INTRODUCTION TO INTELLECTUAL PROPERTY

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1. DEFINITION

1.1 Intellectual Property

Intellectual Property is defined in Blacks Law Dictionary[1] as:

> A category of intangible rights protecting commercially valuable products of the human intellect.

Intellect is a word that has Latin roots from the word '*intellectus*' meaning 'understanding'. Intellect is on the other hand grammatically defined as the faculty of reasoning and understanding objectively[2] • one's mental powers

The objects of Intellectual property are therefore ***creations of the human mind***, the human *intellect* hence the expression "intellectual" property. In a somewhat simplified way, one can state the intellectual property relates to pieces of information, which can be incorporated in tangible objects.

Intellectual Property (IP) or Intellectual Property Rights (IPR) refers to the branch of law that protects some of the finer manifestations of human brilliance and achievement. IPR are rights given to persons over the creations of their minds. They usually give the creator and exclusive right over the use of his/her creation for a certain period of time.

There is no official definition of Intellectual Property. However the TRIPS[3] Agreement provides[4] that, for the purposes of that Agreement, the term "Intellectual Property" refers to all categories of rights which are covered by sections 1 to 7 of Part II of the Agreement itself, namely: *copyrights and related rights, trademarks (and service marks), geographical indications, industrial designs, patents including plant varieties, layout designs of integrated circuits and undisclosed information, including trade secrets*.

Similar to property in movable things and immovable property, intellectual property, too, is characterized by certain limitations eg. a limited duration in the case of copyright and patents.

Some companies have already adopted the Statement of Financial Accounting Standards (SFAS), which deals[5] with Goodwill and Intangible Assets that include Intellectual Property.

IP Rights are customarily divided into three main areas or branches: copyright (and rights related to copyright); patents and trademarks.

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[1] Seventh Edition
[2] Concise Oxford English Dictionary
[3] Trade Related Intellectual Property Rights
[4] Article 1.2 thereof
[5] At Number 142

1.2 Industrial Property

Industrial Property is sometimes misunderstood as relating to movable or immovable property used for industrial production, such as factories, equipment for production, such as factories, equipment for production. Typically, the creations to which industrial property relates are inventions and industrial designs. Simply stated, inventions are solutions to technical problems, and industrial designs are aesthetic creations determining the appearance of industrial products. I addition, industrial property includes trademarks service marks, commercial names and designations, geographical indications (indications of source and appellations of origin) and the protection against unfair competition. Here, the aspect of intellectual creations – although existent- is less prominent, but what counts here is that the object of industrial property typically consists of signs transmitting information to consumers, in particular, as regards products and services offered on the market, and that the protection is directed against unauthorized use of such signs which is likely to mislead consumers, and against misleading practices in general.

The expression "industrial " property may appear not to be entirely logical because it is only as far as inventions are concerned that the main segment of economy that is interested in them is industry. Indeed, in the typical situation, inventions are exploited in industrial plants. But trademarks, service marks, commercial names and commercial designations are of interest not only to industry but also and mainly to commerce. Notwithstanding this lack of logic, the expression " industrial property" has acquired a meaning, which clearly covers not only inventions but also the other objects just mentioned.

2. BRANCHES OF INTELLECTUAL PROPERTY

2.1 Copyright

Copyright is defined under the Blacks Law Dictionary as a property right in an original work of authorship (*such as a literary, musical, artistic, photographic, or film work*) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the work.

Dr. Kameri Mbote will be presenting a paper on Copyrights but to try and speak in general terms, the word copyright means just what it says: the right to make a copy. It is therefore the right given against the copying of defined types cultural, informational and entertainment productions. Artistic creations will include poems, novels, music, paintings and cinematographic works.

Britain's Statute of Queen Anne, the earliest copyright statute, was passed in 1709 not only to protect local printers after the advent of the Gutenberg printing press but also to protect the foreign works (mainly books) that were being imported from Europe into England at that time.

Copyright does not protect an abstract idea; it protects only the concrete expression of an idea. To be valid, a copyrighted work must have originality and some modicum of creativity.

The expression “copy right” refers to the main act, which, in respect of literary and artistic creations, may be made only by the author –thus the phrase author’s rights- or with his authorization. That act is making of *copies* of the literary work, such as a book, painting, a sculpture, a photograph, a motion picture.

The expression, “author’s rights” refers to the person who is the creator of the artistic work, thus underlining the fact, recognized in most laws, that the creator (or author) has certain specific rights in his creation, for example, the right to prevent a distorted reproduction, which can be exercised only by himself, whereas other rights, such as the right to make copies, can be exercised by other persons, for example a publisher who has obtained a license to this effect from the author[6].

2.2 Patents

In its simplest terms, a Patent is an agreement between an inventor and the public, represented by the Government: This definition of patent is what may often be called the document “letters patent”.

The other definition is the content of the protection that a patent confers.

If a person makes what he believes is an invention, he, or if he works for an entity, that entity, asks the Government by filing an application with the patent office – to give him a document in which it is stated what the invention is and that he is the owner of the patent.

Not all inventions are patentable. Generally, patent laws require that, in order to be patentable, the invention must be new, it must involve an inventive step (or it must be non - obvious), and it must be industrially applicable.

It is customary to distinguish between inventions that consist of products and inventions that consist of processes. An invention that consists of a new alloy is an example of a product invention. An invention that consists of a new method or process of making a known or new alloy is a process invention. The corresponding patents are usually referred to as a ”product patent”, and a ”process patent” respectively.

Now, to the other sense of the word ”patent”. The protection that a patent for invention confers means that anyone who wishes to exploit the invention must obtain the authorization of the person who received the patent called “the patentee” or “the owner of the patent” to exploit the invention. If anyone exploits the patented invention without such authorization, he commits an illegal act. One speaks about “protection” since what is

[6] Dennis de Freitas, former head of the British Copyright Council, has commented, “the copyright system as it now exists in virtually every civilized country is a vital part of modern society's infrastructure.”

involved is that the patentee is protected against exploitation of the invetion, which he has authorized.

Patent protection is limited in time. The term of protection must not end before the expiration of a period of twenty years counted from the filing date[7].

The patent rights consist of:-

- in the case of product patents, the right to prevent third parties from making, using, offering for sale, selling or importing the product that includes invention;
- in the case of process patents, the right to prevent third parties from using the process that includes the invention, and to prevent third parties from using, offering for sale or importing products which were made by the process that includes the invention.

It has been mentioned earlier that, if anyone exploits the patent invention without the authorization of the owner of the patent for invention, he commits an illegal act. However, as already stated, there are exceptions to this principle, because patent laws may provide for cases in which a patented invention may be exploited without the patentee's authorization, for example, exploitation in the public interest by or on behalf of the government or exploitation on the basis of a compulsory license.

A compulsory license is an authorization to exploit the invention given by a governmental authority, generally only in very special cases defined in the law and only where the entity wishing to exploit the patented invention is unable to obtain the authorization of the owner of the patent for invention. The conditions of the granting of compulsory licenses are also regulated in detail in laws, which provide for them. In particular, the decision granting a compulsory license has to fix an adequate remuneration for the patentee, and that decision may be the subject of an appeal.

It should be noted that the TRIPS Agreement establishes[8] a number of obligations with respect to the use of a patented invention without the authorization of the owner of the patent. Members of that Agreement have to comply licenses on the ground of failure to work or insufficient working of an invention if the protected product is lawfully imported into the territory of the member concerned.

2.3 Trade Marks

Any sign or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks[9]. Most countries require the trademarks for which protection is desired be registered with a government authority. The protection that

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[7] Article 33
[8] Articles 27.1 and 31
[9] TRIPS Article 15.1

laws give to a trademark consist essentially of making it illegal for any entity other than the owner of the trademark or a sign similar to it, at least in connection with goods for which the trademark was registered or with goods similar to such goods without the authorization of the owner. The TRIPS Agreement sets out[10], the rights conferred on the owner of a trademark and the protection to be given in respect of well-known marks.

The TRIPS Agreement also deals, *inter alia*, with the protectable subject matter, the term of protection, the requirements of use as well as licensing and assignment.

3.4 Trade Names

Another category of objects of industrial property is "commercial names and designations".

A commercial name or trade name – the two expressions mean the same thing – is the name or resignation which identifies the enterprise. In most countries, trade names may be registered with a government authority. However, under Article 8 of the Paris Convention for the protection of industrial property, a trade name must be protected without the obligation of filing or registration, whether or not it forms part of a trademark. Protection generally means that the trade name of one enterprise may not be used by another enterprises either as a trademark or a service mark and that a name or designation similar to the trade name, if likely to mislead the public, may not be used by another enterprise.

3.5 Utility Models

Utility Models are found in the laws of a limited number (about 20) of countries in the world, and in the OAPI regional agreement. In addition, some other countries (for example, Australia and Malaysia) provide for titles of protection, which may be considered similar to utility models. They are called "petty patents" or "utility innovations".

The expression "utility model" is merely a name given to certain inventions, namely-according to the laws of most countries, which contain provisions on utility models-inventions in the mechanical field. Utility models usually differ from inventions for which ordinary patents for invention are available mainly in three respects: first, in the case of an invention called "utility model", either only novelty but no inventive step is required or the inventive step required is smaller that in case of an invention for which a patent for invention is available; second, the maximum term of protection provided in the law for a utility model is generally shorter than the maximum term of protection provided for a patent for invention ; the third , the fees required for obtaining and maintaining the right are generally lower than those applicable to patents.

Moreover, in certain countries there is also a substantial difference in the procedure for obtaining protection for utility model: this procedure is generally shorter and simpler than the procedure for obtaining for invention.

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[10] Article 16

3.6 Industrial Designs

Generally speaking, an industrial design in the ornamental and aesthetic aspect of a useful article. Such particular aspect may depend on the shape, pattern or color of the article. The design must appeal to the sense of sight. Moreover, it must be reproducible by industrial means; this is essential purpose of the design and is why the design is called "industrial".

In order to be protectable an industrial design must, according to some laws, be new and, according to other laws, original.

Industrial designs are usually protected against unauthorized copying or imitation. Under Article 26.3 of the TRIPS Agreement, the duration of protection available shall amount to at least 10 years. Members of the said Agreement are also obliged to ensure that requirements for securing protection of textile designs, in particular in regard of any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection.

The document, which certifies the protection, may be called a registration certificate or a patent. If it is called a patent, one must in order to distinguish it from patents for invention, always specify that it is a patent for Industrial design

3.7 Integrated Circuits

The question of the type of protection to be given to the layout-design, to topography, of integrated circuits is relatively new. Although prefabricated components of electrical circuitry have been used for a long time in the manufacture of electrical equipment (for example, radios), large scale integration of a multitude of electrical functions in a very small component became possible only a few years ago as a result of advances in semi conduct technology. Integrated circuits are manufactured in accordance with very detailed planes or "layout designs" and utilized in large range products, including articles of everyday use, such watches, television sets, washing machines, automobile, etc as well as sophisticated data processing equipment.

The Treaty on Intellectual Property in respect of Integrated Circuits was adopted in 1989[11]. The features of protection mandated under the Treaty can be summarized as follows:

A layout-design is defined in the Treaty as the "three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and some or all of the interconnections of an integrated circuit, or such a three- dimensional disposition prepared for an integrated circuit intended for manufacture".

[11] The treaty has not entered into force but its substantive provisions have, to a large extent, been adopted in the TRIPS Agreement.

The protection required under the Treaty, as modified in the TRIPS Agreement, is the prohibition, for a period of at least ten years, of the performance of the following acts, without the authorization of the holder of the right:

i) reproducing, whether by incorporation in an integrated circuit or otherwise, a protected layout-design in its entirety or any part thereof, except the act of reproducing any part that does not comply with the requirement of originality; and

ii) importing, selling or otherwise distributing for commercial purposes, a protected layout-design or an integrated circuit in which a protected layout design is incorporated

The rights in layout-designs provided for under the Treaty are subject to three exceptions. Firstly, a third party is able to perform any act with respect to a layout-design for the purposes of evaluation, analysis, research, or teaching. Secondly, a third party may copy a layout-design or part thereof in order to prepare a second, original, layout-design. According the Treaty, such a second layout-design is not to be regarded as infringing rights held in the first layout-design. The third party may perform any act in respect of a layout-design that was independently created.

3.8 Geographical Indications

The TRIPS Agreement establishes[12] certain obligations as regards the protection of geographical indications, which are defined therein for the purposes thereof, as indications which identify a good as originating in the territory of a member or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin". The notions of "indications of source" and of appellations of origin", which are used in the Paris Convention, encompass geographical indications as defined by the TRIPS Agreement.

An indication or source is constituted by any denomination, expression or sign indicating that a product or service originates in a country, a region or a specific place (for instance," made in….). As a general rule, the use of false or deceptive indications off source is unlawful.

An appellation of origin is constituted by the denomination of a country, a region or specific place which serves t designate a product originating there, the characteristic qualifies of which are due or essentially to the geographical environment, in other words to natural and /or human factors. The use of an appellation of origin is lawful only for a certain circle of persons or enterprises located in the geographical area concerned and only in connection with the specific products originating there (for instance, "Bordeaux").

[12] Articles 22 to 24

4. IMPORTANCE OF INTELLECTUAL PROPERTY

All countries have an important interest in providing adequate intellectual property protection as a way of encouraging more investment, research and innovation from which they should benefit. This is particularly so in medicine, where new drugs are very expensive and time consuming to research, and where the results of the research are uncertain.

The economic growth of copyright cannot be gainsaid. In 1996, which is almost ten years ago, the International Intellectual Property Alliance estimated that copyright industries are one of the largest and fastest growing economic assets in the United States, accounting for 3.7 percent of the country's gross domestic product — $278,400 million. The core copyright industries produce and distribute computers and computer software, motion pictures, television programs, home videocassettes, music and sound recordings, textbooks, trade books, reference and professional publications, and journals[13].

Protection of trademarks promotes enterprise activity, regulating competitiveness and transparency in the trade of goods and services.

Inventors of patents are rewarded by being given the possibility to recover the money and time expenses for the invention. This helps promote the development and commercialization of invention and innovation activity as well as the diffusion of technical creations.

5. ADVANTAGES FOR KENYA

Before the 1970s and 1980s, most of the laws regarding the protection of intellectual property in Kenya were mere replicas of existing laws of our colonizing country. These laws had been designed specifically to protect the rights of the colonizing nationals and their businesses and firms, and no account was taken of the different conditions in the colonies and in Kenya.

Even after our emergence from post-colonialism, successive governments have not attached much priority to the need to protect intellectual property rights until perhaps it was too late. Many industries were in their infancy, and the domestic manufacturing base was virtually nonexistent. What was prevalent in Kenya was the vibrant folklore tradition around which cultural industries clustered in areas such as music, textiles, jewelry, and the like.

A quick glance at past copies of the Kenya Gazette or Industrial Property Journal will show that foreigners own most of the Trademarks registered in Kenya.

[13] In Britain, according to statistics released by the British Phonographic Industry in its 1995 report on the recording industry, the 1994 retail value of British music sales was 1,400 million pounds sterling, with exports and invisible earnings amounting to 800 million pounds. Apart from direct recording company employment, the British music industry provides a living for over 50,000 people in music retailing and music publishing.

It is not in dispute that people with creative minds further the development of civilization. Economic survival of companies is also based on the protection of creative ideas that arise from that company. By incorporating new ideas that are normally in the form of Intellectual Property, companies are able to move progressively to a secure future.

Companies also generate considerable income by licensing their industrial property rights. Licensing can go along way into creating healthy co-operation between companies in a block like the East African Community or the COMESA countries.

Industrial Property rights when protected will provide a useful link between generations such that the next Kenyan generation will be able to access very useful information from which they can develop and build on to a new inventive level not currently imagined by our generation or the past generations.

Intellectual Property also creates a wide job market. Patents Draftsmen can get a source of employment when they are engaged in the drafting of the patents applications for filing at the Kenya Industrial Property Institute.

The so-called *jua kali* sector involving artisans who will most frequently have industrial designs needs to be protected so as not to lead to loss of the inventive steps taken by such artisans to the existing items.

Some of the advantages that a developing country like Kenya can acknowledge as having directly resulted from increased enforcement of the intellectual property laws are:

a) Stimulation of creativity and inventiveness in society, thereby contributing to a country's development.
b) Provision and protection of the infrastructure necessary for the growth of production, manufacture, and distribution within the cultural, educational, and entertainment industries.
c) Creation of an environment conducive to attracting domestic and foreign private sector investment in the copyright industries.
d) Protection — in view of emerging technologies — of expressions of folklore and live performances through the enhanced legal protection of performers' rights.

With the vibrant local industry like the emergence of new musical groups, the issue of copyright protection is a great advantage to the musicians and other recording artistes as they can achieve some measure of success in their operations though collecting and distributing royalties for their repertoire.

If piracy is not dealt with this can lead to serious consequences including:-

i) The exodus of many of our talented authors to Europe, the United States, and other developed countries. Such a drain would deprive Kenya of a wealth of native creativity.
ii) Stultification of the development of all the copyright-associated industries and the subsidiary activities of those involved in the business of legitimate creativity.

iii) Considerable loss in revenue to the state through direct and indirect forms of taxation.
iv) Retardation of the cultural creativity of our local communities, which, ours as a developing country, whose national identity and cultural roots are inextricably linked with its national economic development, may have far-reaching consequences.

6. PROTECTION OF TRADITIONAL KNOWLEDGE[14]

The protection of knowledge and practices innovations and local communities (that is to say, traditional knowledge) received increasing attention on the international agenda in recent years.

It has been recognized that traditional knowledge plays a key role in preservation and sustainable use of bio diversity. This is highlighted in both the Convention on Biological Diversity (CBD) and the International Undertaking on Plant Genetic Resources of the Food and Agriculture Organization (FAO).

Many activities and products based on traditional knowledge are important sources of income, food and health care for large parts of the populations in many developing countries including Kenya.

However, traditional knowledge in being rapidly lost as local ecosystems are degraded and traditional communities are integrated into the wider society.

Concerns have been raised about how the benefits derived from the use of biodiversity and associated traditional knowledge are appropriated and shared. The vast majority of plant genetic resources and other forms of biodiversity are found in/or originate from developing countries. Access to these resources and associated traditional knowledge can provide substantial benefits to companies and scientific research centers in both developed and developing countries. However there is concern that traditional knowledge is at times appropriated, adapted and patented by scientists and industry for the most part from developed countries, with little or no compensation to the custodians of this knowledge and without the prior informed consent.

While the need to protect traditional knowledge and secure fair and equitable sharing derived from the use of biodiversity and associated traditional knowledge has been fully recognized, there is no agreement on what would be most appropriate and effective ways to achieve these objectives. There have been calls for a better understanding of the needs of traditional knowledge holders and exchange information on the effectiveness of existing system of protection such as customary Law, Intellectual Property Rights, Sui Generis Systems, access and benefits, sharing mechanisms, voluntary measures and documentation.

The long-term sustainable economic development of many indigenous and local communities may depend on the ability to harness their traditional knowledge for

[14] This presentation is indebted to Joseph Mbeva

commercial benefit. Traditional; technologies and innovations, which are by their very nature adapted to local needs can contribute to a viable and environmentally sustainable path to economic development. It is therefore important to encourage traditional knowledge - based by the communities concerned, explore the commercialization of traditional knowledge - derived products. It is also important to ensure that the commercialization of traditional knowledge based products contributes to the long-term socio- economic viability of indigenous and local communities.

7. ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Intellectual Property Rights are essentially private rights. If someone infringes those rights, i.e. uses material without permission where there is no rule of law that might make such use legal, it is generally for IP right owners to use any remedies available under the civil law for example, seeking injunctions and damages.

However, in many cases it may be better to try and negotiate a solution to illegal use with the infringer before taking legal action.

In order to reduce the chances of people using the Intellectual Property without the owner's permission, the owner can make sure that it is brought to the public's attention the existence of Intellectual Property to their notice in any dealings with them. If you put material protected by Intellectual Property into the public domain, e.g. by publishing or selling goods you can mark it appropriately. Taking out an insurance policy to cover the cost of possible enforcement action could also be worthwhile.

If some Intellectual Property rights are intentionally infringed on a commercial scale, there may also be the possibility of prosecuting that person for a criminal offence. Criminal offences exist in copyright, trademarks, performers rights and conditional access law. The circumstances need to be studied carefully to determine if the behaviour amounts to a criminal offence or a matter that can be resolved using the civil law.

The words counterfeiting, piracy and bootlegging are often used to describe the criminal behaviour. Where criminal offences may have been committed, an IP owner may pursue the matter themselves as a private prosecution, or report the matter to a public sector enforcer such as the police or trading standards office. Many Intellectual Property owners concerned about criminal offences belong to umbrella groups.

Where goods infringing an Intellectual Property right are being imported into the country from a third country, it is possible to ask the Customs and Excise Department to seize the illegal goods.

8. GOVERNING BODIES

8.1 Kenya Industrial Property Institute

Formerly referred to as the Kenya Industrial Property Office, the Kenya Industrial Property Institute is the body that registers trademarks, patents, industrial designs, utility models and others.

It is established[15] under of the Industrial Property Act, 2001. Section 5 lists the functions of KIPI as to:

- consider applications for and grant industrial property rights.
- screen technology transfer agreements and licenses.
- provide to the public, industrial property information for technological and economic importance.
- promote inventiveness and innovativeness in Kenya.

Prof. Otieno-Odek is the Managing Director of KIPI.

8.2 World Intellectual Property Organization

The World Intellectual Property Organization (WIPO) based in Geneva, Switzerland is an international organization dedicated to helping ensure that the rights of creators and owners of intellectual property are protected worldwide and that inventors and authors are, thus, recognized and rewarded for their ingenuity. WIPO seeks to

- Harmonize national intellectual property legislation and procedures.
- Provide services for international applications for industrial property rights.
- Exchange intellectual property information.
- Provide legal and technical assistance to developing and other countries.
- Facilitate the resolution of private intellectual property disputes.
- Marshal information technology as a tool for storing, accessing, and using valuable intellectual property information

9. CONCLUSION

In conclusion, we shall examine three statements with relevance to Intellectual Property.

He, who receives an idea from me, receives instruction himself without lessening mine, as he who lights his taper at mine, receives light without darkening me. *(Thomas Jefferson)*

At a glance of this statement, it appears that Thomas Jefferson did not grasp what intellectual property was all about. If the idea that he talks about was an abstract idea that was not reduced into any form, then anyone who develops that idea will simply be let off in respect of copyright since there will be no intellectual property protection.

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[15] Section 3

If the idea had been reduced into some form and was protected by a form of intellectual property rights, then unless whoever lit the taper did so with the permission of the owner, infringement will be written all over the use of that idea without permission.

The use of that instruction to create something that will be better might lead to the obsolescence of the idea that Jefferson had, to the extent that it will become useless leading to great loss of intended profits; and thus lessening the efforts of whoever came up with the idea.

If I have seen further, it is by standing on the shoulders of giants*. (Sir Isaac Newton)*

There is acknowledgement that not all ideas are original. Sometimes there is one person who takes the giant leap and others develop their ideas from that person. Industrial Designs and Utility Models for instance by being a form of petty patents are always indebted to the person who created the original sample.

There is no denying that technological innovations borrow heavily from the past inventions which is why all inventions have to be protected and preserved for the later generations that may have to develop them further.

All the great empires of the future will be empires of the mind*. (Sir Winston Churchill)*

The mind rules. The mind invents. The mind creates a better future. Countries that have really developed have done so with the benefit of the creations that have come from the minds of its geniuses. The mind has the capacity to create property in the form of Intellectual Property.

There is greater need to take the branch of Intellectual Property seriously if this country aspires to be come a great empire or to use a politically equal term, to enable this county achieve its aim of being an industrialized nation.

Thank you.

QUICK REFERENCE TABLE

	PATENT	COPYRIGHT	TRADEMARK
Underlying theory	Limited monopoly to encourage production of utilitarian works in exchange for immediate disclosure and ultimate enrichment of the public domain	Limited (although relatively long-lived) monopoly to encourage the authorship of express works; developed initially as a means of promoting publishing.	Perpetual protection for distinctive nonfunctional names and dress in order to improve the quality of information in the marketplace.
Source of law	Industrial Property Act	Copyright Act, 2001; common law (limited)	Trade Mark Act; common law (unfair competition)
Subject matter	Process, machine, manufacture, or composition of matter; plants (asexually reproducing); designs – excluding: laws of nature, natural substances, business methods, printed matter (forms), mental steps	Literary, musical, choreographic, dramatic, and artistic works *limited by* idea/expression dichotomy (no protection for ideas, systems, methods, procedures); no protection for facts/research.	Trademarks; service markets; certification marks; collective marks; trade dress; *no protection for* functional features, descriptive terms, geographic names, misleading aspects, or "generic" names (e.g., Thermos).
Standard for Protection	Novelty, non-obviousness, and utility (distinctiveness for plant patents; ornamentality for design patents).	Originality; authorship; fixation in a tangible medium.	Distinctiveness; secondary meaning (for descriptive and geographic marks); use in commerce (minimal); famous marks (for dilution cases).
Scope of Protection	Exclusive rights to make, use, sell innovation as limited by contribution to arts; extends to "equivalents"	Rights of performance, display, reproduction, derivative works.	Exclusive rights; likelihood of confusion; false designation of origin; dilution (for famous marks).
Period of Protection	20 years from filing (utility); extensions up to 5 years for drugs, medical devices, and additives.	Life of author & 70 years; "works for hire"; minimum of 95 years after publication or 120 years after creation	Perpetual, subject to abandonment.
Rights of Others	Only if licensed; can request reexamination of patent by Patents Office	Fair use; compulsory licensing for musical compositions, cable TV, et. al.; independent creation	Truthful reflection of source of product; fair and collateral use (e.g., comment)
Costs of Protection	Filing, issue, and maintenance fees; litigation costs.	None (protection attaches at fixation); publication requires notice; suit requires registration; litigation costs.	Truthful reflection of source of product; fair and collateral use (e.g., comment).
Licensing and Assignment	Encouraged by completeness of property rights, subject to antitrust constraints	Assignor has termination right between 36th and 41st years (of notice given).	No naked licenses (owner must monitor license); no sale of trademark "in gross".
Remedies	Injunctive relief plus damages (potentially treble); legal fees (in exceptional cases)	Injunction against further infringement; destruction of infringing articles; damages (actual or profits); statutory damages within court's discretion); legal fees (without court's discretion); criminal prosecution	Injunction; accounting for profits; damages (potentially treble); attorney fees (in exceptional cases); seizure and destruction of infringing goods; criminal prosecution for trafficking in counterfeit goods or services.

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