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PROTECTION GRANTED BY IP LAW IN THE ICT INDUSTRY

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Aparrajitha Ariyadasa¹

1. INTRODUCTION

“Reportedly killed Chinese 23-year-old Ma Ailun, after his counterfeit iPhone 4 charger gave him a severe shock. Apple sells its basic name-brand chargers for around \$20, Meanwhile there are millions of counterfeits on the market selling for a dollar or two—a black market.”²

Apple i-phone is an invention. It comes in many colours and has a very smooth surface, shape, texture and size. This is called the trade dress/ industrial design. On the back of the phone, a silver colour apple is embossed which is known as trade mark the words ‘apple’ is referred to as the trade name. Internal hardware of this phone is called integrated circuit. It has an in built memory card called the software solution.

Inventions invaded the fields of agriculture, Engineering, Space, Communication, Information Technology up to replication of human genes. Inventors and governments invested billions of money for research and development. Bill Gates, Mari Curi, John loggy bared etc. became billionaires because of their inventions.

2. WHAT IS IP LAW IN SL PERTAINING TO THE ICT INDUSTRY?

Inventions, Integrated circuits/ Layout designs invented words and trade names, Industrial designs, literary and artistic work, Related rights such as Broadcasters rights, rights of broadcasting organizations and even invented characters like aunt Sibils “Sooththara Puncha”

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² A.Pasick, Ain't Nothing Like The Real Thing: Deadly fake iPhone charger accidents continue to plague thrifty users, News Article, 19.07.2013, <http://qz.com/106146/why-are-fake-iphone-chargers-causing/> accessed on 22.07.2013.

and Walt Disney's "Donald Duck" are the creations generated by the human intellect the intangible personal property.³ These are called Intellectual Property (IP).

Turning point on IP Law of Sri Lanka was the Code of Intellectual Property Act No 52 of 1979(the Code)⁴ which has followed the WIPO Model Law in the last two decades with a many success⁵. After Sri Lanka became a party to the World Trade Organization, it was under obligation to update the IP Law within the frame work of the Agreement on Trade Related Aspects on Intellectual Property Rights. Thereafter the existing statute in Sri Lanka which governs this Intangible Property is the Intellectual Property Act No 36 of 2003(the Act) came in to existence.

In the ICT industry, computer software, computer designs, web designs are protected under copyright, invented words or marks on the computers and computer accessories are protected under trade marks, computer hardware are protected by patents, some of the electronic devices are protected under integrated circuits and layout designs. Webcasting and broadcasting of programmes are protected under related rights under the IP Act. IP Rights are divided in to two for easement. 1. Industrial Property 2. Copy Right. Patents, trademarks, Industrial Designs and Integrated circuits come under Industrial Property. Patentable inventions are protected under Law of Patent which is described comprehensively by Part IV of the Act.

3. PROTECTION GRANTED FOR IT UNDER SRI LANKAN IP LAW.

3.1-Protection for patentable inventions (patents rights)

Invention is ['an idea of an inventor which permits in practice the solution to a specific problem in the field of technology']⁶. Patent is the protection given by the government to an Invention granting the exclusive rights to exploit the patented invention to assign or transmit the patent and to conclude license contracts⁷. Patents are granted for products and processes.⁸ "Safety Tea Pack" is a product⁹ and "LAWS" which is a process¹⁰ which is already reregistered in National Intellectual Property Office of Sri Lanka (NIPO). There are many

³ H. Cabral, "Inventions and Patents: an overview," [Colombo], pg2

⁴ D.M.Karunaratne, An Introduction to the Law of Copy Right and Related Rights in Sri Lanka, [Sarvodaya Vishwalekha Publication], pg.9

⁵ Ibid

⁶ Section 62(1) of Intellectual Property Act No 36/2003 Sri Lanka (IP Act)

⁷ Certificate of Patent dated 18.05.1998 for the invention Safe Tea Pack

⁸ Ibid Section 62(2)

⁹ Ibid Section 84 and Patent certificate number 10694 of National Intellectual Property Office of Sri Lanka(NIPO)

¹⁰ Patent Certificate number 15632

inventions which hold patents in the world such as Computers, joy sticks, USB Drives, computer mice, mobile equipments etc. Patents are granted after fulfilling the required procedure.¹¹

Even though Sri Lankan IP Law does not safe guard Software patents, USA grants protection for software patents.

3.1.(a) software patents

On 21 May 1962, a British patent application entitled "*A Computer Arranged for the Automatic Solution of Linear Programming Problems*" was filed. The invention was concerned with efficient memory management for the simplex algorithm, and could be implemented by purely software means. The patent was granted on August 17, 1966 and seems to be one of the first software patents¹²

Ever since software became generally patentable in the United States in 1995, the wisdom of such a change has been widely debated. Proponents of the change argue that there is no statutory reason to exclude software (or computer-implemented) inventions from patentability, and also that patenting software has social benefits from disclosure and from the fact that it enables software components to be reused by others.

Invented words and invented signs are also protected under IP Act which is having a great relevance in the ICT industry.

3.2-protection for trademarks and trade names

*'An invented word is allowed to be registered as a trade mark not as reward on merit, but because its registration deprives no member of the community of the rights which possesses to use the existing vocabulary as he pleases'*¹³

Trademarks and Trade names are protected under the Law. A mark can be a trade mark or a service mark¹⁴. Trade Names even without registration are protected by the Act¹⁵ Domain

¹¹ Ibid Section (71)-(79)

¹² http://en.wikipedia.org/wiki/Software_patent

¹³ Shaw Wallace & Co. Vs. The Egyptian Phosphate Company.Ltd (1923)25 N.L.R.75

¹⁴ Ibid Section (101)

names will serve as trade marks or service marks. Internet users can be misled by functions of similar domain names with hyphen, space etc.¹⁶



Figure 1: Above picture shows popular and registered trade marks in the ICT industry in the world.

Signs are allowed for registration in Sri Lanka,¹⁷ after going through a procedure.¹⁸ Certificate is issued upon the registration.¹⁹ Priority is given on first come first served basis.²⁰ It is understood by the Law the admissibility of marks shall be considered.²¹ There is a special Temporary protection and priority is given to a mark exhibited in an International Exhibition.²² A mark is defined in Section 102 (3) of the Act. Industrial Design is also a compulsory element in the ICT industry.

3.3. Protection for Industrial Designs/trade dress

¹⁵ Ibid Sec.144

¹⁶ S.D.B.Abeyratne, “Introduction to Information and Communication Technology Law”. (2008) published by S.D.B.Abeyratne pg.36

¹⁷ Ibid Sec.06

¹⁸ Ibid Chapter 109-113

¹⁹ Ibid Section 109-114

²⁰ Ibid Section (107)

²¹ K.I.Kamilas Perera Vs.Thudugala Mudalige Anura Chandralal Thudugala and another CHC 04/2003, held on 8.8.2003 and K.T.Chithrasiri, Decisions on Intellectual Property Issues(2005) Vishwalekha Publishers, , pg108

²² Ibid Section(108)



fig: 2-Difference between I phone and Nokia

Apple is one of the most popular trade marks in the world. It has his own computer devices such as iphones, ipads, laptops etc. In this Picture, the i-phone is identical because its color, shape, structure and texture. This is called Industrial design. It is described further by the section 30 of the IP Act.

Novel Industrial designs²³ which are not anticipated by prior art are protected.²⁴ Ownership of an industrial design is with the owner or the joint owners who make the application first to the NIPO²⁵ and go through a registration procedure²⁶ If an employee creates a design, the employee is entitled to a equitable remuneration²⁷. In USA, Computer fonts have been registered as industrial designs .

i-Phone again cannot be used without the functional hardware in it. It is called Layout Design of Integrated Circuit. These inventions are also protected under IP Act.

3.4 Integrated circuits

²³Ibid Sec. 29 (a)

²⁴ Ibid section 31

²⁵ Ibid section 32

²⁶ Ibid sec 36-44

²⁷ Ibid 34

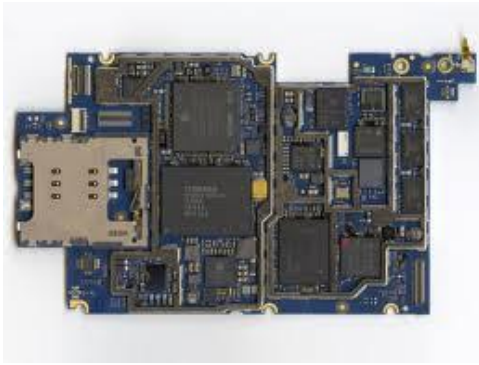


Figure -3: Integrated circuit in a I Phone²⁸

Integrated circuit is defined in the Act in Section 159. The Ownership of a layout design of an Integrated circuit is with the owner or the co- owners²⁹. Owner of the integrated circuit has the exclusive right to exploit it for ten years³⁰ and this shall be registered in NIPO as per a specific procedure³¹. Inventions are consisting of literary and artistic work such as, Software of the i-phone. Protection under IP Act over copy right is discussed in the next paragraph.

3.5-Copyrights

Copyright protection is granted for the computer programmes under the present IP Act.³² “Computer programmes, both in source code and object code are protected under literary work” under the Berne Convention of 1971.³³

Accordingly, '**Computer**' means an electronic or similar device having information processing capabilities³⁴; in the meantime it could be suggested that the definition of the Computer should have been modified as a “an electronic or similar device having information processing and transmission capabilities” because of the latest technological advances such as sophisticated mobiles, -----

²⁸ https://www.google.lk/search?num=100&rlz=1C1CHJW_enLK526LK526&q=pictures+of++the+circuit+in+i+phone&oq=pictures+of++the+circuit+in+i+phone&gs_l=serp.12...360836.378992.0.381186.47.45.2.0.0.0.318.6677.22j5j17j1.45.0...0.0..1c.1.20.serp.tq5iYZthiDU, Accessed on 22.07.2013

²⁹ IP Act sec.146(1)

³⁰ Ibid Sec.149

³¹ Ibid 150,151

³² Section 5 defines the “Computer” and the “Computer Programme”

³³ Article 10 of the Trade Related Aspect of Intellectual Property Rights (TRIPS)

³⁴ Section 05 of the IP Act of Sri Lanka 2003.

'**Computer programme**' is a set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a medium that the computer can read, of causing a computer to perform or achieve a particular task or result. However, this interpretation can bring unnecessary disputes in future unless “the electronic signals” are included.

Source code and the object code are found in the computer programmes. Chris reed defines Source code as a version of a programme, using *alphanumeric* symbols.

Computers cannot process the source code directly without translating the same into a machine- readable form (object code) after compiling with a particular computer language compiler. Source Code is very important in further developments in an existing computer programme.

Object code comprises of a long series of ones and zeroes (on and off switch modes) .instructions to process data. According to **Search Soa.com** *'Source code and object code refer to the "before" and" after" versions of a computer programme that is compiled before it is ready to run in a computer. The source code consists of the programming statements that are created by a programmer with a text editor or a visual programming tool and then saved in a file³⁵.*

Data bases are protected under copyright under derivative works³⁶ disk to disk copying, Downloading imaged from the internet, cover pages, creating images from the existing photos in the internet, caching, sniffing, framing, linking, spamming, junk mail, mouse trapping, cookies, phishing. Are violations of IP Rights in the cyber space.

caching

In computing caching is a component that stores data so future requests for that data can be served faster; the data stored in a **cache** might be the results of an earlier computation, or the duplicates of data stored elsewhere.

Sniffing

Browser detection (also known as **Browser sniffing**) is a set of techniques used in websites and web applications in order to determine the web browser a visitor is using, and to serve

³⁵ S.D.B.Abeyratne, “Introduction to Information and Communication Technology Law”. (2008) published by S.D.B.Abeyratne pg.15

³⁶ Section 7 (1) b of the IP Act.

browser-appropriate content to the visitor. This practice is sometimes utilized to circumvent incompatibilities between browsers due to misinterpretation of HTML, Cascading Style Sheets (CSS), or the Document Object Model (DOM).

While the World Wide Web Consortium maintains up-to-date central versions of some of the most important Web standards in the form of recommendations, in practice no software developer has designed a browser which adheres exactly to these standards; implementation of other standards and protocols, such as SVG and XMLHttpRequest, varies as well. As a result, different browsers display the same page differently, and so browser sniffing was developed to detect the web browser in order to help ensure consistent display of content. It's also used to detect mobile browsers and send them mobile-optimized websites.

Cookies

By sending cookies one can violate recipient Intellectual property Rights. It can be used to get know whether the user is logged in or out and which the account he is log with in.

Framing

In the context of a web browser, a **frame** is a part of a web page or browser window which displays content independent of its container, with the ability to load content independently. The HTML or media elements that go in a frame may or may not come from the same web site as the other elements of content on display

Hyperlink

A hyperlink points to a whole document or to a specific element within a document, and is a reference to data that the reader can directly follow either by hovering.

Spamming

To send unsolicited messages, especially advertising, as well as sending messages repeatedly on the same site, we use spamming as the electronic messaging systems.

Phishing

To acquire sensitive information such as user names, pass words and credit card details in electronic communication phishing use as a attempt

The original owner gets the protection³⁷ for his computer programmes under the IP Act, ³⁸duration of Copy Right,³⁹Moral Rights,⁴⁰economic Rights,⁴¹ to the author or the co-authors⁴²and Acts of fair use⁴³ are discussed in the same. In the case *Sakisanda Eliyas*⁴⁴ describes the work protected under the Law⁴⁵and presumption of Authorship.⁴⁶ *SHA FM* Case proves that the right of a creative work of an employee belongs to the employer even it's a creation of the employee⁴⁷. Similarly IP Protection is granted to Computer programmes.

When considering the Law, the owner's/co-owners of the computer programmes bare the exclusive rights⁴⁸ to assign, license, renunciation, exploit, reproduce and sell the IP. These Properties⁴⁹ can be used upon the consent of the owner⁵⁰ or the co-owners. Moreover Derivative work⁵¹ of the Performer.⁵²Performers,⁵³ producers of sound recordings,⁵⁴ rights of broadcasting organizations⁵⁵ are protected by the Law. Copy rights protection given to related rights⁵⁶ is 50 years.⁵⁷

Even though the owners of IP are granted protection under Sri Lankan Law, there are instances where the infringement takes place. Therefore, there should be a efficient enforcement procedure.

³⁷ *Lalitha Sarathchandra Vs. Upul Shantha Sannasgala*, K.T.Chithrasiri, Decisions on Intellectual Property Issues(2005) Vishwalekha Publishers, pg126

³⁸ Sec.10 of IP Act

³⁹ Ibid Sec.13

⁴⁰ Ibid Sec.10

⁴¹ Sec.9 of IP Act

⁴² Ibid Sec.14

⁴³ Ibid.Sec.11

⁴⁴ *Gammanapatabendige Jo Abeywickrama and another Vs.Kapila Thissa Kumara Kothalawala*, CHC 15/2003, K.T.Chithrasiri, Decisions on Intellectual Property Issues, (2005), Vishwalekha Publishers, pg118,Held on 12.02.2004,

⁴⁵ Ibid Sec.6

⁴⁶ Ibid Sec.15

⁴⁷ *Asia Broadcasting Corp Pvt Ltd Vs. N.H.V.Sanka Amarajith Perera*, CHC/ 13/2003, Decided on 30.01.2004, IP Act Sec.34, 146 (2),

⁴⁸ Sec.102 (1),(2), 148 (1),

⁴⁹ Ibid Sec.145,47,59

⁵⁰ Ibid 121 (2)

⁵¹ Ibid Sec.7

⁵² IP Act Sec

⁵³ Ibid Sec.17

⁵⁴ Ibid Sec.18

⁵⁵ Ibid Sec.20

⁵⁶ Ibid Chapter II

⁵⁷ Ibid Sec.17 (4), 20 (2)

4. ENFORCEMENT UNDER THE IP ACT AGAINST THE INFRINGEMENT

If Literary work⁵⁸ Patent, trade mark or a industrial design is infringed; willfully,⁵⁹ or make false representation⁶⁰ or un lawful disclosure regarding the Patent during the course of employment or after,⁶¹ Falsification of entries,⁶² fraudulent application of trademarks, sale or importation of goods under the trade mark⁶³ and false trade descriptions⁶⁴, are offenses which are punishable as per the Law⁶⁵. IP protection is widened even for disclosure against trade secrets and information of a trade.⁶⁶ Injunctive relief, Claiming damages and legal interest as well as criminal Sanction⁶⁷ can be obtained against the infringers to protect the rights of owners and the third parties.

Intellectual Property⁶⁸ can be nullified, cancelled⁶⁹ or renounced⁷⁰ Assigned⁷¹ by “any person showing a legitimate interest”⁷² and can prevent exploiting a Patent⁷³ upon an application. Burden of proof is with the infringer⁷⁴ of a IP case.

Industrial designs are not registerable if they harm, mislead the public or not in public order⁷⁵. If it is a false owner, the Law allows to assign,⁷⁶ renunciation,⁷⁷ or nullify⁷⁸ the said design

The IP Act prevents registration of industrial designs⁷⁹ and marks which are not allowed to register.⁸⁰ Act specifically prevents the registration of marks or industrial designs which

⁵⁸ IP Act Sec.178

⁵⁹ Ibid section 181, 184, 179

⁶⁰ Ibid section 182,185,180

⁶¹ Ibid section 183

⁶² Ibid Sec.177

⁶³ Ibid Sec.

⁶⁴ Ibid Sec.189

⁶⁵ Ibid Sec.194-202

⁶⁶ Ibid Sec.160 (6)

⁶⁷ Ibid Sec.22,22(1)-(2)a-g,156, 23 (1),157,158,170,178,184,186,187,179,156,157,181,190-194, 203

⁶⁸ IP Act Sec 62 (2) d,134,135,60,61,142(9)

⁶⁹ Ibid 154,136,137,142 (8),

⁷⁰ Ibid Sec.133

⁷¹ Ibid Sec.68

⁷² H.Cabral, Intellectual Property Law in Sri Lanka,(2004) published by H.Cabral pg.124, St.Regis Packaging Pvt. Limited Vs. Ceylon Papersacks Ltd,(2001)1 SLR 37

⁷³ Ibid pg.135, Linocell Limited Vs.Cocos Lanka Exports (Pvt) Ltd (HC/CIVIL/30/2001)

⁷⁴ Ibid Sec.86

⁷⁵ Ibid Sec.29(b)

⁷⁶ Ibid Sec.33

⁷⁷ Ibid Sec.59

⁷⁸ Ibid Sec.60

⁷⁹ 29 (b)

⁸⁰ IP Act sec.103

violates third party rights⁸¹Make confusion with respect to another enterprise⁸²and mislead the public. (This is confirmed by the case *Cocacola vs. Mycola*,⁸³)make any damage to properties or the good will(dilution) of a third party,⁸⁴,misleading the Public,⁸⁵ make a discredit to third parties,⁸⁶ to safe guard the public domain.

Fair use⁸⁷ and good faith⁸⁸for archiving purposes are allowed by law in “SAKI SANDA ELIYAS” and held that the owner of a audio visual product is the Producer⁸⁹ Unlike other property acts, the beauty of the Sri Lankan IP Act is that it grants rights to an aggrieved party to take legal action against infringement.⁹⁰this is a intelligent step to safeguard the public domain.

Native cultures, native science, songs etc. are protected by the Act. Societies can be formed for the betterment of IP⁹¹

The performers are protected under the IP Act.⁹²

Fair use concept is be used n the IP Law,⁹³to justify the infringement. Concept of unfair competition,⁹⁴descriptively interprets that fair competition is allowed by the third parties. Doctrine of exhaustion⁹⁵ and parallel Importation also limit the owner’s rights. Not prohibiting Reverse engineering avoid the infringement of patents.⁹⁶ Public can access to the same generic of the patented drug at a lower price.

Even the infringer can get a Declaration of nullity and declaration of non infringement for non infringement by the Law by Sec. 154(4)3it is confirmed in the ICC⁹⁷

⁸¹ Ibid Sec.104

⁸² Ibid Sec.160 (2)

⁸³ The Cocacola Company & another Vs.Pet Packaging Provate Limited CHC 07/2004 Decided on 16.12.2004,(unreported)

⁸⁴ IP Act 160 (3)

⁸⁵ Ibid Sec.160 (4)

⁸⁶ Ibid Sec.160 (5)

⁸⁷ Ibid Sec.11

⁸⁸ Ibid Sec.8,21,22(2)c

⁸⁹ Ibid Sec.14 (5)

⁹⁰ Ibid sec.22 (3)

⁹¹ Ibid Sec.24(1)

⁹² Ibid Sec.27

⁹³ Ibid Sec.12, 24 (2)

⁹⁴ Ibid Sec.160

⁹⁵ Bata Limited Vs. Anil Harishchandra case No.01/2003 CHC Colombo decided on 20.01.2004

⁹⁶ Viagra VS. Edagra case in india<http://www.cipla.com/CiplaSite/Media/PDF/News-Archives/The-Herald-02-12-2000.pdf?ext=.pdf>, accessed on 27.07.2013, accessed on 27.07.2013.

⁹⁷ David Peiris Motor Compay Limited Vs.ICC Development International ltd

Punishments to false trade descriptions, forges (sec186), for misleading and forging the public.

Injunctive relief is not granted unless plaintiff proves primafacea case, irreparable loss, if the facts are suppressed, balance of convenience Eg. Sha FM case

Dishonest trade practices are prevented by the Act by unfair competition law to safe guard the consumers by confusion, damage, dilution, misleading and discrediting.⁹⁸ All the above mentioned steps prove that the Sri Lankan IP Act has taken steps to safeguard the public domain by protecting humans, animals and public interest. Next paragraph will be concluding the essay with suggestions.

8. CONCLUSION AND SUGGESTIONS

IT and IP are two bodies of law that were once strangers are now becoming intimate bed fellows. IP Act of Sri Lanka provides the freedom for ICT professionals to safe guard their rights. In the ICT point of view the IP Act seem to be a wholesome piece of legislation eventhough there are hiccups in some interprtations. Strict enforcement procedure by civil and criminal litigation will grant more protection as well as aggrieved parties. It is further confirmed that the IP Act Addresses the Rights of Broadcasters and performers.

IP Act Act limits Inventor's monopoly by introducing doctrine of fair use, compulsory licensing, parallel import, unfair competition, declaration of nullity, protection of geographic indications, protection for folklore and traditional knowledge etc. to safe guard the public interest and Social Justice.

IP Act is not comprehensive regarding the protection of programme carrying signals, protection of contents for 3G Mobile Broadcasting, satellite Broadcasting and WIFI Webcasting as related Rights. In the Digital era, there is a necessity to address the above matters comprehensively. There is a lacuna in the protection and enforcement of Rights of Folklore and indigenous cultures. Therefore ICT Applications pertaining to falk songs and folklore is left aside. There should be safety measures to prevent the folk songs to be re-mixed.

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⁹⁸ Ibid Sec.160

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