

PUBLIC INTEREST ISSUES IN TRADE SECRET LAWS

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The field of trade secrets is not limited, but quite exhaustive and leads to undefined directions bringing in strong constraints for describing and enforcing the property rights since all such issues are infused with public interest.¹ That is why it is difficult to mark out the limits and to reinforce property rights in this field, particularly relating to heritage and antiquities.

This write up accordingly reviews the problem in the context of antiquities; and focuses on the emerging public interest issues.

To preserve and protect the antiquities, there exists an enactment namely, the Antiquities Act 1975, which is enforced in the whole of Pakistan; it defines the scope of antiquities² and prohibits

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¹ O'Grady v. Superior Court, 139 Cal. App. 4th 1423 (2006)

² As per Sub-section (c) of Section 2 of the Act, Antiquities means:

their export. Enforcement powers in this regard stand bestowed to the Revenue authorities.³

I recall a case where antiquities were the subject matter. An export consignment was detained by Revenue on the ground that it contained prohibited items of antiquity.⁴ In order to resolve the dispute, the Revenue referred the matter to the advisory committee constituted by the Government⁵ in this regard by posing the question, “whether or not seized goods were an antiquity”?⁶ The Committee after its deliberation answered: “the detained goods

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- i. any ancient product of human activity, movable or immovable, illustrative of art, architecture, craft, custom, literature, morals, politics, religion, warfare or science or of any aspect of civilization or culture,
 - ii. any ancient object or site of historical, ethnographical, anthropological, military or scientific interest,
 - iii. any national monument, and
 - iv. any other object or class of such objects declared by the Federal Government, by notification in the official Gazette to be an antiquity for the purposes of this Act ;

³ See subsection (2) of the Section 26 of Antiquities Act, 1975. It reads:

“All antiquities the export of which is prohibited under sub-section (1) shall be deemed to be goods of which the export has been prohibited under section 16 of the Revenue Act, 1969 (IV of 1969), and all the provisions of that Act shall have effect accordingly, except that the antiquity in respect of which the provision of that Act have been contravened shall be confiscated where confiscation is authorized under that Act.”

⁴ Cosmic Textile Pvt Ltd vs. The Collector of Customs Adjudication, PTCL 2002, CL 376.

⁵ See section 3 of the Antiquities Act, 1975.

⁶ The act of counterfeiting was subject to a penalty under Section 24 of the Antiquities Act, 1975.

were counterfeit⁷ of Ghandhara sculpture but not an antiquity per se.” The goods were accordingly confiscated by the Revenue on the ground that the act of export of the disputed goods contravened the provisions of Antiquities Act, 1975.

The order of confiscation was challenged by the exporter before the appellate tribunal empowered to hear appeals against the orders of Revenue. The Tribunal held that under Antiquities Act, the prohibition prescribed under section 26 only relate to an antiquity, since the disputed goods were not an antiquity hence regulations relied upon by the revenue to confiscate the goods were not attracted in the matter and the penal action being taken was not warranted by law.

The issue whether or not a counterfeit trade mark or a false description of copyright or violation of trade mark had taken place

⁷ It is an offence under Section 28 of the Pakistan Penal Code. It reads:
“.....A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.....”

was also examined by the Tribunal.⁸ The Tribunal, failed to find presence of any violation of Trade Secret Laws, hence the Tribunal extended protection to the exporter on the basis of absence of *mens rea* as the evidence on record failed to support the presence of guilty mind.

The archeology department had not filed any complaint against the exporter for violation of copyright or a trade mark as there was no violation of trade secret laws. In these circumstances, the Tribunal was confronted with the question whether or not infringement of the foreign trade laws, has taken place?

The Tribunal though arrived at a different conclusion while balancing the factors relating to existence of an offence of counterfeit, particularly in view of expert's view that detained goods were an incomplete replica lacking many important factors to align it

⁸ See the provisions of sub-section (c) of Section 15 of Customs Act, 1969, which reads as under: "goods having applied thereto a counterfeit trade mark within the meaning of the Pakistan Penal Code, 1860 (Act XLV of 1860), or a false trade description within the meaning of the Copyright Ordinance, 1962 (XXXIV of 1962), the Registered Layout-Designs of Integrated Circuits Ordinance, 2000 (XLIX of 2000), the Registered Designs Ordinance, 2000 (XLV of 2000), the patents Ordinance, 2000 (LXI of 2000), and the Trade Marks Ordinance, 2001 (XIX of 2001).

with Gandhara art.⁹ Even otherwise the heritage goods were not protected under trade secret laws. The Tribunal also ruled that act of deception or a practice of deception had not taken place. The resultant legal position in this regard stands as under:

- (i). Heritage related designs are out of the scope of trade secret laws.
- (ii). As per existing laws designs or marks are required to be registered with the competent authority and where these are not registered, infringements relating to trade secret laws does not arise.
- (iii). The related laws require to define.
 - a. "Fair use"
 - b. "Reuse and its closeness to source"

⁹ Style of Buddhist visual art stood developed in Pakistan territories between 1st century BC and the 7th Century AD.

- c. Transformation: To figure out when and how, functions, meaning and message get changed in a culture.¹⁰

In the current legal structure, there is no protection to heritage related designs, these designs stand excluded from the purview of trade secret laws. Consequently, following problems relating to protection are being confronted:

- a. Absence of recognized protection under the law.
- b. Failure to define character of rights;
- c. Free availability of heritage assets as public goods.
- d. Economic consequences emerging from the abuse of heritage designs are undefined.

Notable are the following limiting factors for application of IPRS¹¹ on heritage designs:

¹⁰ Copyright Law is often very smart but it is not very deep and art is just the opposite. When two things collide, you get problems.

¹¹ Intellectual property rights.

- a. Failure to define boundaries;
- b. Failure to define the character of property rights; and
- c. The scope of rights relating to heritage stand limited due to following factors:
 - i. Distortions of new creations relating to heritage designs;
 - ii. Absence of value fixation methodology for heritage designs;
 - iii. Absence of an effective enforcement regime.

It is notable, the laws relating to Intellectual Property Rights (IPA) lack a direct application to cultural heritage. The protection under IPR regulations has not been made applicable to heritage designs.¹² The existing situation, therefore, calls for a review of these regulations in order to control the abuse of heritage designs.

¹² For evaluating the value of heritage creations no mechanism exists