

INTELLECTUAL PROPERTY LAW

The Introduction to the Intellectual Property in the Knowledge Society

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Increasingly the world's most valuable commodities take the form of intangible intellectual valuables, rather than physical assets and resources. Economic activity is increasingly based on the production, distribution and use of knowledge and information. The fore-running industries of the XXI century, widely associated with the future of economic growth and prosperity of almost all modern nations are information technology, biotech, pharmaceutical, communications, entertainment, education and other – and all are based on intangible intellectual goods. Maintaining competitiveness of the traditional businesses is simply dependent on knowledge and innovation. Economics of the modern society, which is approaching the state of knowledge society, increasingly depends on knowledge based products, processes and services. Countries with innovative local industries almost invariably have laws to foster innovation by regulating the copying of inventions, identifying symbols, and creative expressions. These laws encompass four separate and distinct types of intangible property - namely, patents, trademarks, copyrights, and commercial secrets, which collectively are referred to as intellectual property.

Intellectual property shares many of the characteristics associated with real and personal property. For example, intellectual property is an asset, and as such it can be bought, sold, licensed, exchanged, or gratuitously given away like any other form of property. Further, the intellectual property owner has the right to prevent the unauthorized use or sale of the property. The most noticeable difference between intellectual property and other forms of property, however, is that intellectual property is intangible, that is, it cannot be defined or identified by its own physical parameters. It must be expressed in some discernible way to be protectable.

All four types of intellectual property are protected on a national basis. Thus, the scope of protection and the requirements for obtaining protection will vary from country to country. There are, however, similarities between national legal arrangements. Moreover, the current worldwide trend is toward harmonizing the national laws.

The concept of intellectual property

Intellectual property is the name of the one of the principal incentives for creation, disclosure and use of knowledge. As it was argued in the first part, as well as commonly accepted political and legal initiatives - intellectual property plays a certain role in innovation. Intellectual property literally pervades our daily life. It is found in most goods and services that we encounter on a daily basis, including things like food, clothing, footwear, mobile phones, computer hardware and software, novels, music, internet sites, cars, etc.

From a legal point of view it is most common to define intellectual property by reciting various legal rights established in the laws, including patents, copyright, related rights, trademarks, designs, etc. This approach is taken in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – which is the modern day international standard for

regulating intellectual property. Article 1.2 of the TRIPS simply states that intellectual property includes copyright and related rights, trademarks, patents, industrial designs, geographical indications, topographies of integrated circuits, protection of undisclosed information (commercial secrets and know-how), sui generis rights, as well as control of anti-competitive practices in contractual licenses. It is important to draw attention that aforementioned rights are rather different systems that developed independently of each other, serve different purposes, have different rules and are not based on any shared underlying principle. Many of the said rights are not even designed to protect real innovation, but are mere means to differentiate the business, product or service, or just the origin thereof. Nevertheless, the principal common standard running through the intellectual property systems that justifies grouping them together – in a general sense intellectual property is concerned with recognizing the creative, intellectual or administrative efforts in developing new products, processes, designs and materials, as well as marketing and distribution thereof.

From a micro-economic/managerial point of view intellectual property rights may be perceived as economic incentive systems available in modern capitalist societies for protecting innovative products and services from imitation, non-innovative competition or piracy. By conferring enforceable legal rights on those who produce creative and intellectual output, intellectual property provides an incentive to engage into these activities and security for the considerable investment of resources required for creative and intellectual activities. Ensuring that innovative knowledge and ideas are sufficiently protected and investments therein are secure is of fundamental importance in the development and marketing of new products and services, particularly in the context of globalizing markets. Thus in a sense, intellectual property is an artificial socio-legal barrier created so that the market for the protected knowledge can be protected allowing the innovator to extract certain monopoly profits, which may not be available in a competitive market without the said barrier.

Some intellectual property rights come into existence automatically while others are granted only after certain registration and external review formalities are finalized. Included in the category for which registration is not required are copyright, related rights, moral rights, integrated circuit layouts, as well as confidential information. In order to obtain intellectual property rights under the patents, trade mark and industrial designs systems, which are commonly denominated as industrial property, it is necessary to comply with formal registration procedures, consequent upon the submitting of an application with the relevant national authorities and review of the claimed subject matter by the expert of the field. Another hallmarks of the industrial property is purely national nature (i.e. patent issued in one country is not automatically valid in the other countries), as well as significant time lapse prior to issuance (review period) of the pertinent intellectual property right. Moreover industrial property rights are costly to register and maintain, while the breadth of the exclusive rights (especially in respect of patents) is highly dependent on the expertise and skill of drafting of the claims. Time expenses and financial cost involved in obtaining and maintaining patents is related both to the necessity of national procedures (where the technical cost alone (translations, representing, counseling) are very substantial), as well as the requirement to pay registration and annual maintenance fees for the whole life of the patent. Copyright on the opposite is almost free and multi-national right, which requires no registration procedures or complex filling procedures in order to be established. The only significant cost involved with copyright is enforcement cost, which however is rather accidental and is not very

much different from patent enforcement cost. It is interesting to note that most of the costs related with intellectual property rights in their essence are sunk costs.

The various forms of intellectual property are not mutually exclusive. It may be necessary to rely on two or more systems concurrently to protect the same subject matter efficiently. In many cases, the different intellectual property rights come into play sequentially with one form of intellectual property supplanting another at different stages of a product's life-cycle. As an example: the idea for an invention can be kept secret as confidential information, design drawings and business plans will be protected by copyright, while the commercially useful product or process may eventually qualify for patent registration if it complies with the formalities; and the brand name under which the patented product or process is marketed can be registered as a trade mark as well as being protected by an action against unfair competition.

At the same time it is very important to emphasize that not all forms of knowledge resulting from creative or intellectual effort fall within the scope of the intellectual property. Notably the very basic fundamental knowledge – such as discoveries or plain ideas, which are difficult to appropriate or exploit in commercial activity, regardless of absolute novelty thereof – fall outside of intellectual property protection. Tacit knowledge, which is also difficult to apprehend may also not need protection by intellectual property rights.

In addition to legal features of intellectual property, it is also necessary to identify and study key economic features of intellectual property, which predetermine suitability thereof as an incentive for innovation. Principal socio-economic features of intellectual property are:

1) disclosure (except for trade secrets); disclosure of knowledge protected by intellectual property may be requested either specifically (patents, trademarks) or indirectly (in case of copyright protected knowledge is effectively self-disclosing). Disclosure is necessary for the users, authorities and competitors to know what is claimed as proprietary, in some cases – to evaluate whether it meets the mandatory criteria for intellectual property protection (e.g. novelty in case of patents, or non-generic properties in case of trademarks, or originality in case of copyright). Disclosure also ensures that knowledge enters the public domain (is converted to commons) after the intellectual property rights expire and can be used as a background for further innovations. On the other hand, sometimes in order to protect knowledge non-disclosure may be preferred, because it is not possible to protect all of the knowledge disclosed and claimed as intellectual property. However choosing the secrecy is only attractive if the protected knowledge does not leak out, is not close to the surface of the product and is very difficult to rediscover independently, i.e. trade secret is appropriate for tacit knowledge, however, still would effectively provide no protection from reverse-engineering, while patents, which are disclosed would effectively prevent a reuse of knowledge obtained through reverse engineering.

2) non-rivalness; in economic terms non-rivalness means that marginal costs of providing intellectual objects to an additional user are close to nil. This feature means that intellectual property rights are vital in order to create and sustain a workable market for knowledge and similar intellectual goods, which are non-rivalrous. On the other hand non-rivalness allows major economic benefits to be reaped out of knowledge, after the initial investment, of course provided it meets market needs;

3) limited monopoly rights; limited in term and scope (exhaustion plus exceptions); while intellectual property rights are in force, modern statutory, contractual and technical mechanisms ensure that right-holders have an almost absolute right to control the use of the knowledge protected by intellectual property rights. This feature is somewhat contrary to the disclosure effect of intellectual property, since during their validity term intellectual property rights restrict access to and the free use of knowledge by making others pay for this use. Although this is the principal negative effect of intellectual property, it is at the core of the incentive mechanism underlying intellectual property.

4) competitiveness and efficiency in the sense that market value and market effects of intellectual property are linked to the social value thereof, so that firms will, to some degree, compare social value and social cost when deciding whether to invest. Moreover users of the intellectual property voluntarily pay the costs and are not directly compelled to purchase the intellectual property based products or service. Investments into intellectual property need to be efficient, since if the resulting intellectual good would not be in social demand, the investor would incur significant loss despite all and any intellectual property rights available to him.

Most of the intellectual property systems give the creator exclusive or monopoly rights over the use of his or her creation for a limited period of time and delineate conduct for which the right-owner's permission is required. It must be emphasized that intellectual property rights are essentially negative, since they are aimed at stopping others from engaging in unauthorized use of the protected subject matter. It must also be noted that intellectual property is personal property with which the owner may deal in the same way as other forms of property, including by selling, transferring or licensing it.

From epistemological point of view the principal effect of intellectual property over knowledge, knowledge markets and innovation is that innovators are going to expect higher profits from knowledge protected by intellectual property than under free market conditions. With intellectual property their willingness to spend money and effort to investigate and to develop new knowledge shall therefore increase, while individual risk of investment shall decrease. In sum these effects shall have positive impact on the generation of new knowledge and the rate of innovation.

Philosophical rationale of intellectual property

The recognition of property rights in respect of knowledge derived as a result of intellectual and creative effort has been justified on a range of grounds. The existence of intellectual property rights is usually justified by reference to one or more of the following theories.

Natural rights. One of the most basic justifications for intellectual property is the view that such rights are natural rights earned through adding labour to the common resource, such as nature or information. A person who puts intellectual effort into creating something should have a natural right to own and control what has been created through his or her labour, or in words of John Locke "whatsoever a man sowed, that shall he also reap". Locke further elaborates that any

person is the owner of her/his own body and hence also of the products made by the operation of this body and its labour.

There are two arguments against this classical justification of intellectual property rights. First of all, intellectual activity is not creation ex nihilo meaning that intellectual products build on other already existing intellectual work. Also, strictly following the Locke's argument it allows only for the ownership of the added value but not total ownership. But it is difficult, if not impossible, to identify and separate the previous and the added value. The second argument against the ownership of "fruits from labor as a natural right" is that intellectual property should not provide ownership at the full market value via intellectual property rights. This value depends on too many different factors (locale, local economy, marketing, market constitution, etc.) which are not related to the direct creation of the intellectual product, thus the right to receive what the market will bear is a socially created privilege, and rather not a natural right. This is especially apparent with the small-emerging economies.

Similar problems as with a natural right justification arise with that of property in intellectual products based on the fruits of one's labour. Nevertheless, an entitlement following the Locke's lines is recognized in Article 27(2) of the Universal Declaration of Human Rights which states: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

The intellectual property theory, dominating the Anglo-Saxon intellectual property jurisprudence is – economic incentive or utilitarian theory, which is a dominant intellectual property theory of the capitalist societies (especially the Anglo-Saxon societies), and assumes the utilitarian ethic that legal protection of intellectual property is a needed incentive to advance public welfare because it fosters creativity and innovation for the benefit of the whole society. The economic incentive theory recognizes that the production of creative output often occurs only through the expenditure of considerable resources (financial and/or intellectual) but, ironically, can be readily copied or used by others at little or no cost due to non-rivalness. In the absence of rights over the results produced through investment in creative effort, it would be difficult to prevent "free riding" by others who have made no contribution to the creative product.

The economic theory is based on the recognition of failure of knowledge in the free market, without intellectual property. Failure is due to three principal factors. The first one is the indivisibility of research expenditures and the burden of a huge fixed cost for any investor. The second is the general investment risk that goes along with the technological and creative uncertainty, and which is inherent to the process. The third reason is the above outlined non-rivalness of knowledge. Intellectual property can be used and enjoyed jointly by as many as care to make use of it without hindering the others. Under free market conditions the non-rivalry feature would result in an overuse of intellectual property and a loss of incentive for investment in activities which provide intellectual property. This is the usual argument why government intervention in the form of intellectual property rights is required.

Without the possibility of some return on their investment of time and resources, creators would lack economic incentives to engage in creative effort. By providing creators with exclusive property rights which they can use to control the exploitation of their output, thereby recouping

their investment or obtaining an economic return on it, the intellectual property systems act as an incentive to engage in innovative activities. With a lack of intellectual property there would be no incentive to spend high amounts on research and development of new knowledge. The outcome would be that decrease in original development would be resulting with potentially disastrous consequences for science and technology, as well as economic growth and general development of the society.

Economic theory also recognizes that the intellectual property rights restrict the current availability and use of intellectual products and at the same time their future production and availability. Hence intellectual property shall not be absolute in order to allow future innovation, based on existing knowledge.

As with all business-related activities, economics plays a large role in determining whether to protect intellectual property. Authors and inventors must weigh the potential value of an intellectual property right against both the probability of realizing that value and the costs of securing, enforcing, and maintaining that rights. Unfortunately, there are no simple rules that determine the potential value of a given intellectual property right. What is valuable to one individual or entity may be worthless to another. There are certain obvious factors that contribute to the potential value of the intellectual property, including the potential value of exclusive or other rights, assignments, or licenses, cross-licenses, enforcement against infringers, and as collateral for financing.

Personhood. Intellectual property is an emanation of the person and the law should facilitate this personal aspect of creativity. The intellectual property laws of most European countries (particularly their copyright laws) have long recognized a personal, as well as an economic, aspect to intellectual property rights, in the form of moral or non-pecuniary rights. Moral rights are based on the French *droit moral* doctrine and are personal to authors or creators of copyright material, exist independently from the economic rights and continue to be exercisable even after the economic rights have been transferred. Moral rights are also emphasized as key rights of the author in the Lithuanian copyright law.

Epistemological theory emphasizes the role of intellectual property for dissemination of information and ideas, and therefore is the separate justification for intellectual property rights and a representative of the disclosure properties of knowledge as the main form of intellectual good. The existence of intellectual property laws encourages the disclosure and dissemination of information and widens the pool of knowledge available in the community. This justification is most commonly provided for patents and copyright, since patent information and copyrighted works are most prominent forms of disclosure of protected knowledge.

Economic efficiency. Economic theorists also justify the recognition of property rights in creative endeavors on the basis that it leads to a more efficient use of resources. In case of intellectual property efficiency also comes in a sense that intellectual endeavors always try to tackle the socially important issues, at a minimal cost, or even are directly targeted at cost reduction.

Social planning or cultural enhancement. Intellectual property rights exist to foster the cultural development of a democratic society. According to this view, the driver for recognizing intellectual property rights is the enhancement of cultural existence and not solely economic efficiency or gain. This theory has assumed enormous significance in the debates over copyright in entertainment products (especially music) distributed in digital form and computer programs. In this context, it raises the question of whether intellectual property should focus predominantly on the economic rights of the copyright owner or whether it should also accommodate the social innovation and/or cultural enhancement gained through the widespread distribution of the music or software. The Open Source movement is a good illustration of this. In this way it might be said that intellectual property rights are used for the purpose of cultural enhancement rather than solely for economic efficiency. The philosophy of the Open Source movement has recently been expanded to the notion of sharing digital content and the development of the Creative Commons initiative (www.creativecommons.org) wherein intellectual property rights operate to structure securing open access to knowledge.

Technology transfer. Intellectual property systems is the vehicle for the transfer of technology through foreign direct investment, joint ventures and licensing, i.e. intellectual property is a convenient tool for formalization and economic disposal of intellectual goods .

Intellectual property as a form of subjective personal property rights. The legal definition of intellectual property focuses on the set (or bundle) of rights conferred on creators for the products of their creative or intellectual effort. In the legal context, "property" refers not to a particular object but to the relationship between a person and a "thing" and that "thing" may be tangible or intangible. As intellectual property rights define the relationship between the person who has expended creative or intellectual effort and the results of that effort, they may be classified properly as property or proprietary rights. Intellectual property gives the owner rights which may be exercised in relation to his or her creative or intellectual output and which may be used to exclude others from exercising control over the protected subject matter.

Copyright and Related Rights

A copyright is an exclusive right to reproduce an original work of authorship fixed in any tangible medium of expression, to prepare derivative works based upon the original work, and to perform or display the work in the case of musical, dramatic, choreographic, and sculptural works. Copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, or embodied. Rather, copyright protection is limited to an author's particular expression of an idea, process, concept, and the like in a tangible medium.

Copyright protection automatically arises in all works of authorship from the moment of creation. According to the basic rule set forth in the Berne Convention for the Protection of Literary and Artistic Works the copyright is protected for the life of the author and 50 years after the death of the author (Article 7.1 Berne Convention). The European Union has further extended copyright protection term by additional 20 years through the Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights. The TRIPS Agreement provides a minimum standard for duration of copyright protection of 50 years

(TRIPS Article 12). The United States also recently extended its protection for copyrighted works as part of the Digital Millennium Copyright Act (DMCA). In the United States, the copyright for the work of an individual author created on or after January 1, 1978, lasts for his or her lifetime plus 70 years after the author's death. However, if the work is made for hire, the copyright lasts for 120 years from the time of creation or 95 years from first publication, whichever is shorter.

According to both Berne Convention and the TRIPS, copyright validity and protection is automatically extended to the states, which are signatories of the either convention. This is extremely important feature of copyright, which makes it by far the most accessible and least expensive international intellectual property right.

The exclusive rights granted to the copyright owner do not include the right to prevent others from making socially beneficial use (fair use) of the owner's work. In Europe such socially beneficial uses are listed in the European Union Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, as the copyright exceptions. They include use of the work for purposes of criticism, comment, news reporting, teaching or education, and personal or backup copying. In the UK, the US and other common law countries the socially beneficial uses of copyrighted work are defined through the doctrine of fair use, which is actually broader than the European list of exceptions. The nature of the work, the extent of the work copied, and the impact of copying on the work's commercial value are all considered in determining whether an unauthorized use is a fair use.

To secure copyright protection, the work in question must be an original work of authorship fixed in a tangible medium of expression. Originality is commonly defined as author's own intellectual creation. Thus, it is possible for two different authors to come up independently with very similar work (what is not uncommon e.g. in case of history research, documentary, computer software, etc.). In such cases both authors will be considered rightful owners of the work.

Most popular types of copyrightable works are:

- Literary works;
- Musical works and accompanying lyrics;
- Dramatic works and dialogue;
- Pantomimes and choreographic works;
- Pictorial, graphic, and sculptural works;
- Motion pictures and other audiovisual works.

Common objects of related (neighboring) rights may include:

- Performances;
- Recordings of performances including musical recordings;
- Broadcasting rights.

The laws of Lithuania, as well as most other countries, do not limit the type or form of work because authors are continuing to invent new ways of expressing themselves.

To be protected by copyright, a work must be “expressed”, what is understood as the work being fixed in a tangible medium perceivable to others. A work is fixed when it is embodied in a tangible medium so that to allow sufficient and stable access to the others, i.e. it can be perceived, reproduced, or otherwise communicated to other people for a period of time that is not transitory. Any means, manner, or medium of fixation is allowed.

Although copyright protection in the European Union exists from the moment the work is fixed in a tangible expression, some other countries in the world (e.g. the US) require copyright registration. It is important to emphasize that the TRIPS Agreement precludes use of formalities such as a registration system as a prerequisite for foreign nationals before initiating legal action to stop copyright infringement or to recoup costs, including attorneys' fees, of enforcement. So, for example, the United States may require that U.S. citizens, but not foreign authors, register works with the US Copyright Office. In addition, in some countries, a copyright registration constitutes prima facie evidence of the validity and ownership of the copyright.

Patents

In a general sense a patent is a contract between society as a whole and an individual inventor. Under the terms of this social contract, the inventor is given the exclusive right to prevent others from making, using, and selling a patented invention for a fixed period of time in return for the inventor's disclosing the details of the invention to the public. Thus, patent systems encourage the disclosure of information to the public by rewarding an inventor for his or her endeavors.

Patent system originated in the Middle Ages from the system of royal privileges – grants of monopoly over a certain industry or art. The origin of the modern day patent system is believed to be XV century Venetian state. Modern patent systems still retain some of the original elements in a sense that it assumes exclusive rights granted to inventors.

The TRIPS provides the international standard for duration of patent exclusivity, which is 20 years from the date of filing. Under all patent systems, once this period has expired, people are free to use the invention.

A patent rewards the investment of time, money, and effort associated with research. It stimulates further research as competitors invent alternatives to patented inventions, and it encourages innovation and investment in patented inventions by permitting companies to recover their research and development costs during the period of exclusive rights.

The limited term of a patent also furthers the public interest by encouraging quick commercialization of inventions, thereby making them available to the public sooner rather than later. Patents also allow the exchange of information between research groups, help avoid duplicative research, and, most importantly, increase the general pool of public knowledge.

Although the right conferred by a patent is a right to exclude others from making, using, or selling a patented invention during the term of the patent, it is important to understand that a patent does not necessarily give the patent owner the right to make, use, or sell the invention himself or herself. For example, the owner of a patent for an improved method of producing a

chemical compound would not be free to sell the compound made using the patented method if the compound is itself patented by someone else.

Differently from copyright, which automatically gains international validity and protection by means of the Berne and TRIPS agreements, patents are granted under national laws and, therefore, the rights are also national in scope. Thus, a Lithuanian patent can be asserted only against infringing conduct in Lithuania. In most countries these rights are enforceable both by civil and criminal proceedings, depending on the nature of infringement.

Accordingly, enforcement falls solely to the patent owner. In general, any act of making, using, or selling the patented invention without permission infringes that patent, whether by the state, a legal entity, or an individual. Any such infringing act will give rise to liability, regardless of the infringer's intent or lack of knowledge of the patent (differently from copyright). Remedies for patent infringement can include seizures of an infringing business, orders to deliver up or destroy infringing articles, and compensation for damages suffered by the patentee or profits made by the infringer.

An issued patent remains open to attack for invalidity, and it is a common defense for an alleged infringer to assert that the patent is invalid, especially in the countries, which do not carry investigation of the novelty and inventive step of the patent claims (e.g. Lithuania and most other CEE countries). Common defenses are to challenge patents on the ground that the claimed invention was obvious, not new - tainted by prior art or already patented elsewhere by a different party, invented by someone other than the named inventor.

Patentable inventions

Article 27 of the TRIPS Agreement provides that patent protection shall be available for any invention, either a product or a process for creating a product, "provided that they are new, involve an inventive step, and are capable of industrial application." In other words, to be patentable, an invention must be novel, useful, and non-obvious. A prerequisite to patentability is that the invention must be capable of some practical application. This emphasizes the importance the patent system puts on usefulness. Although this principle remains constant, the legislation of particular countries varies; for example, in the United States, patentable subject matter must be "useful", the European Patent office emphasizes "technical effect", whereas in the Lithuanian patent law requires "industrial application".

The invention must be new, i.e. the subject matter of the invention is not or cannot be inferred to be part of what is already known. This is commonly referred to as the novelty requirement. New or novel in this context means worldwide novelty – something which was previously unknown to the public. Therefore, in case the invention has previously been used or known but was not been made available to the public (e.g. it was kept a secret), it still qualifies for patentability.

The invention must also be non-obvious or have an inventive step. This prevents someone from taking advantage of the patent system and obtaining protection for something that is a mere extension or trivial variation of what is known. Generally the test for inventive step is based on

what a reasonable person skilled in the field to which the invention pertains, at the time the invention was made, would consider being non-obvious.

Lithuania and many countries also legislatively exclude certain inventions from patentability. Most commonly excluded types are invention related to medical treatment methods, cloning, etc. European Patent Convention notoriously excludes from patentability computer programs as such.

Trademarks

Trademarks and service marks serve to indicate the source of goods and services and to distinguish the trademarked goods and services from others. The additional rationale for trademarks is that they also symbolize the quality of the goods or services with which they are used. Most trademarks are words or graphic symbols (pictures), but they can be almost anything that distinguishes one product or service from another, such as sounds, designs, shapes, smells or even distinctive designs.

The TRIPS Agreement extends the same level of recognition and protection for service marks as for trademarks (TRIPS Agreement Articles 15, 16). In some countries, registration of a mark may not be required to protect the mark, but in any case WTO members are obligated to provide protection for well-known trade or service marks. Because determinations of whether a mark is well known in the relevant sector of the public are made on a case-by-case basis, firms may find it desirable to register well-known marks. For marks that are not well known, countries may require the owner of the mark to register the mark with the national trademark office before protection in that country is granted.

The duration of protection afforded a mark varies greatly from country to country. Registrations are issued for finite periods of time, however, because of the fundamental purposes of marks namely, avoiding public confusion, encouraging competition, and protecting the owners' goodwill registrations may be renewed and thus extend infinitely as long as the marks are used.

The owner of a mark may prevent others from using a similar mark if such use is likely to cause confusion in the minds of the consumers. Determining whether two marks are so similar as to be confusing usually involves a comparison of the trademarks, their goods or services, their advertising and trade channels, the intent in using a trademark, and the presence or absence of actual confusion with the representative groups of impartial consumers.

Most commonly trademark rights are granted to the first person to obtain a registration in that country. Such system is adopted in Lithuania, however some other countries grant rights to the first person to use the mark in the course of business.

At a minimum, most countries require that a mark be distinctive; that is, it should be capable of distinguishing the goods or services of the owner of the mark from the goods or services of others. A mark may include any original combination of numbers, letters or other symbols, colors, or musical tones.

Commercial Secrets (Information)

A commercial secret is information that is secret or not generally known in the relevant industry and that gives its owner an advantage over competitors. Commercial secret protection exists as long as the information is kept secret or confidential by its owner and is not lawfully and independently obtained by others. Examples of commercial secrets include formulas, patterns, methods, programs, techniques, processes, or compilations of information that provide one's business with a competitive advantage. The owner of a commercial secret may recover damages resulting from the improper disclosure or use of its commercial secret by another.

Commercial secrets are not registered like other forms of intellectual property and are only loosely protected through legislation. Instead, the common protection for commercial secrets comes from the rules of fair competition developed through legislation and case law. Protection for commercial secrets is found in the TRIPS Agreement under the heading "Protection of Undisclosed Information" (TRIPS Article 39). Protection of undisclosed test data for marketing approval of biotechnology products is particularly sensitive and is required in TRIPS Article 39(3).

Some of the factors commonly considered for the protection of commercial secrets are:

- The extent to which the information is known to outsiders;
- The extent to which the information is known by employees and others involved in the commercial secret owner's business;
- The extent of the measures taken to protect the commercial secret;
- The value of the information to the owner and his competitors, e.g. investment made in order to create the commercial secret;
- The amount of money or effort expended by the commercial secret owner in developing the secret; and
- The effort required by others to acquire or duplicate (through reverse engineering) the information.

The secrecy of an alleged commercial secret is the most important factor to be considered. If the information claimed to be a commercial secret is available through any legitimate means and is obtained in this way, then the information is no longer secret and may become ineligible for protection. In case the owner has taken reasonable steps to protect the information, but the commercial secret information nonetheless is publicly disclosed, the protection may still be granted. Such reasonable steps may include requiring those persons who encounter the information as the result of normal working activity to sign confidentiality and nondisclosure agreements.

Other Intellectual Property Rights

Many countries extend intellectual property protection to novel, ornamental industrial designs. In the United States, this form of protection is known as a design patent, while in the European countries, these items are protected through the separate rights of industrial design.

In addition to such usual subjects of patent protection as devices, chemical compositions, and processes, many countries provide patent protection for living matter, such as microorganisms,

bacteria or plant varieties. Asexually reproduced varieties of plants, excluding bacteria, uncultured plants, and tuber propagated plants, can be protected, as can sexually reproduced plants (by seed), excluding bacterial, fungi, and first-generation hybrids. The TRIPS Agreement does not require protection for new living matter or plant varieties, but WTO members may join the International Union for the Protection of New Varieties of Plants.

In the European Union sui generis rights to databases are also considered separate form of intellectual property rights.