

AN INTRODUCTION TO INTELLECTUAL PROPERTY RIGHTS WITH SPECIAL REFERENCE TO TRADEMARK

Written by *Juhi Goel*

Ph.D Student Panjab University Chandigarh

INTRODUCTION

Our legal system provides certain rights and protections for owners of property. Like other property rights, Intellectual property rights are not a common phenomenon in India. But, with the passage of time and in the era of globalization it becomes need of the hour to have stringent laws relating to intellectual property rights, before discussion about development of intellectual property rights we should know its detailed meaning. Intellectual property refers to the creation of mind.¹ As per Black's Law Dictionary Intellectual property means² "A commercially valuable product of human intellect, in an abstract form such as copyrightable work, a protectable Trademark, a patentable invention or a Trademark of secret". Intellectual Property is essentially the creation of human mind and intellect and intellectual Property rights are aimed at safeguarding, authors, and other producers of intellectual goods or any services by granting them certain time bound rights³. Intellectual Property Rights allow people to assert ownership rights on the outcomes of their creativity and innovative activity in the same way that they can own physical property⁴. Intellectual Property results out of mental labour. The four main types of Intellectual Property are Patents, Trademarks, Designs and Copyrights. Trademarks are an important aspect of Intellectual Property. To understand the expression intellectual property rights, it is essential to know the meaning of word property and rights. Let us understand the expression property.

Property means any Article, item, or thing owned with the rights of possession, use, and enjoyment, and which the owner can bestow, collateralize, encumber, mortgage, sell,

¹ Available at <http://newdelhi.usembassy.gov/ipr.html> visited on 17.04.2017

² Available at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/450/wipo_pub_450.pdf visited on 19.04.2017

³ Jyoti Rattan, *Cyber Laws*, (Bharat Law House, 5th edn, 2015), p.309

⁴ Anita Rao and V.Bhanoji Rao, *Intellectual Property-A Primer*, (Eastern Book Company, edn, 2015), p.1

or transfer, and can exclude everyone else from it. Two basic kinds of property are (1) Real (land), involving a degree of geographical fixity, and (2) Personal (anything other than real property) which does not involve geographical fixity.⁵

Personal Property can be classified into two broad categories: Tangible- (moveable and immovable) and Intangible-(intellectual property)⁶. It's worth to discuss the meaning of Right here to enlighten the concept of property rights.

'Right' is a term contracted with duty and a duty is something owed by one person to another. Correspondingly the later has a right against former. Rights are concerned with interest. In other words, they are interests protected by rule of rights. Rights are either moral or legal. A moral right is protected by the rule of morality whereas the legal right is protected by the rule of law.⁷

Every right involves three-fold relation in which the owner of it stands:

- It is a right against some person or persons.
- It is a right to some act or omission of such person or persons
- It is a right over or to something to which that act or omission relates⁸.

As we understood meaning of property and right now let's understand the meaning intellectual property. Human beings are superior from other living creatures because they possess intellect. Creative genius of human being creates intellectual property and, when properly exploited, can earn wealth. Since it is essentially a creation of mind, therefore, it is called intellectual property. According to Encyclopaedia⁹ "Intellectual Property Rights means Ownership of ideas". Very simple meaning of intellectual property is all results of the human brain. In other words, everything which is created by human brain is known as intellectual property. It can be transfer like other properties for commercial gain. In simple words, intellectual property right means ownership of ideas.

⁵ Available at <http://dictionary.cambridge.org/dictionary/english/property> visited on 19.04.2017

⁶ M.K.Bhandari, *Law Relating to Intellectual Property Rights* (Central Law Publishers, 1st edn,2010) p.1

⁷ Salmond on Jurisprudence, 12th Ed P.217 to 224

⁸ *Ibid.*

⁹ Available at www.intellectual_property_meaning.in visited on 19.04.2017

According to an eminent jurist, “Intellectual property right means a commercially valuable product of human intellect, in an abstract form such as copyrightable work, a protectable Trademark, a patentable invention or a Trademark or secret. While there is a close relationship between intangible property and tangible objects in which they are embodied, intellectual property rights are distinct and separate from property rights in tangible goods.¹⁰ For example; When a person posts a letter to someone, the personal property of the ink and parchment is transmitted to be recipient, here sender retains intellectual property rights.

Intellectual property rights are like any other property rights, which allow creators or owners of patent, trademark, or copyrighted work to benefit from their own work or investment or creation. These rights are outlined in Article 27 of the Universal Declaration on Human Rights, which provide for the right to benefit from, the protection of moral and material interest resulting from authorship of scientific, and literary or artistic work production. The importance of Intellectual Property was first recognized in Paris Convention for the protection of Intellectual property (1883) and the Bern Convention for the protection of literary and artistic work (1886). Both these treaties are administered by World Intellectual Property Organization (WIPO)¹¹.

Intellectual property is an intellectual work produced by the intellect of human brain i. e literary work produced by the author’s musical work produced by the musicians, inventions invented by the inventors, coining of trademarks used in the course of business or trade, design of industrial products etc, are intellectual properties as they are created by human intellect.¹² The scope of intellectual property is expanding very fast and attempts are being made by persons who create new creative idea to seek protection under the umbrella of intellectual property rights. Intellectual property like tangible property is owned by its owner to the exclusion of others. The owner of intellectual property has exclusive right over his intellectual property. No one can make use of intellectual property without the consent of the owner. i.e no one can copy literary, musical work, or apply a design to an industrial product without the consent of the

¹⁰ Lionel Bently and Brand Sherman, *Intellectual Property Law*, (Cambridge University Press, 1999) p.1-2

¹¹ Available at http://www.wipo.int/export/sites/www/freepublications/en/intproperty/450/wipo_pub_450.pdf visited on 11.04.2017

¹² Dr. Meenu Paul, *Intellectual Property Laws* (Allahabad Law Agency, 4th edn 2012) P.1

author, musician, the inventor as the case may be. Similarly, no one can make use of the Trademarks without the consent of its proprietor. A person enjoys exclusive rights with respect to his intellectual property which he has created by intellect of the brain.

Broadly we can summaries nature/ characteristics of Intellectual Property as:

- Creation of human mind (Intellect)
- Intangible property
- Exclusive rights given by statutes
- Time-bound and Territorial/Jurisdictional

After understanding intellectual property rights let's understand Trademark. A Trademark is a sign which is used to distinguish the goods of an Industrial or commercial enterprise from those of other enterprises, service mark with regards to services serves similar purpose.¹³ A trade or service mark is means of identification which enables traders to mark their goods or service readily distinguishable from similar goods or service supplied by other.¹⁴ The trader uses the mark to identify his goods so that the public may know the source of production of the goods. It is in the interest of public as well as traders or manufactures that the goods available in the market for the purpose of sale or purchase may be identified with respect to the manufacturer or trader so that the public could get the goods of quality which a particular manufacturer has assured to produce¹⁵.

The traders or manufactures adopt a particular mark to sell their goods and purchasers of those goods identify them by the mark used there on. In the course of the time that very mark used frequently by a trader, earn goodwill and reputation which becomes goodwill and reputation of the user of that mark. A Trademark is a commercial asset intended to be used commercially by the businessman.¹⁶ It is considered to be a type of property, the owner of which get a perpetual right to its exclusive use in relation to his goods and services and is entitled to protection under

¹³ D.P.Mittal, *New Law of trademarks passing of and geographical indications of goods* , (Taxman's edn 2002) p.1-5

¹⁴ Available at www.fredictionary.com/trademark visited on 13.04.2017

¹⁵ *Ibid.*

¹⁶ M.K.Bhandari, *Law relating to Intellectual Property Rights*, (Central Law Publications, 2010) p.149.

the Law. Not merely the interests of public but also the interests of the owner are subject to concern of Trademark legislation.

A consumer is duped if he buys a commodity presuming it to have originated from a certain identified source when actually it is not and later he finds the commodity of substandard. In this process, the reputation of traders also suffers if spurious goods are sold under his name which is not manufactured by him. The interest of both the consumer and trader can be served if some identity symbol which mark out the origin of goods from a definite trade source is attached with the goods emanating from such source, Such Symbol is called Trademark¹⁷.

In other words, we can say, A Trademark is a visual symbol in the form of a word, a device or label applied to article of commerce, with a view to indicate to the purchasing public that they are goods manufactured or otherwise dealt in by a particular person or a particular organization as distinguish from similar goods manufactured or dealt in by others. In other words, a Trademark is a visual representation attached to the goods for the purpose of indicating their trade origin. For example: The Trade Mark 'Ponds' distinguished the goods of Ponds company from those say the Revlon. When a trade mark is used in connection with services such as banking, telecommunications, airlines, tourism, etc they are called service marks¹⁸.

¹⁷ *Ibid*

¹⁸ Dr. Meenu Paul, *Intellectual Property Laws* (Allahabad Law Agency, 3rd edn 2009) P.3

While tracing Evolution of Trademark Laws, we found from ancient times human beings have been under the process of creating and innovating things. For Example: during pre-historic period man had made stone, jewelry, hunting materials, vessels etc. However, when spirituality started to sprout up he made figurines of gods and goddesses. Originally, marks were placed on objects to identify ownership and to deter thieves. By this way the ancient people tried to control low quality goods, and as the maker of the product was identified automatically the infringers were punished. The more a Trademark came to be known the more it inspired confidence in the goods and services to potential clients. When a mark was placed it means that any third-party other than the manufacturer did not have any right over it. In a large way, it helped to deter people with vested interest. In the Middle Ages two basic kinds of marks could be found: Merchants Mark and Production Mark.

The Merchants Mark indicated ownership whereas the Production mark indicated the Origin. Production marks were used by guilds to guarantee quality and to control entry to particular trade.¹⁹ People also started engraving their names in ships this was the first widely recognized method of using Trademarks, where in case of ship wreckage, identification would be possible. The other people who started using Trademarks were people doing business or in guilds started asserting it as a mark on their goods. This made the manufacturer responsible for the quality of the goods that are being produced and to retain their customers. Nowadays it is up to a seller to use or not use a mark. Modern marks do not aim at identifying ownership as was the case with the proprietary marks of the Middle Ages. Modern marks are an asset for the producer whereas in earlier times the trade marks were a liability²⁰. Many of the laws like the aforesaid law of bread and beer assizes fought to bring about a mode of standardization as well as protect the consumers so that they do not get cheated with adulterated goods. A specific mode of measurement was fixed.

Now we will switch to Definition of Trademark, as defined in Article 15 of the TRIPs Agreement “Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a Trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall

¹⁹ Ashwani KR Bansal, *Law of Trademarks in India*, (Commercial Law Publishers 2001)p 21

²⁰ *Ibid*

be eligible for registration as Trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.²¹

The Lanham Act, 1946 of United States define Trademark as “The term ‘Trademark’ includes any word, name, symbol, or device, or any combination thereof to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”²²

According to an eminent jurist, the “Trademark” means a distinctive mark of authenticity through which the product of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. Under common law Trademark means of showing that a certain trade or occupation is carried on by particular firm or person. Significantly this expression Trademark is not only used in narrow sense but also trade names and marks which are not in themselves or in their origin distinctive but which have become known by custom and reputation as showing that goods or implements of Trademark are made, sold or employed by a particular person or firm. In a narrow sense of the word a Trade Mark is a distinctive mark or device affixed so or accompanying on article intended for sale for the purpose of indicating that it is manufactured, selected or sold by a particular person or firm.

As per another definition a “Trademark” is the visual symbol, name, figure, letter form or device adopted and used by manufacturers or merchant in order to sell, and to distinguish them from those manufactured or sold by another so that they must be known in the market as his and thus enable him to secure such profits as result from a reputation for superior skill, industry or enterprise.²³

Now, we can conclude Intellectual property is essentially a creation of mind. As we conversant with the fact that every individual has a different intellect and also have rights to protect the creation of one’s intellect. These rights are known as Intellectual property rights. Among other property rights Trademark plays an important role. In the era of globalization and

²¹ Trade Related Intellectual Property Rights

²² Enacted On July 5, 1946, codified at 15 U.S.C. § 1051

²³ P.Ramanath Aiyar, *The Law Lexicon*, Dictionary, 1997, p.1908

commercialization Trademark infringement increases so to protect the exploitation of Intellectual property rights it's a need of the hour to spread awareness about these rights.

