

**THE PROTECTION AGAINST UNFAIR PRACTICES
(INDUSTRIAL PROPERTY RIGHTS) BILL**

(No. .XVI of 2002)

Explanatory Memorandum

1. The object of this Bill is to give effect to the obligations undertaken by Mauritius under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), in the context of the World Trade Organisation (WTO), by providing for the protection against unfair practices arising on the basis of industrial property rights.

2. The Bill seeks to ensure protection against unfair practices in respect of any industrial property rights by –
 - (a) providing for a general definition of an unfair practice;

 - (b) more specifically, describing the different acts that would amount to an unfair practice; and

 - (c) providing for the legal means of redress for someone whose business has been adversely affected by an unfair practice.

.....May 2002

J. K. Cuttaree
Minister of Industry and International Trade

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ARRANGEMENT OF CLAUSES

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A BILL

To provide for the protection against unfair practices in respect of industrial property rights

ENACTED by the Parliament of Mauritius, as follows -

PART I -PRELIMINARY

1. Short title

This Act may be cited as the Protection Against Unfair Practices (Industrial Property Rights) Act 2002.

2. Interpretation

In this Act –

“appearance of a product” includes the packaging, shape, colour or other non-functional characteristics of the product in question;

“business identifier” includes business symbols, emblems, logos and slogans used by an enterprise to convey, in the course of industrial or commercial activities, a certain identity with respect to the enterprise and the products produced or the services rendered by that enterprise;

“dilution of goodwill or reputation” means the lessening of the distinctive character or advertising value of a trademark, trade name or other

business identifier, the appearance of a product or the presentation of products or services or of a celebrity or well-known fictional character;

“industrial or commercial activities” includes the activities of professionals;

“practice” includes an omission to act;

“trademark” includes any mark relating to goods, services or to both goods and services;

'unfair practice' includes any act referred to in –

- (a) section 52 of the Patents, Industrial Designs and Trademarks Act 2002;
- (b) section 3 of the Geographical Indications Act 2002;
- (c) section 15 of the Lay-out Designs (Topographies) of Integrated Circuits Act 2002; and
- (d) section 4 of this Act;

by a person other than the owner of the title of protection and without the agreement of the latter.

PART II - UNFAIR PRACTICE

3. Application

The provisions of sections 4 to 9 of this Act shall apply to any of the industrial property enactments.

4. General principles

(1) Any act or practice, referred to in sections 5 to 9 of this Act, which, in the course of any industrial or commercial activity, is contrary to honest commercial practice, shall be unlawful.

(2) Any act, referred to in subsection (1), shall amount to an act of unfair practice and may give rise to a claim in damages.

(3) In any action under this Act, the court may, notwithstanding any other enactment, grant such remedies, by way of damages, injunction, forfeiture or otherwise as the court may deem fit.

(4) For the purposes of subsection (1), the term "contrary to honest commercial practice" shall include any practice, which may constitute a breach of contract, a breach of confidence, an inducement to breach or the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that any such practice was involved in the acquisition.

5. Causing confusion with respect to another's enterprise or activities

(1) Any act or practice which, in the course of an industrial or commercial activity, causes or is likely to cause, confusion with respect to another's enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an unfair practice.

(2) Such confusion referred to in subsection (1) may, in particular, be caused with respect to any of the following –

- (a) a trademark, whether registered or not;
- (b) a trade name;
- (c) a business identifier other than a trademark or trade name;
- (d) the appearance of a product;
- (e) the presentation of products or services; or
- (f) a celebrity or a well-known fictional character.

6. Damaging another's goodwill or reputation

(1) Any act or practice which, in the course of an industrial or commercial activity, damages or is likely to damage, the goodwill or reputation of another's enterprise, shall constitute an unfair practice, regardless of whether such act or practice causes confusion.

(2) Any damage to another's goodwill or reputation as referred to in subsection (1), may, in particular, result from the dilution of the goodwill or reputation attached to any of the following –

- (a) a trademark, whether registered or not;
- (b) a trade name;
- (c) a business identifier other than a trademark or a trade name;

- (d) the appearance of a product;
- (e) the presentation of products or services; or
- (f) a celebrity or a well-known fictional character.

7. Misleading the public

(1) Any act or practice which, in the course of an industrial or commercial activity, misleads or is likely to mislead, the public with respect to an enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an unfair practice.

(2) Misleading may arise out of advertising or promotion and may, in particular, occur with respect to -

- (a) the manufacturing process of a product;
- (b) the suitability of a product or service for a particular purpose;
- (c) the quality or quantity or other characteristics of products or services;
- (d) the geographical origin of products or services;
- (e) the conditions on which products or services are offered or provided; or
- (f) the price of products or services or the manner in which it is calculated.

8. Discrediting another's enterprise or activities

(1) Any false or unjustifiable allegation which, in the course of industrial or commercial activities, discredits or is likely to discredit, another's enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an unfair practice.

(2) Discrediting may arise out of advertising or promotion and may, in particular, occur with respect to any of the following -

- (a) the manufacturing process of a product;
- (b) the suitability of a product or service for a particular purpose;
- (c) the quality or quantity or other characteristics of products or services;
- (d) the conditions on which products or services are offered or provided; or
- (e) the price of products or services or the manner in which it is calculated.

9. Unfair competition in respect of secret information

(1) Any act or practice which, in the course of industrial or commercial activities, results in the disclosure, acquisition or use by others of secret information without the consent of the person lawfully in control of such information and in a manner contrary to honest commercial practices, shall constitute an unfair practice.

(2) Any disclosure, acquisition or use of secret information by others without the consent of the rightful holder may, in particular, result from -

- (a) industrial or commercial espionage;
- (b) breach of contract;
- (c) breach of confidence;
- (d) inducement to commit any of the acts referred to in items (a) to (c); or

- (e) acquisition of secret information by a third party who knew, or was grossly negligent in failing to know, that an act referred in items (a) to (c) was involved in the acquisition.

(3) For the purposes of this section, any information shall be considered "secret information" where -

- (a) it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons who normally deal with the kind of information in question;
- (b) it has commercial value because it is secret; and
- (c) it has been subject to reasonable steps under the circumstances by the rightful holder to keep it secret.

(4) Subject to subsection (5), any act or practice, in the course of any industrial or commercial activity, shall be considered an unfair practice where it amounts to or results in -

- (a) an unfair commercial use of secret test or other data, the origination of which involves considerable effort, which have been submitted to a competent authority for the purposes of obtaining approval of the marketing of pharmaceutical or agricultural chemical products which utilize new chemical entities; or
- (b) the disclosure of such data, except where necessary to protect the public unless steps are taken to ensure that the data are protected against unfair commercial use.

(5) Subject to subsection (6), no person, other than the person who submitted undisclosed tests or other data, the origination of which involves considerable effort, shall rely on such data in support of an application for product approval for a reasonable period of time after the submission of those tests or data.

(6) For the purposes of subsection (5), a reasonable period or time shall, taking into account the nature of the data and the person's efforts and expenditure in producing them, be not less than 5 years, unless the Minister otherwise decides.

10. Offences

Any person who contravenes section 4(1) shall commit an offence and shall, on conviction, be liable to a fine of 250,000 rupees and to a term of imprisonment not exceeding 5 years.

11. Civil liability

(1) Any civil proceeding by an owner of a right, under any of the industrial property enactments for an unfair practice, shall be commenced by way of plaint with summons before the court.

(2) On the request of the owner of a right or of a licensee if he has requested the owner to institute court proceedings for a specific relief and the owner has refused or failed to do so, the court may -

- (a) grant an injunction to prevent an unfair practice, or an unlawful act;
- (b) award damages; and
- (c) grant any other remedy provided for in law.

(3) In any action for an alleged unfair practice –

- (a) it shall be presumed, unless the defendant puts it in issue, that –
 - (i) right subsists in the work to which the action relates;
 - (ii) the plaintiff is the owner if he claims so to be;

(4) For the purposes of any proceedings under subsection (1), in respect of the violation of the rights of the owner of a patent, where the subject matter of the patent is a process for obtaining a product, the burden of establishing that an identical product was not made by the process shall be on the alleged infringer if either of the following conditions is fulfilled -

- (a) the product is new; or
- (b) a substantial likelihood exists that the product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used.

(6) In requiring the production of evidence, the court before which the proceedings referred to in subsection (4) take place, shall take into account the

legitimate interests of the alleged infringer in not disclosing his manufacturing and business secrets.

12. Regulations

The Minister may make regulations prescribing all matters that are required or permitted to give effect to this Act.

13. Commencement

This Act shall come into force on a date to be fixed by Proclamation.