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IP LAW NEWS

From the Director

With the deadline of WTO-TRIPS set on January 1st 2005 to align the IP Laws of India with that of TRIPS, there is a quite lot of debate in seminar and conference circuits. Placing the Law is not a difficult task. But whether the country is geared up to handle the issues arising out of changes is the moot point. The capacity building exercise on IPR needs to be done in a war-footing or we could not get any advantage but will be by-standers. IPR as a subject is taught only in few law departments. The major issue is that of non-availability of trained IPR teachers. With the market demand high for IP specialists, Academics will be the last choice. The only way is to equip the existing faculty on the new developments of IPR. Even in other fronts such as Industry, Lawyering and Public Sector the phase is quite slow given the complexities of the issues. NALSAR proximate education has a focused course on Patents Law and also deal substantially IPR in Cyber Law and Media Law courses.

In the coming year NC Banerjee Centre will design and structure short term courses for various segments of stakeholders having interface with IPR. NALSAR Proximate Education will also launch its Master's Degree Programme - an advanced course for practitioners of IPR to specialize in niche segments. The University is also planning to launch its e-learning programme named as nalsaronline in the coming academic year. The programme will offer around 25 courses in various segments of Law and will use the broad band internet infrastructure to around 50 cities. The courses will have recorded and live lectures to the enrolled students. The University looks forward to various Government Departments to support and utilize the resource base of NALSAR towards the capacity building exercise.

Prof. (Dr.) Ranbir Singh

CONVOCATION NEWS

NALSAR University will be holding its Second Annual Convocation on November 6th of 2004 at the Justice City Campus, Shameerpet. The Convocation will confer Bachelor's Degree and Master's Degree to NALSAR students. The function will have Union Minister of Law & Justice, Hon'ble Dr.H.R.Bhardwaj as the Chief Guest to deliver the Convocation address. His Excellency Shri Surjit Singh Barnala the Governor of Andhra Pradesh and Dr.Y.S.Rajasekhara Reddy, Hon'ble Chief Minister of Andhra Pradesh will grace the occasion. Hon'ble Chief Justice of Andhra Pradesh and President of NALSAR, Shri Devinder Gupta will preside over the Convocation and will confer the Degrees and Diplomas.

NALSAR Proximate Education's third convocation will coincide the Second Annual Convocation. The successful candidates of Post Graduate Diploma Courses of Patents Law, Cyber Laws and Media Laws will receive their diplomas in the Convocation. The candidates who stood in the first three ranks of the individual diplomas will also receive their merit certificates in the Convocation.

INSIDE

Editorial

Intellectual Property Issues have assumed centre stage among private and public sector players and there are more seminars and workshops in the last two years than the last few decades. Such sensitization and advocacy programmes are more focused on basics of the IP on one hand and acquisition of skills on the other hand. The crucial issue of what direction it has to be and how the country has to tailor its public policy choices is missing in these exercises. Signing of TRIPS is not the end of the matter. Rather it is the beginning of the process. What is crucial is how to interpret balance the private interest and the public interest under TRIPS. This calls for a different level of debate with various stakeholders who will be impacted by TRIPS.

Law Schools have a central role to play in setting the agenda for such jurisprudence. There has to be a two-pronged strategy of capacity building exercise of imparting the subject knowledge, skill acquisitions on one hand and on the other hand to work on a macro view of the IP regime to interpret TRIPS and to work it to one's own advantage. Indian negotiations in Doha and Cancun had some success in areas of agriculture and healthcare and this could be strengthened by research and inputs by research institutes.

In the same breadth, it is a fact that IP policy in Institutional level is simply not there. It is true to corporates also, where only a handful has a framework of IP policy and most others simply react to situation. This is reflected in deliberations of Industry bodies like CII or FICCI where it is mostly sharing of individual understanding or perceptions of the future of IP regimes rather than any concerted policy approach or focus.

In this context, it is imperative for UGC to take an initiative in its domain to draw the IP policy for Universities and other Institutions in its purview. This in the first place, has to have a model guideline to draw the IP resources of Universities in terms of inventions happening there, copyright issues involved and also to motivate Universities and Institutions to work on IP policy inputs. It is imperative to have the macro view correct which can spot the devil in the details or else it will be a confused state of understanding various interpretations, which could relevant in parts of its sum but will not add up to the whole for a policy framework.

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NALSAR - MHRD Workshops

The South Zone workshops on World Copyright and Book Day and World Intellectual Property Day were conducted by the NC Banerjee Centre of IP Law Studies at the Justice City Campus. The Two day deliberations had speakers from all over the country to address a gathering from Academics, Industry and Legal Profession. The World Copyright and Book Day workshop was inaugurated by Mr. G.V. Prasda, CEO and Vice Chairman of Dr. Reddy's Lab. The Intellectual Property Rights Day had Mr. Pravin Anand, IP Attorney and Mr. Shahid Ali Khan, former Deputy Director General of WIPO.

The deliberations were conducted by Dr. Jaya Govind, Director, NLSIU, Dr. P.M. Bharghava, former Director of CCMB, Dr.Yadav, Director of IICT, Mr. A.A. Mohan, Patent Attorney, Prof.Ramakrishna, NLSIU, Prof. Unni, NALSAR, Dr. Sridhar Acharyalu, NALSAR, Prof. Vivekanandan, NALSAR, Mr. Sumesh Reddy of Dr.Reddy's Lab, Dr. Anindya Sircar of Biocon, Dr. Suman Sahai of Gene Campaign, Mr. Gabriel of Kumaran & Sahar, Mr. Sampath Kumar, IPR consultant, Mr. Gopa Kumaran, IP consultant, Mr. Shailendra representing Music Industry.

AIDS as a Detriment to India Shining: The new Government's Focus on Patents

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India Shining – the campaign rejected by the Indian public in 2004, did not discuss an important shadow looming over the country and threatening its population. Even Congress – I, the party now in power and then, could not bring itself to address the one issue that Indians continue to hope would be outshined by the current economic trend - AIDS. There are several angles to the AIDS crisis – the most important being the human angle, the most consequential being the legal economics of patents affecting the price of pharmaceuticals and thus, accessibility to medication. Unfortunately, the AIDS issue is most likely to haunt the Indians and question the country's political ability to handle sensitive issues. India cannot, given the current projections of the disease, do away with compulsory licensing and price control of generic medication, particularly the AIDS medication.

The mechanism of compulsory licensing forces the patentee to license the patent to the government. Compulsory licenses, as "involuntary contract[s] between a willing buyer and an unwilling seller imposed and enforced by the state,"[1] affect market exclusivity directly and market price indirectly. Price control, being government-induced interferences with the market, restricts the maximum market price.[2] Prices can be controlled either directly or indirectly. Direct price control is where the government restricts the market price of a product from exceeding a certain percentage above the cost of production. Indirect price control is where the government uses an incentive, a deterrent, or both, to prevent the manufacturer from realizing the highest marginal profit. The issue of compulsory licensing or price control holds unique significance in the area of pharmaceuticals. Unlike consumer products, where the elasticity of individual human-need varies with affordability, the demand for pharmaceuticals is independent of affordability. A medication's cost efficiency minimally affects demand due to the continued needs of patients, given the lack of alternatives. In low per capita income markets, like India, increasing the cost reduces affordability, causes disease conditions to worsen thus increasing the demand for medication and raising the need to use tools like compulsory licensing to balance trade with welfare. Hence, use of the appropriate intellectual property and health care policies has a direct bearing on economic development.

In contrast, the higher per capita income in the developed nations virtually eliminates the use of compulsory licensing except when the economy slows down. Hence patentees generally enjoy a total monopoly during the patent term. Patents serve as market incentives enabling patentees to derive maximum economic efficiency irrespective of maximization of consumer welfare. Since competition is curtailed, patent owners charge the highest price that the market can bear, typically far exceeding the marginal cost.[3] Presumably, the increased cost covers the investor's past and future investments on research and development. Consumers, in turn, associate the higher cost for patented products with the privilege of using the invention. Developed nations, particularly the United States, believe that patent owners with valuable products will market them and hence, discourage government interference with patent monopolies. Thus, the United States disfavors patent restrictive mechanisms like

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**. A detailed argument of the issues raised in this paper titled *The Jekyll & Hyde Story of International Trade: The Supreme Court in PhRMA v. Walsh and the TRIPS Agreement,* is published at 38 U. Rich. L. Rev. 777 (2004). The paper is a modified from a presentation made at the symposium organized by the Benjamin N. Cardozo School of Law, Yeshiva University, entitled "Patent Law, Social Policy, and Public Interest: The Search for a Balanced Global System." The paper has also been presented at the University of Pennsylvania at a symposium titled "Corporate and Legal Implications of Re-pricing Essential Medicines in Developing Nations."

1. Gianna Julian-Arnold, *International Compulsory Licensing: The Rationales and the Reality*, 33 IDEA 349, 349 (1993) (quoting Paul K. Gorecki, Regulating the Price of Prescription Drugs in Canada: Compulsory Licensing, Product Selection, and Government Reimbursement Programmes (Economic Council of Canada 1981)).

2. *See* Mary T. Griffin, *AIDS Drugs & the Pharmaceutical Industry: A Need for Reform*, 17 Am. J.L. & Med. 363, 402 n.260 .

3. *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law,* 75 Tex. L. Rev. 989, 1065–66 (1997) (noting that "producers will price at marginal cost only if they are forced to by the existence of competition. A producer who controls a market will cut output and raise prices, increasing its profits but reducing both consumer and aggregate social welfare").

compulsory license and price control as disincentives to inventors and patent holders. On this basis, the developed nations persist that the international trade obligations in the Agreement on Trade Related to Intellectual Property Rights (TRIPS) to which India is a party, necessitates a level of patent protection that eliminates the option of exercising compulsory licensing and price control mechanisms even under a threat to public health.

Unlike the emphasis by developed nations on inventor incentives, India should continue to emphasize the public accessibility of the invention. The low per capita income within India affects the government's ability to fulfill basic requirements and thus increases the probability of occurrence of health exigencies. Given the higher population and illiteracy rates, India should prioritize increased consumer maximization, especially for products like medication catering to basic requirements. Such a move will enable India to effectively balance intellectual property rights with consumer welfare. In a global sense, this is the balance between trade and welfare. India should choose this option because of several reasons. First, the developed nations' argument that increased trade would positively impact per capita income and ultimately benefit the marginalized by trickling down does not convincingly account for the welfare obligations during the interim period. Conventional prudence suggests that deteriorating economic conditions cannot serve as a means to improve the economy over a period of time. Second, TRIPS, even before the Doha amendment, implied that compulsory licensing could be used to preserve public health. Article 31 provides the right to compulsory licensing subject to certain conditions as a means for developing nations to enable marginalized people to access pharmaceuticals. The Doha amendment further secures for the developing world, the right to read the TRIPS commitments flexibly to proactively avoid health exigencies. India should fully use the opportunity provided by the Doha Declaration of 2001. Third, developed nations themselves avoid increasingly marginalizing the poor knowing that it will worsen economic conditions before stabilizing them. For example, even as late as in 2000s, an economic crisis within the states moved the Supreme Court of the United States, in Pharmaceutical Research and Manufacturers of America ("*PhRMA") v. Walsh*,[4] to validate indirect price control over pharmaceuticals. The threat of an anthrax crisis moved the United States and Canada towards compulsory licensing as discussed below.

When the economy in the United States slowed in 2001, it resulted in a deficit from tax revenues in several states. Simultaneously, the cost of the most frequently used prescription drugs rose at four times the rate of inflation.[5] The declining tax revenues left states with the choice of either reducing the state funds for Medicaid or confronting the cost of drugs.[6] Owing to the economic slowdown, state governments sought what the federal government advocated against in developing nations—balancing the rights of manufacturers and consumers by interfering with the market price of pharmaceuticals. Efforts were taken to reduce state expenditures on prescription drugs without affecting accessibility of drugs to the needy. State governments wanted to indirectly influence the price of branded pharmaceuticals to reduce the cost of patented Medicaid pharmaceuticals.

The State of Maine took the first step by passing the Fairer Pricing for Prescription Drugs Act of 2000, which created the "Maine Rx Plus Program" ("Program").[7] The Program dealt with pharmaceutical drug pricing and

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4. 123 S. Ct. 1855 (2003) (to be filed at 538 U.S. 644).

5. The rising prescription drug costs became a larger factor in the total health expenditures of states, and led to an increase of 16%, or $142 billion, on prescription medication. Ron Winslow et al., *States, Insurers Find Prescriptions for High Drug Costs,* WALL ST. J., Sept. 11, 2002, at A1 (explaining that the total spending in the U.S on prescription drugs accounts for 10% of American health care spending. The rate of inflation for prescription drug prices exceeded the rate of general inflation.). *See generally* Whitney Magee Phelps, Comment, *Maine's Prescription Drug Plan: A Look into the Controversy*, 65 ALB. L. REV. 243, 245 (2001) (reporting that total drug expenditures are expected to double from 1999 to 2004). Between 1982 and 1988, prescription drug costs increased at an average annual rate of 9.5% . . ., more than any other component of the health care sector. "Between 1998 and 2000, Medicaid's average annual spending on prescription drugs grew by 19.7%." Sarah Lueck, *States Efforts To Cut Drug Prices Get Boost From Medicaid Chief,* WALL ST. J., May 30, 2003, at A1; *see* Sara M. Ford, *Congressional Research Service Report to Congress, Medicaid: Reimbursement for Outpatient Prescription Drug*, CRS- 15 (Mar. 7, 1991). From 1980 to 1989, payments for Medicaid prescription drugs increased 179%. Medicaid expenditures for all other services increased by only 134%.

6. Medicaid is a federal and state approved health insurance program designed to provide access to health services for persons below a certain income level. *See also Miracle. On Ice,* ECONOMIST, May 17, 2003, at 29 (arguing that despite consistent ranking among the top in health care, education, and quality of life, a two-year deficit of $4.2 billion threatens Minnesota's programs).

7. ME. REV. STAT. ANN. tit. 22 § 2681 (West. Supp. 2003).

profits—terms, incidentally, used in several third world nations, including India, to refer to price control. Under the Program, the state government acting as a market player negotiated a discounted rebate for drugs with the pharmaceutical manufacturers. Sales made by manufacturers who did not "voluntarily" enter into rebate agreements with the Commissioner of Maine Care were subject to the *prior authorization requirements* of Maine Care, the state Medicaid administrator. The procedural burdens imposed by the prior authorization requirement shifted patient and physician loyalty to competing drugs of manufacturers not subject to the authorization. Soon drug companies voluntarily negotiated rebates reducing the cost of drugs meant for Medicaid. Encouraged by the success of Maine, other states including Florida, Vermont *etc*., introduced similar programs. Michigan, however, made the bold move of seeking rebates for non-Medicaid drugs. Michigan's Best Practices Initiative ("Initiative") identified drugs bearing negotiated rebates as "best in class." Drugs not so identified were subject to *the prior authorization* requirement. Manufacturers could avoid the *prior authorization* procedure by either matching the price of the lowest priced "best in class" drug in the "relevant therapeutic class," or, by discounting prices of certain non-Medicaid drugs. PhRMA challenged the programs on different grounds in each of the states in question. In Maine, the First Circuit refused to agree with PhRMA's argument that the program was federally preempted on the basis that the substantial local benefit outweighed any effect on interstate commerce.[8] In Florida, the Eleventh Circuit disagreed with PhRMA's argument that the prior authorization aspect of the program violated the federal Social Security Act ("SSA") requirement that *all* drugs be available to Medicaid beneficiaries.[9] Similarly, the United States District Court for the District of Columbia validated the indirect price reduction for both Medicaid and non-Medicaid drugs in Michigan after hearing PhRMA's argument under the SSA challenging the authority of the Secretary of Health and Human Services ("Secretary") to approve the program.[10] The court, however, agreed with PhRMA's contention against a similar Vermont program that the SSA required the Medicaid program to pay the cost of medication under a "state plan."[11] PhRMA contended that the state programs shifted the burden of funding Medicaid on the pharmaceutical companies, requiring them to cover 18% of the cost of prescription drugs. The Circuit conflicts resulted in the Supreme Court of United States granting certiorari to decide whether there was an abuse of discretion in allowing Maine to implement the Program. The Supreme Court in *PhRMA v. Walsh*[12] held that the Maine Program did not impose a disparate burden on out-of-state manufacturers in violation of the Commerce Clause. Interestingly, the Supreme Court never considered whether indirect price controls violated TRIPS. The Court, however, favored indirect price controls for non-Medicaid drugs. Referring to public health obligations, the Court ruled that a state's "interest in protecting the health of its uninsured residents also provides a plainly permissible justification" for imposing the indirect price control, including coercing manufacturers to reduce prices of all drugs. The Court in fact, dismissed the impact on profit margins of manufacturers as irrelevant so long as "transfer of business to less expensive products produce[d] savings for the Medicaid program." Notably, the United States precluded developing nations' efforts to make medical services affordable to the poor by emphasizing on manufacturer profits. Justice Thomas appreciated the state governments' attempts as an essential, if not commendable, "delicate balance" of health care with cost. The "delicate balance" Justice Thomas refers to is precisely what the price control measures of all developing countries seeks to achieve. If such a "delicate balance" is envisaged in a nation with a higher per capita income to assist the poor, the exercise of balancing between economic and social welfare in developing countries is bound to be dire and less delicate. The issue of "balancing" has a greater relevance in developing

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8. *See* Pharm. Research & Mfrs. of Am. v. Concannon, *249 F.3d 66, 75.*

9. *See* Pharmaceutical Research & Mfrs. of Am. v. Meadows, 304 F.3d 1197, 1208 n.9 (11th Cir. 2002). *See also* Conrad F. Meier, *PhRMA Asserts Itself in Court Action*, HEALTH CARE NEWS, Oct. 2001, at 2. Because manufacturers refused to enter into such agreements, fifty percent of the branded drugs in the Medicaid program were not on the preferred list. *Medows*, 184 F. Supp. 2d at 1189.

10. *See* Pharm. Research & Mfrs. of Am. v. Thompson, 259 F. Supp. 2d 39, 45 (D.D.C. 2003);

11. *See* Pharm. Research & Mfrs. of Am. v. United States, 135 F. Supp. 2d 1, 4 (D.D.C. 2001), *rev'd*, 251 F.3d 219 (D.C. Cir. 2001).

12. 123 S.Ct. 1855 (2003).

nations since the cost of medication is borne by patients. Developing countries wanted to "balance" for the noble and economically sound objective, promoted in the United States, of avoiding more expensive treatment if AIDS became an epidemic. Instead, United States opposed efforts by developing nations, by prioritizing manufacturers' profits dismissing the factor of cost-effectiveness for the respective governments. The proposals of the developing world have repeatedly been touted as economically unsound initiatives with noting more than the human rights angle.

The anthrax crisis is another example to demonstrate how the United States, in the wake of a mere threat to public health, relegated the importance of branded prices and future generations to a secondary position and considered the compulsory licensing option to ensure access to drugs. When the anthrax crisis was reported, the United States determined that public affordability of the medication was a priority—signifying a change from its traditional disregard to public affordability of medication in developing nations. The United States considered reducing the cost of Cipro, the recommended anthrax medication, by either compulsorily licensing Bayer's patent on Cipro, or purchasing Cipro from generic sources. Both options restricted Bayer's ability to price the drug above marginal cost. Compulsorily licensing Cipro interfered with Bayer's right to exploit its patent. The second option of procuring generic ciprofloxin from third world countries like India restricted Bayer's market share as a patent owner and cut into the profits allocated for research and development. Incidentally, the United States government opposed the use of both options by developing countries as violating TRIPS. Presumably, the United States government reasoned that the increased sales of Cipro—generated by the high-volume need for the drug—would offset Bayer's profits from a higher market price with comparatively limited sales. This is the reasoning the government repeatedly rejected when put forward by third-world governments seeking AIDS medication at lower prices for millions of poverty stricken citizens. Finally, the United States Department of Health and Human Services ("DHHS") forced Bayer to reduce the price of Cipro by threatening to compulsorily license Bayer's patent.[13] Thus, although the DHHS did not compulsorily license the patent, it indirectly controlled the price of Cipro at ninety-five cents a pill. Importantly, under a threat to local public health, much like how TRIPS was not considered in PhRMA v. Walsh, the issue of compliance with TRIPS was not even raised internally by the United States government.

That the United States, despite TRIPS, was able to prioritize its national responsibilities while compelling third world countries to do otherwise demonstrates that the inability of TRIPS to secure equivalent behavior from all parties. Developed nations are seemingly exempt from obligations developing nations are forced to fulfill. Thus, poorer nations like India uniquely suffer a "poverty penalty." The "poverty penalty" refers to the cost poorer nations suffer from fulfilling international obligations that require prioritizing trade interests to the detriment of welfare. The "poverty penalty" can cause dangerous economic consequences in a developing country. For example, within developing nations, AIDS-infected people with limited access to testing and medication have spread the infection. Lack of medication affects standards of living, sometimes permanently, either from loss of loved ones or loss of good health. Any epidemic increase of AIDS reduces life expectancy, affects labor and economic output, as the younger casualties increase. The decline of national productivity from loss of labor is proportionate to the value of output of each life lost. That is, assuming that a person's productivity is derived from several indicators, such as: living conditions; earning potential; or per capita income, the loss of each adult life in his/her most productive age represents an equivalent deprivation of productivity to the economy. The cumulative loss of productivity will be further enhanced by the losses from other factors of productivity—"total factor productivity"—from costs affecting the economy. Examples of other costs range from the increasing cost of employee medical benefits to the deterrence such costs create for foreign investments.[14] For example, the increased incidence of AIDS in South Africa raised the cost of employee medical benefits from 7% of income in 1995 to 19% by 2005.

13. *See* Charles Schumer, Editorial, *The Cipro Circus,* Wall St. J., Oct. 25, 2001, at A20;

14. *See, e.g.,* Lori Bollinger & John Stover, The Policy Project, U.S. Agency for Int'l Dev., The Economic Impact of AIDS in South Africa 3 (1999).

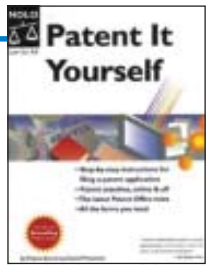
The increased cost of employee benefits impacted overall economic productivity and output, especially since the additional costs were incurred at the same time that productivity was declining.[15] Considering that labor has been, and continues to remain, the main factor of productivity in several poor nations, including India, TRIPS can cause unfortunate effects on labor productivity without supplementing or substituting the loss of labor productivity with other sources of economic development. The diminishment of the main factor of productivity—labor, in this case, due to increased disease conditions—will detrimentally affect other sources of economic development, like foreign investments. Thus, the deterrence of the AIDS epidemic to foreign investors is higher than the incentive to investment from signing TRIPS. For example, AIDS affected the profitability of Anglo American, a mining conglomerate with operations in Africa, by causing absenteeism, deaths, and increased medical costs for AIDS-related illnesses. The Economist recently reported that the company was on the verge of losing 30,000 members of its South African workforce to AIDS. Thus, each developing nation can potentially suffer economic losses unless adequate steps are taken to protect national health at the appropriate juncture.

Countries like India should highlight such economic and legal issues arising from TRIPS. After all, the game at WTO is a game played in turf of developed nations given their bargaining power in trade. Hence India should tailor its arguments in a manner that developed nations understand. Developed nations understand the language of legal economics better than emotional and philosophical issues of patenting, which India seems to emphasize. India's achievements at the Doha Summit are impressive. However, as the emerging leader of the developing nations, India should recognize the potentially looming national crisis if health care deteriorates, particularly from AIDS, and take steps towards fully and convincingly arguing its case to the international community.

15. *AIDS Toll on Regional Economies*, Southern African Economist, May 15, 1997.

Book Review

Patent It Yourself



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Attorney David Pressman

592 pp. List Price: $49.99 eBook- $34.99

Patent It Yourself is the world's bestselling patent book, recommended by patent attorneys, inventors, librarians and journalists.

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What is a trade secret?

In most states, a trade secret may consist of any formula, pattern, physical device, idea, process or compilation of information that both:

- provides the owner of the information with a competitive advantage in the marketplace, and
- is treated in a way that can reasonably be expected to prevent the public or competitors from learning about it, absent improper acquisition or theft.

Some examples of potential trade secrets are a formula for a sports drink, survey methods used by professional pollsters, recipes, a new invention for which a patent application has not yet been filed, marketing strategies, manufacturing techniques and computer algorithms. Unlike other forms of intellectual property such as patents, copyrights and trademarks, trade secrecy is basically a do-it-yourself form of protection. You don't register with the government to secure your trade secret; you simply keep the information confidential. Trade secret protection lasts for as long as the secret is kept confidential. Once a trade secret is made available to the public, trade secret protection ends.

How do businesses put trade secrets to use?

Trade secrets often protect valuable technical information that cannot be sheltered under other forms of intellectual property law, such as the formula for Coca-Cola. Trade secrets may also:

- protect ideas that offer a business a competitive advantage, thereby enabling a company or individual to get a head start on the competition -- for example, an idea for a new type of product or a new website
- keep competitors from learning that a product or service is under development and from discovering its functional or technical attributes -- for example, how a new software program works
- protect valuable business information such as marketing plans, cost and price information and customer lists -- for example, a company's plans to launch a new product line
- protect "negative know-how" -- that is, information you've learned during the course of research and development on what not to do or what does not work optimally -- for example, research revealing that a new type of drug is ineffective, or
- protect any other information that has some value and is not generally known by your competitors -- for example, a list of customers ranked by how profitable their business is.

What rights does the owner of a trade secret have?

A trade secret owner can prevent the following groups of people from copying, using and benefiting from its trade secrets or disclosing them to others without permission:

- people who are automatically bound by a duty of confidentiality not to disclose or use trade secret information, including any employee who routinely comes into contact with the employer's trade secrets as part of the employee's job
- people who acquire a trade secret through improper means such as theft, industrial espionage or bribery
- people who knowingly obtain trade secrets from people who have no right to disclose them
- people who learn about a trade secret by accident or mistake, but had reason to know that the information was a protected trade secret, and
- people who sign nondisclosure agreements (also known as "confidentiality agreements") promising not to disclose trade secrets without authorization from the owner. This may be the best way for a trade secret owner to establish a duty of confidentiality. Even though employees are bound under an implied duty not to disclose sensitive information, all employees who come into contact with a company's trade secrets -- including high-level employees and company presidents -- should sign nondisclosure agreements, because such agreements make it clear to the employee that the company's trade secrets must be kept confidential. In addition, a company's lenders, investors and potential investors may require employees to sign nondisclosure agreements. (To learn more, see Nondisclosure Agreements.)

There is one group of people that cannot be stopped from using information protected under trade secret law. These are people who discover the secret independently, that is, without using illegal means or violating agreements or state laws. For example, it is not a violation of trade secret law to analyze (or "reverse engineer") any lawfully obtained product and determine its trade secret.

Example

XCEL glue is comprised of a trade secret protected formula. Phil, a chemist, analyzes the contents of XCEL glue, determines its composition and recreates the formula. Phil can legally use this information to make and sell his own glue.

How can a business protect its trade secrets?

Simply calling information a trade secret will not make it so. A business must affirmatively behave in a way that

proves its desire to keep the information secret. Some companies go to extreme lengths -- for example, the formula for Coca-Cola (perhaps the world's most famous trade secret) is kept locked in a bank vault that can be opened only by a resolution of the Coca-Cola Company's board of directors. Only two Coca-Cola employees ever know the formula at the same time; their identities are never disclosed to the public and they are not allowed to fly on the same airplane.

Fortunately, such extraordinary trade secrecy protection measures are seldom necessary. Although you should take reasonable precautions to protect any information you regard as a trade secret, you don't have to turn your office into an armed camp to do so. Sensible precautions include marking documents containing trade secrets "Confidential," locking trade secret materials away after business hours, maintaining computer security and limiting access to secrets to people with a reasonable need to know.

But the very best way to protect trade secrets is through use of nondisclosure agreements. Courts have repeatedly reiterated that the use of nondisclosure agreements is the most important way to maintain the secrecy of confidential information. Or put another way, without nondisclosure agreements, the odds go up that information you consider to be extremely valuable to your business will be deemed to have no legal protection. (For more information, see Nondisclosure Agreements.)

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How can a business enforce its rights if someone steals or improperly discloses confidential information?

Every state has enacted a law prohibiting theft or disclosure of trade secrets. Most of these laws are derived from the Uniform Trade Secrets Act (UTSA), a model law drafted by legal scholars. A listing of states that have adopted some version of the UTSA is provided at the end of this FAQ.

A trade secret owner can enforce rights against someone who steals confidential information by asking a court to issue an order (an injunction) preventing further disclosure. For example, if Company A learns that an employee has emailed trade secrets to Company B, Company A can obtain a court order preventing use of the secrets by Company B. A trade secret owner can also collect damages for any economic injury suffered as a result of the trade secret's improper acquisition and use. Here are some examples of incidents that can lead to trade secret lawsuits:

- Sarah, a former employee of C-com, discloses C-com trade secrets to her new employer.
- Mary hacks her way into the network for a computer company and downloads the specs for a new silicon chip. She sells the information to a third party -- a rival computer company.
- Sheldon is a software programmer who works as an independent contractor for Diskco. Sheldon signed a nondisclosure agreement with Diskco, but later discloses Diskco secrets to a rival.

To prevail in a trade secret infringement suit, a trade secret owner must show (1) that the information alleged to be confidential provides a competitive advantage and (2) the information really is maintained in secrecy. In addition, the trade secret owner must show that the information was either improperly acquired by the defendant (if the defendant is accused of making commercial use of the secret) or improperly disclosed by the defendant (if the defendant is accused of leaking the information).

The "Inevitable Disclosure" Doctrine

In some cases, a company may prevent a former employee from working for a competitor if the company can demonstrate that employment with the competitor will inevitably lead to disclosure of trade secrets. In a 1995 case, PepsiCo successfully argued that a former executive could not work as Chief Executive Officer of Gatorade/Snapple because the executive could not help but rely on PepsiCo's trade secrets as he plotted Gatorade and Snapple's new course, giving the competitor an unfair advantage over PepsiCo.Some states have rejected the inevitable disclosure doctrine because it challenges an employee's basic freedom to switch employers. In one case, a court refused to apply the doctrine unless there was additional showing of bad faith, underhanded dealing, or employment by a competitor lacking comparable technology.

Is stealing trade secrets a crime?

Intentional theft of trade secrets can constitute a crime under both federal and state laws. The most significant federal law dealing with trade secret theft is the Economic Espionage Act of 1996 (EEA) (18 U.S.C., Sections 1831 to 1839). The EEA gives the U.S. Attorney General sweeping powers to prosecute any person or company involved in trade secret misappropriation and punishes intentional stealing, copying or receiving of trade secrets. Penalties for violations are severe: Individuals may be fined up to $500,000 and corporations up to $5 million. A violator may also be sent to prison for up to ten years. All property used and proceeds derived from the theft can be seized and sold by the government.

The EEA applies not only to thefts that occur within the United States, but also to thefts outside the U.S. if the thief is a U.S. citizen or corporation, or if any act in furtherance of the offense occurred in the U.S. If the theft is performed on behalf of a foreign government or agent, the corporate fines can double and jail time may increase to 15 years.

Source - nolo.com

Microsoft 'patents human skin'

Microsoft has reportedly succeeded in patenting human skin as a new kind of network.

InSourced claims recently awarded US Patent No. 6, 754, 472 is a 'method and apparatus for transmitting power and data using the human body'.

The patent, it says, is part of a new plan to link together several devices using skin as a connector.

As an example, Microsoft says it would be possible to have just one speaker for a person's watch, PDA, and portable radio, if they were all connected to that speaker through skin.

It adds that different devices could be powered from a single power source strapped to the skin.

Each would be driven by multiple power supply signals working at different frequencies, and data and audio signals could also be transmitted over that same power signal.

The power source and devices would be connected to the body via electrodes.

Microsoft has patented a network that uses the "body of a living creature" as a data bus and power supply for communication between two electronic devices. (U.S. Patent 6,754,472).

According to the abstract,

> *Methods and apparatus for distributing power and data to devices coupled to the human body are described. The human body is used as a conductive medium, e.g., a bus, over which power and/or data is distributed.*

The patent includes the use of pulsed AC or DC to power miniature wearable devices.

> *100 Hz signal may be used to power a first device while a 150 Hz signal may be used to power a second device. Digital data and/or other information signals, e.g., audio signals, can be modulated on the power signal using frequency and/or amplitude modulation techniques.*

For instance, a miniature speaker may be located within an earring while an audio input microphone may be attached to a bracelet.

(The drawing is from the face of the patent).

Sources -http://www.ananova.com/news/story/sm_999310.html

http://patentlaw.typepad.com/patent/2004/06/microsoft_paten.html

Netherlands launches alternative internet copyright licence

Creative Commons, a simpler way of handling copyrights on the internet, has been introduced in the Netherlands — the third European country, after Finland and Germany, to adopt it — during the inaugural meeting of the new Dutch rights-organisation, Disc.nl, last week.

The brainchild of Lawrence Lessig (who attended the launch), law professor at California's Stanford University, and others, Creative Commons (CC) was originally launched as an American initiative 18 months ago.

CC's objective is to stimulate the distribution of electronic material, like literature, photographs, music, films and scientific works, over the internet without breaching copyright laws, and creating, in the process, a large public domain — a 'creative commons' — for artists and scientists to share and work in.

Unlike the present, 'all rights reserved' copyright system, CC adopts a simpler, 'some rights reserved' attitude. Its licences come in 12 flavours of varying application and coverage—stipulating exactly where (for non-commercial purposes, for example) and how (mentioning the information source is mandatory) a licensed work can be used.

Professor Bernt Hugenholtz and Nynke Hendriks of University of Amsterdam's Institute for Information Law (IViR) adapted the American version of the CC licence system to comply with Dutch law. This was necessary because, "it is not possible, for example, to completely circumvent copyrights in the Netherlands. However, you can dictate that everyone can use [your copyrighted work], but you alone can claim its ownership," said Professor Hugenholtz.

An interesting and exciting source of information is the vast archives of broadcast material.

The British Broadcasting Corporation (BBC) announced last month that it was making its audiovisual archives available on the internet, securing them through a CC-type licence.

However, public broadcasters in the Netherlands are a bit more reluctant when it comes to opening up their own content. According to Erwin Blom of VPRO Digitaal, a Dutch public broadcaster, this is largely due to the complex negotiations involved in preventing copyright conflicts: most broadcasts contain bits of content, the rights of which are not owned by the broadcasters.

However, CC did manage to score a success in the Netherlands. The very first Dutch work, 'Hippies from Hell', a film by Dutch director Inne Poppe, was secured with a CC licence during the meeting.

Source: Planet News

US Senate debates cybercrime treaty

A controversial treaty that is the first to focus on computer crime is inching toward ratification in the U.S. Senate. The treaty would require participating nations to update their laws to reflect computer crimes such as unauthorized intrusions into networks, the release of worms and viruses, and copyright infringement. The measure, which has been ratified by Albania, Croatia, Estonia, Hungary, Lithuania and Romania, also includes arrangements for mutual assistance and extradition among participating nations.

The Bush administration supports the proposal. If ratified by the Senate, the treaty would enhance the United States' ability to receive, as well as render, international cooperation in preventing, investigating and prosecuting computer-related crime,

An addition to the treaty would require nations to imprison anyone guilty of "insulting publicly, through a computer system" certain groups of people based on characteristics such as race or ethnic origin, a requirement that could make it a crime to e-mail jokes about Polish people or question whether the Holocaust occurred.

The Department of Justice has said that it would be unconstitutional for the United States to sign that addition because of the First Amendment's guarantee of freedom of expression. Because of that objection, the Senate is not considering the addition, but other nations ratifying the treaty are expected to adopt both documents. Still, some civil liberties groups have criticized the portion of the treaty that is moving through the Senate.

Protection of Technology

Patents on World Wide Web could have created different world

by Alessandro Cancian

If 16 years ago Berners-Lee had decided to patent his idea of the World Wide Web, nowadays the world would likely be quite different, and the British researcher might be the world's richest man. However, it didn't go that way, and we can all use or exploit the Net.

Last week the creator of the "WWW" that opened the way to the explosion of the IT society was in Finland to receive the Millennium Technology Prize, a prestigious international award. The father of the Web took advantage of the occasion for speaking out. Had he patented the technologies he had developed at the CERN laboratories in Geneva, he said, we would now have "16 different Webs", instead of a shared environment freely linkable to an incredible quantity of different applications.

"Lord knows how many non-interacting hypertext systems there were. There would now be a Web of CERN, one of Microsoft, one of Digital, and Apple's HyperCard, and none of these would have been compatible with any other."

Berners-Lee used this example to fire a broadside at the current patenting system, which he maintains has lost its sense of direction. He mentioned the U.S. patent Microsoft obtained on double-clicking, on handhelds only. He also mentioned the extreme Eolas case, where a company claims paternity on plug-ins and applets, a patent on which would put a lid on the whole Web; Berners-Lee is actively fighting against this possibility.

U.S.-style patenting has been exported to Europe, where software patenting has just been introduced and an about-face, although highly recommended, is unlikely. Berners-Lee declared, "It's time to look at this whole system. In the United States, the situation requires a radical change."

"Today's problem," he said, "is that someone might write something on his own and a lawyer could take a look and say, 'Sorry, what we've written between lines 35 and 42 is ours, even if you didn't copy it from us.' "

According to the scientist, patents are endangering "the whole spirit of software development." He further clarified, "If you can imagine a computer performing a given operation, then you can write a programme for that. This is the spirit behind so many wonderful innovations. If one thinks of the spirit of the Internet, which is about openness and sharing, all this is terribly negative for creativity. [Patents] are restricting the ability to research and generate new ideas." Unfortunately, however, legal litigation among major software producers are mostly centered on patent infringement. As regards technology, companies with huge financial resources are trying to patent as many hardware and software solutions as possible, many of them just imagined. Patent costs become a major hindrance for independent developers or the world of open source. Many sides are already advocating for the future development of technology to be protected from the greed of IT giants.

Source: http://www.tandemnews.com/viewstory.php?storyid=4107

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