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VEPACHEDU EDUCATIONAL FOUNDATION

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IP and Industry News

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Issue 130

Trademark Law in China
Protection of Recipes
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Trademark Law in China¹

In China, an applicant who files first gets the trademark. If two applicants file on the same day for the same trademark, the applicant who has the earliest first use of the trademark gets the priority.² Trademark registration remains valid for a period of ten years from the date of approval for registration and can be renewed for an additional period of ten years, within twelve months prior to expiration and with a grace period of six months.³

Requirements for a trademark application in China include the applicant's name in Chinese characters, a power of attorney, and a certification of incorporation and good standing of the corporation. If a third party registers a trademark (or a similar trade mark) in China this may form the basis to bring a claim for infringement against real owner who failed to register in China. In addition, that third party can use the trademark for a Customs Seizure Notice, allowing customs officials to seize goods bearing the registered trademark which are either being imported into or exported out of China, including goods manufactured in China for export, effectively excluding the real owner who failed to register the trademark in China.

Under Article 57⁴, trademark infringement includes:

- 1) Using a trademark that is identical with a registered trademark in connection with the same goods without the authorization of the owner of the registered trademark;
- 2) Using a trademark that is similar to a registered trademark in connection with the same goods, or that is identical with or similar to a registered trademark in connection with the same or similar goods, without the authorization of the owner of the registered trademark, which may cause public confusion;

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- 3) Selling goods that violate the exclusive right to use a registered trademark;
- 4) Counterfeiting, or making, without authorization, representations of another party's registered trademark, or selling such representations;
- 5) Altering another party's registered trademark without authorization and selling goods bearing such an altered trademark;
- 6) Help any others to infringe the exclusive right to use its registered trademark with intention to provide convenience for infringing the exclusive right to use its registered trademark;
- 7) Otherwise causing prejudice to another party's exclusive right to use its registered trademark.

Protection of Recipes

Intellectual property rights in food recipes are an ancient concept that has been well documented in the literature. American and Indian intellectual property protection laws are based on the English system that began with the Statute of Monopolies (1624) and the Statute of Anne (1710). The Statute of Monopolies granted fourteen-year monopolies to authors and inventors and ended the practice of granting rights to "non-original/new" ideas or works already in the public domain⁵.



Public banquets were held at frequent intervals, and *cooks who concocted the best dishes were rewarded with golden crowns and monopolies to protect their recipes for a whole year*, in the rich Greek city of Sybaris⁶ that has a fascinating history documented in writings of Athenaeus, Diodorus Siculus, Herodotus, Pliny, Strabo, etc. The ever increasing wealth of Sybaris inevitably (?⁷) led to their ruin through self-indulgence; it was alleged that the final undoing was having trained horses to dance at their feasts to the accompaniment of pipes. As Aristotle records in his account of the constitution, says Athenaeus, "Now the people of Croton knew this when they made war on the Sybarites and struck up the dance tune for the horses; for they had with them pipers in military uniform; and no sooner did the horses hear the pipers than they danced away, and not only that, but with their riders on their backs

they deserted to the people of Croton." Sybaris was destroyed about 510 B.C. by Croton.

Regarding **copyrights**, most probably the first ever copyright case, Vitruvius (257–180 B.C.E.) is said to have revealed intellectual property theft during a literary contest in Alexandria. While serving as judge in

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the contest, Vitruvius exposed the false poets who were then tried, convicted, and disgraced for stealing the words and phrases of others⁸.

For recipes, the most promising intellectual property rights (IPRs) among all the available IPRs seem to be patent rights⁹ and trade secrets. In general, copyrights do not prevent the use of ideas embodied in the writing; however, copyrights protect the presentation of the recipe in a certain way, as evidenced in a recent case, *Tomaydo-Tomahhdo*¹⁰. The Northern District Court of Ohio explained that “[t]he identification of ingredients necessary for the preparation of food is a statement of facts. There is no expressive element deserving copyright protection in each listing.” The court further concluded that “recipes are functional directions for achieving a result and are excluded from copyright protection under 17 U.S.C. § 102(b)” and confirmed that any available copyright protection would only extend to creative manner in which the recipes were presented¹¹.

Copyright eligible original works of authorship include literary works, musical works, dramatic works, pantomimes, choreographic works, pictorial and graphic works, sculptural works, sound recordings, architectural works, etc.¹² Facts are not eligible for any protection because they are not created by humans, they are discovered. And although facts may be presented in an expressive manner, the underlying facts themselves are natural. Therefore, the Copyright Act expressly states that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”¹³,

The domain of patent law comprises three types: utility patents, design patents, and plant patents. Utility patents protect any new, useful, and nonobvious machine, article of manufacture, composition of matter, any new and useful improvement and processes thereof; whereas a trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others¹⁴. A food dish is nothing, but an expected sum total of individual components, e.g., the more sugar one adds to a dish, the sweeter the finished dish would be. Adding salt to a dish does not unexpectedly taste salty, because it is expected to taste salt. When considering processes for food preparation, because materials’ behaviors are well understood, and making changes to the order or method of adding ingredients often results in something expected and be obvious to a person having ordinary skill in the culinary arts. Unless, the combination of ingredients used,

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or the way they are processed, results in a food product totally unexpected; that may be patentable due to its unexpected advantageous results, although the recipe is obvious and unpatentable otherwise. Therefore, numerous patents on food products are issued each year based on such alleged unexpected results. However, it is most likely that the inventors in these patents are not house-spouses who cook at home, but they are companies with special labs to develop food products, with dedicated scientific staff to develop new products.

As one would expect, it is not a secret if everybody knew it, i.e., not just knowing about it, but it is Trade secrets are nothing but such secrets that are not known generally within the industry, published in trade journals, reference books, etc., or readily available in the market. Therefore, owners of trade secrets have exclusive rights to make use of the secret only as long as the secret is maintained. If the secret is made public by the owner, then trade secret protection lapses and anyone can make use of it. In addition, trade secret rights do not exclude independent invention or discovery, i.e., without the knowledge of the secret. However, owners of trade secrets enjoy management rights and are protected from misappropriation, useful to protect from industrial espionage and employee theft of intellectual works.

A trademark is any word, name, symbol, or device, or any combination thereof, adopted by a manufacturer or merchant to identify her goods and distinguish them from goods produced by others¹⁵. A trademark confers a right to use a particular mark or symbol and the right to exclude others from using the same (or similar) mark or symbol in a particular area and location of the industry depending upon the registration.

Economy of Telangana

For the record, statistics on June 2, 2014: Telangana, the new 29th state in the Indian Union, a land-locked area of 114,840 square kilometers with a population of 35,200,000, has 66.46 per cent literacy rate. Telangana recorded a GSDP (State Gross Domestic product) of Rs 335,018,000,000 for the year 2012-13, driven by industry and services sectors. As per reports, the average annual GSDP growth of Telangana, between 2004-05 and 2012-13 was 16 %. The state GDP grew 13 % in 2012-13 to Rs 335,018,000,000 over Rs 295,767,000,000 in 2011-12. In 2012-13, the service sector contributed 54 % to the GSDP (at current prices). It was followed by the industry sector, contributing 29 % at over Rs 96,000,000,000 and the agriculture sector's contribution was at 17.2 per cent at over Rs 57,000,000,000; 95 % of the revenue from services sector was contributed by the capital Hyderabad and surrounding areas. Telangana's per capita income of Rs 24,409 in 2004-05 has phenomenally grown to a whopping Rs 83,020 in 2012-13.

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Despite some sluggishness during 2009-10, the growth was largely on track during 2008-09 to 2012-13, the reports said. However, barring Hyderabad and Ranga Reddy districts, the number of households using open toilets hovers at 58.6 per cent of the total in the state. While Hyderabad has less number of households using open toilets at 0.9 per cent, Mahabubnagar is at 71.1 per cent. The land-locked state is expected to have nearly Rs 4,000,000,000 surplus budget, but lingering power deficit may force the new government to spend more on the power purchase, the official said. The neighboring Andhra Pradesh may face the deficit anywhere about Rs 150,000,000,000. The undivided state had shown Rs 186,000,000,000 surplus in its budget last fiscal year.

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Om! Asatoma Sadgamaya, Tamasoma Jyotirgamaya, Mrityorma Amritamgamaya, Om Shantih, Shantih, Shantih!
(Aum! Lead the world from wrong path to the right path, from ignorance to knowledge, from mortality to immortality, and peace!)

¹ Trademark Law in China: <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn195en.pdf>

² **Article 31.** Where two or more applicants apply to register identical or similar trademarks for use in connection with the same or similar goods, the Trademark Office shall first examine and approve for publication the mark with the earliest application date. Where the applications are filed on the same date, the Trademark Office shall first examine and approve for publication the mark with the earliest date of use. Registration of the other trademark applications shall be refused and the marks shall not be published.

³ **Article 39.** A trademark registration shall remain valid for a period of ten years from the date of approval for registration. **Article 40.** Where the registrant intends to continue to use the registered trademark beyond the 10-year period, an application to renew the registration shall be made within twelve months prior to the date of expiration. Where no application for renewal is filed within the six-month period, a grace period of six months is allowed. A trademark registration may be renewed each time for a period of ten years within one day after the expiration of the previous validity time. If no application for renewal is filed at the expiration of the grace period, the registered trademark shall be cancelled. After a trademark registration is renewed, it shall be published.

⁴ Chapter 7, Protection of the Exclusive Rights to Use Registered Trademarks; Article 57: <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn195en.pdf>;

⁵ The Statute of Anne (1710) is considered by scholars to be the first statute of modern copyright. The statute begins: "Whereas printers, booksellers, and other persons have lately frequently taken the liberty of printing, reprinting, and publishing books without the consent of the authors and proprietors ... to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write use books, be it enacted ..." (Great Britain, Statute of Anne, 1710)

⁶ In Search of Sybaris: <http://penn.museum/documents/publications/expedition/PDFs/5-2/In%20Search.pdf>

⁷ ? Is it inevitable for a rich state to fall because it became rich? It depends, but in general, human nature is that it gets corrupted with power and riches, and forget the history and reality, which brings them their doom, as happened in Sybaris, no matter how highly educated may be the society. What is wrong with training horses dance instead of training them for war, when you don't anticipate war? But, the human history tells us that there is always war to reckon with and no empire lasts forever.

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⁸ The Genesis of American Patent and Copyright Law (Bugbee 1967).

⁹ Patent rights protect a product, i.e., a culinary delight, cookie, cake etc., and the methods of making (the recipe) and uses of the product (if that food item has any specific new use, e.g., to treat a disease).

¹⁰ Tomaydo-Tomahdo LLC et al. v. George Vozary et al., no. 1:14-cv-00469, at 1–3 (N.D. Ohio Feb. 28, 2014).

¹¹ Id.

See also, *Harrell v. St. John*, 792 F.Supp.2d 933, 942–44. (S.D. Miss. 2011) (finding recipes not eligible for copyright protection where they lacked any literary expression and were “nothing more than a list of ingredients with very basic assembly or preparation instructions.”); *Publications Intern., Ltd. V. Meredith Corp.*, 88 F.3d 473, 478–82 (7th Cir. 1996) (finding recipes in a copyrighted recipe book excluded from copyright protection under 17 U.S.C. § 102(b)); *Lambing v. Godiva Chocolatier*, 142 F.3d 434, at *1 (6th Cir. 1998) (unpublished) (“[R]ecipes are functional directions for achieving a result and are excluded from copyright protection under 17 U.S.C § 102(b).”); *Sassafras Enterprises, Inc. v. Roshco, Inc.*, 889 F. Supp. 343, 347 (N.D. Ill. 1995) (concluding recipes are ineligible for copyright protection because they “dictate themselves and flow from the characteristics and intended use of the product, not form the imagination of any independent author.”). *Barbour v. Head*, 178 F. Supp. 2d 758, 762–764 (S.D. Tex. 2001). In *Barbour v. Head*, the Southern District of Texas refused to hold that certain recipes in plaintiff’s Texas-themed cookbook *Cowboy Chow* were ineligible for copyright protection as a matter of law and explained that the *Cowboy Chow* recipes were arguably “infused with light-hearted or helpful commentary” that could conceivably qualify as protectable expression.

¹² 17 U.S.C. § 102(a). “Copyright law does not protect recipes that are mere listings of ingredients . . . Copyright protection may, however, extend to substantial literary expression—a description, explanation, or illustration, for example—that accompanies a recipe or formula or to a combination of recipes, as in a cookbook.” U.S. Copyright Office. Factsheet FL-112: Recipes (Feb. 6, 2012). In its circular entitled *Copyright Protection Not Available for Names, Titles, or Short Phrases*, the Office states that it “cannot register claims to exclusive rights in . . . [l]istings of ingredients, as in recipes, labels, or formulas.” The Office also notes, however, that “[w]hen a recipe or formula is accompanied by an explanation or directions, the text directions may be copyrightable, but the recipe or formula itself remains un-copyrightable.” US Copyright Office, Circular 34: Copyright Protection Not Available for Names, Titles, or Short Phrases, at 1 (Jan. 2012).

¹³ Id.

¹⁴ U.S. Legal Code, The Restatement (Third) of Unfair Competition, 1995, §39.

¹⁵ 15 U.S.C. §1127 (1988).

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