



Mauritius Research Council

**BASICS
OF
INTELLECTUAL PROPERTY RIGHTS**

September 2003

Disclaimer

This brochure is intended to provide basic information in the area of intellectual property and should not be taken as legal advice or as a substitute for the official texts. Whilst every effort has been made to give accurate and up to date information, no warranty is given as regards the completeness of the information therein provided, and no liability shall accrue as a result of information provided therein. The readers should take advice from a qualified professional when dealing with specific situations or matters.

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Foreword

The Mauritius Research Council (MRC) is the apex organisation for the promotion and co-ordination of national investment in research. It acts as a central body advising the Government of Mauritius on Science and Technology (S&T) issues, and influences the direction of innovation by funding research in areas of national priority.

This booklet has been prepared in response to one of the recommendations following an "Awareness Workshop on Intellectual Property Rights (IPR)", organised by the MRC on August 28-29, 2002.

The objectives of this workshop (conducted by a team of IPR experts from the Department of Science and Technology (DST), Ministry of Science and Technology, New Delhi, India, in collaboration with the Attorney General's Office of Mauritius) were to conduct dialogue and share knowledge on IPR, with particular emphasis on the need to (i) sensitise people in Mauritius to IPR issues, and (ii) provide an opportunity to address specialist IPR areas that are directly relevant to Mauritius.

In line with the first objective of the workshop, the publication of this booklet is intended to provide up-to-date information on IPR and its importance in relatively simple terms. It is hoped that readers will find the booklet useful in focusing on the basics of IPR, especially in the context of the ongoing discussions on the benefits and costs of IP protection for developing countries like Mauritius. It is also expected that this will stimulate the need to consider the protection of knowledge as an important tool in the early phases of innovation, research and development.

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1. INTRODUCTION

1.1 Intellectual Property v/s Industrial Property

Intellectual property is a term used to encompass the rights which may result from intellectual activities in the industrial, scientific, literary and artistic spheres and includes patents, trademarks, commercial names and designations, industrial designs, geographical indications, copyright and related rights and protection against unfair competition.

Traditionally, the term "intellectual property" is divided into two branches, namely "industrial property" and copyright. As such, the expression "industrial property" will cover technological inventions and industrial designs, where an invention is defined as a new solution to a technical problem, and industrial design will cover the aesthetic creations determining the appearance of the finished product. The notion of industrial property will also cover matters like trademark.

1.2 Types of intellectual property

Intellectual property protects the application of ideas and information that are of commercial value. Presently there is an increasing level of activity in the legal and political arena to protect economically exploitable information and ideas, and as international trade becomes more and more sophisticated with the impact of new technologies this interest is likely to be on the increase.

Granting of an intellectual property right to a person in effect allows that person to control the activities of others in respect of that particular right. Generally, intellectual property grants a negative right - to the owner of that right, the owner may prevent others from doing certain things (copying, making counterfeits) and may even prevent a third party who has reached the same idea independently from exploiting that idea. Intellectual property may also grant positive entitlement, such as the grant of a patent or trademark if certain conditions have been complied with.

Patents, Copyright and Trademarks are the three traditional intellectual property rights and can be considered as the models which have inspired the subsequent developments in intellectual property, such as industrial designs, geographical indications, trade secrets and others.

1.3 Legislation governing intellectual property in Mauritius

Intellectual property in Mauritius has long been governed by the following Acts of Parliaments and regulations made there under, namely:

The Patent Act (R/L 4/135 – 22 May 1875)
The Trademarks Act (R/L 5/476 – 1 November 1868)
The Copyright Act 1997 (as amended).

However, during the course of the year 2002, Parliament has passed the following enactments, which shall govern matters relating to industrial property in Mauritius, namely:

- The Patents, Industrial Designs and Trademarks Act 2002
- The Layout Designs (Topographies) of Integrated Circuits Act 2002
- The Geographical Indications Act 2002
- The Protection against Unfair Practices (Industrial Property Rights) Act 2002

These new Acts are in line with international norms and follow the international commitments taken by the State, within the World Trade Organisation. Further, it is understood that the Copyright Act will be amended to take into account the change in technology, and new legislation will be passed to take into account “plant varieties”.

1.4 Administration of intellectual property rights

The administration of copyright and related rights falls under the responsibility of the Ministry of Arts and Culture. In the field of copyright there is also the Mauritius Society of Authors (MASA), which is a statutory body established under the Copyright Act, and which looks after the interests of its members, that is copyright owners or exclusive licensees.

In the field of Trademarks and Patents, the Ministry of Industry and International Trade is presently looking into the administration of those intellectual property rights. However, with the new legislation some substantial changes will be brought about with the establishment of a new institutional framework, namely the Industrial Property Office, which office shall be administered by a Controller. However, it can be assumed that within a short term the different institutions established by the Industrial Property legislations will be administered and will function under the Ministry of International Trade.

The Controller will have the function to grant patent, register any mark, industrial design, geographical indication or lay-out design as the case may be.

The decisions of the Controller can be challenged by way of appeal to the Industrial Property Tribunal. Also, the Tribunal is empowered to give rulings on the interpretation of any provisions of any of the industrial property enactments.

The law further provides for an appeal to the Supreme Court, if a person is dissatisfied with the ruling of the Tribunal, but such appeal shall be on points of law only, and by a procedure known as case stated. It is to be noted that one cannot bypass the Tribunal and appeal directly to the Supreme Court.

1.5 Enforcement of intellectual property rights

As regards the enforcement of intellectual property rights, to the extent that these are private rights, the prime responsibility rests on the owner of the right to seek enforcement of his/her rights through the mechanism set down in the legislation. In addition, the help of public authorities, like the Police, may be sought, and depending on the legislation applicable any breach of an intellectual property right may lead to criminal prosecutions.

Depending on the circumstances of the case, civil remedies (such as injunction – to prevent certain acts or damages – to compensate certain loss) or criminal sanctions (which normally will take a longer time and the proceeding will ultimately be taken over by public authorities) may be resorted to. In case of extreme urgency, *ex-parte* application before the judge in chambers may be resorted to, to prevent irreparable or consequential damages.

It is to be noted that under the new enactments, the Controller may upon his own initiative investigate any potential offence under any of the industrial property laws. In that respect, the Controller has extensive powers of investigation including powers to request information and detention of documents or material. In the conduct of any enquiry the Commissioner of Police shall provide such assistance as necessary to the Controller.

1.6 Some international conventions

There are quite a number of international conventions governing the area of intellectual property, and with the rapid development of technology, new conventions are in the making. However, the prime international conventions can be found in the-

- TRIPS (Trade Related Aspects of Intellectual Property);
- Paris Convention;
- Berne Convention.

It is to be noted that the TRIPS does, by incorporation, take on board most of the substantive provisions of the Paris and Berne Conventions.

1.7 Fees

Application fees, renewal fees and such other fees to be levied are to be prescribed by regulations made under the enactments. Details of the fees will be available at the Industrial Property Office.

2. PATENTS

2.1 What is a patent?

A patent is a document issued by a government authority (or a regional authority) granting the exclusive right to the applicant (normally the owner of invention) to exploit an invention to the exclusion of others, for a limited period of time. In other words it is a title that is granted to protect an invention. This document therefore creates a legal right and may relate to a product (product patent) or process (process patent).

It is to be noted that a patent has territorial limitation (that is valid in the country where it is granted) and is akin to a property right, hence may be disposed of by sale, assignment, licensing, ...etc. At present there is no "international patent", but in some regions like in Europe or central Africa there can be a "regional patent", that is a patent that is valid in a number of countries (European Union or OAPI). (However see paragraph 2.10 on PCT)

2.2 Conditions for granting a patent

For an invention to be "patentable" it has to:

- be new;
- involve an inventive step;
- be capable of industrial application.

(a) What is "new"?

In principle an invention will be considered as new if it has not been anticipated by prior art, that is any information which is in the public domain. Generally, information disclosed, be it verbal (during a conference for example), written (article in a magazine for example) or published (as a book, over the internet, etc), prior to the filing of the patent, or the priority date if applicable, will be considered as in the public domain, hence not new.

However, disclosure of an invention to the public within 12 months prior to the filing date shall not be considered as falling within the public domain, if the disclosure results from the acts of or as a consequence of acts of the applicant or his predecessor in title, or as a result of an abuse committed by a third party.

(b) What is "priority date"?

The Mauritian system of registration is based on the first to file system. That means that the first person who files his application (assuming that the application is granted) gets the patent. This "first to file" system no doubt puts tremendous pressure on competing scientists or technicians to reach the "Patent Office" as soon as is feasible. This problem is accentuated if the patentee would like to file his patent in foreign countries. It is therefore necessary that the applicant be given some time during which he should not lose his priority.

The priority date may be defined as the date on which an application is tested against prior art or the state of art (test for novelty), and which date is normally taken to be the date of filing. Under the Paris Convention, an applicant is given 12 months as from the date of the first filing (the priority date) of his application, during which he shall have priority over other applications. In other words, an applicant will have a period of 12 months as from the date he had first filed his application (normally in his national country) to file his application in any country signatory to the Paris Convention and if granted the patent will be considered as having been granted from the date of first filing.

(c) What is an "inventive step"?

An invention will be considered as involving an inventive step where having regards to the prior art, the invention would not have been obvious to a person having ordinary skill in the relevant art. Increasingly the term "non-obviousness" is used as synonymous to "inventive step" and often a "scintilla" of invention is sufficient for an invention to be considered as "non-obvious".

The inclusion of this requirement is based on the premise that protection should not be given for not only what is already known as part of the art, but also for what would have been obvious to or that can be deduced by a person having ordinary skill in the art.

(d) What is "industrial applicability"?

An invention shall be considered as industrially applicable where it can be made or used in any kind of industry. In the new legislation the term "industry" is construed in its broadest sense and covers handicraft, agriculture, fishery and services, as well as other commercial sectors. In other words a patent will not be granted if it is not useful.

(e) Added requirement of “enabling disclosure”

In return for a patent the applicant is expected to disclose his invention to the public, in his application. The question that often arises is: what is the degree of disclosure that is required from the applicant?

Mauritian legislation has deemed it fit to specify the degree of disclosure that is required of an applicant. As such any description of the invention shall disclose the same in a manner that is “sufficiently clear and complete for the invention to be carried out by a person having ordinary skill in the art, and shall, in particular, indicate at least one mode known to the applicant for carrying out the invention”.

It is to be noted that this requirement of “enabling disclosure” does not require the applicant to disclose the “best” way of carrying out the invention.

2.3 What can be patented?

Normally, a patentable subject matter is established by statute, and is usually defined in terms of exception to patentability. The general rule is that patent protection should normally be available for inventions in all fields of technology. In the United States, the Supreme Court, in the case of *Diamond v Chakrabarty* (65 Law Ed. (2d) 144 (1980)) stated that “anything under the sun” apart from human beings were patentable. Other countries have not been as sweeping as that in their approach to the issue of patentability.

In Mauritius, any invention that provides a technical solution to a specific problem in the field of technology and which complies with the requirements listed at paragraph 2.2 above may potentially be patented, unless specifically excluded by the law.

As such art, process, manner of manufacture, machine, apparatus, ..etc may be the subject matter of a patent application.

2.4 What inventions cannot be patented?

The general exception is that any commercial exploitation of an invention, which is contrary to public order or morality is not patentable.

The following inventions have expressly been excluded by Mauritian legislation under the new enactments:

- discoveries, scientific theories and mathematical methods;
- schemes, rules or methods of doing business, performing purely mental acts or playing games;

- methods for treatment of the human or animal, as well as diagnostic methods practised on the human or animal body;
- plants;
- animals;
- essentially biological processes for the production of plants and animals;
- plant varieties;
- literary, dramatic, musical or artistic works or any other aesthetic creation whatsoever;

However, it is to be noted that the law provides that “any product” used in any of the methods referred to above, such as for example for the treatment of a human, may obtain patent protection. Pharmaceutical products used in the treatment of human subjects therefore benefit from patent protection.

In addition there may be temporary exclusion from patent protection (see compulsory and non-voluntary licensing below at paragraph 2.11).

The issue of patentability and non-patentability is not an easy one and often, in other jurisdictions, this distinction has led to extensive and prolonged litigation.

For example: How to distinguish between an invention (which is patentable) and a discovery (which is not patentable)? Generally, discovery is considered to be the unearthing of causes, properties or phenomena which are already in existence in nature, whilst invention is the application of knowledge to satisfy social needs. However, the rapid advance in bio-technology has resulted in massive investments by the commercial sector in research and development, resulting in a substantial increase in application for patent protection, and at the earliest possible stage. For example, the Human Genome Project has resulted in the application for protection of specific genes or gene sequences. One of the questions that would arise to the Patenting Authority in the country where protection is sought is: whether this is an invention or a discovery? The answer to this question may vary from one country to another, and often one will have to look at the judicial pronouncement to find the solution. Further, one has to also consider the social, moral and ethical values that may be involved.

2.5 How to file a patent?

In principle a patent should be filed at the earliest possible opportunity bearing in mind the criteria set down at paragraph 2.2 above. Delay in filing an application entails the risk that a competitor may get priority over one's invention. It is imperative that the services of professionals dealing with the filing of patents be retained during this process.

The new legislation provides that an application has to be made in a prescribed form, and in such manner as may be required by the Controller. An application shall contain:

- a petition (to the effect that one is requesting for a patent to be granted);
- particulars of the applicant, inventor or agent;
- the title of the invention;
- a description of the invention;
- claim(s) (that is the description of the matter for which protection is being sought and which shall determine the scope of protection that will eventually be granted);
- any drawings (if any) or abstract (normally this is the technical description);
- justification as to the applicant's right to the invention if he is not the inventor;
- contact address of the applicant.

It will be appropriate to contact a patent attorney or an authorised agent when these documents, which are legal and technical in nature, have to be prepared and filed. More details as to what has to be included will be found in regulations made under the Patents, Industrial Designs and Trademarks Act 2002.

2.6 How long is a patent valid for?

Under the old legislation a patent was valid for a period of 14 years from the date of filing and could be renewed for a further period of 14 years.

Under the new legislation a patent shall expire 20 years after the filing date of the application.

It is to be noted that an annual fee has to be paid to maintain the patent, and upon failure to do so the relevant authority will consider that the patent has been withdrawn. The renewal fees will be prescribed by regulations made under the Patents, Industrial Designs and Trademarks Act 2002.

2.7 Who has the right to a patent?

The rule of thumb is that the right to a patent belongs to the inventor, and in case of a joint invention to the inventors jointly. If the invention has been made in execution of or under a contract of employment, unless there is anything specific to the contrary in the contract, the right shall vest in the employer. Also, in case of independent inventors, the first one to file his application, shall have the right to the patent.

2.8. How to enforce your patent?

Once a patent is granted, the right holder shall have the right to exploit the invention in Mauritius to the exclusion of others. It is to be noted that this right may be sold, transferred, or assigned. This means that any person who makes, imports, sells or offers for sale, uses or stocks the product for any of the acts referred to above will, if done without the authorisation of the right owner, be in contravention of the law.

However, given that this right is a private one, it is important that the patent holder take appropriate action once he has reason to believe that his rights are being breached. In addition to criminal action, the right holder may avail himself of civil remedies such as injunction (to prevent the other person from breaching his right) and damages. Once again it may be appropriate for the right holder to seek legal advice once he/she is of the view that his/her rights are being or are likely to be violated.

It is to be noted that under the new legislation the Courts will be empowered to inflict fines of up to Rs 250,000 and imprisonment up to a maximum of 5 years in certain cases, as well as forfeiture of the incriminating articles, where appropriate. Further, the rules against unfair practice will also be available as remedy (see the Protection Against Unfair Practices (Industrial Property Rights) Act 2002).

2.9. Can you enforce your patent in another country?

In principle the rights granted have effect only in the territory in which it is granted. Hence a patent granted in Mauritius will have effect only within the territory of the Republic of Mauritius.

2.10. The Patent Cooperation Treaty.

The Patent Cooperation Treaty (PCT), which came into force in 1978, provides a forum where an inventor can seek protection of his right in several countries. It is to be noted that the PCT does not itself grant the right, which is left for each individual country to decide upon, but does provide for a number of non-negligible advantages. The activities of the PCT are administered by the World Intellectual Property Organisation (WIPO) based in Geneva. It is to be noted that some reduction in the normal fees (starting as from about 600 Swiss francs as basic fee) are granted to low income countries. Applications using the PCT are usually through the local patent office (Industrial Property Office in Mauritius), even though applications can be made directly to the WIPO.

Mauritius has showed keen interest in joining the PCT, and it is to be noted that section 26 of the Patents, Industrial Designs and Trademarks Act 2002 does make provision for the Controller to process applications in accordance with the procedures laid down under the PCT.

2.11 Compulsory licence or non-voluntary licence.

The Controller may, where he is satisfied that a patent is not exploited or insufficiently exploited, issued a "non-voluntary" licence. A licence is exploited if the invention is worked locally or by importation in Mauritius. However, it is to be noted that a non-voluntary licence can only be issued after 4 years of the filing of the application or 3 years after the patent has been granted, and the owner of the patent may derogate from the application of this provision of the law (section 24 of the Patents, Industrial Designs and Trademarks Act 2002), if he can satisfy the Controller that there are circumstances justifying the non-exploitation or insufficient exploitation. Further, non-voluntary licences are granted on very specific terms.

3.1 What is an industrial design?

It is any composition of lines or colours, a three-dimensional composition or any material which gives a special appearance or can serve as a pattern for a product. However, for this composition to be considered as an industrial design, the product has to be that of an industry or handicraft, and the finished article is judged by its appearance to the eye. That is, the features that are applied to the finished product must appeal to the eye, or attract the attention of the consumer. Design is not something that is distinct from the product to which it is applied. It features the shape, configuration, pattern or ornament applied to an article by an industrial process. However, the protection for industrial design does not extend to a design which serves solely to obtain a technical result and which leaves no freedom as regards arbitrary features of appearance.

The purpose of the protection is essentially to protect the aesthetic look of a particular industrial product.

3.2 What are the requirements for registering a design?

A design can be filed for registration with the Controller if it is new. By new, it is understood that the design has not been disclosed to the public anywhere in the world or has been published in a tangible form, or used in any way prior to the filing date or the priority date, where applicable.

However, disclosure made to the public within 12 months prior to the filing or priority date by the applicant, or as a result of or by consequence of an abuse committed by a third party, shall not destroy the "novelty" of the application.

Also, an application may relate to part of an article, and two or more industrial designs may form part of one application.

3.3 Contents of application

An application has to be made with the Controller and has to contain the necessary drawings or graphic representations and an indication of the article to which the industrial design relates to. In addition, the law requires that a specimen of the article has to be put in where the industrial design is two dimensional. Other information such as proof of ownership and claim of priority (where applicable) also has to be disclosed.

It is to be noted that if an application does not comply with the requirements of the law (section 30 of the Patents, Industrial Designs and Trademarks Act 2002 and regulations made under the Act), the declaration may be considered as null.

3.4 Rights conferred by registration

The registered owner has the right to exclude any person from making, selling or importing an article bearing or embodying a design which is a copy or substantially a copy of his industrial design.

The right holder, in addition to any other rights and remedies available, may institute court proceedings against any person who infringes his rights by performing without his agreement, any act of making, selling or importation, as stated in the above paragraph, but also bring court proceedings against any person whose act is likely to amount to an infringement. (See also paragraph 2.8)

3.5 Duration of the right

The registration shall be valid for a period of 5 years as from the date of filing of the application and may be renewed for a further period of 5 years to a maximum total period of 20 years.

4. TRADEMARKS

Trademark has always played an important role in trade and is a key factor in the modern world that is dominated by international trade and market economies. With the growth in trade a number of products from a number of manufacturers, and often with no apparent differences, are put on the market. The need for businesses to individualise their products, and for the consumer to be provided with information so as to consider the alternatives is therefore a prime consideration. One of the ways of doing this is by using a trademark.

4.1 What is a trademark?

The normal definition of a trademark is therefore any sign that individualises the goods of a given enterprise and distinguishes them from the goods of its competitors. In the European Directive the term covers “any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertaking”.

In the Mauritian context distinction has been made between:

- a trademark – which is any visible sign capable of distinguishing goods;
- a service mark – which is any visible sign capable of distinguishing service.

4.2 How to acquire the exclusive right to a trademark?

The right to a mark may be acquired by registration. It follows from the definitions given above, that virtually any sign that is capable of distinguishing a good from another may be capable of registration. As such, it is quite difficult to draw up a list of signs that are potentially capable of registration.

4.3 What are the marks that are not eligible for registration?

The law provides a list of signs or marks that shall not be registered. The main exceptions are:

- signs that are not capable of distinguishing goods or services of one enterprise from those of other enterprises;
- signs which are contrary to public order or morality;
- signs which are designed or which are likely to mislead the public;

- signs which imitate or copy the emblem or armorial of a state, intergovernmental organisation (unless the applicant has the authorisation of the state or the organisation);
- signs which are identical or confusing similar to a well known mark; and
- signs which can deceive or cause confusion to the consumer.

The above list is not exhaustive, and the law has made specific provisions as regards the flag, arms and seal of the State of Mauritius and the word "Mauritius"; which can only be used with the authorisation of the Minister (who has the portfolio of international trade).

4.4 What are well-known marks?

The term "trademark piracy" is generally used when a person registers or uses well-known mark that is not registered in the country of use. The Paris Convention (Article 6 bis) provides that a well-known trademark is to be protected even if it not registered in the country.

The law in Mauritius provides that the mark has to be well known in Mauritius to benefit from this protection. This would imply that the mark has become known to a substantial segment of the public or users of the mark in relation to goods and services.

Examples of such trademarks would be "PEPSI" or "COCA-COLA".

4.5 What are the criteria of protectability?

For a mark to be able to benefit from protection it has to satisfy some standards, which basically relate to the function of a mark (trade or service mark) or the potential harmful effect it may have. As it has already been stated above, signs which are considered contrary to public morality or public order will not be registered. Below are some of the criteria used in considering whether a sign should be registered as a mark or not.

(a) Distinctiveness and lack of distinctiveness

Signs that lack distinctiveness may not be registered. However, distinctiveness has to be evaluated in relation to the product or service to which the mark is applied. "KODAK" is often used as an example of a distinctive trademark. "CAMEL" on the other hand, although not an invented word, through advertising and usage has become known as a trademark for cigarettes. Another example will be the trademark "APPLE" which is quite distinctive for computers, but cannot be registered to identify apples.

Also to be considered as non-distinctive are names or surnames, colour, figures, numerals, basic geometric shapes or signs which are purely illustrative or simple in nature. However, if the applicant does prove that the sign has acquired distinctiveness through use or a secondary meaning through use, registration may be obtained. As a general rule, signs which are considered non-distinctive or which lack distinctiveness are not considered fit to be registered.

(b) Generic terms

Generally a generic term will not be registered as a mark, unless through usage it has acquired a distinctive or secondary meaning. A sign will be considered as generic when it defines a category or type to which the goods belong (example: furniture, coffee, drinks, etc).

(c) Descriptive signs

Descriptive signs are considered to be those signs that are used to designate the kind, quality, intended purpose, value, place of origin, time of production or any characteristics of the goods for which the sign is intended to be used or is being used.

(d) Geographical Origin

Here a distinction has to be made as regards the geographical denomination, which is considered as not distinctive as opposed to the origin of the goods in the sense of origin-indication function. Also, this presupposes that the consumer knows the geographical location and hence may be deceived by the use of that geographical location as a registered mark. Again usage may make a sign distinctive through long and extensive use. Also, if the name of the locality is practically unknown to the consumer one may consider the sign or mark a candidate for registration.

4.6 Rights conferred by registration?

In principle if the sign satisfies the formal criteria, and if there has been no opposition to the registration within the prescribed limit, or if the opposition procedure has been decided in favour of the applicant, the mark will be entered in a register and the applicant will be issued with a certificate of registration.

Any person who intends to use that trademark will have to obtain the authorisation of the registered owner. The same judicial recourse as in the case of industrial design will be available to the registered owner in case of infringement of his rights.

4.7 What is a collective mark?

Whilst trademark typically identifies an individual enterprise, collective marks are used to indicate the affiliation of enterprises using a particular mark or which refer to set standards which are met by the products on which the marks are used.

In the Mauritian context, a collective mark has been defined as “any visible sign designated as such in the application for registration and capable of distinguishing the origin or any other common characteristics, including the quality of goods and services, of different enterprises which use the sign under the control of the registered owner of the collective mark.”

4.8 What is a trade name?

A “tradenam” refers to the name or designation identifying and distinguishing an enterprise.

4.9 Duration of trademark?

The registration of a trademark shall be valid for an initial period of 10 years and renewable for a further period of 10 years.

Subject to the trademark being invalidated by the Tribunal, or if removed from the register for non-use, the trademark may last for an infinite period. Another recognised condition where a person may lose its trademark is where the trademark becomes a generic term or a term commonly used in current language. Example of such trademarks is “FRIGIDAIRE” or “CELLOPHANE” which have now become generic terms.

5. COPYRIGHT

Copyright is the branch of intellectual property law that deals with the rights of intellectual creators, and covers artistic, literary and scientific works. For a good understanding of this area of law it is essential to distinguish the different types of copyright involved and try to answer questions like:

- Can the work or creation attract copyright?
- For what duration?
- Who is the author or owner of the copyright?
- What constitutes an infringement?

Initially some legislators built upon a distinction between copyright of creators in literary, dramatic, musical and artistic works, as compared to the rights (related rights) which were given to entrepreneurs who were in the production of sound recordings, making of films, broadcasting business, publishing, etc. With the expansion of new technologies these rights have evolved with time.

The law on copyright is governed by the Copyright Act 1997 (as amended), and translates into national legislation the provisions of the TRIPS Agreement. The TRIPS itself builds upon the provisions of the Berne Convention (1971) (incorporates the substantive part of the Convention – Article 1 to 21), and provides for the protection of computer programs and compilation of data, as well as rental rights. It also provides for a minimum term of protection for a work (other than a photographic work or a work of applied art), and the protection of performers, producers of phonographs (sound recordings) and broadcasting organisations.

Unfortunately the TRIPS did not make any legal adjustment for digitalised information systems and the internet, which does have a profound impact on the protection of intellectual property as a whole.

5.1 A semblance of a definition

The Copyright Act defined copyright as “an economic right subsisting in a work”, where work is defined as “an artistic, literary or scientific work, or a derivative work ...” which enjoys protection under the Act.

5.2 What is covered by copyright?

Any work of an artistic, literary or scientific nature and the derivative work is covered by copyright. The term artistic, literary or scientific work includes:

- a production in any of these domains;
- an illustration, map or plan;
- a lecture, sermon or any such address;
- a dramatic or dramatico-musical work;
- a musical work;
- a choreographic work or pantomime;
- an audiovisual work (that is a work consisting of a series of related images and accompanying sounds and includes a cinematograph or other film);
- drawings, paintings, sculpture, architecture, engraving, lithography and like works;
- a photographic work;
- a computer program;
- a judgement of a court of law or tribunal.

However, copyright protection does not cover any idea, procedure, system, method of operation, concept, principle, discovery or mere data. It also does not include an official text of a legislative, administrative or legal nature or an official translation thereof.

In addition only an original work that has been reduced to material form (written down, recorded, or fixed or reduced in any material form) will benefit from copyright protection.

5.3 What are the rights of a copyright holder?

(a) Rights of a copyright owner or author

The owner shall have the exclusive right to:

- carry out or authorise the reproduction of the work;
- carry out or authorise the distribution to the public of the original and each copy of the work by sale, rental or otherwise;

- authorise the carrying out of public performance of the work;
- communicate the work to the public;
- broadcast the work;
- import copies of the work;
- translate the work; or
- adapt, arrange or transform the work.

(b) Rights of the broadcasting organisation

A broadcasting organisation shall have the exclusive right to authorise or prohibit:

- the re-broadcasting of its broadcasts;
- the fixation of its broadcast;
- the reproduction of the fixation of its broadcast, where the initial fixation was without its authorisation or for a different purpose for which authorisation was granted.

(c) Rights of the performer

The following acts may not be performed by any person unless authorised to do so by the performer, namely:

- fix an unfixed program;
- broadcast a performance or distribute it by cable (unless the broadcast is from a fixation of the performance or if authorised);
- communicate a performance to the public (unless the communication is made from a fixation or if authorised)
- unauthorised reproduction of a fixation of a performance or reproduction for a different purpose for which it was initially authorised.

(d) Rights of the producer of sound recordings

The producer of a sound recording shall have the exclusive right to carry out or authorise the following acts:

- direct or indirect reproduction of the sound recording;
- importation of copies of the sound recording;
- adaptation or transformation of the sound recording;
- rental or public lending of a copy of the sound recording.

5.4 Limitation on copyright (economic right)

Part IV of the Copyright Act established a number of circumstances which are limitations to the exclusive rights of a copyright or related right holder.

As such, the private reproduction of a published work in a single copy, for one's own personal purpose is permissible. However, this general exclusion rule does not extend to:

- a work of architecture in the form of a building or other construction;
- a reprographic reproduction (e.g. by fax or photocopying) of an entire book, of a musical work in graphic form or a work of fine art (e.g. drawings, paintings);
- a computer program, unless the reproduction or adaptation is necessary for the use of the computer program, and to the extent for which the program has been obtained, or for archival purpose and replacement of the original in case it is destroyed, lost or rendered unsafe.

Reproduction for the purposes of quotations, for teaching purposes, scientific research, by library or archive (presumably not involved in strictly commercial activity), for information purpose is also permissible, under certain conditions as laid down in the Act.

Acts of public lending by a library or archive (not involve in strictly commercial activity) are also allowed.

However, although the law does allow the reproduction, broadcast or lending without the authorisation of the copyright owner, a number of these exceptions are subject to a right of equitable remuneration payable to the author, in particular where audiovisual works or sound recordings are concerned.

5.5 How long does copyright last?

Copyright protection is obtained without any need for registration and is available the moment a work, which is original, is fixed. Also, different works have different length of protection.

(a) General rule

Economic rights relating to the work of an author are protected during his/her life time and 50 years after his/her death. If the work is that of joint ownership, the protection will be during the lifetime of the last surviving author and 50 years after his/her death.

In case of anonymous work the protection will last for 50 years as from the date of publication of the work, and if the identity of the author is ascertained meanwhile, the work shall benefit the normal protection (life of author + 50 years).

(b) *Audiovisual works*

In case of audiovisual work, the protection will last for 50 years as from the date of making or the work. In case of authorised broadcast or communication to the public, the time starts running as from the end of the year during which the authorisation was obtained.

(c) *Photographic work or a work of applied art*

These works are protected until the expiry of 25 years as from the making of the works.

(d) *Work done in the course of employment or commissioned works*

Where these works have been assigned to the employer of the person commissioning the works, the protection shall expire after 50 years as from the date of creation or publication of the work.

5.6 Economic rights v/s moral rights

As compared to the economic rights which can be transferred or assigned, the moral rights in a work remains with the author. Moral implies the right to claim authorship of the work, and object to any distortion, mutilation or alteration of the work, which would be prejudicial to his/her honour or reputation.

5.7 Who is the owner of the economic or moral rights?

(a) *General rule for authors*

As general rule, the author of the work is the owner of the economic and moral rights in work. The name of the person who appears as the author in a published or in case of an anonymous work the publisher, shall be presumed to be the author, unless the contrary is proved.

In case of joint ownership, the economic and moral rights shall accrue to the joint authors. However, if part of the work can be considered as independent (performed, reproduced or used separately), the author may retain the economic and moral rights in relation to that part of the work.

(b) Works made during the course of employment and commissioned works

Where a work is made during the course of employment, unless otherwise stated in an agreement, the economic rights in the work shall be vested in the employer. Similarly, in the case of a commissioned work, unless otherwise specified in the agreement, the economic rights shall be vested in the person who has commissioned the work. It is to be noted that the moral rights still rest with the author of the work.

(c) Audiovisual works

In the case of audiovisual works, the economic rights are vested in the producer, subject to the other rights that may accrue in relation to the musical works contained therein.

5.8 Copyright and computer programs

It is to be noted that under the Mauritian law, a computer program is specifically protected by copyright and is considered as forming part of literary work. This tends to follow Article 10 of the TRIPS, which provides that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention.

However, increasingly patent protection is being resorted to for computer programs in a number of countries, including the United States, given that it is considered that patent protection confers stronger rights on the patent holder.

The law is still evolving on this issue and there have been attempts to produce legislation, which takes care of the specificities of computer programs.

6. MISCELLANEOUS

6.1 Geographical Indications

"Champagne", "Cognac", "Sheffield" and "Darjeeling" are some well-known examples of names associated with products of a certain nature and quality, and one common feature is their geographical connotation.

Geographical indications is relatively new and was originally used by WIPO to describe the subject matter of a new treaty for the international protection of names and symbols which indicate the geographical origin of a certain product. In the Paris Convention for the Protection of Industrial Property the terms "indication of source" and "appellations of origin" are used. "Indication of source" means any expression or sign used to indicate that a product (or service) originated from a country. "Appellation of origin" means the geographical name of a country, region or a specific place that serves to designate the product originating therein and the characteristic qualities which (the product) are due exclusively or essentially to the geographical environment, including natural and or human factors.

(a) Definition

In the Geographical Indications Act 2002, geographical indication is defined as "an indication of a product originating in the territory of a country, or a region or locality in that territory, where the given quality, reputation or other characteristic of that product is essentially attributable to its geographical origin."

(b) Presumption established by registration

Protection for geographical indications can be obtained without the need for registration (section 4(1) of the Act), but registration does provide a presumption that an indication is a geographical indication, and hence very relevant in case of dispute.

(c) Who can apply for protection

Any producer or exploiter of an agricultural product, or a manufacturer of handicraft or industry may apply for registration.

(d) Unfair competition

Trying to register geographical indications with the intent to deceive consumers, hence falling within the concept of unfair practice, is liable to severe sanctions, which may go up to a fine of Rs 250,000 and a term of imprisonment not exceeding 5 years.

(e) *Prior use exception*

However, where a person has been using a geographical indication for at least 10 years preceding the 15th April 1994 (coming into force of the TRIPS Agreement) or in good faith preceding that period, in a continuous manner, he may continue to use that geographical indication.

6.2 Layout designs

The Layout Designs (Topographies) of Integrated Circuits Act 2002 provides for the protection of semi-conductor integrated circuits layout designs. This protection is a relatively new one in the international scene and had to be developed given the advance in semi-conductor technology that permits the large scale integration of a substantial number of electrical functions in a very small component.

The development and manufacture of these integrated circuits are done in accordance with very detailed plans and layout designs, and are usually the result of substantial financial investment, hence need for protection from unauthorised reproduction.

6.3 Secret Information or trade secrets

The competitive strength of a particular industry may often depend on innovative techniques but also a certain know-how. The techniques are sometimes not protected under the existing intellectual property legislation for a number of reasons. One of the most well kept trade secrets is the formula for making Coca-Cola.

Any information is considered as secret information if it is not readily known among or readily accessible to persons who normally deal with that kind of information. That information must also have some commercial value (otherwise there will be no need to keep it secret) and the person legitimately detaining that information must have taken reasonable steps to keep it secret.

Hence, the legislator has deemed it fit to protect this information, unless the secret information has been obtained as a result of acts such as industrial or commercial espionage, breach of contract, breach of confidence, or acquisition of the information by unfair means.

6.4 Unfair practices

The Protection Against Unfair Practices (Industrial Property Rights) Act 2002 established a set of conducts which are considered as anti-competitive and which can be sanctioned under the Act, irrespective of such other remedies as injunction, forfeiture, damages and so on. The protection granted under this Act covers all the Industrial Property rights. Sanctions are provided in case of acts which cause confusion with respect to another enterprise or its activities, damage to the goodwill or reputation of another person, mislead or are likely to mislead the public, are calculated to discredit another person's enterprise or activities and create unfair competition in respect of secret information.

BIOTECHNOLOGY AND INTELLECTUAL PROPERTY

Modern biotechnology or biological engineering have created quite a revolution in the scientific and legal, not to mention the ethical arena, by exciting imagination but also provoking concerns. On one side there is the enormous potential to solve chronic and economic problems, but on the other side worries have been expressed about the long-term effects of its application to human or non-human health, environment or community.

Given the enormous economic value, this technical revolution has become a subject matter of interest and sought to be protected by those who retain the knowledge. Recent developments in intellectual property have allowed unprecedented claims for protection to be made to the whole or part of living organisms. However, the granting or non-granting of intellectual property protection does not by itself stop certain practices that are coined as unethical, or that are challenging the boundaries of acceptable moral standards, to the extent that intellectual property legislations deal with rights to be given to an "inventor" or a "creator". Curbing certain practices that are considered to be morally reprehensible will need other legislations that will provide limits, within which this technology can be developed.

PROTECTION OF BIOTECHNOLOGY AND AGRICULTURAL BIOTECHNOLOGY

There are basically three legal instruments that are used for the protection of innovations in the area of biotechnology. They are patents, plant variety protection and trade secrets.

Patents, as we have discovered, is relatively more difficult to get, but does provide strong protection. Patents are used to cover specifically defined attributes of an invention, as described in the claims. For example, for a new plant, the patent will define the rights of the patent holder in terms of the characteristics of the plant, such as a corn plant which has a particular gene inserted in its genome, and which gives it certain specific characteristics. Patent protection can also cover the nucleic acids that have been used to transform the plants, or the process used to transform the plant.

The second legal instrument is the plant variety protection. Initially it used to be somewhat more relaxed than the patents, but one has to recognise that there are more and more similarities between plant variety protection and patents. The basic idea about plant variety protection or plant breeders' rights was that one cannot invent a plant variety, but one has to start from somebody else's variety and try to improve on that. However, recent decisions in the United States said that a plant variety can benefit both from plant variety protection as well as patent protection. It is to be noted that our legislation provides that plant and plant variety are excluded from patentability. The international instrument that embodies the plant variety protection is the UPOV (a French acronym).

The third legal instrument is trade secrets (or undisclosed information). This is basically confidential information which the innovator does not wish to be disclosed to the public and which is used to keep the commercial advantage.

PROTECTION OF PLANT VARIETIES

UPOV in a nutshell

1. Basis for plant protection.

Section 27(3) of the TRIPS provides that a member state may exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes. However, that section further provides that a member state shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by a combination thereof.

So it is open for countries to protect plant varieties either through the traditional patent protection that is if the criteria of new, inventive step and industrial application can be established or through a specialised regime, or using a combination of both. For example as far back as in the 1930's the United States established patent plant protection for asexually reproducing varieties. The Plant Variety Protection Act 1970 (United States) extended patent-like protection to new varieties of "sexually" reproduced plants. On the other hand, a number of countries have opted for the *sui generis* type of protection, which they believe could be better adapted to the specificities of this type of intellectual property. The U.K Act of 1963, the Plant Varieties and Seeds Act, was introduced to provide an elaborate form of intellectual property rights. Some European countries decided to have a convention known as the UPOV Convention (1991 version is now applicable). It is to be noted that the TRIPS Agreement makes no reference to the UPOV nor does it require any WTO member to adhere to it.

However, given its commercial ties, Mauritius may tend towards the UPOV Convention type of protection, which arguably is more restrictive as regards the farmers' rights in its present 1991 version and more akin to patent protection as regards the strength of that protection (The 1978 version is said to be more flexible as regards the farmers' rights).

Note: Mauritius is currently not a member of the UPOV convention.

2. What is UPOV

UPOV stands for “International Union for the Protection of New Plant Varieties”. The first version was enacted in 1961 and was then subsequently revised in 1972, 1978 and 1991.

3. What is a plant variety under the UPOV?

“Variety” shall be taken to mean a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the condition for the grant of plant variety right are fully met, can be:

- defined by the expression of the characteristics that result from a given genotype or combination of genotype;
- distinguished from any other plant grouping by the expression of at least one of the said characteristics; and
- considered as a unit with regard to its suitability for being propagated unchanged.

4. Varieties covered by the breeders’ rights.

The varieties covered by the breeders’ rights are:

- the protected variety;
- varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;
- varieties which are not clearly distinguishable (in accordance with article 7) from the protected variety; and
- varieties whose production requires the repeated use of the protected variety.

5. Conditions for protection.

The UPOV 1991 grants protection to a variety, that is breeders’ right, with respect to a “variety” which is “new”, “distinct”, “uniform” and “stable”. These terms are defined in Article 6 of UPOV 1991.

The concept of novelty (or new) refers more to commercial novelty, in that this term is defined with reference to the marketing or non-marketing of the new variety within a specified period. In a nutshell, to benefit from protection the variety should not have been put on the market in the country where the application is filed, within a period of one year prior the filing of

the application. Further, the variety should not have been put on the market four years prior to the filing date in any other UPOV country. In the case of vines and trees the period is six years.

A variety is going to be considered as “distinct” if it is clearly distinguishable from any other varieties which existence is a matter of common knowledge at the time of filing the application.

A variety will be considered as “uniform” if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.

Finally, a variety will be considered as “stable” if the relevant characteristics of the variety remain unchanged after repeated propagations or reproductions.

In addition to the above requirements, the UPOV convention provides that the variety should be designated by a denomination (that is a name that will not be confusing as to the value of the variety or the identity of the breeder).

6. Duration of Protection.

The duration of the breeder’s right is a minimum of 20 years from the date of the grant, and 25 years for vines and trees.

7. Scope of protection.

The following acts in respect of “propagating material” of the protected variety shall require the authorisation of the breeder:

- production or reproduction (multiplication);
- conditioning for the purpose of propagation;
- offering for sale;
- selling or other marketing;
- exporting;
- importing;
- stocking for any of the purposes mentioned above.

Also, to note that “propagating material” includes seeds, plants, parts of plant and plant cells.

Further, the protection in the above areas also extends to harvested materials obtained through the unauthorised use of propagating material of a protected variety.

8. Limitations to breeders' rights.

The breeders' rights are subject to certain limitations that relate mainly to acts done for experimental purposes, and certain farmers' privileges (that is the right to use products of harvested material for use in the own holding of the farmer). Also exempted, are acts done privately and for non-commercial purposes, or acts done for breeding other varieties.