

Intellectual Property

Intellectual property is a broad categorical description for the set of intangible assets owned and legally protected by a company or individual from outside use or implementation without consent. An intangible asset is a non-physical asset that a company or person owns.

The concept of intellectual property relates to the fact that certain products of human intellect should be afforded the same protective rights that apply to physical property, which are called tangible assets. Most developed economies have legal measures in place to protect both forms of property.

KEY TAKEAWAYS

- Intellectual property is an umbrella term for a set of intangible assets or assets that are not physical in nature.
- Intellectual property is owned and legally protected by a person or company from outside use or implementation without consent.
- Intellectual property can consist of many types of assets, including trademarks, patents, and copyrights.
- Intellectual property infringement occurs when a third party engages in the unauthorized use of the asset.
- Legal protections for most intellectual property expire after some time; however, for some (e.g., trademarks), they last forever.

Understanding Intellectual Property

Companies are diligent when it comes to identifying and protecting intellectual property because it holds such high value in today's increasingly knowledge-based economy. Also, producing value intellectual property requires heavy investments in brainpower and time of skilled labor. This translates into heavy investments by organizations and individuals that should not be accessed with no rights by others.

Extracting value from intellectual property and preventing others from deriving value from it is an important responsibility for any company.

Intellectual property can take many forms. Although it's an intangible asset, intellectual property can be far more valuable than a company's physical assets. Intellectual property can represent a competitive advantage and as a result, is fiercely guarded and protected by the companies that own the property.

Types of Intellectual Property

Intellectual property can consist of many types of intangibles, and some of the most common are listed below.

Patents

A patent is a property right for an inventor that's typically granted by a government agency, such as the U.S. Patent and Trademark Office.¹ The patent allows the inventor exclusive rights to the invention, which could be a design, process, an improvement, or physical invention such as a machine. Technology and software companies often have patents for their designs. For example, the patent for the personal computer was filed in 1980 by Steve Jobs and three other colleagues at Apple Inc.²

Copyrights

Copyrights provide authors and creators of original material the exclusive right to use, copy, or duplicate their material. Authors of books have their works copyrighted as do musical artists. A copyright also states that the original creators can grant anyone authorization through a licensing agreement to use the work.³

Trademarks

A trademark is a symbol, phrase, or insignia that is recognizable and represents a product that legally separates it from other products. A trademark is exclusively assigned to a company, meaning the company owns the trademark so that no others may use or copy it. A trademark is

often associated with a company's brand. For example, the logo and brand name of "*Coca-Cola*," is owned by the Coca-Cola Company (KO).⁴

Franchises

A franchise is a license that a company, individual, or party—called the franchisee—purchases allowing them to use a company's—the franchisor—name, trademark, proprietary knowledge, and processes.

The franchisee is typically a small business owner or entrepreneur who operates the store or franchise. The license allows the franchisee to sell a product or provide a service under the company's name. In return, the franchisor is paid a start-up fee and ongoing licensing fees by the franchisee. Examples of companies that use the franchise business model include United Parcel Service (UPS) and McDonald's Corporation (MCD).

Trade Secrets

A trade secret is a company's process or practice that is not public information, which provides an economic benefit or advantage to the company or holder of the trade secret. Trade secrets must be actively protected by the company and are typically the result of a company's research and development (which is why some employers require the signing of non-disclosure agreements, or NDAs).

Examples of trade secrets could be a design, pattern, recipe, formula, or proprietary process. Trade secrets are used to create a business model that differentiates the company's offerings to its customers by providing a competitive advantage.

International Organisation

There are different subject matters of intellectual property like Patents, Copyright, Trademarks, Industrial design, Plant Varieties etc. Need for protection in these different subjects arose in different periods. These are reflected in different treaties. Agreement on TRIPS, under the aegis of WTO, remains the most influential, comprehensive and inclusive of all. Other treaties are covered here for background information.

There are two main bodies – World Intellectual Property Organization (WIPO) under UN which administers 1-7 treaties mentioned below. the 8th treaty is independent of any organization. Another relevant body is the World Trading Organization. 9th (or TRIPS) is administered by the WTO. the 10th treaty comes under UNESCO.

Paris Convention for Industrial Property, 1883

Since it deals only with Industrial property, it covered only Patents and Trademarks. It was among the first treaties to recognize various principles of international trade like National Treatment, Right of Priority, Common rules etc.

The relevant provisions related to National Treatment are contained in Articles 2 and 3 of the Convention. Under National Treatment Provisions, the convention provides for this in respect of Industrial property security, for each Contracting State shall grant nationals of other Contracting States the same protection it grants to its own nationals. Non-Contracting States nationals are only approved to seek national care under the convention should they be domiciled or have a true and successful commercial or industrial establishment in a Contracting State;

The “right of priority” means that, in the light of a common application for an industrial property right submitted by the individual applicant in one of the Member States, the same applicant, or his successor in title, may seek protection in all other Member States within a defined period of time (six or 12 months). Those subsequent requests are deemed to have been filed on the

same day. Article 4 of the convention contains the “*Right to Priority*” clause.

Article 4b(5) provides for a special feature of the patent independence principle for invention. The provisions require that a patent issued in respect of an application stating the priority of one or more international applications should be granted the same period as would have been granted under national legislation if no priorities had been asserted.

Bern convention for literary and artistic works, 1886

It provided for a copyright system. It doesn't provide for any formality to claim protection. Protection is automatically accorded to any creation, provided work is original and other conditions under the treaty are fulfilled. It means that your work, if original, is already protected. You can claim that you have copyright.

Madrid Agreement, 1881

Governs the international recognition of trademarks. Made international filings easy and cheap.

Patent cooperation treaty, 1970 –

It was earlier not possible for an entity to claim protection in different countries by single application. This was made possible as it aimed for co-operation and it was open for all parties to the Paris convention.

The Treaty on Patent Cooperation is an agreement for international patent cooperation. The most critical development in international collaboration in this area after the adoption of the Paris Convention itself is also spoken of as being. The PCT does not allow for the grant of “*international patents*”. The duty and responsibility for granting patents remains solely in the hands of the patent offices of the countries in which protection

is obtained (the “*designated offices*”). The PCT is not conflicting with, but is simply complementing the Paris Convention. Indeed, under the Paris Convention, it is a special agreement open only to States that are already parties to that convention.

The Features of The Patent Corporation Treaty (PCT) are the following:

The act establishes an international structure allowing a single application (the “*international application*”) to be lodged with a single Patent Office (*the “receiving Office*”) in one language in each of the countries party to the PCT designated by the applicant (“*designates*”) in its submission. For the smooth running of the procedures, the act provides for systematic review by a single Patent Agency, the receiving Agency, of the foreign application.

The Patent Corporation Treaty refers each international application to an international search resulting in a report referencing the applicable prior art (mainly published patent records relating to previous inventions) which may have to be taken into consideration when determining if the invention is patentable. The act also provides for centralised international publication and correspondence to specified offices of international applications with relevant international search reports.

One of the most critical checks in this act is that it provides an opportunity for an international preliminary review of the international application, which provides the applicant and ultimately the offices which have to determine whether or not to issue the patent, with an opinion as to whether the asserted invention satisfies certain international patentability requirements.

trade names (indications of manufacturing or commercial activity),

Budapest Treaty of 1980 –

It made possible patenting for microorganisms. Claimant is required to deposit his invention on micro-organisms with an Authority – ‘International depository of Micro-Organisms’ under WIPO. He shall make all the adequate disclosures.

Trademark Law Treaty, 1994 – Harmonized administrative procedures and introduced ‘service marks’ in ambit of trade marks. Earlier trademarks were accorded only to goods.

The Hague agreement concerning the International Deposit of ‘Industrial Design’ 1925 – It created the International Design Bureau of WIPO.

International Union for protection of new varieties of plants, 1961 – This provides breeders and farmers the right to new plant varieties.

Agreement on Trade Related Aspects of Intellectual Property – It is a landmark and most comprehensive treaty on Intellectual property. While earlier treaties’ subject matters were specific, TRIPS deal with 8 kinds of property rights – Patents, Trademarks, trade dress, Copyrights, Industrial Designs, Plant Varieties, Integrated Circuits and layouts, and Geographical Indication. Further, almost all countries are party to TRIP. In earlier treaties only limited countries participated. It also provides an enforcement mechanism which was not available in WIPO treaties. It mandated all member countries to make their domestic laws compliant to TRIPS. India passed certain laws and amended others. India’s IPR regime now stands fully compliant to TRIPS. For E.g. India amended patent law in 2005 to provide ‘product’ patent protection. Earlier protection was available only to ‘processes’.

TRIPS were the results of discussions held in the Uruguay round which led to the formation of WTO. This treaty is an offshoot of the General Agreement on Trade in Goods (GATT). This treaty provided a robust Dispute Resolution Mechanism and stringent penal provisions under auspices of WTO.

World Intellectual Property Organization (WIPO)

The World Intellectual Property Organization (WIPO) is an international body that defends the interests of creators and proprietors of intellectual property worldwide. It was adopted at Stockholm on 14 July 1967 and enforced on 26 April 1970. On 1 May 1975 India became an official WIPO member. The origin of the WIPO dates back to 1884 when the Paris Convention entered into force with 14 Member States establishing an International Bureau for the performance of administrative tasks, such as organising Member States' meetings.

Aim and Objectives of WIPO

WIPO came into existence with two main objectives, namely for the advancement of intellectual property rights worldwide and to safeguard administrative cooperation between the intellectual property Unions defined by the WIPO-administered Treaties. The aims of the WIPO are to:

1. Encourage the defence of intellectual property rights by supporting new treaties;
2. To help in the modernisation of domestic legislation;
3. Gather and provide technical assistance and information
4. Ensure cooperation between member countries by centralising the management of accords.
 - The Paris Convention for the Protection of Industrial Property
 - The Paris Convention applies to commercial matters and in the broadest sense, including patents, trademarks, product

designs, utility models (a type of '*small-scale patent*' laid down by the laws of some countries), service marks,

Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The Uruguay Round of multilateral trade negotiations under the General Tariff and Trade Agreement (GATT) was concluded on 15 December 1993. The agreement creating the World Trade Organization (WTO Agreement) was implemented in Marrakech on 15 April 1994. The negotiations involved, for the first time, debates within the GATT on aspects of foreign trade's intellectual property rights. The outcome of those agreements, set out in an appendix to the WTO Agreement, was the Trade-Related Aspects Agreement on Intellectual Property Rights (TRIPS). Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the most detailed and important international IPR agreement. The agreement is automatically binding on WTO member countries. The agreement includes most forms of intellectual property, such as patents, copyrights, trademarks, trade secrets, geographical indications, industrial designs.

The Basic Principles of the Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The TRIPS Agreement provides that, for the purposes of the agreement, the term 'intellectual property' applies to all types of intellectual property protected by Sections 1 to 7 of Part II of the TRIPS Convention, including copyright and related rights. The fundamental principle regarding the existence and scope of TRIPS responsibilities is that the members should apply the provisions of the agreement and extend the care provided for in the agreement to the nationals of other members. A '*national*' means natural or legal persons liable for immunity where all members of the World Trade Organization are also bound by the Paris, Berne and Rome Conventions and the

Washington Treaty on Intellectual Property in relation to the integrated circuits.

National Treatment – In accordance with the provisions of the Paris, Berne, Rome Convention and the IPIC Treaty, TRIPS sets out the concept of national treatment which requires the Member to grant care to nationals of other Member States, the latter specified, as provided for in the agreement. Exceptions provided for in the applicable treaties are to be followed under the TRIPS Agreement. The definition extends to both intellectual property and copyright protection. As regards freedoms, the responsibilities extend only in the case of performers, phonogram manufacturers and broadcasting organisations in respect of those rights provided for under the convention

Most Favoured Nations- TRIPS Agreement introduces the concept of the most favoured nation historically not defined in the sense of multilateral intellectual property rights. This principle stipulates that the nationality of all other Members shall be granted immediately and unconditionally, with certain specified exceptions, to any benefit, privilege or immunity granted by the member to another National. As is the case with national procurement, from this definition is removed the method for the acquisition or protection of intellectual property rights provided for in multilateral agreements concluded under the auspices of WIPO.

Protection of Existing Subject Matter- the TRIPS Agreement includes clear rules on the impact on the Member of the Agreement on the issue of intellectual property rights on the date the agreement was implemented. While the agreement does not give rise to obligations for the Member concerned with regard to acts occurring prior to the date of application of the Agreement (Article 70.1), the agreement gives rise to obligations existing and protected on the date of application of the agreement or fulfilling the criteria for protection thereafter in relation to all the subject matter. Part II of the TRIPS Agreement sets basic

requirements about the availability, scope, and usage of intellectual property rights. This Section covers eight parts relating to copyright, trademarks, geographical indications, industrial designs, patents, and integrated circuit layout designs, defence of confidential knowledge and enforcement of anti-competitive practices in contract licences, respectively.

General Agreement on Tariffs and Trade (GATT)

was an international trade agreement signed in 1947. 23 nations were signatories of this trade agreement. GATT came into effect on January 1, 1948. The purpose of GATT was to liberalise trade by reducing tariffs and reducing quotas among member countries. The member nations had to remove all the trade discriminations. The 7 rounds of negotiations from 1947 to 1993 reduced average tariffs on industrial goods from 40% to 5%. The steps taken at GATT led to economic globalization some of the reasons are listed below.

1. GATT lacked a coherent institutional structure. World Trade Organisation (WTO) incorporates the principles of GATT and provides a more institutional framework for implementing and extending them.
2. GATT was ad hoc and provisional in nature, it was never ratified in the parliaments of member countries.
3. WTO and its agreements are permanent, it has a strong legal basis, and member countries have ratified it in their parliaments.
4. GATT dealt with just trade in goods, WTO covers services and intellectual property as well.
5. WTO dispute settlement is faster, its rulings can never be blocked.

World Trade Organization (WTO)

is an intergovernmental organization that regulates and facilitates international trade.^[6] With effective cooperation in the United

Nations System,^[7] governments use the organization to establish, revise, and enforce the rules that govern international trade.^[6] It officially commenced operations on 1 January 1995, pursuant to the 1994 Marrakesh Agreement, thus replacing the General Agreement on Tariffs and Trade (GATT) that had been established in 1948. The WTO is the world's largest international economic organization, with 164 member states representing over 98% of global trade and global GDP.^{[8][9][10]}

The WTO facilitates trade in goods, services and intellectual property among participating countries by providing a framework for negotiating trade agreements, which usually aim to reduce or eliminate tariffs, quotas, and other restrictions; these agreements are signed by representatives of member governments^{[11]:fol.9–10} and ratified by their legislatures.^[12] The WTO also administers independent dispute resolution for enforcing participants' adherence to trade agreements and resolving trade-related disputes.^[13] The organization prohibits discrimination between trading partners, but provides exceptions for environmental protection, national security, and other important goals.^[13]

The WTO is headquartered in Geneva, Switzerland.^[14] Its top decision-making body is the Ministerial Conference, which is composed of all member states and usually convenes biennially; consensus is emphasized in all decisions.^[15] Day-to-day functions are handled by the General Council, made up of representatives from all members.^[16] A Secretariat of over 600 personnel, led by the Director-General and four deputies, provides administrative, professional, and technical services.^[17] The WTO's annual budget is roughly 220 million USD, which is contributed by members based on their proportion of international trade.^[18]

Studies show the WTO has boosted trade and reduced trade barriers.^{[19][20][21][13][22][6]} It has also influenced trade agreement generally; a 2017 analysis found that the vast majority of preferential trade agreements (PTAs) up to that point explicitly reference the WTO, with substantial portions of text copied from WTO agreements.^[23] Goal 10 of the United Nations Sustainable Development Goals also referenced WTO agreements as instruments of reducing inequality.^[24] However, critics

contend that the benefits of WTO-facilitated free trade are not shared equally.^{[25][26]}

Importance of Securing Intellectual Property Rights

When you have a great idea for a product or service, there will always be people who will want to duplicate your success and sell your ideas as their own. Depending on individual circumstances, you can use patents, trademarks, or copyrights – all of which cover different areas of intellectual property. This way, you can prevent competitors from using your ideas for their own profit without your consent. Intellectual property (IP) protection applies to businesses of all sizes; even huge corporations have had their ideas infringed upon and have made multi-million dollar lawsuits; just look at the on-going disputes between Apple and Samsung over their smartphones.

The Business Can Profit from its Innovative Ideas

Ideas on their own have little value or no value. Intellectual property (IP) has great untapped potential to turn your ideas into commercially successful goods and services. Registering your patents and copyright can result in a steady stream of royalty and extra revenue, which can improve the overall business bottom line.

Protection of Small Businesses

If you are a small business, it's very important to protect any unique products or services that you own. Otherwise, competitors can use your success to take away market share, resulting in slow growth or loss of revenue. Losing market share early on in a business's development can be devastating and time-consuming if trying to chase up the guilty party without any legal protection. It's important to remember that no one else will check to see if your intellectual property has been infringed; it's your responsibility to ensure that no one else is using your assets.

Securing Unique Ideas and Creations

When any person has a unique idea or creation, there will always be people who will try to replicate that idea or creation for monetary gains. Hence, you must secure your IP assets before they are illegally infringed by any third party. All kinds and sizes of businesses can protect their unique ideas under Intellectual Property (IP) rights. So, after analyzing the business need and circumstances, a person can decide which Intellectual Property Protection (trademark, copyright, or patent registration), can be used for covering different areas of Intellectual Properties

Export Opportunities for the Business Increases

Intellectual Property also increases the competitiveness of a business in the export market. An IP right holder can use these brands or designs for marketing the goods and services in foreign countries. Additionally, they can seek franchising agreement with the overseas firm, or export the patented goods.

Rewards and Encouragement for Entrepreneurs

Intellectual Property (IP) rights incentivize entrepreneurs to keep pushing for new advances in the face of adversity. It also facilitates the free flow of information by sharing the protected know-how critical to the original, patented invention. In turn, this process leads to new innovations and improvements to existing ones.

Conclusion

Thus, it can be said that Intellectual property (IP) protection is critical to fostering innovation. Without the protection of ideas, businesses and individuals would not reap the full benefits of their inventions and would focus less on research and development. Similarly, anyone can steal artists' ideas hampering their valuation and cultural identification. IP laws help innovative technologies prosper and successfully reach masses by protecting their ownership. No doubt, intellectual property (IP)

Rights are indispensable and all countries must have poignant laws for protecting them.

Trade Mark

Trademark can be any word, phrase, symbol, design, or a combination of these things that identifies your goods or services. It's how customers recognize you in the marketplace and distinguish you from your competitors.

The word "trademark" can refer to both trademarks and service marks. A trademark is used for goods, while a **service mark** is used for services.

A trademark:

- Identifies the source of your goods or services.
- Provides legal protection for your brand.
- Helps you guard against counterfeiting and fraud.

A common misconception is that having a trademark means you legally own a particular word or phrase and can prevent others from using it. However, you don't have rights to the word or phrase in general, only to how that word or phrase is used with your specific goods or services.

For example, let's say you use a logo as a trademark for your small woodworking business to identify and distinguish your goods or services from others in the woodworking field. This doesn't mean you can stop others from using a similar logo for non-woodworking related goods or services.

Another common misconception is believing that choosing a trademark that merely describes your goods or services is effective. Creative and unique trademarks are more effective and easier to protect.

The essential function of a trademark is to exclusively identify the source or origin of products or services, so a trademark, properly called, indicates the source or serves as a badge of origin. In other words, trademarks serve to identify a particular entity as the source of goods or services. The use of a trademark in this way is known as trademark use. Certain exclusive rights attach to a registered mark.

Trademarks are used not only by businesses but also by noncommercial organizations and religions to protect their identity and goodwill associated with their name.^{[10][11][12]}

Trademark rights generally arise out of the use of, or to maintain exclusive rights over, that sign about certain products or services, assuming there are no other trademark objections.

Different goods and services have been classified by the International (Nice) Classification of Goods and Services into 45 Trademark Classes (1 to 34 cover goods, and 35 to 45 cover services). The idea behind this system is to specify and limit the extension of the intellectual property

right by determining which goods or services are covered by the mark, and to unify classification systems around the world.

A **trademark** (also written **trade mark** or **trade-mark**^[1]) is a type of intellectual property consisting of a recognizable sign, design, or expression that identifies products or services from a particular source and distinguishes them from others.^{[2][3]} The trademark owner can be an individual, business organization, or any legal entity. A trademark may be located on a package, a label, a voucher, or on the product itself. Trademarks used to identify services are sometimes called service marks.^{[4][5]}

The first legislative act concerning trademarks was passed in 1266 under the reign of Henry III of England, requiring all bakers to use a distinctive mark for the bread they sold. The first modern trademark laws emerged in the late 19th century. In France, the first comprehensive trademark system in the world was passed into law in 1857. The Trade Marks Act 1938 of the United Kingdom changed the system, permitting registration based on "intent-to-use", creating an examination based process, and creating an application publication system. The 1938 Act, which served as a model for similar legislation elsewhere, contained other novel concepts such as "associated trademarks", a consent to use the system, a defensive mark system, and a non claiming right system.

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Types of Trademark

Trademark is logo or combination of characters and numerals used by a company to claim its ownership on a term or design to represent its products and services. There are various of types of trademarks which can be registered like product mark, service mark, collective mark, certification mark, shape mark, sound mark and pattern mark. Though there are many kinds of trademarks, their purpose is for the same – which is to enable the consumers identify goods and services originating from a certain manufacturer or services provider. In this article, we look at the various types of trademark.

Product Mark

Product mark is a mark that is used on a good or on a product rather than on a service. This this type of trademark is used to recognize the origin of the product and helps in maintaining the reputation of a business. Trademark applications filed under trademark class 1-34 could be termed as a product mark, as they represent goods.

Service Mark

Service mark is similar to the product mark but a service mark is used to represent a service rather than a product. The main purpose of the service mark is that it distinguishes its proprietors from the owners of other services. Trademark applications filed under trademark class 35-45 could be termed as a service mark, as they represent services.

Collective Mark

Collective mark is used to inform the public about certain distinguished features of a product or service used to represent a collective. A group of individuals can use this mark so that they are collectively protecting a goods or service. The mark holder can be an association or can be a public institution or can also be a Section 8 Company.

In a collective mark, normally the standards of the products are fixed by the regulator owing the mark. Others associated with the collective are held responsible to adhere to certain standards while using the mark in the course of business. A commonly known collective mark in India is the Chartered Accountant designation.

Certification Mark

Certification mark is a sign that denotes a products origin, material, quality or other specific details which are issued by the proprietor. The main purpose of certification mark is to bring out the standard of the product and guarantee the product to the customers. A certification mark can also be used to uplift the product's standard amongst the customers by showing that the product had undergone standard tests to ensure quality. Certification marks are usually seen on packed foods, toys and electronics.

Functions of Trademarks in India

A trademark is a brand name or logo associated with the company's goods, products or services. The consumers who buy the goods or avail of the services recognise it with its brand. The brand or trademark may consist of words or numerals, designs or a combination of all.

A trademark can distinguish the goods or services of one person or company from those of others. They are intellectual property rights in India. The Trademarks Act, 1999, regulates the registration and functions of a trademark.

Primary Functions of Trademarks

A trademark primarily serves the purpose of identifying the origin or source of goods, products or services. In India, a trademark performs the following functions:

- It identifies the product and its origin
- It proposes to guarantee the quality of the product
- It advertises the product as it represents the product
- It creates the image of a product in the minds of the public, especially the consumers or the prospective consumers of the product

Product Differentiation Function

Trademarks serve as the basic means of achieving product or service differentiation. The trademarks enable a customer to distinguish goods, products or services in the market without confusion and make him/her arrive at a decision on what to purchase.

In perfect competition, trademarked services or products of various sellers are the perfect substitutes for a buyer. But in product differentiation competition, such trademarked services or products are just close substitutes. The competition takes place in building brand loyalty and advertising effort based on the non-substitutability of the services or products.

Identification of Source and Origin Function

One of the most important functions of a trademark is to serve as information to the customers for identifying the origin or source of a product. The trademark guarantees the identity of the origin of the trademarked services or goods to the consumer or end-user. It enables the consumer to distinguish the trademarked goods or services from others that have another origin without any confusion.

Under the Trademarks Act, 1999, a trademark must be distinctive to fulfil its identification of origin function. When the trademark is distinctive, it is granted registration and protection under the trademarks law in India. The Registrar of Trademarks can refuse the trademark registration when the mark is not distinctive, and thus, the trademark will fail to perform its function of identifying the source. Trademarks get legal protection under the Trademarks Act, thus making it difficult for third parties to imitate or copy the product.

The Trademarks Act also safeguards the trademark since it prohibits any identical or similar use of the trademark by its competitors in the market, who may take advantage of the reputation and position of the trademark.

Quality Function

A trademark ensures customers of the quality of the trademarked products or services. Customers select goods or services known for their quality. Thus, trademarks help the customers decide the products they need to purchase or the service they need to avail of. Reputation and identification of quality are the key features of trademarks.

Customers often use trademarks to identify and choose products or services with quality. When a customer has a good experience with a trademarked product, he/she will prefer to use the same product having the same trademark. A customer will re-purchase a product again as he/she will believe the trademarked product will have the same high quality that it had when it was purchased previously.

Advertising Function

The trademark represents a product or service. Another significant function of trademarks is promoting products and services, thus providing an effective mode of advertising them. The intention of the use of trademarks is to make consumers aware of the trademark and attract their attention to the trademarked products or services. Customers can be attracted through advertisements, which reinforce the image of a product or service.

Trademarks are used in marketing and advertising campaigns to establish positive associations and brand recognition. The trademark or

logos act as a visual cue for the services and goods of a company and thus set it apart from its competitors. Companies can achieve brand recognition successfully by using a logo or slogan.□

Creation of Image Function

Trademarks create an image of the product or service they are associated with. Trademarks essentially function to create goodwill for the company. The goodwill embodied in a trademark constitutes a company's intellectual property or asset. The prolonged usage of a trademark associated with a particular business helps the business gain reputation and goodwill regarding its particular trademark.

In due course of time, the general public gains the knowledge and is aware of the trade name or brand name and associates the particular trademark with the specific services or goods. Thus, trademarks gain reputation and goodwill, which eventually expands to a larger area making the trademarks known globally.

Step by Step Guide on Trademark Registration Process

Trademark registration can be obtained for words, logo, numerals, slogan, device and more in India. Trademark registration provides legal right of exclusivity for use of the mark to the owner of the trademark.

Trademark registration is however a long process involving multiple steps. In this article we cover the trademark registration process in India.

Trademark Search

Before beginning the trademark registration process, the entrepreneur or a trademark professional must conduct a trademark search of the trademark database. A trademark search will provide information about identical or similar trademark that has already been filed with the trademark registry.

A trademark search can be conducted by visiting the Trademark Registrar Website. A guide on “**How to do a trademark search**” and “**Interpreting Trademark Status**” is available in the IndiaFilings Learning Center.

Trademark Filing

Once a trademark search is completed, the application for trademark registration can be filed with the Trademark Registrar. The application for registration of trademark must be made in the prescribed manner and filed along with the fee for trademark registration.

Trademark application can be filed at one of the five Trademark Registrar Office having jurisdiction over the State or online. Trademark applications can be filed online by **IndiaFilings.com** or a trademark agent or lawyer.

A trademark registration application must contain the following information:

- Logo or the Trademark
- Name and address of the trademark owner
- Classification or Trademark Class

- Trademark used since date
- Description of the goods or services

Trademark Application Allotment

Once the Trademark registration application is filed with the Trademark Registrar, a trademark application allotment number is provided within one or two working days.

The trademark application can also then be tracked online through the **Online Trademark Search facility**.

Typically, on obtaining trademark application allotment number, the owner of the trademark can affix the TM symbol next to the logo.

Vienna Codification

The Vienna Classification or Vienna Codification, established by the Vienna Agreement (1973), is an international classification of the figurative elements of marks.

Once the trademark registration application is filed, the Trademark Registrar will apply the Vienna Classification to the trademark based on the figurative elements of marks.

While this work is in progress, the trademark application status usually reflects as “Sent for Vienna Codification”.

Trademark Examination

Once Vienna Codification is completed, the trademark registration application will be allotted to a Trademark Officer in the Trademark Registrar Office.

The Trademark Officer would then review the trademark application for correctness and issue a trademark examination report. The Trademark Officer has the ability to accept the trademark registration application and allow for trademark journal publication or object the trademark registration application.

If the trademark registration application is objected by the Trademark Officer, the trademark applicant has the right to appear before the Trademark Officer and address the objections.

If the Trademark Officer is satisfied with the justifications of the trademark applicant, the trademark would be allowed for trademark journal publication.

In case the Trademark Officer is not satisfied with the justifications, the trademark applicant has the right to appeal the decision of the Trademark Officer before the Intellectual Property Appellate Board.

Trademark Journal Publication

Once the trademark registration application is accepted by the Trademark Registrar, the proposed trademark is published in the Trademark Journal.

The trademark journal is published weekly and contains all the trademarks that have been accepted by the Trademark Registrar. Once the trademark is published in the trademark journal, the public have an opportunity to object the trademark registration, if they believe they will be damaged by that registration.

If there are no objections filed within 90 days of that publication, the mark will typically be registered within 12 weeks – months time.

If the trademark registration application is opposed by a third-party, hearing will be called for by the Trademark Hearing Officer.

Both the trademark applicant and the opposing party have the chance to appear at the hearing and provide justifications for registration or rejection of the trademark application.

Based on the hearings and the evidence presented, the Trademark Hearing Officer will determine if the trademark registration application should be accepted or rejected. The decision of the Trademark Hearing Officer can also be challenged by escalating to the Intellectual Property Appellate Board.

Trademark Registration

Once there are no objections or oppositions for the trademark registration application, the trademark manuscript and trademark registration certificate will be prepared and sent to the trademark application.

Once the trademark registration certificate is issued, the trademark is considered to be a registered trademark of the owner, granting the

trademark owner exclusive use of the mark. The ® symbol can now be placed next to the logo or trademark.

Copyrights

Copyright is a type of intellectual property that protects **original works of authorship** as soon as an author **fixes** the work in a **tangible form of expression**. In copyright law, there are a lot of different types of works, including paintings, photographs, illustrations, musical compositions, sound recordings, computer programs, books, poems, blog posts, movies, architectural works, plays, and so much more!

Copyright is originality and fixation

Original Works

Works are original when they are independently created by a human author and have a minimal degree of creativity. Independent creation simply means that you create it yourself, without copying. The Supreme Court has said that, to be creative, a work must have a “spark” and “modicum” of creativity. There are some things, however, that are not creative, like: titles, names, short phrases, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; and mere listings of ingredients or contents. And always keep in mind that copyright protects expression, and never ideas, procedures, methods, systems, processes, concepts, principles, or discoveries.

Fixed Works

A work is fixed when it is captured (either by or under the authority of an author) in a sufficiently permanent medium such that the work can be perceived, reproduced, or communicated for more than a short time. For example, a work is fixed when you write it down or record it.

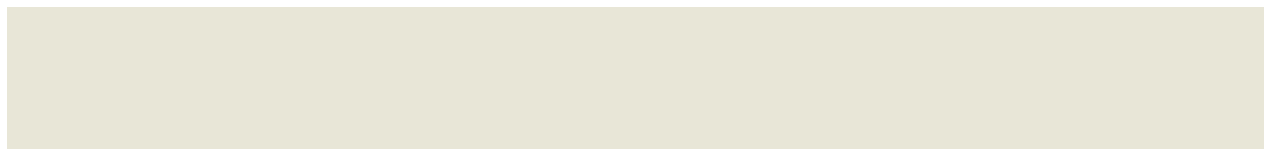
Copyright is a form of intellectual property protection granted under Indian law to the creators of original works of authorship such as literary works (including computer programs, tables and compilations including computer databases which may be expressed in words, codes, schemes or in any other form, including a machine readable medium), dramatic,

musical and artistic works, cinematographic films and sound recordings.

Copyright law protects expressions of ideas rather than the ideas themselves. Under section 13 of the Copyright Act 1957, copyright protection is conferred on literary works, dramatic works, musical works, artistic works, cinematograph films and sound recording. For example, books, computer programs are protected under the Act as literary works.

Copyright refers to a bundle of exclusive rights vested in the owner of copyright by virtue of Section 14 of the Act. These rights can be exercised only by the owner of copyright or by any other person who is duly licensed in this regard by the owner of copyright. These rights include the right of adaptation, right of reproduction, right of publication, right to make translations, communication to public etc.

Copyright protection is conferred on all Original literary, artistic, musical or dramatic, cinematograph and sound recording works. Original means, that the work has not been copied from any other source. Copyright protection commences the moment a work is created, and its registration is optional. However it is always advisable to obtain a registration for a better protection. Copyright registration does not confer any rights and is merely a prima facie proof of an entry in respect of the work in the Copyright Register maintained by the Registrar of Copyrights.



Indian perspective on copyright protection:

The Copyright Act, 1957 provides copyright protection in India. It confers copyright protection in the following two forms:

- A. Economic rights of the author, and
- B. Moral Rights of the author.

(A) Economic Rights:

The copyright subsists in original literary, dramatic, musical and artistic works; cinematographs films and sound recordings. The authors of copyright in the aforesaid works enjoy economic rights u/s 14 of the Act. The rights are mainly, in respect of literary, dramatic and musical, other than computer program, to reproduce the work in any material form including the storing of it in any medium by electronic means, to issue copies of the work to the public, to perform the work in public or communicating it to the public, to make any cinematograph film or sound recording in respect of the work, and to make any translation or adaptation of the work.

In the case of computer program, the author enjoys in addition to the aforesaid rights, the right to sell or give on hire, or offer for sale or hire any copy of the computer program regardless whether such copy has been sold or given on hire on earlier occasions. In the case of an artistic work, the rights available to an author include the right to reproduce the work in any material form, including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work, to communicate or issues copies of the work to the public, to include the work in any cinematograph work, and to make any adaptation of the work.

In the case of cinematograph film, the author enjoys the right to make a copy of the film including a photograph of any image forming part thereof, to sell or give on hire or offer for sale or hire, any copy of the film, and to communicate the film to the public. These rights are similarly available to the author of sound recording. In addition to the aforesaid rights, the author of a painting, sculpture, drawing or of a manuscript of a literary, dramatic or musical work, if he was the first owner of the copyright, shall be entitled to have a right to share in the resale price of such original copy provided that the resale price exceeds rupees ten thousand.

(B) Moral Rights:

Section 57 of the Act defines the two basic 'moral rights of an author. These are:

- i. Right of paternity, and
- ii. Right of integrity.

The right of paternity refers to a right of an author to claim authorship of work and a right to prevent all others from claiming authorship of his work. Right of integrity empowers the author to prevent distortion, mutilation or other alterations of his work, or any other action in relation to said work, which would be prejudicial to his honour or reputation.

The proviso to section 57(1) provides that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer program to which section 52 (1)(aa) applies (i.e. reverse

engineering of the same). It must be noted that failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section. The legal representatives of the author may exercise the rights conferred upon an author of a work by section 57(1), other than the right to claim authorship of the work.

Copyright Registration Procedure

The procedure for registration is as follows:

1. Application for registration is to be made on as prescribed in the first schedule to the Rules;
2. Separate applications should be made for registration of each work;
3. Each application should be accompanied by the requisite fee prescribed in the second schedule to the Rules; and
4. The applications should be signed by the applicant or the advocate in whose favor a Vakalatnama or Power of Attorney has been executed. The Power of Attorney signed by the party and accepted by the advocate should also be enclosed.

Time for Processing Application

After you file your application and receive a diary number you have to wait for a mandatory period of 30 days so that no objection is filed in the Copyright office against your claim that particular work is created by you.

Scope and Extent of Copyright Registration

Both published and unpublished works can be registered. Copyright in works published before 21st January 1958, i.e., before the Copyright Act, 1957 came in force, can also be registered, provided the works still enjoy copyright. Three copies of published work may be sent along with the application.

If the work to be registered is unpublished, a copy of the manuscript has to be sent along with the application for affixing the stamp of the Copyright Office in proof of the work having been registered. In case two copies of the manuscript are sent, one copy of the same duly stamped will be returned, while the other will be retained, as far as possible, in the Copyright Office for record and will be kept confidential. It would also be open to the applicant to send only extracts from the unpublished work instead of the whole manuscript and ask for the return of the extracts after being stamped with the seal of the Copyright Office. When a work has been registered as unpublished and subsequently it is published, the applicant may apply for changes in particulars entered in the Register of Copyright in Form V with the prescribed fee.

All kinds of literary and artistic works can be copyrighted, you can also file a copyright application for your website or other computer programs. Computer Software or program can be registered as a 'literary work'. As per Section 2 (o) of the Copyright Act, 1957 "literary work" includes computer programs, tables, and compilations, including computer databases. 'Source Code' has also to be supplied along with the application for registration of copyright for software products. Copyright protection prevents the undue proliferation of private products or works and ensures the individual owner retains significant rights over his creation.

Copyright Reproduction Rights

The reproduction right is one of the exclusive rights granted to the owner of a copyright by the Copyright Act. Under this right, no one other than the copyright owner may make any reproductions or copies of the work. Under the Copyright Act, the copyright owner has the exclusive right to reproduce the copyrighted work or to authorize its reproduction. Examples of unauthorized acts which are prohibited under this right

include photocopying a book, copying a computer software program, using a cartoon character on a T-shirt, and incorporating a portion of another's song into a new song. The Copyright Act covers reproduction in any form.

Infringement of the Reproduction Rights

It is not necessary that the entire original work be copied for an infringement of the reproduction right to occur. All that is necessary is that the copying be substantial and material.

Reproduction for Blind or Other People with Disabilities Exception

It is not an infringement of copyright for an authorized entity to reproduce copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced in specialized formats exclusively for use by blind or other persons with disabilities.

Reproduction by Libraries and Archives Exception

It is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, with a few exceptions and under certain conditions.

International copyright law doesn't exist! Each country has its own domestic copyright laws that apply to its own citizens, and also to the use of foreign content when used in one's country. It allows creators and content owners around the world and citizens of many countries to enjoy copyright protection in countries other than their own. Read below for practical tips on addressing international copyright issues that you face.

DO YOU HAVE AN INTERNATIONAL COPYRIGHT ISSUE?

Many copyright issues that appear to be national copyright issues are in fact international copyright issues. Understanding your own country's copyright laws is most important, but understanding how copyright treaties and international copyright law works is also essential when publishing content or using content online.

Copyright is one of the areas of *intellectual property*, which also includes trademarks and patents.

WHEN DOES AN INTERNATIONAL COPYRIGHT ISSUE ARISE?

With the internet and the way we use, share and publish content in our digital environment, many issues that were once domestic copyright issues have become international copyright issues. A global copyright issue arises in a variety of situations. You have to think globally if any of the following examples apply to you:

- An employee accesses your licensed databases while traveling out of the country
- You're negotiating a digital license with a vendor/publisher/content owner who's based outside your own country
- Librarians from more than one country (e.g., South Africa, Australia, Canada and the U.S.) join a journal club and share articles through the club (a journal club involves posting articles to a private online space)
- Two colleagues share research papers by authors from several countries via Sharepoint

- You post content on a website or intranet that will be accessed outside your own country
- You post a photograph on your Facebook page and someone accesses that photograph from another country
- Your organization has locations or employees in more than one country
- You're teaching an online course with students located in more than one country
- You're using content from outside your own country

HANDLING AN INTERNATIONAL COPYRIGHT ISSUE

If any of the above scenarios apply to you, you need to start thinking about global copyright implications in the planning stages of these activities and prior to using the affected content. As part of your international copyright law education, we set out information below describing the structure of global copyright law. We also provide *tips* on managing global copyright issues and answer your *international copyright questions*.

INTERNATIONAL COPYRIGHT LAW AND THE BERNE COPYRIGHT TREATY

Copyright literally translates to “right to copy.” But it’s not as simple as that (is copyright ever that simple?). This article sets out international copyright law basics in a general and broad manner. Refer to the copyright laws in your country to obtain specific information on what rights and privileges exist in your domestic copyright laws.

If your country is a member of the *Berne Copyright Convention*, then you'll likely have at least the minimum protection set out in Berne and

any exceptions to copyright law will be subject to the "exceptions test" in Berne.

The Berne Convention is the leading international copyright treaty, administered by the World Intellectual Property Organization (WIPO). It has close to 200 member countries. You can see the list of Berne members *here*.

NATIONAL TREATMENT

Each Berne member country automatically provides citizens from other member countries with, at a minimum, the same copyright protections it provides for its own citizens. This is the notion of national treatment. For example, when you photocopy an article in Australia, you apply Australian law — even if that article originates from an American or British author/copyright owner. Similarly, if you show a French film in public in a U.S. theatre, you apply U.S. copyright law with respect to the right to perform a work in public.

AUTOMATIC COPYRIGHT PROTECTION

In Berne member countries around the world, copyright protection is automatic upon the creation of a work in a fixed form (i.e., once the work is in some sort of tangible form). This means that no registration or deposit with a government copyright office is required in order to have copyright protection. There are, however, voluntary government registration systems where copyright owners can register their works, thereby gaining entitlement to certain benefits, especially in cases of copyright infringement of their works.

Similarly, the use of the copyright symbol isn't mandatory under the Berne Convention and by extension in its member countries. However, using the symbol — © — is always a good reminder to the public that copyright exists in a work.

COPYRIGHT DURATION

The duration of copyright is determined by the copyright statute in each country. For example, in Canada the general duration of copyright is life-plus-fifty (it lasts for 50 years after the author's death). In the U.S. and in European Union (EU) countries, it's life-plus-seventy. Specific works and circumstances may result in deviations from these general rules of copyright duration. (Note: Canada's duration of copyright will be amended to life-plus-seventy by 1 January 2023.)

Once copyright in a work has expired, that work is said to be in the *public domain* and anyone may freely use, adapt and reproduce that work.

Patents

A patent is the granting of a property right by a sovereign authority to an inventor. This grant provides the inventor exclusive rights to the patented process, design, or invention for a designated period in exchange for a comprehensive disclosure of the invention. They are a form of incorporeal right.

Government agencies typically handle and approve applications for patents. In the United States, the U.S. Patent and Trademark Office

(USPTO), which is part of the Department of Commerce, handles applications and grants approvals.

KEY TAKEAWAYS

- A patent is the granting of a property right by a sovereign authority to an inventor.
- A patent provides the inventor exclusive rights to the patented process, design, or invention for a certain period in exchange for a complete disclosure of the invention.
- In June of 2018, the U.S. Patent and Trademark Office issued its 10 millionth patent.
- Utility patents are the most common patent issued in the United States, accounting for 90% of all issued patents.
- Utility and plant patents are granted for 20 years, whereas design patents are granted for either 14 or 15 years, depending on when filed.

Understanding Patents

Most patents are valid for 20 years in the U.S. from the date the application was filed with the USPTO, although there are circumstances where exceptions are made to extend a patent's term. U.S. patents are only valid in the United States and U.S. Territories. If seeking protection outside of the United States, it is important to research the intellectual property rights of other nations and apply for protection with their governing authorities.

According to the U.S. Patent and Trademark Office, a patent can be granted to any person who:

*Invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent, subject to the conditions and requirements of the law.*¹

Types of Patents

There are three types of patents available in the United States: utility patents, design patents, and plant patents. Each has its own specifications and durations.

Utility Patents

Utility patents, or patents for invention, issue legal protection to people who invent a new and useful process, an article of manufacture, a machine, or a composition of matter. Utility patents are the most common type of patent, with more than 90% of patents issued by the U.S. government belonging to this category.² A utility patent lasts for 20 years from the date of filing as long as maintenance fees are paid. Maintenance fees are surcharges applied to utility patent applications filed after December 12, 1980.³

Design Patents

Design patents are patents issued for original, new, and ornamental designs for manufactured products. Design patents protect the design or look of something. They require the invention to which the design belongs to be original and useful. Design patents last for 15 years for applications filed after May 13, 2015. For applications filed before May 13, 2015, patents last for 14 years from the date of the filing. Maintenance fees do not apply to design patents.²

Plant Patents

Plant patents go to anyone who produces, discovers, and invents a new kind of plant capable of reproduction. These patents are granted for 20 years from the date of filing and no maintenance fees apply.²

Patents provide an incentive for companies or individuals to continue developing innovative products or services without the fear of infringement. For example, large pharmaceutical companies can spend billions of dollars on research and development. Without patents, their

drugs and medicines could be duplicated and sold by companies that didn't research or invest the needed capital for R&D.

In other words, patents protect the intellectual property of companies to help their profitability. However, patents also serve as bragging rights for companies demonstrating their innovativeness.

Trade Secret

Definition

Trade secrets are any valuable information regarding a company's processes or operations guarded and concealed from the public eye. The company actively protect them and they are available to only a limited number of people. As a result, they possess the potential to be licensed or sold for profit.

The technical or commercial information contained in trade secrets is often a result of years of internal research that can give its keepers a competitive advantage in the market. Therefore, unauthorized access, use,

or disclosure of the data is unfair and includes commercial or industrial espionage, breach of contract, and confidence

- Trade secrets are confidential business information and are a type of intellectual property. Therefore, an entity can either license it or sell it for profit. These include knowledge about a company's processes, designs, client information, etc. and the company keeps it a secret, out of the public eye.
- The knowledge must be financially valuable, and the general public shall not be aware of it, except for a limited number of persons who have the authorization to know about it.
- They are different from patents, exclusive rights granted for an invention or an innovative solution. They are complementary to patents, trademarks, and Copyright Protection.
- Uniform Trade Secrets Act (1985) in the U.S. overlooks information infringement and other issues.

Trade Secret Law

Uniformly, the TRIPS (Trade-Related Aspects of Intellectual Property Rights) of WTO (World Trade Organization) offers Trade secret protection to all members against unfair competition. Apart from that, in the U.S., trade secrets receive protection under state laws. As per the laws, every state protects against trade secret theft even though the statutes and degrees vary from state to state. Uniform Trade Secrets Act (1985) is one such act that offers uniformity across. All states have adopted the act with the exception being Massachusetts, Texas, and New York. The act provides definitions for trade secrets, misappropriation, and remedies (injunctive relief, damage relief, and attorney's fee in some cases).

According to the act, a trade secret possesses the following characteristics:

- Independent economic value and others can obtain the same economic value on their use or disclosure.

- Generally not known to the public and incapable of being readily ascertainable by proper means.

Specifications in a Nutshell:

Uniform Trade Secrets Act of 1985, Section 1(4), states that for liability to exist under this act, the simple action of duplicating an unpatented item is not punishable. Either the secret's acquisition, its disclosure to others, or the use of the secret must be improper under Section 1(4) (2). According to the act, when multiple people are entitled to protection for the same knowledge or information, only the one who was misappropriated is eligible for a legal remedy. The act also recognizes reasonable efforts to maintain secrecy and prevent infringement.

Trade secret litigation

Trade secret litigation is a type of lawsuit that occurs when a trade secret is stolen or used without permission. In the digital age, these lawsuits are becoming more and more common.

The Digital Age and Trade Secret Litigation

For over 200 years, courts in the United States have recognized the ability of corporations to protect trade secrets. In most cases, trade secrets are used to secure valuable intellectual property, such as the ingredients necessary to create a popular soda such as Coca-Cola. While it's always been possible to legally protect trade secrets, pursuing a federal civil case for trade secret theft was not possible until 2016, which is when the Defend Trade Secrets Act (DTSA) was passed by Congress.

Congress decided common law and state protections were no longer adequate to protect trade secrets several reasons. Some of the motivations for passing the DTSA include:

- Increased mobility of employees.

- Improved technology.
- Ineffective patent protections.

Because trade secret cases are now able to be tried federally, it is likely that trade secret litigation will become much more common. Two primary reasons that trade secret theft has become more common in the 21st century have been determined.

First and foremost, employees are now more mobile than they have been at any other point in history. Changing jobs regularly has become common practice, especially in the tech industry. In addition, when changing jobs, employees now frequently seek a position with a competitor of their former employer. When an employee leaves their job, it's possible they can take important information with them. While this information can be knowledge that the employee has retained in their mind, it can also be files and documents that are crucial to the company.

Second, it is now much easier to store documents in electronic form. Information that would have once taken up rooms filled with file cabinets can now be stored on a small USB drive. Also, thanks to the ability to transfer files using email or other services, an employee leaving a company is even riskier when it comes to protecting trade secrets. Because many companies have policies related to destroying files and emails, it's possible that evidence of trade secret theft will be erased unintentionally.

It's estimated that the overwhelming majority of trade secret misappropriation involves a company employee or partner. Trade secret theft happens almost every day, causing instances of trade secret litigation to skyrocket. Another reason that trade secret litigation is now so common is that a 2014 Supreme Court decision limited patent protection for both business methods and software.

Because of this decision, companies are no longer confident that they can protect their intellectual property using patents, causing them to shield their IP as trade secrets.

Acquiring trade secrets is also much more affordable than obtaining a patent, which is very attractive to most companies. Patent litigation can be very complicated, which is another motivation for companies to acquire trade secrets instead of patents.

TC Heartland LLC vs Kraft Foods Groups Brands LLC was a Supreme Court case decided in 2017. The decision in this case significantly limited the venues where a company could file patent litigation. Prior to this decision, a company could sue for patent infringement in any location where the infringement happened. After the decision, patent litigation was only available in the location where the defendant had a physical business or had incorporated.

Popularity of Trade Secret Litigation

Trade litigation has become extremely common at both the state and federal level. Mostly, trade secret litigation involves new technology that can be transported with minimal effort. These cases can also be focused on software and technological knowledge. Trade secret litigation is very attractive to companies as plaintiffs tend to have a much higher success rate than they do in patent litigation. In the year after the DTSA was passed, hundreds of federal cases were filed. While a good portion of these cases were dismissed, many made it to the courtroom.

Protecting Trade Secrets

One of the most important factors in protecting your company's intellectual property is actually understanding what your trade secrets are and who in your company has access to these secrets. You also need to identify where your secrets are located and how valuable they are to your company. If an employee breaches one of your secrets and you decide to sue, you will need to identify exactly which secret has been stolen and how damage the theft causes to your company.

If you need help with trade secret litigation, you can post your legal needs on UpCounsel's marketplace. UpCounsel accepts only the top 5

percent of lawyers to its site. Lawyers on UpCounsel come from law schools such as Harvard Law and Yale Law and average 14 years of legal experience, including work with or on behalf of companies like Google, Menlo Ventures, and Airbnb.

Unfair Competition

In the United States, unfair competition is an umbrella term for a number of different economic torts. Unfair competition can be used in reference to a number of deceptive practices which can ultimately cause harm to both businesses and consumers.

Examples of unfair competition include such practices as:

- False, misleading, and deceptive advertising,
- Fraudulent activities,
- Artificial lowering of prices,
- “Passing off” goods in a way that hides their true origin,
- Bait-and-switch or other unauthorized substitutions of one brand of goods for another,
- Trade libel or rumor mongering, and
- Misappropriation of trade secrets, among other practices.

While many of these economic torts are prohibited by state laws, unfair competition can often involve some level of trademark or trade dress infringement, or even the selling of counterfeit goods where one party is copying the shape, size, colorways, or feel of another product or its packaging.

WHAT IS UNFAIR COMPETITION?

Unfair competition is a term that encompasses several different deceptive business practices that are meant to confuse consumers as to the source of goods or services or harm the reputation or goodwill of other businesses.

Sometimes, the phrase “deceptive trade practices” is used to specifically refer to actions where consumers are misled, while “unfair competition” specifically refers to actions designed to restrict a company’s revenue.

Penalties for unfair competition may include:

- Restitution to businesses injured by the action in the form of lost profits or other monetary damages,
- Punitive damages, designed to punish the defendant,
- Attorney’s fees and costs, and
- Equitable relief in the form of an injunction.

In the United States, most forms of unfair competition are generally governed at the state level, although the federal Lanham Act, which regulates trademark infringement, is often invoked in false advertising claims. Additionally, the Federal Trade Commission (FTC) was established to protect consumers from this sort of deceptive trade practice. If state and federal laws or regulations conflict, federal laws will generally preempt the conflicting state laws.

Although unfair competition is typically governed by civil law, federal and state governments do have the ability to bring criminal sanctions against certain offenders.

There are a number of public policies that unfair competition laws are meant to address.

First, these types of laws protect business owners who invest time and money on improving their goods and services, as well as on distinguishing themselves from their competitors. Without these laws, businesses would have greater difficulty surviving among competitors selling sub-par products, designed to look like authentic items.

Second, businesses are able to create goodwill among their customers and consumers of their products because consumers are able to make informed decisions about the goods and services they purchase. This ability to make informed decisions encourages consumers to spend money confidently.

Third, these laws encourage honest competition among businesses to provide goods and services at a price appropriate to their quality. Healthy competition keeps prices in balance and avoids monopolies in certain markets. Because prices are kept in check, these laws protect consumers.

Fourth, unfair competition laws are designed to punish bad actors. By making deceptive statements or creating confusingly similar products, people and companies that engage in unfair competition are not profiting honestly. Our laws are designed to discourage and prohibit such behavior. Although the ultimate goal is prevention, states and the federal government have the ability to bring criminal actions against particularly bad actors.

It is important to remember that often, unfair competition laws are an important source of economic protection for small businesses, which may not see a profit for several years, or may have tight profit margins. These regulations give business owners an opportunity to participate in a level playing field.

ELEMENTS

Generally, unfair competition consists of two elements:

First, there is some sort of economic injury to a business, such as loss of sales or consumer goodwill. Second, this economic injury is the result of deceptive or otherwise wrongful business practice.

However, because unfair competition can refer to a variety of different economic torts, each tort will have its own test that must be met before a plaintiff can succeed in his or her case, although elements may overlap.

For example, if the unfair competition consists of false advertising, the plaintiff would need to prove:

- The defendant made a false or misleading statement of fact,
- The statement was used in an advertisement,

- The statement deceived or is likely to deceive customers in a material way, and
- The statement caused or is likely to cause injury to the plaintiff.

If the unfair competition consists of some element of fraud, the plaintiff would have to prove:

- The defendant made a false statement of material fact
- The defendant knew the statement was false
- The defendant intended to deceive
- The victim relied on the statement, and
- The victim suffered injury as a result of their reliance.

Generally, the different economic torts involve some level of intentional deception of consumers, whether as to price, quality, or origin of the goods or services.

Acts that constitute unfair competition may be different across industries, so inquiries into the existence of unfair competition typically require a fact-heavy analysis. However, the underlying action giving rise to this cause of action typically involves some level of fraud, deception, or bad faith.

False advertising is a type of advertising that is deceptive or untrue because it includes misleading information or claims to deceive the audiences to make a move in the favor of the advertiser.

False advertising is the use of misleading or false information or claim or similar activities in an ad campaign to deceive the user or buyer – and influence their purchase decisions.

It is essential for the makers and sellers of products or services to honestly represent their items and prices in front of the target audiences, but when they do not do so, it is false advertising. Let us delve into its world through some examples and understand how you can safeguard yourself from such ads-

What is the law's definition of False Advertising?

According to the law, misleading advertising occurs when a firm offers false information in its ads. The advertising may also be a forgery if it omits any vital information that the customer should have been aware of.

The legal definition of false advertising as per federal Lanham Act-

Any advertising or promotion that misrepresents the nature, characteristics, qualities, or geographic origin of goods, services, or commercial activities.

Before ruling the advertising to be false, the court requires the consumer to show a few proofs.

The following are the proofs required by the court:

1. The buyer viewed the deceptive advertising
2. The client purchased the product/service after believing the advertisement
3. That the lie was connected to something important
4. That the advertising was misleading and untrue

The proof must show that the advertisement was the only basis for the consumer's purchase of the goods.

1. Deceptive Pricing

There have been several instances of businesses concealing taxes or surcharges from customers via deception. For example, there is an airline ticket booking service that claims to purchase your flights for as little as \$1,000.

After reviewing the advertising, you decide to book one. However, once the ticket reaches the final payment step, your bill turns out to be \$2,000. These might be illegal charges on consumers' bills, which the Federal Trade Commission refers to as "cramming" (FTC).

If any such "additional charge" or "hidden costs" scenario arises in the name of different charges, customers have the right to file a complaint with the law.

2. Deceptive Measurements or Quantities

There may be times when the firm provides a fake quantity. If the brand has given a measurement or amount less or more than the actual one, they are accountable for misleading information.

Recently an example of similar practice occurred when computer hard-disk maker Western Digital resolved a class action case regarding the capacity of the hard-drive-claims in 2006. Based on the binary number system used by computers, one kilobyte (KB) is the same as that of 1,024 bytes of memory in computer science.

One megabyte (MB) is the square of 1 KB or 1,048,576 bytes. According to the class action complaint, Western Digital and other manufacturers adopted the decimal system, with one KB equalling 1,000 bytes and one MB equalling one million bytes. Using the binary approach, the company's 80-gigabyte (GB) hard disc supposedly contained just 74.4 GB of data.

3. Deceptive Comparisons

In the market, there is always unavoidable competition between two brands. The rivalry, however, is considered to be fair only if the businesses continue to promote their brand's features.

When a firm chooses to promote itself against its competitors by comparing their characteristics, it becomes a misleading advertisement.

4. Deceptive Guarantee or Warranty

Different brands and corporations provide guarantees or warranties on their products. They aim to increase the value of their brand by giving such tactics to the public. However, the brand may not always explain the solution and may subsequently reject to assist the client. It is when a customer has the right to sue a brand because of misleading advertising.

A brand must respond to the consumer if they misled them about the promise. Contract law needs clarity for a contract to be binding; thus, rules governing misleading and fraudulent advertising must fill the void.

5. Bait and Switch

Bait and switch are essential methods marketers use to show one product as bait and then switch it with another. They proceed to market an upgraded product before you after offering a low-cost one.

A store advertises a low-cost product that they have no intention of selling. However, when the buyer contacts them about purchasing the product, the vendor compels them not to do so. They instead laud a high-priced product and persuade the buyer to buy the upgraded version.

6. Misleading Depictions

There are always occasions when corporations provide appealing images of their items to get customers to purchase them. This is unmistakably fraudulent advertising.

Some food product businesses show a different image on the package and avoid the legislation by mentioning in the corner that the image is a serving recommendation. Such businesses have made wise decisions. A few fruits that are packaged in packets exhibit a false-color of the items that they are.

7. Leaving out Vital Information

There may be instances where businesses withhold critical information from their customers. For example, if a consumer receives a packet of cheese, the marketing must state that it must be used within three days.

These are the details that the client must be aware of to avoid loss. As a result, mentioning them should be an essential element of the company's advertising.

Can you sue a company for False Advertising?

Consumer law has advanced significantly across the world. The law is far more committed to preventing any fraud from being perpetrated on any client or consumer. As a result, if a firm engages in misleading advertising, they risk being sued.

Many jurisdictions throughout the country provide customers with the right to sue corporations that use false information in their marketing. There may be circumstances where states may not have laws against misleading advertising. However, there are limited common-law provisions for customers that allow them to sue such brands

New Developments in intellectual Property

In the recent times, India has been trying to establish itself as an Intellectual Property Rights (IPR) friendly nation in the world, by defining its standards as per the Global Intellectual Property norms. This has been clearly reflected in some of the latest developments in the laws related to Intellectual Property Rights in India. One such effort can be seen in the Indian government's vision to set-up fully computerized Intellectual Property offices based on the United States Patent and Trademark Office model. The Government has recently approved the Patent Prosecution Highway Program which will ease and expedite the process of patent examination in India. Changes in the Manual of Patent Office Practice and Procedures have clarified and eased several filing processes. Other developments in the IP regime include the Defence Research and Development Organisation (DRDO) allowing free access of its 450 patent to industries. This newsletter aims to bring to you the latest updates in the IP segment.

This issue covers:

- Govt. Approves Patent Prosecution Highway Program – Measure to Expedite Patent Examination in India
 - DRDO grants free patent access to boost indigenous production
 - Government brings key changes in Manual of Patent Office Practice and Procedure (2019)
 - Filmmaker's win over YouTube and Google in Copyright violation case

Historically, a company's strength was derived from its tangible assets, such as land, buildings, machinery, and equipment. Today, however, an increasing number of organisations rely on intangible assets for competitive advantage, particularly patents, trademarks, trade secrets, copyright, designs, and the like.

An intellectual property audit is a systematic evaluation of a company's intellectual properties that it owns, uses, or acquires in order to assess and manage risk, solve problems, and adopt best practices in intellectual property asset management. An intellectual property audit is now an essential tool for successfully managing knowledge-driven businesses by assisting in creating or revising their intellectual property strategy.

Furthermore, a rigorous and systematic intellectual property audit examines a business's essential intellectual property assets and its intellectual property-related policies, procedures, agreements, and competitors' intellectual property.

Because intellectual property rights are specified and designed by law, intellectual property audits are typically performed by an intellectual property law firm. Such firms have extensive experience dealing with many types of intellectual property and intellectual property value matters. Suppose the monetary value of a company's intellectual property portfolio is the primary concern. In that case, the team may look forward to hiring an economist or accountant with prior experience dealing with intellectual property valuation matters.

Businesses with advanced intellectual property understanding can begin discussions by surveying their intellectual property portfolio and competitive position in the business environment, followed by a more focused analysis of intellectual property challenges and concerns. The most comprehensive intellectual property audits include estimations of the monetary value of intellectual property assets, as well as specific suggestions and protocols for dealing with intellectual property assets. Intellectual property audits can be broad in scope or specific to a single event or kind of intellectual property. General-purpose intellectual property audits are extremely beneficial to both startups and established businesses in terms of not just evaluating and maintaining their

intellectual property assets but also identifying opportunities, development needs, and risks.

Intellectual Property audit

An Intellectual Property audit is a tool for assessing the IP assets of a business, namely the trade marks , patents, design rights and copyright . A comprehensive IP audit will include:

- Identifying the IP assets held by a business;
- An assessment of the protection currently in place to protect IP;
- An assessment of the current IP against the needs of the business;

The systems in place within a business to protect future assets; In short, all businesses would benefit from an IP audit and the size of the business dictates the size of the undertaking. The sooner you conduct an audit and put the business on the right track with its IP assets the more effective the business can be going forward, however, an audit can be particularly effective at certain stages, such as:

- First year of trading to make sure you are secure in what you're doing, and that the necessary protection is put in place to continue to do so.
- New product or service launches to ensure you implement the correct protection strategy.
- When seeking investment or contemplating a merger or acquisition . A strong IP portfolio can make a business more attractive to investors.
- When assessing and developing the overriding business strategy, an effective IP strategy can help deliver your commercial goals.

The audit will identify risks to the business and provide recommendations on how such risks can be eliminated or mitigated. The audit will also recognize and protect opportunities and direct budget to where it can be used most effectively. An effective audit is based on good communication. The relevant parts of the business must all be on the same

page and understand the direction of travel and this needs to be effectively communicated and understood by your IP advisors. Communicating effectively in this way ensures that the various working parts of a business are aligned and problems further down the line are avoided.

Different types of Intellectual Property Audits:

1. ***Event-Driven IP Audit***: This type of Intellectual Property Audit seeks to locate IP assets and then assess the value & risks involved. It is conducted during an IP Licensing, IP transfer, when launching a new product or when the risk or value has to be estimated in a proposed Intellectual Property Acquisition or Sale. In all such conditions, while such an Audit may be conducted to assess infringement, it may also, in the case of an Intellectual Property transfer or Merger/Acquisition, lead to an increase in the value of the attained company or license fee or to a reduction in the value of the acquired company or license fee or to a decrease in the value of the same depending on the level of risks and Intellectual Property (IP) issues involved.
2. ***General IP Audit***: It's an audit that is conducted when a new company is being established, or when a business is regarding implementing new policies or considering a new marketing approach, etc. It is done with the intent of getting a general idea regarding the assets under or with the business.
3. ***Limited-Purpose IP Audit***: This is usually done when there are vital changes in Intellectual Property Laws and procedures; when a business or enterprise decides to have an online presence, an Intellectual Property Audit aids in identifying the requirements of e-commerce. This IP Audit may also be conducted during procedures to make sure that no unrelated party has access to Copyrighted materials during the software development to examine the sufficiency and requirement of such a procedure. It may also be carried out before a company decides to begin its Intellectual Property filing procedure across various jurisdictions.

Importance of Intellectual Property Audits

Intellectual property audits can help business companies and organizations lead toward the ultimate path of success in the following ways:

1. **Intellectual Property Audits help in identifying what IP is owned:** One can never deny that every successful business is well-managed in every way. Intellectual property is undeniably a critical component of all businesses, which necessitates proper management. If a corporation is unaware of its intellectual property assets, it will never be able to manage them efficiently or safeguard them from loss or damage. That is where an intellectual property audit comes in handy, as it educates a business about the intellectual property assets it has, allowing the company to make informed decisions on Intellectual Property Protection, development, licencing, and exploitation. Furthermore, an intellectual property audit may discover flaws in title chains and detail procedures to resolve them.
2. **Intellectual Property Audits help in identifying new profit opportunities:** Intellectual property audits have the potential to open up new commercial opportunities for brands and enterprises in both domestic and international markets through intellectual property licences. They also provide beneficial results in monitoring competitors' intellectual property in the market. An additional advantage of doing an intellectual property audit is that it allows inventors, decision-makers, and marketers to secure intellectual property prospects before they are lost.
3. **Intellectual Property Audits help in preventing costly disputes:** Without a doubt, intellectual property litigation is both difficult and expensive, and the unfortunate reality is that startups and small businesses must sometimes forego litigation, even having winnable and meritorious claims. An intellectual property audit can successfully assist businesses in anticipating potential issues and implementing effective avoidance actions. It can also highlight flaws in the audited company's Intellectual Property Rights (IPRs), which can subsequently be rectified efficiently and promptly.

4. **Intellectual Property Audits help in facilitating and optimizing business transactions:** Intellectual Property audits have become more prominent in corporate transactions in the digital age. An intellectual property audit prepares business owners to cope with opportunities that may come at some point, such as a new sales or expansion opportunity requiring funding or a third party offer to buy the company, by providing a thorough grasp of its intellectual property assets and their estimated value.