INTELLECTUAL PROPERTY LAW TEACHING AND RESEARCH SITUATION IN NEPAL

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The objectives of this paper are threefold, they are: a) to analyse the present situation of the Law of intellectual property, b) to assess the teaching of the subject and c) to survey the status of research on the subject in Nepal. Intellectual property law in Nepal in each of these three areas is in a rudimentary stage. The progress is, no doubt, very slow but it is not stagnant. The legal system of each country is influenced by its geography, culture and polity. Before I deal with the Law of intellectual property in detail I will briefly discuss the factors which influence the Nepal legal system.

Nepal is a tiny mountainous country with difficult terrain. It is situated between two big countries of Asia, namely China and India. It is a land-locked country with inadequate infrastructure for transport and communications. It falls under the category of "most seriously affected and least-developed country." In spite of its significant role in trans-himalayan trade in the past, Nepal from the nineteenth century to the mid-twentieth century was under the Rana regime. Nepal was virtually isolated from the rest of the world. Nepal could not gear itself up to the process of industrialization. Prior to the unification of Nepal in 1779, Nepal was divided into several principalities. These principalities were governed mostly by Hindu rulers. They applied Dharmashastras and custom as their bases for the administration of justice, Srutis, Smritis and Dharmashastras were the main sources of the law. Royal ordinaces were also promulgated. The post unification era witnessed several royal Ordinaces and the Codification of laws to regulate relations between persons. In addition the principle that no man shall steal what belongs to another was recognised. Plagiarism was forbidden by the law. Thus the concept of intellectual property law was recognised. At that time, violations of the intellectual property right were rarer than they are today.

The first code on the law of intellectual property was promulgated in 1935 (1993/2/23 B.S.)[2] and it was captioned "Patent, Design and Trademark Law". The law defined patent as the absolute right of the inventor to his new inventions. Sections 1-10 of the Law dealt with patent. The patent right could be granted for 7-14 years on the payment of the prescribed fee (Sect. 7).

Design included sketched, printed or chemically produced materials. The design right was normally valid for five years initially with the possibility of two five-year extensions (Sect. 9). Compensation for infringement of the design right amounted to three hundred rupee payable to the owner of the design (sect. 23(b)). Sections 17-23 were devoted to matters relating to design.

Trademark was defined in the law as a sign used by the manufacturer of the goods to indicate that the goods bearing the sign belonged to him. Sections 24-28 dealt with matters relating to trademark. Counterfeiting a

trademark was punishable offence. The offender was liable to pay a fine of rupees 200 or was liable for imprisonment for a period of six months (see 25). This law was repealed by the new Patent, Design and Trademark Act of 1965.

In 1965, two sets of legislative enactments came into being, one on patent, designs and trademark and the other on copyright.[3]

The Preamable of the Patent, Design and Trademark Act states that the purpose of the Act is to safeguard comfort and economic interest of the people at large. Section 28 of the 1965 Act repeals the Patent, Design and Trademark law of 1936. The 1965 Act defines patent as useful scientific discoveries based on a new theory or formula. It included composition of materials, or any new method or device for spreading and communicating new ideas (sect. 2(a)). Discovery as defined by this Act is the creation of any theory that was not in existence or practice in the country at the time of application for registration of the patent. Sections 3-11 are related to patent. In order to obtain the exclusive right to a patent, design or trademark, one must register it with the Department of Industry, fulfilling all the prescribed requirements. The applicant must specify the name of the inventor, his address and profession, the capacity in which the applicant, if he is not the inventor, has obtained the right to the invention, the intended use of the patent, the specific theory of formula of the invention and a photoblock of the patent. A patent can be registered only after it is duly scrutinized by the Department of Industry which, if necessary, may seek the advice of the experts. The Department will examine the novelty and usefulness of the discovery, and them it will decide whether to register a patent or not. The secrecy of a registered patent has to be maintained under this Act. In case the Department refuses registration of a patent, it has to state the reasons for its refusal. If the inventor of a patent already registered the patent in his own country and has also registered the same patent in three other countries, the patent thus applied for is exempted by this Act from review and examination. Registration of a patent is denied by the Act in the following situation:

(1) If the patent has been registered in the name of some other person;

(2) If the patent was not invented by the applicant or the applicant has not duly obtained the right from the inventor;

(3) If the granting of the patent would be against the health, good conduct and morality of people in general, or is against the interest of the nations;

(4) if the granting of the patent would contravene any laws of the land.

A patent right is normally valid for fifteen years and after the expiry of the term it is terminated. Extension of the term of a patent for another fifteen years is possible on the ground of substantial improvement of the patent. The owner of the patent is obligated to submit a sample and description of the patent to Government Museum. Violation, attempt to violate or inducement to violate the right results in infliction of fine up to rupees 500 and, if the guilt is established, confiscation of all the materials related with the offence.

The Act defines design as structure, style or shape of any matter prepared through any method or device. The creator of the design ort he owner of the design enjoys full right to the design provided that the design is duly registered. Imitating a registered design without the permission of the owner is forbidden by the law. The creator of a design or the person who hired the creator to prepare the design for him can apply for the registration of the design. Registration of a design is possible if it is not against the reputation of any person or institution, is not against the good conduct and morality of the people and is not against the national interest. Registration of a design already registered in someone's name cannot be registered in the name of the applicant. Unauthorized uses of a design, imitation of a design or use of a design for which the registration has been revoked on grounds of public good and national interest, are prohibited by the law. The infringement of any of the design rights results in the infliction of fine up to two hundred rupees and confiscation of all materials related with offence.

The Act defines trademark as a sign, symbol, emblem or mark used by the manufacturer on his manufacturered goods to manifest that the goods bearing the sign belong to him. Registration of a trademark is essential in order to safeguard the right. Punishment for the violation of the laws relating to trademark is a fine of not more than rupees 200 and confiscation of the article related to the offence.

A person not satisfied with the order issued by the Department of Industry on matters relating to patent, design and trademark may appeal to the zonal court, the first appellate court for purpose of this Act, within 25 days of the issue of the order by the Department.

A violation of the provisions relating to Patent, Designs and Trademark Act of 1965 results in liability for an amount equal to the actual loss suffered by the holder of a patent, design or trademark.

Registration under the law of 1935 relating to patent, design and trademark will remain valid and will be treated if registered under the Act of 1965.

There has been a single reported case, i.e. Ratanlal Dhanawat V. Nand Kishor Bohara[4] relating to trademark in Nepal, where the Supreme Court of Nepal approved the decision made by two subsequent lower courts, i.e., Regional and Zonal Court. The complaint in this case filed a writ of injunction in the Zonal Court against the Department of Industry, the authority to register a trademark, not to revoke the registration already duly done. The defendent on the other hand took the plea that trademark used by the complainant caused confusion on the part of customers by using the similar nature of trademark, with little difference by use of a single word. The Supreme Court held that the trademark registered by the respondent was older than that of the appellant's trademark and hence there was nothing wrong on the part of the respondent.

The Copyright Act of 1965 came into force on 13 April 1966 by the notification published in the Nepal Gazette on 4th April 1966.[5] The Copyright Act of 1965 is the first Act in separate legislation in Nepal, with 27 clauses. The preamble of the Act is aimed at the maintenance of good conduct, decency and morality of the people in general.

The right to hold a copyright emanates from a "work" either in favour of the author of the work or the person who obtains this right from the author. The word "work" in the Act has been defined in a broad way which encompasses a variety of products like books, articles, music notations, sketches, photographs, translations, cinematographs, audio-visual cassettes and literary products, etc. The Act defines author in three headings: (a) the person who has written or prepared books, articles, literary writings, music notations, translations in the original form, (b) the person possessing right over a drama or cine or any dialogue, scenographic at the time of its completion (c) person who has made, engraved, or photographed any drawing map, photograph or engraved sketches.

For the purpose of this Act publication connotes exhibition, sale, distribution, giving on hire, for public show or use by the public. The right to hold a copyright is normally vested in the author (sec. 3.2). Registration of a copyright is essential for its protection under the laws of the land. The Act spells out certain exceptional conditions where the right to have a copyright does not belong to the author of the work.

The conditions are: (a) if the author relinquishes his rights to his work in any manner; (b) if the author authorizes any person to use his work; (c) if the author is paid for the work or assigned for the work on salary or remunerative basis; and (d) if the work is anonymous.

Transfer or copyright of any work in whole or in part is allowed under this Act. It is obligatory on the part of transferee to inform to the Registrar of the copyright within three months by written notice along with a copy of relevant documents. The Registrar endorses the necessary changes in the Register. Registration of copyright is done by the Registrar. The Chief Librarian of the National Library of Nepal is designated as the Registrar of Copyright.

The term of copyright for any work is lifetime and fifty years after the death of author. For posthomous and anonymous work, the term of copyright is fifty years beginning from the date of publication of the work. Public exhibition marks the commencement of publication of any drama, music, cinema, or any other work for stage performance.

License to prepare copies or reproduction of the copyrighted work is allowed for translation, public exhibition and for the use of public library either with the consent of the holder of the copyright or by the Registrar. Availability of the copies of copyrighted work to the public, translation in Nepalese language and public use are the determining factors for granting such license of any copyrighted work.

Article 15 of the Act defines unauthorized publication as copying or publishing without the permission of the copyright holder or the Registrar. Contravention of any term of the license amounts to unauthorized publication. Publication of any copyrighted work for the private study, research, criticism, review, for press or for radio and for court proceedings is allowed. Importation of unauthorized work prepared outside Nepal is illegal under this Act. But importation of a single copy for personal use is allowed.

The Act has broadly classified punishments for violation or copyright in three specific categories and two general categories. The specific categories are: (a) punishment for unauthorized publications; (b) punishment for import

of unauthorized copies; and (c) punishment for acting in contravention of the license. Acts leading to false entry and submission of false particulars with malafide intentions are also punishable under the law. Contravention of the Act and the rules in any manner is also forbidden by the Act.

Infringement of copyright in whatsoever manner amounts to a fine of rupees 100 - 500. Persons who violate the Copyright Act for the fourth consecutive time will also be imprisoned for six months, and the copies produced or imported in an unauthorized manner will be confiscated. Persons aggrieved by the infringement of copyright have the remedy to obtain just compensation from the person who infringes the Copyright.

Infringement complaints have to be lodged with the Registrar of the Copyright within six months from the date of such infringement. Persons not satisfied with the orders of the Registrar can appeal to His Majesty's Government within 35 days from the date of the order.

The Civil Liberties Act of 1955 also protects intellectual property right. The right to property includes holding and enjoying property. The Act provides in Section 17 that in case of violation of these rights, the victim may ask the Court jurisdiction, which is the first Appellate Court to issue temporary or permanent injuction and award compensation. Under this power the Court can issue interlocutory and ex-parte restrictive orders as well.

Teaching of Intellectual Property Law as a separate paper is not included in the Syllabus of Law in Tribhuvan University. Tribhuvan University is virtually a single University in the Kingdom with faculty of Law. The Syllabus for Law of the University, has however, developed a paper on "Law of Property" to give general and theoretical knowledge on the law of property with special reference to Nepalese laws. Intellectual property law as such is taught under the heading of kinds of property. The content of the course is given in the end of this paper.

From a research point of view there are many branches of law which are still not explored. Awareness in legal research is a recent phenomena in Nepal. Nearly a decade ago some intellectuals in Nepal showed their concern on the legal aspect of copyright in a workshop organized by the UNESCO. We are optimistic of the view that there will be some research activities in this field in near future under the joint collaboration of Tribhuvan University and some other financing agency of Nepal or of abroad. Apart form the University, some non-governmental organizations like International Law Association, Nepal Branch, Nepal Law Society and other organizations are striving for the betterment of the research situation in Nepal.

International property law, as it exists elsewhere in the developing countries, is a new subject. This branch of law is getting momentum in Nepal. Due to lack of literacy among the great majority of people, and lack of adequate infrastructure in the field of transport and communications, it has not been able to develop and diversify its trade and industry. As spheres of activities in the field of literature, commerce and industry grow, a reasonable and just mechanism has to be evolved to solve the problem. the Literary Journalists Association of Nepal and the Chamber of Commerce are striving for the improvement of the situation.

FOOTNOTES

1. Clause 31A, Chapter on ADAL (i.e. maintenance of economic, social and cultural order), Muluki Ain of 1992 B.S. Government of Nepal, Kathmandu, 1992 B.S.

2. Nepal Ain Sangrah Vol. 2, Ministry of Law and Justice, Law Book Management Committee, Kathmandu, 2021 B.S. (1965 A.D.)

3. Patent, Design and Trademark Act of 1965, Nepal Ain Sangrah, Vol. 5, Ministry of Law and Justice, Law Book Management Committee, Kathmandu.

4. Nepal Kanoon Parika (Nepal Law Report), Supreme Court of Nepal, Vol. 27, No. 3, Asar 2042 p. 276

5. Copyright Act of 1965, in Nepal Ain Sangrah Vol. 5, Ministry of Law and Justice Law Book Management Committee, Kathmandu.

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