7.0 INTELLECTUAL PROPERTY CRIMES: A Review

"We live in a fascinating time – The transition into the Information Age"

The rise of the Information Age has quite predictably brought a whole range of criminal endeavor. While at first blush the two topics – computer crime and intellectual property crime – may appear unconnected, the reality of the Information Age is that they are converging. Increasingly, intellectual property crime is computer crime, because it is computers and the Internet that provide the medium for large scale and profitable commission of intellectual property crime – for example the wholesale distribution over the Internet of copyrighted computer software that the government attempted unsuccessfully to prosecute in United States v. La Macchia (Preface: Computer and Intellectual Property Crime).

7.1 CRIME IN THE ‘Information Age’

We live in a new, post-industrial age – the ‘Information age’. Social commentators, economists, and academics have correctly observed that computer technology has fundamentally altered the industrial Society of the developed countries. The increasing speed, decreasing size, and lower cost of computers hence combined to make them ubiquitous. The opening of Internet access to the world at large and the concomitant development of the World Wide Web have revolutionized how people communicate and conduct their affairs. These developments have led to new methods of communication such as e-mail, new methods of portable data storage and retrieval such as laptop computers and hand-held digital organizers, and new methods of doing business such as e-commerce. Simultaneously, the upsurge in creative ideas, from music that is protected by copyright, to biotechnology that is protected as trade secrets is causing a sea change in what society values as, wealth, from the industrial-based paradigm of factories and hard assets to the new paradigm of information, the so-called intellectual property. Unsurprisingly, technological innovation has also led to criminal innovation.

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Criminals of various ilks are preying on today's computer users and net workers and are absconding with today's intellectual property. For the criminally minded, computers provide a new medium through which to accomplish age-old goals. In addition, intellectual property – including that stored on or relating to computers – constitutes a new kind of valuable that may be stolen or otherwise corrupted for personal gain. The criminals of the information age range from business competitors and foreign internets who seeks to raid trade secrets and computer data, to malicious hackers who damage computers and disrupt communications to gain notoriety or advance a political cause.

Intellectual property crime has also been on the rise. In 1996, when then president Clinton signed the Economic Espionage Act into law noted that “trade secrets are an integral part of virtually every sector of our economy and are essential to maintaining the health and competitiveness of critical industries operating in the United States” and said that the new statute would “help us crack down on acts like software piracy and copyright infringement that cost American businesses billions of dollars in lost revenues. During 1988, it was reported that losses attributable to software piracy alone amounted to $11 billion in lost sales and licensing fees. In spring 2000, the Department of Justice indicated a group of hackers, who billed themselves as the “pirates with Attitude, for allegedly stealing thousands of software programs from companies like Microsoft and Intel and subsequently making them available for free on the Internet. In a unique twist to the case, the defendants – who have been described as “economic philanthropists” – claimed to have acted not for personal gain but rather out of the belief that all basic software programs in cyberspace should be freely available to the public. A variation on this view in the area of copyrighted music is reflected in the dispute between the record industry and Internet – based services such as Napster that allow the public to access and exchange digital copies of sound recordings on a large-scale basis. Although this dispute has been fought in the civil forum, the courts’ conclusion that Napster may have engaged in contributory and vicarious copyright infringement has Criminal Law Overtones. In Sony Corporation v. Universal City Studio (466 us 417) & the US Supreme Court dismissed the suit and held that –

1 The time shift for watching the TV programme for private viewing was fair use and it does not infringe copyright.

2 A manufacture is not liable for selling a staple article of commerce that is capable of commercially significant non-infringing uses.

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2 Supra 1 – p. 6
7.1.1 INTELECTUAL PROPERTY CRIMES:

The “intellectual property crime” in the cyber space encompasses three general areas of criminal endeavour: The Criminal infringement of copyrights, the criminal misappropriation of trademarks, and the theft of trade secrets.

7.1.2 A. COPYRIGHT INFRINGEMENT: Copyrights protect a wide range of creative and artistic efforts by giving the authors, composers, artists, and creators a number of exclusive rights in their works, including the rights to copy, distribute, perform, or display those works. Federal copyright protections arise from the United States constitution, which provides that congress may pass laws to “promote the progress of science and the useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective writing and Discoveries” (U.S. CONST.). The drafting of the Constitution intended both to provide authors with a fair commercial return on their creative labour and “to stimulate artistic creativity for the benefit of the public at large”.

The current incarnation of federal copyright law is based on the copyright Act, which was passed by (U.S.) Congress in 1976, and has been amended under the federal copyright Act, copyright protection exist in:

Original works of authorship fixed in any tangible medium of expression, now known or later developed from which they can be perceived, reproduced or otherwise communicated either directly or with the aid of a machine or device. Works of authorship included the following categories:

1) Literary works; 2) Musical works, including any accompanying works; 3) dramatic works, including any accompanying music; 4) pantomimes and choreographic works; 5) pictorial graphic, and sculptural works; 6) motion pictures and other audiovisual works; 7) sound recording; and 8) architectural works

Copyright protection does not “extend to any, procedure, process system method of operation ….. regardless of the form in which it is described, explained illustrated or embodied in such work”. Elements of computer Programs such as structure, sequence, organization, and user interface may thus be copyrighted when

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4 G. peter albert, jr & laff, whitesel & saret, LTD., INTELLECTUAL PROPERTY IN CYBERSPACE - 1990 - 209
they constitute expression, rather than ideas (Johnson Controls, Inc. v. Phoenix Control).

A copyright is separate from any physical item that embodies the copyrighted work: Thus, the ownership of a physical object that embodies the copyrighted work, such as a recording of a copyrighted song does not give the owner of the object any rights to the works copyright, and therefore does not permit the owner of the object to make copies of the recording he or she owns. The first sale doctrine, however, terminates a copyright holder’s exclusive right to distribute any copy of a copyrighted work that he or she sells.

The protections of the federal copyright law attach to a work as soon as it is created and generally last for the author’s life plus 70 years. Because federal copyright law protects a work from the moment of its creation, the federal law preempts all state copyright law with respect to works that are protected under the Federal Statute. After the duration of a copyright expires, the work is considered to be in the public domain, and anyone may copy distribute, or perform if although a work is considered copyrighted as soon as it is created the creator or owner of that work must register a copyright with the federal copyright office before a federal court or criminal action for infringement may be brought.

To register a copyrighted work, the owner must complete an application form, and must send the form, an application fee, and a copy, copies, or portion of the work to the copyright office.

The precise number of items embodying the work that must be sent to the copyright office depends on the type of work that the owner is registering.

In 1998, the U.S. Congress passed the Digital Millennium Copyright Act, which added several new sections to the copyright laws in Title 17 of the U.S. Code in order to comply with the requirements of the world Intellectual property copyright Treaty and the performances and phonograms Treaty. Among other provisions, the statute prohibits activities that, “circumvent a technological measure that effectively controls access” to a copyrighted work. The statute also prohibits manufacturing or trafficking in devices, technologies, services or parts that are primarily designed to circumvent such protections. Examples of technological measures that control access
to copyrighted works include broadcast signal scramblers and encryption programs. Another section of the statute focuses on copyright on management information which includes information about the title, author owner, and performer of the work, and terms and conditions for use of the work. This section prohibits providing or distributing false copyright management information, removing or altering management information from copyrighted works, and distributing or performing copyrighted works from which the management information has been removed or altered.

The willful infringement of a copyright is a federal crime under two specific circumstances. Those are first, when the infringement is for commercial advantage or private financial gain, or second, when the infringement involves reproduction or distribution of works having a retail value exceeding $1000 in any six month period. “Infringement in the criminal context means the same thing that it does in the civil context, and entails violating any of the copyright holding exclusive rights in the work. In essence, infringement means unauthorized reproduction or distribution of a copyrighted work.

The copyright (of India) Act, 1957 has been enacted to check the piracy i.e., infringement of rights under copyright Act, so that fruit of the labour put by the author or the copyright owner may be enjoyed by the author or the owner and not by the pirates.

The copyright Act not only protect rights of the author or artist alone but the law also protects the enrichment of culture and the society and its interest.

The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by license in writing signed by him or by his duly authorized agent: provided that in the case of a license relating to copyright in any future work, the license shall take effect only when the work comes into existence, where a person to whom a license relating to copyright in any future work is granted dies before the work comes into existence, his legal representatives shall, in the absence of any provision to the contrary in the license, be entitled to the benefit of license (Section 30. The Copyright Act, 1957).

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6 Supra I – p. 28-30
7 Girish Gandhi, etc. v. Union of India and Another AIR 1997 Raj 78 at p 84
8 Mannu Bhandari v. Kala Vikas pictures Pvt. Ltd. and another AIR 1987 Del 13
A license deed in relation to a work should contain the following particulars—

i) identification of the work

ii) duration of license,

iii) the right licensed,

iv) territorial extent of license

v) the quantum of royalty payable and

vi) the terms regarding revision, extension and termination.

The Copyright Act gives an option to the owner of a copyright to have the work registered under section 45 of the Act. If it is so registered, a certified copy of the entry in the register shall be a \textit{prima facie} evidence without further proof of production of the original but it raises rebuttable presumption of evidence.

Copyright in a work under The Copyright Act, 1957 shall be deemed to be infringed—

a) when any person without a license granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act—(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or (ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or (b) when any person (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or (ii) distributes either for the purpose of trade or to such an extent, as to affect prejudicially the owner of the copyright, or (iii) by way of trade exhibits in public, or (iv) imports into India any infringing copies of the work: provided that noting in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer (Section 51 of The Copyright Act, 1957).

\footnote{P. Narayanan, Intellectual Property Law (1997), pp. 258, 259}
The expert opinion should be sought in deciding the question of infringement of copyright. In AIR 1938 All 266, the court held that, "there is no infringement of copyright if the original result has been produced by labour and research.

Again, in order to decide whether a fair abridgement of the original work is or is not an infringement of a copyright the test is whether or not it is a reproduction of the work or substantial part of it in any material form whatsoever whereas Section 52 of the Act specifically mentioned certain act/acts not to be infringement of copyright.

7.1.3 Civil Remedies:

Civil remedies for infringement of copyright – (1) where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise, as are or may be conferred by law for the infringement of a right:

Provided that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the court may in the circumstances deem reasonable.

2) Where in the case of a literary, dramatic, musical or artistic work, a name purporting to be that of the author or the publisher as the case may be appears on copies of the work as published, or, in the case of an artistic work, appeared on the work when it was made the person whose name so appears or appeared shall, in any proceeding in respect of infringement of copyright in such work, be presumed, unless the contrary is proved to be the author or the publisher of the work, as the case may be.

10 Sita Nath Basak v. Mohini Mohan Singh AIR 1924 Cal 595
11 Gopal Das v. Jagamata Parsad AIR 1938 All 266
12 Marry P. Marshal v. Ram Narian Lal AIR 1934 All 922 at PP. 924, 925
3) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the discretion of the court.

In case of Gramophone Company of India Ltd. v. Mars Recording Pvt. Ltd.\textsuperscript{13}, it has been held that independently of the authors copyright and even after the assignment either whole or partly of the said copyright, the author of a work shall have the copyright:

(i) to claim authorship of the work; and

(ii) to restrain or claim damages in respect of any distortion mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion mutilation, modification of other act would be prejudicial to his honour or reputation. But the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer programme to which clause (99) of subsection (1) of Section 52 of the Act applies. The right conferred upon an author of a work by sub-section (1) of Section 57, other than the right to claim authorship of the work, may be exercised by legal representatives of the author. It has been held that the compliance of provisions of section 52(1)(j) (i) and (ii) is sufficient to obtain injunction\textsuperscript{14}.

Section 63 of the Act declares that any person who knowingly infringes or abets the infringement of the copyright in a work or any other right conferred by the Act except the right conferred by Section 53A is liable to be punished with imprisonment of a term not less than six months but extendable up to three years and fine not less than fifty thousand but which may be extended to two lakh rupees. Section 63A of the Act provides that whoever having already been convicted of an offence under Section 63 is again convicted of any such offence shall be punishable for the second and for every subsequent offence with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Provided that where the infringement has not been made for gain in the course of trade or business the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than one year of a fine of less than one lakh rupees.

\textsuperscript{13} Gramophone Company of India Ltd. v. Mars Recording Pvt. Ltd. 2000 PTC 117 at p 126

\textsuperscript{14} Dr. Vikas Vashishth - Law and Practice of Intellectual Property in India ; Bharat Law House, New Delhi Edn. 2002 – p. 587
7.2 ELECTRONIC COPYRIGHT MANAGEMENT SYSTEMS (ECMS)

With the advancement of digital computing, storage technology and widespread use of the Internet, Digital Libraries have become the state of the art libraries. CD-ROMs are replacing journals and books. Library users want information on-line. The successful growth and use of digital library will depend on the resolution of IPR issues in general and copyright issues in particular.

In the case of digital libraries, due to the fact that the digital media enables fact and unauthorized copies being taken, such an exemption is likely to be misused. With digital reference material being available through electronic media, suitable legislations may be required to ensure that the right to online browsing is retained.

Intellectual property (IP) nurtures a huge business activity. In this market, many modern products are sold. The costs of these products are not determined by the material value, but by the costs involved in extensive research, remuneration for ingenious ideas and creativity in making the product etc. The revenue generation by IP is threatened by the new digital age; ‘piracy’ being the main danger. In this context, Electronic Copyright Management Systems which protect digital works have gained great importance. Techniques are emerging to custom – build ECMS to fit into the various business models.

The purpose of an ECMS is to aid enforcing the copyrights owned by the author, publisher etc., and to keep track upon the actions performed by an end user so that the appropriate royalties can be provided to the copyright owner. The design and development of an ideal Electronic Copyright Management System should address the following basic issues namely –

- Technical expression of copyrights – i.e., making known to the and after that the copyrights are owned by the author etc., by utilising technological innovations.
- Automatic access control, licensing collection of revenue by way of royalty, enforcing various rights, and monitoring various activities with a view to prevent infringement.

Technically speaking an ideal ECMS should evolve a mechanism for declaring the copyrights through explicit statements in machine readable formats. These copyright statements should be embedded to the information objects. Machine readable copyright declarations statements are instrument in developing suitable
systems for automatic access control, licensing royalty revenue collection etc. Based on the above criteria, the components of a good ECMS could be:

- A digital copyright registration and recording system
- A digital library system with affiliated repositories of copyrighted works and
- A transaction monitoring system to check the illegal use of works

Technologies are being developed for protecting electronic or machine readable copyright works. Explicit copyright control, contents Registration, Author Registration, Digital watermarking etc., are some of the methods being tried upon to implement ECMS.

Module Freeware!

7.2.1 President Clinton (of the U.S.A.) Acts -

President Clinton, has passed a law to combat piracy in the Net. The law has made it an offence to exchange unauthorized copies of software, music and literature even if offender does not make a profit. The No Electronic Theft (NET) Act, specifically relates to the internet and related technology. The act provides that anyone distributing illegal copies of material having value US $ 2,500 or more will be subject to five years in prison plus a fine of US $ 25,000.

For illegal possession of material value at US $ 1,000 or more the culprit will face a misdemeanour charge and a jail sentence of one year. The importance of the Internet and high technology industries to the US economy has seen number of bills introduced in the recent past.

The Incidence of Indian copyrights Act on Soft Propriety Works

Section 63B of the Copyright Act, 1957 provides for knowing use of infringing copy of computer programme to be an offence. The section states thus:

Any person who knowingly makes use of a computer of an infringing copy of a computer programme shall punishable with imprisonment for a term which shall not be less than seven days but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees:

Provided that where the computer programme has not been used for gain or in the course trade or business, the court may, for adequate and special reasons to be mentioned in the judgment, not impose any sentence of imprisonment and may impose a fine which may extend to fifty thousand rupees. Section 64 of the Act, provides the power to police to seize infringing copies.

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7.3 TRADEMARK MISAPPROPRIATION

The terms "trademark" and "service mark" describe an extremely broad category of words, symbols, and devices put simply, trademark can protects a mark, that is used in the market place by a business to identify the goods it manufactures or the service it supplies from being appropriated by a stranger to market the stranger's goods or services in a confusing or deceptive manner that will pass off the stranger's goods or services as those of the holder of the mark.

Under the Lanham Act, the federal statute defining and protecting trade marks and service marks, such marks include:

Any word, name symbol, or device. or any combination thereof .......... used by a person, or ........ Which a person has a bona fide intention to use in commerce and applies to register on the principal register ..........., to identify and distinguish, in the case of a trademark his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source if the goods, even if that source is unknown and, in the case of a service mark, the services of one person, including a unique service, from the services of others and indicate the source of the services, even if that source is unknown.

The definition of trademark is intentionally very broad and the U.S. Supreme Court has upheld its breadth\(^16\).

Shapes such as the coca-cola bottle, sounds such as the NBC chimes, scents such as the plumeria blossom scent on Sewing thread, and columns such as that of specialized sponges have been upheld as trademarks. Trademark and service marks receive the same protections under the Lanham Act.

The Lanham Act provides a number of protections for trademarks and service marks. Such marks can be registered with the United States patent and Trademark office. If a person uses a mark that is confusingly similar to a validly registered mark, the owner of the registered mark may bring a civil suit against the infringer for damages. Goods bearing counterfeit trademarks are subject to seizure. In addition, the Lanham Act establishes a federal law of unfair competition, and allows civil actions against persons engaging in false advertising. Owners of famous trademarks may sue for trademark dilution, weakening of the distinctiveness of a mark by marks that resemble it closely. Finally, trademark owners may bring suit when their marks have been misappropriated in an Internet domain name by a person who has the bad faith intention to profit from the mark\(^17\).

\(^{17}\) Supra 1. pp. 31-32
Again trademark – means a mark capable of being represented graphically and may include a word, name, symbol, device, numeral, letters, signature, label, ticket, brand, slogans, pictures, characters, sounds, smell, shape, logo, graphic designs, three dimensional form, moving image product or packaging features etc. It is distinctive of a person’s goods or services and is used in a manner that identifies those goods or services and distinguished them from the goods and services of others\textsuperscript{18}.

A trademark is the name, symbol, figure, letter, form or device adopted and used by the manufacturer or merchant in order to designate the goods that the manufactures to sells, and to distinguish them from those manufactured or sold by another, to the end that they must be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry or enterprise\textsuperscript{19}.

Trade mark is a kind of property and is entitled to protection under the law, irrespective of its value in money so long as it has some business on commercial value. Not merely the interest of public but also the interests of owner are the subject concern of trade mark legislation\textsuperscript{20}. Protection cannot be granted unless a plaintiff establishes that the particular mark indicates not merely a certain quality of goods but also that they are the goods of the plaintiff manufacturer\textsuperscript{21}.

A valid registration of trade mark in favour of a person gives him the exclusive right to use the trade mark in relation to goods or service in respect of which the trade mark is registered. The plaintiff can obtain relief in the court of law in respect of infringement of trade mark. The relief in suit for infringement includes injunction, either damages or an account of profits, together with or without any order for the delivery up of infringement labels and marks for destruction or ensure.

When the trade description was a false trade description, the court held that the applicant be disentitled to protection in a court and should not be registered as a trade mark\textsuperscript{22}.

**Infringement Action**

The use of a trade mark by a person who not being registered proprietor of the trade mark or a registered user thereof which is identical with or deceptively

\textsuperscript{18} Vakul Sharma - Information Technology Law and Practice, Universal Law Publishing Co. Ltd. Edn. – 2005 – P. 392
\textsuperscript{19} P. Ramanath Aiyar, The Law Lexicon Wadhwa & Co. - 1997, P. 1908
\textsuperscript{20} London Rubber Co. Ltd. v. Durex Products and another AIR 1959, Cal 56
\textsuperscript{21} Anglo Indian Drug & Chemical Co. v. Swastik Oil Mills Co. Ltd. AIR 1935 Bom 101 at P. 108
\textsuperscript{22} National Research Development Corporation of India, New Delhi v. Delhi Cloth and General Mills co. Ltd. and Others AIR 1980, Del 132
similar to a registered trade mark amounts to infringement\textsuperscript{23}. The unauthorized use of a trade mark or service mark which causes confusion or deception in the mind of public is infringement of that trade mark. In order to constitute infringement what is necessary is the user of any mark not necessarily absolutely identical in all respects but deceptively similar to the registered trade mark likely to mislead a purchaser of average intelligence and imperfect memory and cause confusion in the mind of that purchaser by its outstanding features of resemblance. The main element to be considered is the probability of deception\textsuperscript{24}. There may arise three types of cases where the use of a trade mark by the defendant constitutes infringement of registered trade mark of plaintiff. These are: (i) whether the defendant trade mark is identical with the plaintiff's trade mark; (ii) whether the trade mark of defendant contains or consists of the whole or any essential or leading features of the plaintiff's mark combined with other matter; and (iii) whether the mark of defendant is identical with, any of them in the plaintiff's mark\textsuperscript{25}. The fundamental principle of law of infringement of a trade mark is that a person shall not trade under a name so closely resembling that of the plaintiff as to be mistaken for it by the public\textsuperscript{26}.

Further, a trademark infringement is a violation of the trademark owner's rights. An infringement occurs, when the impact of the proposed trademark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trademark. It is important to quote the following observations of Parker, J. Pianotist Co.'s Application: 1906(23) RPC 774.

"You must take the two words. You must judge them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact you must consider all the surrounding circumstances, and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion that, is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods – you may refuse the registration, or rather you must refuse the registration in that case".

\textsuperscript{23} Indo Pharmaceutical Works Ltd. v. Citadel Fine Pharmaceuticals Ltd. AIR 1998 Mad 347
\textsuperscript{24} Vikas Manufacturing Co. v. Bhoraj Manufacturing Co. AIR 1980 P & H 127
\textsuperscript{25} Tata Oil Mills Co. Ltd. v. Wipo Ltd. AIR 1986 Del 346
\textsuperscript{26} Supra 9 p. 156-157
The words of Parker J. were echoed in the Supreme Court decision in AIR 1970 SC 2062 where it was held that "marks must be compared as a whole the true test being whether the totality of the proposed trademark is such that it is likely to cause deception, a confusion or mistake in the minds of persons accustomed to the existing trade mark. Microscopic examination is not called for and both visual and phonetic tests must be applied." 28

7.4 THEFT OF TRADE SECRETS

The common law has long recognized that one who "invents or discovers, and keeps secret a process of manufacture has a property interest in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons." 29

[(Peabody v. Norfolk, 98 Mass. 452, 458 (1868)]. As the U.S. Supreme Court has observed, the broad policies behind trade secrets law are the "maintenance of Standards of commercial ethics and the encouragement of invention." 30

Under the formulation of the Restatement (First) of Torts in 1939, a trade secret considered of any formula pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it [ RESTATEMENT (First) of Torts, Comment b (1939)]. Novelty of invention in the sense that it is required for patentability, is not necessary for a trade secret and thus trade secrets law encompasses a broader range of subject than does patent law (Kewanee Oil Co., 416 U.S. at 476). An absolute requisite of a trade secret, however, is its secrecy from the general public and from others in the same, trade or business. Federal patent law does not pre-empt trade secret law, and the states are free to enact trade secret protections by statute. 31

Case: DeCSS and Trade Secret Misappropriation:

One of the objectives of the DVD Copy Control Association, Inc. (DVD CCA) consisting of motion picture studios, computer and consumer electronics

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27 F. Hoffman-La Roche El Co. Ltd. v. Geoffrey Manners & Co. Ltd., AIR 1970 SC 2062,
28 Supra 1 – p. 32
29 Peabody v. Norfolk, 98 Mass 452, 458 (1868)
31 Supra 1. – p. 33
industries was to use the CSS (Content Scramble System) technology to encrypt copyright content on DVD’s and grant and administer the licenses for the CSS technology.

The posting of the computer programme called DeCSS that circumvents the CSS protection system on Internet by Jon Johansen in September, 1999 resulted in its rapid circulation. Soon thereafter, DeCSS appeared on other websites (at least 118 websites had been identified that either contained proprietary information related to CSS or provided links to other websites with such information), including a website maintained by Andren Bunner.

In December, 1999, approximately two months after the initial posting, CCA filed a complaint against Bunner and numerous other named and unnamed individuals. In the complaint, DVD CCA did not seek damages. Instead, it only sought an order “enjoining and restraining defendants ......... from making any further use or otherwise disclosing or distributing, on their websites or elsewhere, or ‘linking’ to other websites which disclose, distribute, or ‘link’ to any proprietary property or trade secrets relating to the CSS technology and specifically enjoining defendants ............. from copying, duplicating, licensing, selling, distributing, publishing, leasing, renting or otherwise marketing the DeCSS computer programme and all other products containing using and /or substantially derived from CSS proprietary property or trade secrets ..........”

Burner posted DeCSS on his website allegedly because “it would enable ‘Linux’ users to use and enjoy ‘DVDs’ available for purchase or rental in video stores’ and ‘make ‘Linux” more reactive and visible to consumers”.

Burner also claimed be wanted to ensure that programmers would have access to the information needed to add new features fix existing defects and, in general, improve the ‘[D]eCSS’ programme”.

The Superior Court has issued injunction enjoined the named defendants, including Bunner, from :posting or otherwise disclosing or distributing, on their websites or elsewhere, the DeCSS program. The Court of Appeals has reversed the lower courts’ injunction.

Judgment : Supreme Court of California

The narrow question before the Supreme Court, California in DVD Copy Control Association, Inc. v. Andrew Burner (Case no. S 102588) was whether the
preliminary injunction violates Bunner’s right to free speech under the United States and California Constitutions even though DVD CCA was likely to prevail on its trade secret claim against Bunner. By a majority decision it reversed the judgment of the Court of Appeal.

As per the majority view, delivered by Brown, J. on August 25, 2003, “Our decision today is quite limited. We merely hold that the preliminary injunction does not violate the free speech clauses of the United States and California Constitutions, assuming the trial court properly issued the injunction under California’s trade secret law. On remand the Court of Appeal should determine the validity of this assumption.”

7.5 Prevention, protection and control of cyber and Intellectual property crime –

(A) Issues on intellectual property is the prime concern of these days. Everyone agree on protection of Intellectual property. Intellectual property protection is a vital part of social, cultural, and economic development. A country could reach these goals with strong Intellectual Property Protection.

We can credit 17th century England with the concept of a “copyright”, a law that protects the creative products of authors, artists, singers and to reflect developments since the 1600s, filmmakers and software developers. The artists and creators should be able to enjoy the fruits of their labour for a specified time period, after which the material becomes available for public use. Copyright protection is a necessary ingredient for ensuring cultural wealth in our societies. And theft of these copyrighted goods is a threat to the creative, sectors in our societies.

While there has been much press play recently regarding on-line downloading of music and movies in developed countries like the United States, in fact it is in the developing world that much of the serious damage is being done. Many new musical voices, new authors and new stories on film around the world have never been made available simply because the incentives were not there for these artists to take a risk. They have known that whatever they produce will be immediately pirated – stolen – and they will not be provided, the means to develop their talent. In Hong Kong, where a thriving movie industry was so hurt by rampant piracy that, just a few years ago, observers were predicting it would disappear from the film making map. Today, the industry is in better shape and moviegoers around

32 Supra I – pp. 377-378
the world enjoy new and exciting releases primarily because Hong Kong authorities total decisive action to combat the piracy problem. Studios in "Dhaliwood" movie industry went on strike in March 2004 to protest the problem of piracy and demand action by the government. Similar developments have taken place in the world of music. Ethiopian musicians went on a seven-month strike in 2003 to press for better anti-piracy measures from the government. These artists all understood the importance of protecting their works from pirates.  

A trademark identify the producer of a product and serve as an indicator of quality. They also inform consumers where to seek recourse if the product fails. Some forms of trademarks have been around for thousands of years. The assurance of quality and accountability is completely lost when counterfeiters illegally use a trademark and deceive consumers with their goods. When many people think of counterfeit goods, they might bring to mind items such as take Rolex watches, Zippo lightens, or Louise Vuitton handbags.

People today live and work in a global economy. Intellectual property rights are in the forefront of many of the fastest growing areas of global trade in goods and services, such as silicon chips, computer software, and audio and video recordings. People in business be aware of changes in the international agreements affecting protection for intellectual property. The form and extent of global protection varies considerably, from little or none to substantial depending on the kind of property and the particular country involved. Adequate legal protection for newer technologies has often lagged behind the development of such products and services. More than one hundred nations of the world are members of the General Agreement on Tariffs and Trade (GATT), the major international agreement that is the touchstone for global trade. The Uruguay Round of Multilateral Trade Negotiations under the GATT began in 1986 and final agreement was reached on December 15, 1993.

One of the proposals in the Uruguay Round was, for the first time, to add protection of intellectual property to this international agreement. This proposal would require member countries to afford broader and more effective protection (generally equivalent to that afforded their own nationals, i.e. national treatment),

34 Supra 33 - p. 12 & 15
for the intellectual property rights of persons and companies in other countries, when exploited in such members countries35.

7.6 CHOOSING THE RIGHT PROTECTION

Different forms of protection may be available for different aspects of the same products or services. For example, a packaged computer software program usually involves several forms of protection. The program itself can generally be protected by copyright, and sometimes by patent law, the product name and logo can be protected by trademark law, and other aspects of the program may be protected as trade secrets.

It is important to understand the basic principles of the different types of intellectual property in order to ensure that appropriate protection is obtained. For example, patents provide protection for new products or process themselves if they are highly original and give their creators a monopoly in the use of those ideas for a period of time. However, the product or process must be disclosed to the public, and after the period of exclusive patent protection has expired anyone can use and exploit them.

The same product or process can be protected indefinitely as the “trade secret” of a particular person or business, for example, the formula for Coca Cola. The creator or owner of a trade secret must keep the information secret and protect it through agreements with those who have access to the secret and through vigilant enforcement of those agreements.

Ideas themselves cannot be copyrighted, but an individual’s particular expression or discussion of an idea can be copyrighted and others cannot use that particular expression without the author’s permission.

Copyright in a work is created and protected from the moment the work is “fixed” in some tangible or perceivable form. Neither registration nor government approval is required to create the author’s copyright. In contrast, trademark and tradenames until very recently, could be created only by their use and association with a particular business or product36.

Concluding Comments:

Intellectual Property law, which covers patents, trade secrets, copyrights, and

36 Supra 35 – p. 144-145
Trademarks, confers a set of exclusive rights in a variety of subject matter, including inventions, useful information, creative expression, and commercial symbols. The intellectual property crime in the cyber space encompasses three general areas of criminal endeavour: the criminal infringement of copyrights, the criminal misappropriation of trademarks and the theft of trade secrets. Intellectual property protection is a vital part of social, cultural, and economic development. A country could reach these goals with strong intellectual property protection. Now the world facing the problem of on-line downloading of music and movies. Trademarks serve as an indicator of quality. The assurance of quality and accountability is completely lost when counterfeiters illegally use trademarks and deceive consumers with their goods.