7.0 Intellectual Property Rights

1. Intellectual property: Definitions

Property has two fundamental elements i.e. the **matter** and **intellectual capability to use the matter to meet demands.** Intellectual property, in its literal sense, means the things which emanate from the exercise of human brain. It is the product emerging out of the intellectual labor of human beings.

Intellectual property (**IP**) is a term referring to a number of distinct types of creations of the mind for which a set of exclusive rights are recognized, and the corresponding fields of law. Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs. Common types of intellectual property rights include copyrights, trademarks, patents, industrial design rights and trade secrets in some jurisdictions.

The World Intellectual Property Organizations (WIPO) has listed the followings as intellectual property:

i. Literary, artistic and scientific works
ii. Performances of performing artists, phonograms and broadcasts
iii. Inventions in all field of human endeavor
iv. Scientific discoveries
v. Industrial designs
vi. Trademarks, service marks and commercial names and designations
vii. Protection against unfair competitions, and
viii. All other rights resulting from intellectual activity in industrial, scientific, literary or artistic fields.

Although many of the legal principles governing intellectual property have evolved over centuries, it was not until the 19th century that the term *intellectual property* began to be used, and not until the late 20th century that it became commonplace in the majority of the world. The British Statute of Anne 1710 and the Statute of Monopolies 1623 are now seen as the origins of copyright and patent law respectively.

Intellectual Property Rights, IPR

The rights given to the creators of intellectual properties to protect their interests in terms of financial incentives and to protect their inventions from unauthorized use by others are called Intellectual Property Rights. Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs.

2. Characteristics of Intellectual Property

a) IP is 'value added' system in view of the special intellectual contribution clearly identifiable which may be registered or not.

b) It is specially created and recognized in law in spite of its monopolistic nature for a definite or for an unlimited period based upon the nature of creation.

c) Since the concept is comparatively new, virtually the whole concept has been developed through statutory prescriptions even in the countries of common law culture.

Intellectual Property is predominantly recognized in the commercial world in order to protect the interest of mercantile community who acquire a special right of production of goods and services on account of special knowledge.

3. History of IPR

Modern usage of the term *intellectual property* goes back at least as far as 1867 with the founding of the **North German Confederation** whose constitution granted legislative power over the protection of intellectual property to the confederation. When the administrative secretariats established by the **Paris Convention (1883)** and the **Berne Convention (1886)** merged in 1893, they located in Berne, and also adopted the term intellectual property in their new combined title, the **United International Bureau for the Protection of Intellectual Property**. The organization subsequently relocated to Geneva in 1960, and was succeeded in 1967 with the establishment of the **World Intellectual Property Organization (WIPO)** by treaty as an agency of the United Nations. According to Lemley, it was only at this point that the term really began to be used in the United States (which had not been a party to the Berne Convention), and it did not enter popular usage until passage of the Bayh-Dole Act in 1980.

"The history of patents does not begin with inventions, but rather with royal grants by Queen Elizabeth I (1558-1603) for monopoly privileges. Approximately 200 years after the end of Elizabeth's reign, however, a patent represents a legal [right] obtained by an inventor providing for exclusive control over the production and sale of his mechanical or scientific invention. Until recently, the purpose of intellectual property law was to give as little protection possible in order to encourage innovation. Historically, therefore, they were granted only when they were necessary to encourage invention, limited in time and scope.

4. Objectives of IPR

The main objective of intellectual property legislators and those who support its implementation is "absolute protection". "If some intellectual property is desirable because it encourages innovation, they reason, more is better. The thinking is that creators will not have sufficient incentive to invent unless they are legally entitled to capture the full social value of their inventions." This absolute protection or full value view treats intellectual property as another type of 'real' property, typically adopting its law and rhetoric.

Financial incentive

These exclusive rights allow owners of intellectual property to benefit from the property they have created, providing a financial incentive for the creation of an investment in intellectual property, and, in case of patents, pay associated research and development costs.

Economic growth

The WIPO treaty and several related international agreements are premised on the notion that the protection of intellectual property rights is essential to maintaining economic growth. The *WIPO Intellectual Property Handbook* gives two reasons for intellectual property laws:

One is to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.

Economists estimate that two-thirds of the value of large businesses in the U.S. can be traced to intangible assets. "IP-intensive industries" are estimated to generate 72 percent more value added (price minus material cost) per employee than "non-IP-intensive industries".

Morality

According to Article 27 of the Universal Declaration of Human Rights, "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". Although the relationship between intellectual property and human rights is a complex one, there are moral arguments for intellectual property.

Various moral justifications for private property can also be used to argue in favor of the morality of intellectual property, such as:

1. *Natural Rights/Justice Argument*: this argument is based on Locke's idea that a person has a natural right over the labor and/or products which is produced by his/her body. Appropriating these products is viewed as unjust. Although Locke had never explicitly stated that natural right applied to products of the mind, it is possible to apply his argument to intellectual property rights, in which it would be unjust for people to misuse another's ideas
2. *Utilitarian-Pragmatic Argument*: according to this rationale, a society that protects private property is more effective and prosperous than societies that do not. Innovation and invention in 19th century America has been said to be attributed to the development of the patent system. By providing innovators with "durable and tangible return on their investment of time, labor, and other resources", intellectual property rights seek to maximize social utility. The presumption is that they promote public welfare by encouraging the "creation, production, and distribution of intellectual works".

- *"Personality" Argument*: this argument is based on a quote from Hegel: “Every man has the right to turn his will upon a thing or make the thing an object of his will, that is to say, to set aside the mere thing and recreate it as his own”. European intellectual property law is shaped by this notion that ideas are an “extension of oneself and of one’s personality”. Personality theorists argue that by being a creator of something one is inherently at risk and vulnerable for having their ideas and designs stolen and/or altered. Intellectual property protects these moral claims that have to do with personality.

5. Criticism of IPR

The term itself

Free Software Foundation founder Richard Stallman argues that, although the term *intellectual property* is in wide use, it should be rejected altogether, because it "systematically distorts and confuses these issues, and its use was and is promoted by those who gain from this confusion." Lawrence Lessig, along with many other copy left and free software activists, have criticized the implied analogy with physical property (like land or an automobile). They argue such an analogy fails because physical property is generally rivalrous while intellectual works are non-rivalrous (that is, if one makes a copy of a work, the enjoyment of the copy does not prevent enjoyment of the original).

Limitations

Some critics of intellectual property, such as those in the free culture movement, point at intellectual monopolies as harming health, preventing progress, and benefiting concentrated interests to the detriment of the masses, and argue that the public interest is harmed by ever expansive monopolies in the form of copyright extensions, software patents and business method patents.

The Committee on Economic, Social and Cultural Rights recognizes that "conflicts may exist between the respect for and implementation of current intellectual property systems and other human rights". It argues that intellectual property tends to be governed by economic goals when it should be viewed primarily as a social product; in order to serve human well-being, intellectual property systems must respect and conform to human rights laws. According to the Committee, when systems fail to do so, they risk infringing upon the human right to food and health, and to cultural participation and scientific benefits. Some libertarian critics of intellectual property have argued that allowing property rights in ideas and information creates artificial scarcity and infringes on the right to own tangible property. Stephan Kinsella uses the following scenario to argue this point:

Imagine the time when men lived in caves. One bright guy—let's call him Galt-Magnon—decides to build a log cabin on an open field, near his crops. To be sure, this is a good idea, and others notice it. They naturally imitate Galt-Magnon, and they start building their own cabins. But the first man to invent a house, according to IP advocates, would have a right to prevent

others from building houses on their own land, with their own logs, or to charge them a fee if they do build houses. It is plain that the innovator in these examples becomes a partial owner of the tangible property (e.g., land and logs) of others, due not to first occupation and use of that property (for it is already owned), but due to his coming up with an idea.

Other criticism of intellectual property law concerns the tendency of the protections of intellectual property to expand, both in duration and in scope. The trend has been toward longer copyright protection (raising fears that it may someday be eternal).

Another limitation of current Intellectual Property legislation is its focus on individual and joint works. Copyright protection can only be obtained in 'original' works of authorship. This definition excludes any works that are the result of community creativity, for example folk songs and folk stories and IPR does not recognize the uniqueness of indigenous cultural 'property' and its ever-changing nature.

Ethics

The ethical problems brought up by intellectual property rights are most pertinent when it is socially valuable goods like life-saving medicines and genetically modified seeds that are given intellectual property protection. For example, pharmaceutical companies that produce, apply intellectual property rights in order to prevent other companies from manufacturing their product without the additional cost of research and development. The applications of intellectual property rights allow companies to charge higher than the marginal cost of production in order to recoup the costs of research and development. However, this immediately excludes from the market anyone who cannot afford the cost of the product, in this case a life saving drug.

6. Types of IP

The prominent types of Intellectual Property are classified under:

- Patents
- Copyrights
- Industrial Designs
- Trademarks
- Trade Dress
- Trade Secrets

The law defines what can be protected, the extent of protection and allied rights.

Patents

A patent grants an inventor the right to exclude others from making, using, selling, offering to sell, and importing an invention for a limited period of time, in exchange for the public disclosure of the invention. An invention is a solution to a specific technological problem, which may be a product or a process. Patent protection is available to anyone who "invents or discovers any new and useful process, machine, manufacture, or composition of matter or any improvement thereof." In addition, patent protection is available for certain hybridized and

asexually reproduced plants. Design patents are available for ornamental and non-functional features in articles of manufacture, provided the basic requirements of patentability are met.

Copyright

A copyright gives the creator of an original work, the exclusive rights to it, usually for a limited time. Copyright may apply to a wide range of creative, intellectual, or artistic forms, or "works". Copyright does not cover ideas and information themselves, only the form or manner in which they are expressed.

Industrial design rights

An industrial design right protects the visual design of objects that are not purely utilitarian. An industrial design consists of the creation of a shape, configuration or composition of pattern or color, or combination of pattern and color in three-dimensional form containing aesthetic value. An industrial design can be a two- or three-dimensional pattern used to produce a product, industrial commodity or handicraft.

Trademarks

A trademark is a recognizable sign, symbol design or expression which distinguishes products or services of a particular trader from the similar products or services of other traders.

Trade dress

Trade dress is a legal term of art that generally refers to characteristics of the visual appearance of a product or its packaging (or even the design of a building) that signify the source of the product to consumers.

Trade secrets

A trade secret is a formula, practice, process, design, instrument, pattern, or compilation of information which is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors or customers. Trade secret law varies from country to country.

7. Issues of Intellectual Property Right in Construction Business

The issues related to IPR that arise more frequently in the construction industry are:

- Copyright protections that exist in architectural plans, drawings, and the constructed buildings themselves;
- The rights of visual artists;
- The potential for trademark protection in non-functional and distinctive design and décor features in buildings; and
- The challenges of trademark protection for larger development projects.

7.1 Patent

Patent protection is available to anyone who "invents or discovers any new and useful process, machine, manufacture, or composition of matter or any improvement thereof." In addition, patent protection is available for certain hybridized and asexually reproduced plants. Design patents are available for ornamental and non-functional features in articles of manufacture, provided the basic requirements of patentability are met.

The essence of the "patent bargain" is that the inventor or subsequent owner of a patented invention is granted a statutory monopoly to make, use, offer to sell, sell or import the patented invention for a defined term, in exchange for a full public disclosure of the invention, including the best mode for practicing the claimed invention.

Generally, in order for a patent to issue and the patent monopoly to be granted to the inventor, three statutory hurdles must be cleared:

- *The invention must comprise patentable subject matter. The invention must relate to a useful process, machine, manufacture, or composition of matter.*

- *The invention must be new. That is, a difference must be found when the invention is compared to the prior art. Also, the invention must have been conceived by the named inventor(s).*

- *The invention, as a whole and at the time the invention was made, must not have been obvious to persons of ordinary skill in the related art.*

Design Patents for Ornamental Buildings and Ornamental Building Features

Design patents, as mentioned above, are available to whoever invents any new, original, and ornamental design for an article of manufacture. Such design patents are commonly issued for ornamental designs for building features, and for buildings themselves. While such designs are incorporated into structures that are generally expected to last for much longer than the patent term, the patents in such cases provide their owners with the exclusive rights described above during that term, which may provide a significant competitive advantage for the owner

While contractors and construction projects commonly make use of patented tools, construction materials, and methods, most work in the construction industry for decades and never face a claim of patent infringement. However, anyone who uses, manufactures, or sells any patented invention, without authorization, may be accused of patent infringement. In the construction context, liability can extend from the architect or structural engineers, to the general contractor, to the subcontractors.

For example, in the case of *Baut v. Pethick Construction Co*. an architect, who was aware that the plaintiff had applied for a patent and that infringement was possible, directed a subcontractor to construct a stained glass window using a method later found to be covered by the plaintiff's patent. Not only were the architects and subcontractor found liable for patent infringement, the general contractor was also found liable as having made, used, or sold a patented invention. Damages for patent infringement are usually measured using a "reasonable royalty," the lost profits of the patent owner, or the infringer's profits. Damages may be trebled in the case of

willful infringement. Today, construction documents between the property owner and the contractor or architect often contain indemnification provisions that assign obligations to pay the cost of defense and any royalties, license fees, or damages arising from patent claims.

7.2 Trade secret Law

The trade secret laws exist to prevent commercially sensitive and confidential information from being used or disclosed by those with whom the trade secret owner has a confidential relationship or by improper means.

In the construction industry, an awareness of trade secret law can be valuable both to use as a competitive advantage and to reduce the chances of improperly misappropriating the trade secrets. Businesses who are aware that their commercially sensitive information can inexpensively be protected as trade secrets can build value into their business by taking simple steps to perfect that information as a trade secret. Likewise, it is prudent to be aware of the confidential relationships inherent in any construction industry business, including those of existing and newly hired employees, to assure that information learned or disclosed through those confidential relationships are not improperly used or disclosed.

The first step in determining whether the trade secret laws are implicated is to determine whether there exists a trade secret at all. Trade secrets can be any information or know-how that - is not publicly available, and provides a commercial advantage. This information could include such things as customer and client lists, production or construction methods, product formulas, marketing strategies, pricing strategies and policies, certain contracts, and any other competitively sensitive information.

In order to determine what a trade secret is, the courts generally consider a number of factors like:

- *The extent to which the information is known outside the business;*
- *The extent to which the information is known by those inside the business;*
- *The savings affected and the value of having the information, as against competitors;*
- *The effort or money expended in obtaining and developing the information;*
- *The amount of time it would take third parties to acquire and duplicate the information; and*
- *Precautions taken to guard secrecy of the information*

In order to successfully maintain trade secret protection for confidential information, the owners of potential trade secrets should consider implementing the following steps:

- *Initial interviews for all new employees to discuss the existence of the company's trade secrets, to explain the importance of maintaining the confidences of the company, and to sign confidentiality agreements before any trade secrets are disclosed to the employee.*

- *Well-drafted and up-to-date confidentiality agreements to cover all trade secret information and non-solicitation provisions as necessary. In some cases, agreements should be modified and re-executed upon promotion to managerial positions.*

- *Non-competition agreements for management-level employees and to preserve trade secrets. These agreements are generally scrutinized by courts called upon to enforce them. In Colorado, non-competition agreements must contain reasonable durational and geographic limitations, and are only enforceable in limited situations.*

- *Password protection for information stored on computers and networks.*

- *Specific policies and practices on marking trade secret documents "confidential," and limiting distribution of such information on a specified "need-to-know" basis.*

- *Maintaining distribution lists or access logs that track to whom the trade secret information has been disclosed.*

- *Maintaining appropriate on-site security and/or I.D. badge to prevent un- escorted visitors at your company.*

- *Exit interviews with departing employees to remind them of confidential obligations and obtain information on potential competitive activities.*

If these precautions have been taken, trade secret owners can seek and obtain both injunctive relief, damages, punitive damages, and other remedies to preserve the trade secrets, including protective orders; *in camera* hearings; and the seizure of wrongfully obtained documents, computers, or other information.

7.3 Copyright Law

Under the copyright law, a work is automatically protected by copyright the moment it is created and fixed into a physical form. Neither registration nor publication is required for copyright protection. The use of a "copyright notice," while still a good idea, is not required as a prerequisite to protection.

Of most interest to the construction industry is that copyright protection extends to architectural drawings, sketches, and plans, including site plans and construction documents. The copyright law generally, and particularly the copyright law as it extends to architectural works has significant limitations:

- *Works that have **not** been fixed in a tangible form of expression are generally not protectable.*

- *Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices. Methods of construction, for example, are not protected under the copyright law, although as described previously in this chapter, such methods can be the subject of patent protection.*

- *Works consisting **entirely** of information that is common property and containing no original authorship — for example, standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources — are not protected by the copyright law.*

- *Functional features are not capable of copyright protection; only creative features can be protected. Standard configurations in a building's spaces and individual standard features, such as windows, doors, and other staple building components, are not protected.*

In order to infringe copyright, the copyright owner must prove:

(1) *the ownership of valid copyright in the work, and*
(2) that the infringer copied the work.

As an alternative to proof of copying, a copyright owner can instead prove that:

(1) *the infringer had access to the original work, and*
(2) the accused work is "substantially similar" to the original.

The question of infringement turns on the issues of ***access*** and ***substantial similarity***. Proving access previously required proof that the infringer had access to a structure's design plans. Today, access can be established by showing the infringer visited or had seen the building itself.

"Substantial similarity" exists when the accused work is so similar to that of the copyright owner that an ordinarily reasonable person would conclude that the defendant unlawfully appropriated the copyright owner's protectable expression by taking material of substance and value.

7.4 Trademark Law

The fourth body of intellectual property law that often affects the construction industry is trademark law. In contrast to patent law, which provides a finite monopoly on specifically defined inventions; or trade secret law, which protects and preserves information learned through confidential relationships; or the copyright law, which rewards those who create original expression, the trademark law concerns itself with assuring that consumers are not misled or confused. The touchstone of trademark law is whether the use of words, terms, names, symbols, or other devices are likely to cause confusion, to cause mistake, or to deceive consumers.

8. Claims in Intellectual Property rights: Global trend and its condition in Nepal

In its most general sense, the term infringement claim simply refers to a situation where it is claimed someone's rights were violated by the actions of another. More specifically, an infringement claim often refers to a violation of a copyright or some other type of intellectual property theft. The claim is often based on plagiarism (copying, stealing), meaning someone steals the creative work of another person in an attempt to earn some sort of reward, be that in the form of noto

riety, or money.

Though there are high-profile claims, many infringement claims never get a lot of attention. Often, the company or individual first making the infringement claim tries to handle the issue by directly approaching the supposed offending party. The party claiming the infringement may simply ask that the other party stop using a trademarked or otherwise protected item. Such use could be mistaken as an endorsement by the other company. If the demands are met, or a compromise is agreed upon, there is often no other action taken.

For example, a daycare may paint an image of a popular, but trademarked, cartoon character on the wall without the permission of the character's owner. If that takes place, the owner, which is most likely a movie or television production studio, could seek an injunction (order, ruling) or some other legal action to prevent the daycare facility from displaying the character. Often, the daycare may have the option of purchasing officially-licensed images, or perhaps buying a license to display the image that was already created. In many other cases, the image is simply removed.

In cases where there is a clear financial reward based on an infringement, the claim could go into the court system. There, the claiming party, often referred to as the plaintiff, seeks compensation for damages. Doing this often involves using a skilled intellectual property attorney who is well versed in intellectual property law. These cases could receive a great deal of attention, simply because the lawsuits could be worth millions of dollars.

In order to be successful in a lawsuit where an infringement claim has been made, there are generally two factors that need to be proven. The first is that the claimant is the owner of the work. The second is that the alleged violator had no rights to use the work. In some cases, the claimant may also need to prove when the work was first produced in order to establish he or she was the first one to create the intellectual property.

If an infringement claim has been made against a party, there are a number of defenses that can be used. The most common is likely fair use, which states that part of an academic work can be used for the purposes of review or critique. In such cases, there are certain requirements that must be met such as the quoted portion of the work must be attributed, and cannot exceed a certain percentage of the entire work.

I Patent Protection in Nepal

The patent system is a mode of protecting “inventions” that are “**new and useful**”. Patent Design and Trademark Act 2022 (PDTA) has defined Patent as any useful invention based on new principle or formula or any new way or method of construction, operation or transmission related to substance or a body of substance. Invention has been defined as:

a) Art, process, method or manner of manufacture;

b) Machine, apparatus or other article;
c) Substance produced by manufacture or any improvement of any of the above;

A patentable invention must be a "manner of new manufacture".

The underlying economic, commercial and political justification for the patent system is that it acts as a stimulus to investment in industrial innovation. Innovative technology leads to the maintenance of and increase in, the nation's stock of valuable and tradable industrial assets.

As per PDTA 2022

- A person should make registration of the patent as per act
- The registered patent should not be copied or used without the written permission of the inventor until the period as protected by the law.
- The right over the patent is protected for 21 years- seven years for the first time and can be renewed for two times of 7 years each.
- As other property patent right may also be transferred.
- If someone acts against the provision of the PDTA, such person is subjected to fine up to Rs. 2000 and confiscation of the related items.

Registration Procedure:

Upon receipt of application, DOI shall conduct formality examination. A formality examination will be made to determine whether the application fulfills the necessary procedural and formal requirements. An invitation to correct will be made where necessary documents are missing. Upon completion of formality examination, DOI shall conduct substantive examination. Substantive examination will be carried out by the examiners, who will decide whether or not the claimed invention should be patented. It will be thoroughly checked whether:

- The claimed invention is patentable subject matter or not.
- The claimed invention is novel, an invention is new if it is not anticipated by the prior art.
- It can be applied for practical purposes for its utility or the industrial applicability.
- The existence of inventive step or not, there must be a clearly identifiable difference between the state of the art and claimed invention.
- The invention is sufficiently disclosed in the application or not. The application must disclose the invention in a manner sufficiently clear for the invention to be carried out by a person skilled in the art.

II Copyrights Protection in Nepal

The copyright system is the means of protection of the legal right of the owner of property in an "original work" to prevent anyone else from reproducing the work in anyway. It is the right given to the author of the works that are related to the following (Copyright Act 2059);

a. Book, pamphlet, article and research papers
b. Drama, opera, dumb show and similar works prepared for show.
c. Musical works with or without words
d. Audio visual works
e. Architectural design
f. Painting, sculpture, wood carving, lithography
g. Photographic works
h. Works related to applied art
i. Excerpts, maps, plan, three dimensional works related to geography, topography and scientific writing and articles.
j. Computer program

As per Copy Right Act 2059,

- Registration not mandatory and can be registered if desired.
- Explanation of ideas, religion, news, concept, court decision, folk songs and folk stories, proverb, statistics is not protected.
- Rights granted are **Economic** and **Moral**
- The term of copy right granted to the author is up to the life of the author and 50 yrs. After his/her death. In case of joint authorship, it remains up to 50 yrs. After the death of the author who dies last. For anonymous works or publication with pseudo names shall be protected for 50 yrs from the date of publication.
- The penalty for infringement ranges from Rs 10,000 to Rs. 100,000 or imprisonment up to 6 months or both for first time and for second time onwards RS 20,000 to Rs. 200,000 or imprisonment of one year or both for each default.

Registration Procedure:

Any owner of the work, sound recording, performance or broadcasting who desires to register any work, sound recording, performance or broadcasting shall have to submit an application to the Registrar in the prescribed format with specified his/her evidence. Upon receipt of application, Registrar shall examine it and shall order the applicant, if required, to submit additional documents. The Registrar shall thoroughly examine whether

- The fixation of material/permanent form of work, if there is no fixation, no copyright. In order to protect the work under copyright law, idea should be in physical form or tangible form.
- The work is original or not, the degree of originality required for copyright protection is minimal, the emphasis is more on the labor, skill and judgment and capital expended in producing the work. Thus originality doesn't mean first, it means independently created.
- If the Registrar is satisfied on those grounds, he/she shall register such a work, sound recording, performance or broadcasting in the applicant's name on the basis of submitted documents.

III Trademarks Protection in Nepal

A trademark refers to a mark or symbol used by a trader in association with specific goods manufactured and or sold. The mark is a symbol of a reputation of some kind in the goods, either in terms of their origin or quality or both. Normally these goods would have attained a reputation over a period of years and are readily identifiable. Thus it is the trader's reputation involved with goods which is protected by the mark. On this basis the owner claims an exclusive monopoly in the use of that mark on the goods. Full trademark protection is properly secured only by registration. The creation of trademark rights under Nepal Law is 'first to file within the jurisdiction'.

Protection of Well-known Trademark:

Though Nepal is a member country of Paris Convention, it is obliged to protect the well-known trademark in its territory; however, Nepal Law is silent on the provisions of well known trademark and its recognition along with to demarcation between well-known trademark and others. No basic facts or bases are stated in Nepal Law to recognize as a well-known trademark .

In order to protect the well-known trademark, at least, Nepal law has provided that if it is felt that proposed trade-mark may hurt the prestige of any individual or institution or adversely affect the public conduct or morality or undermine the national interest or the reputation of the trade-mark of any other person, or if such trade-mark found to have already been registered in the name of another person, it shall not be registered

Registrable:

Trademark, Service mark, 3/D mark, Collective mark, Geographical Indication

Non-Registrable:

Non Traditional Trademark (NTTM) i.e. Audible Sign (Sound mark), olfactory mark (Smell mark) and other (Invisible) sign

According to PDTA 2022,

- Trademark is the use of any word, sign or picture or the combination of the three by a firm, company or person to distinguish the product or services from those of the others.
- Anyone can protect their right over the trademark by registration of the same.
- The registered trademark should not be used or should not imitate to give false impression.
- The right over the trademark can be protected forever subjected to renewal.
- There is a provision of fine up to Rs 1000 and confiscation of the items if someone acts against the provisions of PDTA regarding the use of trademarks.

IV Protection of Designs in Nepal

"Designs" means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means whether manual, mechanical or chemical, separate or combined in the finished article which appeals to an eye judged solely by the eye.

This system of registering rights in designs arose because the traditional copyright protection extended only to literary works. Therefore pressure was brought to protect all those engaged in innovative designs.

As per PDTA 2022,

- A person should make registration of the design as per act
- The registered design should not be used without the written permission of the designer until the period as protected by the law.
- The right over the patent is protected for 15 years- five years for the first time and can be renewed for two times of 5years each.

9. WTO and Provision in WTO Regime

The **Agreement on Trade Related Aspects of Intellectual Property Rights** (**TRIPS**) is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for many forms of intellectual property (IP) regulation as applied to nationals of other WTO Members. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994. After the Uruguay round, the GATT became the basis for the establishment of the World Trade Organization. Because ratification of TRIPS is a compulsory requirement of World Trade Organization membership, any country seeking to obtain easy access to the numerous international markets opened by the World Trade Organization must enact the strict intellectual property laws mandated by TRIPS. For this reason, TRIPS is the most important multilateral instrument for the globalization of intellectual property laws.

The TRIPS agreement introduced intellectual property law into the international trading system for the first time and remains the most comprehensive international agreement on intellectual

property to date. In 2001, developing countries, concerned that developed countries were insisting on an overly narrow reading of TRIPS, initiated a round of talks that resulted in the Doha Declaration. The Doha declaration is a WTO statement that clarifies the scope of TRIPS, stating for example that TRIPS can and should be interpreted in light of the goal "to promote access to medicines for all."

Specifically, TRIPS requires WTO members to provide copyright rights, covering content producers including performers, producers of sound recordings and broadcasting organizations; geographical indications, including appellations of origin; designs; integrated circuit layout-designs; patents; new plant varieties; trademarks; trade dress; and undisclosed or confidential information. TRIPS also specify enforcement procedures, remedies, and dispute resolution procedures. Protection and enforcement of all intellectual property rights shall meet the objectives to contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

TRIPS require member states to provide strong protection for intellectual property rights. For example, under TRIPS:

- *Copyright terms must extend at least 20 years, unless based on the life of the author.*
- *Copyright must be granted automatically, and not based upon any "formality," such as registrations.*
- *Computer programs must be regarded as "literary works" under copyright law and receive the same terms of protection.*
- *Patents must be granted for "inventions" in all "fields of technology" provided they meet all other patentability requirements (although exceptions for certain public interests are allowed (Art. 27.2 and 27.3) and must be enforceable for at least 20 years (Art 33).*
- *Exceptions to exclusive rights must be limited, provided that a normal exploitation of the work (Art. 13) and normal exploitation of the patent (Art 30) is not in conflict.*
- *No unreasonable prejudice to the legitimate interests of the right holders of computer programs and patents is allowed.*
- *In each state, intellectual property laws may not offer any benefits to local citizens which are not available to citizens of other TRIPS signatories under the principle of national treatment (with certain limited exceptions). TRIPS also have a most favored nation clause.*

Access to essential medicines

The most visible conflict has been over AIDS drugs in Africa. Despite the role that patents have played in maintaining higher drug costs for public health programs across Africa, this controversy has not led to a revision of TRIPs. Instead, an interpretive statement, the Doha Declaration, was issued in November 2001, which indicated that TRIPs should not prevent states

from dealing with public health crises. After Doha, PhRMA, the United States and to a lesser extent other developed nations began working to minimize the effect of the declaration.

A 2003 agreement loosened the domestic market requirement, and allows developing countries to export to other countries where there is a national health problem as long as drugs exported are not part of a commercial or industrial policy. Drugs exported under such a regime may be packaged or colored differently to prevent them from prejudicing markets in the developed world.

Implementation in developing Countries

The obligations under TRIPS apply equally to all member states, however developing countries were allowed extra time to implement the applicable changes to their national laws, in two tiers of transition according to their level of development. The transition period for developing countries expired in 2005. The transition period for least developed countries to implement TRIPS was extended to 2013, and until 1 January 2016 for pharmaceutical patents, with the possibility of further extension.

It has therefore been argued that the TRIPS standard of requiring all countries to create strict intellectual property systems will be detrimental to poorer countries' development. Many argue that it is, *prima facie*, in the strategic interest of most if not all underdeveloped nations to use any flexibility available in TRIPS to legislate the weakest IP laws possible.

This is likely caused by the lack of legal and technical expertise needed to draft legislation that implements flexibilities, which has often led to developing countries directly copying developed country IP legislation or relying on technical assistance from the World Intellectual Property Organization (WIPO), which encourages them to implement stronger intellectual property monopolies.

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