright statement. The Berne Convention establishes a general and minimum period that lasts the life of the author and fifty years after his (or her) death. Cinematographic works and photographic works have a minimum period of protection of 50 and 25 years upon the date of creation, respectively. This applies to any country that has signed the Berne Convention, and these are just the minimum periods of protection. A member country is entitled to establish greater periods of protection, but never less than what has been established by the Berne Convention.

So, what does all this mean? This means that if a copyright statement reads, "© Copyright 1998, 1999 John Smith" and John Smith is from a country that has signed the Berne Convention, he created his works in 1998 and 1999, and his copyright is not going to expire until at least fifty years after he dies (this period may be greater - remember that member countries may establish longer periods of protection). Until that time, his works are not in public domain.

I have actually seen copyright statements with future dates, such as "© Copyright 2003, 2004 John Smith", most likely because the copyright holder thought that they could establish an expiration date for the copyright. This is incorrect unless John Smith traveled to the future and created the work in question. These types of copyright statements also mislead others to believe that dates in a copyright statement refer to the date a copyright expire, when the date should really refer to the date of creation.

## **The Famous © Symbol**

The © symbol entitles the author to claim copyright, i.e. to use, reproduce and distribute this material unless someone else who wishes to use it obtains the author's prior written permission to use it as well, and only in the manner that the author previously approve. In other words, it means that nobody may access the author's material and copy it until the author provides a written document that states, "Yes, you can use my work, but only in the manner that I deem appropriate."

## International Copyrights

There are no "international copyrights" that enable you to protect your work throughout the world. However, most countries are members of the Berne Convention and the Universal Copyright Convention (UCC), which allow you to protect your works in countries of which you are not a citizen or national. Under these treaties, the following works may be protected: (i) both unpublished and published works of an author who is a national or resident of a country that is a member of these treaties; or (ii) published works, with permission, of an author who is not a national or resident of a country that is a member of these treaties. In this case a work may be considered simultaneously published in several countries if it has been published in two or more Berne Union countries within 30 days of its first publication.

To benefit from the above protection, there are no formal requirements established in the Berne Convention other than having the author's name on the work. Under the UCC, a copyright notice is required. This notice should consist of the copyright symbol "©" accompanied by the year of first publication and the name of the copyright owner, for example: Copyright © 2002 John Smith. This notice is to be placed in such manner and location as to give reasonable notice of the claim to copyright.

So, what does this mean? Well, if John Smith is a resident of Canada (member of the treaties), and if somebody in the United States (also a member country) accesses John Smith's website, which complies with (i) and (ii) above and displays the proper notice of Copyright © 2002 John Smith (as required by the UCC) - I am of the opinion that my work is considered to be "published", and therefore protected, in the United States as well as in Canada.

## Patent

A patent is a set of exclusive rights granted by a state to a person for a fixed period of time in exchange for the regulated, public disclosure of certain details of a device, method, process or substance (known as an invention) which is new, inventive and useful.

The term "patent" originates from the Latin word *patere* which means "to lay open" (ie. make available for public inspection) and the term *letters patent*, which originally denoted royal decrees granting exclusive rights to certain individuals or businesses.

The person applying for a patent generally does not need to be the inventor who created or authored the invention. However, in the United States a patent application must be filed in the name of the actual inventor or inventors, although the application can be assigned to another party, such as the employer of the inventor.

A modern patent provides the right to exclude others from making, using, selling, offering for sale, or importing the patented invention. Generally, patents are enforced only through civil lawsuits. Patent licensing agreements are effectively contracts in which the patent owner (the licensor) agrees not to sue the licensee for infringement of the licensor's patent rights. Governments typically reserve the right to suspend or cancel a patent at will.

## Trademark

A trademark (Commonwealth English: trade mark)[1] is a distinctive sign of some kind which is used by a business to identify itself and its products and services to consumers, and to set the business and its products or services apart from those of other businesses. A trademark is a type of intellectual property, and in particular, a type of industrial property.

Conventionally, a trademark comprises a name, word, phrase, logo, symbol, design, image, or a combination of one or more of these elements. There are also a range of non-conventional trademarks which do not fall into these standard categories.

The essential function of a trademark is to uniquely identify the commercial source or origin of products or services, such that a trademark, properly called, indicates source or acts as a badge of origin. The use of a trademark in this way is known as trademark use and a trademark owner seeks to enforce its rights or interests in a trademark by preventing unauthorised trademark use.

## Trade secret

A trade secret is a confidential practice, method, process, design, or other information used by a company to compete with other businesses. It is also referred to in some jurisdictions as confidential information.

The concept is that, sometimes, Company A is more successful than Company B, or is successful at all, not so much due to access to markets, resources, or personnel, but due to special knowledge owned by Company A. If others had access to the same knowledge, then Company A's ability to survive in an otherwise equal marketplace would be impaired. Thus, such secrets are guarded zealously.

The precise language by which a trade secret is defined varies by jurisdiction (as do the precise types of information that are subject to trade secret protection). However, there are three factors that (though subject to differing interpretations) are common to all such definitions: a trade secret is some sort of information that

- (a) is not generally known to the relevant portion of the public,
- (b) confers some sort of economic benefit on its holder (where, note well, this benefit must derive specifically from the fact that it is not generally known, not just from the value of the information itself), and
- (c) is the subject of reasonable efforts to maintain its secrecy.

Trade secrets are not protected by law in the same manner as trademarks or patents. Probably one of the most significant differences is that a trade secret is protected without disclosure of the secret.

# Copyright, Patent, Design and Trademark in Context of Nepal

## Copyright

Copyright is an intellectual property. It is related to literary, artistic, scientific and research works. It protects the authors from unauthorized copying of their works. It extends protection to form or manner of expressing ideas. But the idea itself cannot be copyrighted. The authors are the prime beneficiaries of copyright protection. Technology has greatly broadened the scope of copyright in modern times.

### Copyright Act, 2002

The legal provisions about copyright in Nepal are contained in the copyright Act 2002, which has 43 sections. The Copyright Rules guide its implementation. The salient features of the copyright Act are

#### 1. Copyright Protection (Sec 3)

The Act extends copyright protection to any work, including literary, artistic, scientific and other works, which are original and intellectually presented.

Work has been defined as follows

- a) Book, pamphlet, article, research paper
- b) Drama, lyrical drama, silent acting
- c) Musical works with or without words
- d) Audio-visual works, including movies
- e) Architectural design
- f) Paintings, sculpture, wooden arts, lithography
- g) Photographic works
- h) Photographic works
- i) Drawings, maps, plans, three-dimensional geographical works, topographical and scientific articles and works
- j) Computer programs

#### 2. Non-protection of Copyright (Sec 4)

Copyright cannot be protected for

- a) Ideas, religion, news, concept, principle
- b) Rulings of the courts, administrative decisions
- c) Folklores, folk stories, old sayings
- d) General statistics

#### 3. Economic Beneficiary of copyright (Sec. 6)

The Act vests the ownership of copyright in the author of the work. Exceptions are

- a) Coauthor for joint works
  - b) Persons or institutions commissioning joint works
  - c) Persons or institutions paying remuneration for producing the work
  - d) Publisher for anonymous work until the author is identified.
- ? Registration of work is not essential to enjoy copyright. The copyright author also has ethical rights.

#### **4. Economic Benefits (Sec. 7-13)**

The copyright owner has the following economic benefits

- a) Reproduction of works
- b) Translation of works
- c) Revision of-works
- d) Changes in the form of works
- e) Sale and renting of works
- f) Transfer of copyright
- g) Public shows and broadcasting, etc.

#### **5. Term of copyright (Sec. 14-15)**

The term of copyright granted is the life of the author plus fifty years after death.

- ? For joint authorship, the term of copyright is fifty years from the death of author who dies last.
- ? For anonymous work, the term is fifty years from the date of publication.

#### **6. Transfer of Copyright (Sec. 24)**

Copyright is transferable in whole or in part.

#### **7. Use of Copyright without Permission (Sec. 16-23)**

Copyright materials can be reproduced without permission for:

- a) Personal use
- b) Reference purposes
- c) Teaching purposes
- d) Library and archives purposes
- e) Public knowledge

#### **8. Unauthorized Publication (Sec. 25-26)**

The law prohibits unauthorized publication of work. The following acts are regarded unauthorized publication

- a) Sale of copies of other's work for business purpose to make economic gain without permission.
- b) Gain advantage from the prestige of other's work through advertisement or publicity.
- c) Create work by changing the structure or language of other's work for economic gain.
- d) Gain advantage from imitation or advertisements. Import of unauthorized publication is banned.

## 9. Penalty

Fine ranging from Rs. 10,000 to Rs. 100,000 or six months imprisonment, or both have been prescribed for unauthorized publication. The penalty is double for second and subsequent offences. The unauthorized copies are also confiscated. Compensation can also be claimed by the owner of copyright.

- ? Unauthorized imports are subject to a fine of Rs. 5000 to Rs. 100,000 plus confiscation of copies imported.

## 10. Registration

The Registrar of Copyright has been provided to deal with copyright matters.

## Conclusions

The copyright Act in Nepal lacks effective implementation.

- The consciousness is lacking about copyright in Nepal. Till 1998, a total of 189 books, 204 audio cassettes, 5 films and 9 paintings were registered for copyright.

## 4.2 Copyright Rules 1989

Rules are needed to implement the law. The copyright rules in Nepal were formulated for copyright Act of 1965. Now rules have not been passed as yet

The copyright rules deal with the following aspects :

### 1. Registration and Certificate of Copyright

The format of application and fee has been prescribed for registration of copyright. Copies of the work are also required. The format and fee for certificate are also prescribed.

### 2. Inspection and Copying

Procedures have been laid down for inspection and copy of copyright register.

### 3. Corrections in copyright Register

The Salient provisions in the law about patent are

Corrections in copyright register can be made in respect of Name and address of the author

- Name of publisher of the work
- Name of printer

- Transfer of copyright

#### 4. Nepali Translation

Procedures have been laid down for granting permission for Nepali translation. Format has also been prescribed.

#### 5. Duties, Responsibilities and Powers of the Copyright Advisory Committee

They are as follows

- Give decisions on problems related to any work
- Solve questions related to copyright
- Give decisions on “Yours and mine” type disputes
- Give decisions on plagiarism of work
- Fix number of copies needed for registration of copyright.
- Solve problems related to implementation of Act and rules.

Provisions related to committee meetings have been prescribed.

### Patent, Design and Trademark

Patent, design and trademark are intellectual property. They are the creation of human mind.

The Patent, Design and Trademark Act 1965 (amended in 1987), together with Rules, regulate patent, design and trademark in Nepal.

#### Patent

Patent has been defined as follows

Patent is any new method or way of constructing, conducting or processing any matter or body of matters or any useful invention based on a new principle or formula.

#### 1. Registration

- a) A person should register the right of patent in his name. The term of registration is seven years. It can be renewed for two terms of seven years each (total life of patent cannot exceed 21 years)
- b) Copying of patent is not allowed without the permission of the patentee.
- c) Patent right can be transferred like a movable property. The transfer should be registered.
- d) The application for registration of patent should contain
  - I. Name, address and occupation of inventor
  - II. Manner and nature of right acquired, if applicant is not the inventor
  - III. Manner of producing, using or conducting the patent
  - IV. Principle or formula on which the patent is based.
  - V. Map or drawing of the patent with description



- e) The registered patents should be published, except those needing confidentiality in the national interests.

## 2. Non Registration of Patent

The patent cannot be registered in the following conditions

- a) Already registered in another person's name
- b) Not invented by the applicant or the right to patent not received
- c) Causes adverse effects on health, good conduct or morality or is prejudicial to national interests
- d) Contravenes existing laws of Nepal

## 3. Archives

The drawing or sample of patent should be provided to National Archives.

## 4. Punishment

Infringement of patent laws is subject to fine of upto 1(s. 2,000 and confiscation of articles connected with the offence. Compensation can also be awarded to the aggrieved party.

## 5. Foreign Patents

Patents registered in foreign countries must be registered in Nepal to claim right of ownership.

Patents for Nepalese products must first be registered in Nepal to get foreign registration.

## Design

Design has been defined as follows:

Design means any feature, pattern or shape of a matter prepared and produced in any manner.

The salient legal provisions about design are

### a) Registration

Registration is needed to obtain right to design. A person can prepare the design himself or through other

The term of design registration is five years. It can be renewed for two terms of five years each (total life of design cannot exceed 15 years)

- Use or copying of design is not allowed without the permission of the owner. Permission can be given by agreement of both parties—owner and the person desiring to use.
- Map or drawing of design with description plus four copies should be submitted for registration purposes.
- The registered designs can be published for public knowledge. Complaints should be lodged within 35 days of such publication.

### b) Non Registration of Design

The design cannot be registered in the following conditions

Already registered in another person's name

- Likely to cause damage to the reputation of an individual or an institution
- Causes adverse effects on good conduct or morality of general public.

**c) Infringement of design law is subject to fine upto Rs. 800 and confiscation of articles connected with the offence. Compensation can also be awarded to the aggrieved party.**

#### **d) Foreign Design**

- Foreign design must be registered in Nepal to claim right to ownership.
- Nepalese designs must first be registered in Nepal to get foreign registration.

### **Trademark**

Trademark has been defined as follows:

Trademark is any sign, picture or word or their combination used by a person, firm or company to distinguish its goods and services from those of others.

A registered brand is a trademark.

The salient legal provisions about trademark are

#### **a) Registration:**

Registration is needed to obtain right of trademark. The term of registration is seven years. It can be renewed for unlimited terms of seven years each. It can be cancelled if not used within one year of registration.

- Use or copying of trademark is not allowed without the permission of the owner. Permission can be given by agreement between the owner and the person desiring to use.
- Publication of trademark can be done for public knowledge.

#### **b) Non Registration of Trademark**

The trademark cannot be registered in the following conditions

- Already registered in the another's name; or
- Likely to cause damage to the reputation of an individual or an institution; or
- Likely to harm goodwill of trademark of others; or
- Adversely affects the good conduct or morality of general public; or
- Is prejudicial to national interest.

#### **c) Classification of Goods and Services for Trademark**

- The government can classify goods and services for the purposes of trademark registration.
- Separate applications are needed for trademark registration in each category of goods and services.

- Same trademark can be registered for various classes of goods and services.

**d) Infringement of trademark law is subject to fine of up to Rs. 1000 and confiscation of articles connected with the offence. Compensation can also be awarded to the aggrieved party.**

### **e) Foreign Trademarks**

Foreign trademarks must be registered in Nepal to claim right of ownership

- Trademarks for Nepalese products must first be registered in Nepal to get foreign registration.
- The government has not yet laid down rules to facilitate implementation of the design and trademark act.

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**Source: -**

? Dr. Govinda Ram Agrawal, *Dynamics of Business Environment in Nepal*, Edition 2003