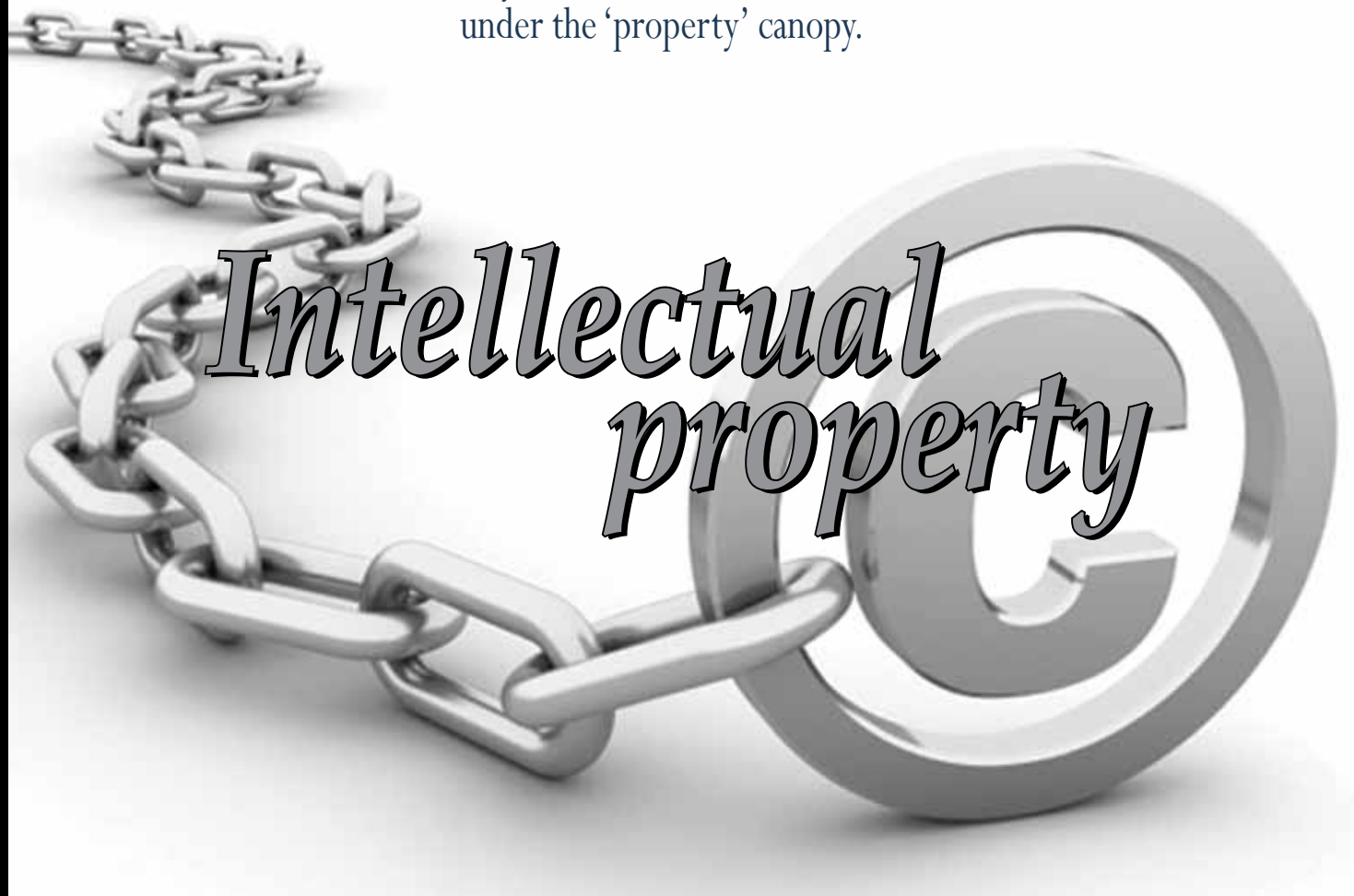
Tracing the development of IP Law

Intellectual Property as a legal concept finds root and genesis in the 'proprietary' nature of 'ideas' and the ethical and moral debates that have since time immemorial been linked to the unjust enrichment of one at the cost of another man's ideas. One can conclude safely that recognition and rudimentary understanding of 'intellectual property' has existed through the ages, though modern intellectual property law is a product of the medieval renaissance and the development phenomenon of modernism. To trace the development of this branch of law, it becomes necessary to examine how ideas and ideation came to nest under the 'property' canopy.



Anuradha Maheshwari
Partner
Lex Mantis

Ideas and Ideation

In the early saga of human survival, man's needs for a better and safer life dominated the ideation process with characteristic ideas forming the solution/responses. It is common knowledge that man owes his survival to his innate human ability 'to ideate', extraordinary results of which lie in the great ideas that saved mankind and changed the world we live and work in, bringing in layers of new knowledge and skills. As thoughts and intellectual activities gradually progressed, demands for successful, workable ideas gave birth to trade, economic activity and 'the market place'; alongside which, mushroomed a new culture of 'competition and copying of ideas'. The latter of course subsequently led to unfair competition and activities that discouraged creativity.

The success of human evolution ironically can also be credited to man's inherent nature to copy, emulate and outdo his neighbour in every sphere of life, be that social, political, or in business. Economic rivalry between market contestants, both existing and new, is the primary market force that has driven innovation and has kept the market place buzzing and alive. Competition thus, creates checks and balances by ousting all market detractors in restrictive trade practices and monopolies and helps maintain market sanity, price balances and constant supply of products. Contrarily however, in their pursuit to outdo competition, market players often adopt unfair means to reach their goals which includes obvious tactics like imitation of ideas (products), counterfeiting, passing off, predatory pricing and in general, an abuse of dominant position. Fair or unfair, either way 'competition kills competition' eventually, an inherent logic that flows from within competition and drives competition to finally result in monopolies, if unregulated!

Further, all ideas are not great, only a few ideas generated once in a while may be viewed as worthwhile and 'valuable'. The moment a certain value is perceived in an idea, it becomes a 'saleable' idea, subject to improvements (read innovations) of course and one that can be commercially exploited. The consumer world today is inundated by a plethora of great saleable ideas in the form of technology, art, cinema, software or music, products, marks and designs, local arts and crafts, each constituting the producer's/seller's USP (unique selling proposition) and his intellectual property.

The question then that arises is - can ideas be owned/monopolised, can ideas be commercially exploited? As Renee Marlin-Bennett in his book 'Knowledge Power' says – "To create something from nothing is a uniquely human ability and using our minds, we originate works of arts, generate inventions, accumulate knowledge and discover truths about the world we live in. What sets our information age apart from prior periods in history is the price tag we put on these human intellectual creations and mechanisms we have put in place to protect them. The new economy depends on buying and selling ideas and facts, intangible and ephemeral though they are." And therein lies our answers and the purpose of this exercise.

The Property Debate

The law of property is a wise and ingenious bit of social engineering and satisfies more human wants and interests and creates an illusion that private property is almost fundamental in nature and absolutely necessary for the development of human society. Early man's moral and ethical consciousness, graduated into societal commandments like "Thou shall not steal", obviously referring to another man's 'property'. The dictum then manifested itself into imposed and enforced territorial legal rules and came to be recognised since long as one of the 'natural rights of man' along with the rights to life and liberty, a concept that was expounded well in the middle ages by great philosophers like John Locke, Thomas Hobbes and others.

Eminent legal philosopher, Roscoe Pound says that the concept of property emerged from man's natural instinct to 'acquire, claim and control' and that men must be able to assume that they have control, over what they have discovered and appropriated to their own use, what they have created by their own labour and what they have acquired under the existing social and economic order, for beneficial purposes to themselves.

Over centuries, the expression 'property' grew and developed to cover a wide expanse of different genres and also stretched into a hitherto unknown domain of 'intangible property', different from the physical and clearly definable corporeal kind. It came to be classified thereafter into broad categories like immoveable and moveable with moveable being further categorised as tangible and intangible or corporeal and incorporeal.

Ownership

The legal concept of entitlement and ownership came much later and soon engulfed property as its most essential and concomitant requirement especially over mere possession, to give an owner strong, everlasting rights and enjoyment of privileges - a right often referred to as 'jus in rem'. Ownership, a purely legal construct refers to the 'exclusive' and ultimate enjoyment and control of objects, things and all that which can be termed as property. It gives the owner absolute and encompassing rights over the different interests a property may have attached to it. Since ages, societies have created rules to specify what can be owned, how and under what conditions. In short, laws were created to constrain and enable

ownership, its use and alienation. The very famous 17th century 'Lockean Labor Theory of Property' also endorsed what was long understood of granting ownership status to the fruits of one's labour. It advocated that every man has a property in his own person, the labour of his body and work of his hands are his and that there could be no deprivation without equitable and adequate compensation.

Property in IP

As value in intellectual creations and 'labour of the mind' came to be appreciated, the notion of property together with ownership and its assignment was applied and extended to them. It came to be appreciated that an idea too 'belonged' to its creator/ owner, who alone had the legitimate right to reap the benefits springing from the same. Further, one person's idea, did/does not preclude another from independently thinking and developing the same to constitute another idea.

We also learn from a history of ideas that intellectual life, arguably the most important, satisfying and characteristic dimension to our existence, is a fragile thing easily destroyed or wasted and therefore needs to be protected and preserved well. If not shared and disclosed, knowledge could be lost forever stalling progress and hence the twin concepts of apprenticeship and rewards against disclosures, was adopted.

To provide security and comfort against theft of ideas and unjust exploitation of an individual's creations, the State stepped in to provide the much-needed protection to the creators through policies and regulation of the market place by enactment of various legislations. The governing philosophy of the protective systems was that the creator must be encouraged to share his knowledge through the State, by an award of an intellectual property right - a monopoly right to practice the fruits of his labour along with monetary rewards thrown in. The system worked well to incentivise inventors to experiment, explore and enjoy their inventions, compositions, writings etc. In this way, specialised skills, knowledge and expertise were brought into the public domain, whilst ensuring the smooth passage of human transition and growth.

The award of a patent, copyright or proprietary data right, leveraged the invention, creative work or data collection and this legal sleight of hand slowly changed the nature and complexion of the global market place.

Development of Monopoly Rights

As early as the ancient MohenjoDaro and Harappan civilisations dating back to almost 3500-2500 BC, Indus merchants like in Sumeria stamped their properties with seals. They used seals first as property marks and then as trademarks impressing them on clay tags to label their goods. More than 2000 traders seals have been found in the Indus cities & others in Mesopotamia, left there by overseas traders pointing to the existence of 'monopoly rights' even in ancient times. In ancient Greek and Roman civilisations, pots were marked with symbols, which were slowly replaced with names obviously of the potter, region or monarch as proprietorial marks and to distinguish one traders' wares from another, paving the way for the emergence of Trademark laws thousands of years later.

History of Patents

The earliest form of patent monopolies can be traced back to Greece to a city called Sybaris where in 500 BC monopolies were granted to new dishes for a period of one year. The trend hardened to community monopolies granted to 'guilds', a culture that flourished then in the Roman Empire. Associations of craftsmen and artisans were built to safeguard their arts and crafts and many contend that patents originated here. Perhaps the earliest forms of geographical indications can also be traced to these regional guilds.

Open letters or "litterae patentes" (Latin term) were unsealed documents used as public proclamations/ notices to grant favours (monopoly rights) including the conferring of ranks, privileges, titles or rights upon an individual, by the sovereign and came to be addressed as letters patent and later simply, as patents. These documents of course, were a far cry from the present patent documents and did not always deal with inventions or processes.

The 14th and 15th century saw much technological growth and development in medieval Europe, giving rise to a system of 'granting exclusive rights' to nurture and urge inventors to bring their inventions out into the open. Of the two schools of thought surrounding the genesis of the patenting monopolies - one claims that a legal system of patenting evolved around the snow bound Tyrolean region in medieval Bavaria and was granted to inventors of water mines, catching on later in Venice and other parts of Europe. However, others believe the system actually grew and gained momentum in Venice and was used to tempt export of technology into nations requiring specialised skill and expertise. Many of the patents granted in Venice were for Venetian art as well as for inventions like boats. It is interesting to note that in 1449, one John Utyman, a master glass maker from Flanders was granted a patent by King Henry VI of England for 20 years to create Venetian glasses for Eton College. In 1474, the Republic of Venice enacted a decree that new and inventive devices, once put into practice, had to be communicated to the Republic to obtain the right to prevent others from using them, making it the first piece of legislation on patents.

The system of patenting became so popular that it also came to be rampantly abused and became an important tool for granting favours and filling Royal coffers. Queen Elizabeth I is said to have referred to 'patents' the 'chiefest flower in her garden'. King James I who took over the reins following her downfall and a public outcry against patents, was forced to introduce a new legislation, the harbinger of our modern patent laws called the Statute of Monopolies Act in 1623. It introduced the concept of 'invention', 'true and first inventor', a system of examination of inventions before grant and disallowed patents for inventions mischievous to the State. Essentially the same components continue to be retained today, though in more sophisticated and complex formats.

Copyright Laws

'Copying' as an unfair means to exploit another's work was an unheard of problem until the advent of the printing press. Nobody ever felt the need to be protected against others who might steal their work of authorship as reading, writing and books themselves were a rare sight. The process of copying books was so tedious and laborious that unfair copying as a civil wrong was rare and as such few copies of existing books were ever made. Copying of books was mostly relegated to the holy texts and scriptures and was generally considered to be a voluntary, sacred act in the service of God. It is no surprise then that the most copied book at that time was the Bible.

Following the onset of the Printing revolution, in the mid-sixteenth century, a Statute established the 'Stationers' Company' protecting the rights of printers and publishers to print but not those books being printed by another and thus eliminated piracy. This however, did not prevent new entrants in the printing business from printing anything they liked. In order to avoid this competition, the Stationers' Company appealed to the King for exclusive monopoly rights to print copies of books – 'a copyright' and exclude those others. This became the source of today's body of copyright law in England, United States and across the world and also introduced a censorship system giving the monarch/ State the ability to control what was printed.

The first shift in the goal of copyright law came with the Statute of Anne 1710, which shifted its focus from printers to authors to protect their works. Although the Statute was quite simple compared to today's intricate and complex web of law and had its own quirks, it is the first "modern" copyright law in so far as the authors were granted rights which the wealthy, powerful printers and their guild had previously controlled. It recognised that if monopoly rights were granted to authors, education would not reach the masses and hence it was named 'An Act for Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the times therein mentioned'.

Trademark Laws

On the Trademark front, laws developed as a positive outcome of the broader law of unfair competition and the common law of fraud and deceit. The source of the present laws of trademarks can be traced to the Southern v How case in 1618 in England and the US Sandforths' case in 1584, both relating to counterfeiting a clothier's marks. The rationale ruling the judgement of the cases was that 'A man is not to sell his goods on the pretence that they are the goods of another man'.

Trademarks, as assets of commercial importance emerged only in the second half of the 19th century, when with the impact of industrial revolution and booming of trade, an urgent need was felt for laws against the use of false marks, names and imitation of brands.The Merchandise Marks Act 1862, was enacted as the first specific legislation on trademarks and was essentially a criminal statute providing for the punishment for 'forging of a trademark' as well as falsely marking goods. Demand for better and comprehensive laws to protect trademarks continued and the Trademark Registration Act was passed in 1875, creating the first Trademark Register in England. Indian laws developed parallel with the common law system in the UK.

International IP Treaties

The Industrial Revolution from the 18th to the 19th century was a period that brought on major innovation and reform in agriculture, manufacturing, mining, transportation and technology and had a profound effect on the social, economic and cultural conditions of the times. The commencement of the Revolution is closely linked to the number of key innovations in the second half of the 18th century, made chiefly in the three 'leading sectors' of textiles, steam power and iron making, propelling the economic take off by which the Industrial Revolution is usually defined. The Revolution and the growth of corporations implied that individual inventors had to sell or assign their patents to their corporations to earn money. In the industrial revolution aftermath in the second half of the 19th century, registration and 'description' processes came to be also incorporated, thereby moving the concentration of the 'intangible' from creativity to object to asset. Eventually 'mere creativity'

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disappeared from patent law, marking an important change in its logic and structure.

The 19th century also saw the introduction of the Designs Act, 1842, which in turn caused a great deal of confusion. The registration of designs was a simpler, cheaper and less diffusible preferred system over patenting. Though innovation and trade joined forces which eventually changed the map of monopolies and patents, it by no means curbed the systemic practice of Royal abuse which was still rampant. The ambiguous nature of the law too was responsible for general unrest pertaining to patents. By 1850, a modern system of patent laws as a separate and defined area of regulation began to be perceived and presented.

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Paris Convention

The increasing clamour for inventors needing better incentives and protections and the stagnancy of the number of patents until the middle of the eighteenth century, brought in a growing realisation of the value and importance of protecting intellectual property rights, especially patents. Holding a patent in one country did not ensure protection of patent rights in another. Typically, an inventor who wanted to be protected and enjoy patent privileges in other countries had to not only apply separately but also had to deal with different standards of protection in different territories. The inconvenience of having to file separate applications at the same time as the domestic, to avoid issues of prior publication taking away from the novelty of the invention, made the process very cumbersome. It thus became critical in the interests of international trade and development that a better and more universal system of incentives linked to patent laws be devised and be made applicable beyond domestic borders.

This led to the formation of an international treaty in Paris, outlining uniform standards to protect industrial property. It came to be called the 'Paris Convention on Industrial Property', was finally approved on March 20, 1883 and is considered to be a landmark development in intellectual property laws. The treaty made Intellectual Property systems including patents of any contracting state accessible to nationals of signatory member states. The term 'industrial property' was specifically coined because the Convention dealt with what was perceived to be intellectual properties having large scale industrial applications like patents, trademarks, designs and utility models. The Treaty today is being administered through the World Intellectual Property Organization ("WIPO").

The Berne Convention

Since the Paris Convention excluded Copyrights from its ambit, it was a serious concern for well-known artists and musicians like Johannes Brahms (composer of 3rd symphony), Robert Louis Stevenson author of Treasure Island, John & Emily Roebling the creators of the famous Brooklyn Bridge in New York, who had attained acclaim for their work in the same period of 1873 to 1883 and were left out in the cold as there was neither recognition nor protection of copyrights in literary or artistic works across borders, despite domestic protections.

Following on the heels of the Paris Convention, the Berne Convention was developed in 1886, at the prompting and initiative of one of the greatest and much revered French author, poet and painter, Victor Hugo. It established an international and uniform framework for the protection of copyrights through the formation of an international union and is relevant even today. Under the Convention, copyrights for creative works are automatically in force upon their creation without being asserted or declared. An author need not "register" or "apply for" a copyright in countries adhering to the Convention, while foreign authors are given the same rights and privileges to copyrighted material as domestic authors in any country that signed the Convention.

Since almost all nations are members of the World Trade Organization, the Agreement on Trade-Related Aspects of Intellectual Property Rights requires non-members to accept almost all of the conditions of the Berne Convention.

Conclusion

In the more recent times of the 20th century, other and specifically international treaties on Intellectual Properties have been passed chief among them being the Patent Cooperation Treaty in 1970, Budapest Treaty on Microorganisms in 1977 and the Trademark Law Treaty in 1994 making intellectual property protection more compact and precise. Finally the treaty on Trade Related Aspects of Intellectual Property Rights was brought into effect on 1st January 1995 under the aegis of the WTO regime, which took over the General Agreement on Trade and Tariffs that ruled international trade since 1947. Today, it is TRIPS that has set the standards and rules governing the domestic and international regime and management of intellectual property rights. This body of law has traversed a long way to become an important market determinant for global trade and commercial success.