

“Indian Law of Privacy and Trade Secrets: Analyzing Conundrum of the Secrecy Act, Design Act, etc. within the IPR”

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Abstract

In India there is no substantive legislation to govern the privacy and data protection matters yet. It is very important that trade secrets and other sensitive information as well as intellectual property rights, which need to be kept secret of a business or an organization are kept confidential. In this paper we have analyzed different laws and how they can help maintain the privacy required by businesses.

Introduction

Companies often acquire and use fresh and particularly revolutionary ideas that are unfamiliar to their competition to get an edge over their competitors and maintain the distinctiveness of their product or service. This vital information of the company is protected by trade secrets. Any information or knowledge about a company that is not widely accessible to the public, in addition to the reasonable safeguards to keep such information confidential, is considered a trade secret.¹

North American Free Trade Agreement (NAFTA) defines a trade secret as “any knowledge of commercial importance that is not in the public realm and for which appropriate measures have been taken to safeguard its confidentiality.”²

Trade secrets, generally, protect confidential business information but it can also include technical data such as manufacturing processes, pharmaceutical test data, computer programme blueprints, and commercial details such as customer databases, advertising tactics and delivery methods.

In this age of globalization, nations are recognising the importance of confidentiality and are attempting to integrate safeguards for it into their legislative framework. Trade-related Aspects of Intellectual Property (TRIPS), the General Agreement on Tariffs and Trade (GATT), and the North American Free Trade Agreement (NAFTA) all contributed to the growth of trade secret protection in the international community. However, India does not have a codified legislation for the protection of trade secrets.³

¹ *Protecting Trade Secrets In India In The Absence Of A Regime*, Khurana & Khurana (Jun. 9, 2020, 01:22 p.m), <https://www.khuranaandkhurana.com/2020/06/09/protecting-trade-secrets-in-india-in-the-absence-of-a-regime/>.

² *Ibid.*

³ Mistry R., *Significance of Trade Secret on Business Laws*, 4 International Journal of Law Management and Humanities 170, 170 - 182 (2021).

In the absence of a legislation, Trade Secrets can be recognised under Contract, Competition, and Intellectual property laws at the same time. Its aspect can also be found in the provisions of Constitution, Indian Penal Code and Information Technology Act of 2000. Restrictive covenants, non-disclosure agreements, and other contractual mechanisms can be used to safeguard them. Furthermore, these secrets can also be protected by a common law action against misappropriation, where misuse of trade secrets can happen as a consequence of a breach of a duty of confidence in addition to theft.⁴

Constitution & Trade Secrets

The Constitution of India provides certain rights such as freedom of speech and expression which are protected as fundamental rights. The right to privacy is also provided as a fundamental right showing how important privacy is in the society. According to Article 19(1)⁵, every citizen must have the right to free speech and expression, to peacefully congregate without weapons, to organise associations or unions, and so on. Article 19(1)(g)⁶ provides the citizen with the freedom to pursue any profession or business. However, all these rights are subjected to reasonable restrictions.⁷

Trade Secrets with respect to Right to Information

Freedom of speech and expression also includes the Right to information. This right is extremely necessary for maintaining the transparent working of the democratic government. However, it has been recognised that certain rights that are being offered to the people of India may jeopardise document secrecy in accordance with the Official Secrets Act⁸.

Furthermore, section 8 of this act⁹ clearly states that "Prohibited Place" refers to any work of defense, and then sub-section (b) of section enumerates the restrictions on government documents. This Act specifies which kinds of data are protected from exposure. But, if the public interest in disclosure outweighs the damage to the safeguarded interest, these excluded information or those exempted under the Official Secrets Act can be disclosed.¹⁰

⁴Shrivatsav N, *Protection of Trade Secrets Under Indian Law*, Legal Service India, <https://www.legalserviceindia.com/legal/article-310-protection-of-trade-secrets-under-indian-law.html>.

⁵The Constitution of India, 1950, § 19(1).

⁶The Constitution of India, 1950, § 19(1)(g).

⁷Kamakhya Srivastava, *India: Trade Secrets In Indian Courts*, mondaq (Nov. 3, 2012), <https://www.mondaq.com/india/trade-secrets/204598/trade-secrets-in-indian-courts>.

⁸The Official Secrets Act, 1923.

⁹The Official Secrets Act, 1923, § 8.

¹⁰Asthana K.B., INTELLECTUAL PROPERTY RIGHTS, CONFIDENTIAL INFORMATION I.E., 'TRADE SECRETS', PRIVACY AND DATA PROTECTION, WITH RESPECT TO RIGHT TO INFORMATION ACT, 2005: AN ANALYSIS, 10 CPJLJ 63, 63-80 (2020).

The right to information is considered to be violated when specific information is withheld. Intellectual property is one of these exceptions. The provision in RTI Act states that information including commercial confidence, trade secrets, or intellectual property, the sharing of which would harm the competitive position of a third party, unless the competent authority is satisfied that the larger public interest demands the disclosure of such information.¹¹ As a result, the trade secret or intellectual property is meant to be kept discreet in order to preserve the parties' business rights. However, if the non-disclosure of such material is in the interest of the public, the responsible authority may request that such confidential information be disclosed.¹²

In respect of trade secrets, the RTI Act also states that information can be withheld if it pertains to a third party, such as a public body, or if its publication would jeopardise the third party's or public authority's competitive stance. The material can also be withheld if the applicant cannot evidently demonstrate a greater public interest in disclosure. This cannot be used when public funds are used to commit fraud. It is refused if the material relates to/contains business confidence, trade secrets, or intellectual property of a third party.

The Copyright Act & Trade Secret

Numerous cases involving trade secrets have been filed in Indian courts and tribunals. In these cases, the courts were presented with copyright concerns, and the Copyright Act was used to offer relief. To tackle infringement of copyright, there are certain provisions under Copyright act which can be really helpful. Section 51 of the Copyright Act¹³ deals with the conditions when the infringement of copyright happens. The civil remedies of copyright is dealt in Section 55¹⁴ of this act whereas Section 63B of this act deals with the offences when the infringement of copyright takes place.¹⁵

Case Laws dealing with protection under Copyright Act

- **Puneet Industrial Controls (P) Ltd. v. Aditya Enterprises Pvt. Ltd.**¹⁶

The issue in this case was whether the defendant had committed copyright infringement by exploiting the plaintiff's drawings for the manufacture of electronic relays and timers within the sections 55 and 51 of the Copyright Act, 1957. The plaintiffs had shown a sufficiently evident case for injunction, and the advantage was in their favour, according

¹¹ The Right to Information Act, 2005, § 8(1)(d).

¹² K.B, *supra* note 10.

¹³ The Copyright Act, 1957, § 51.

¹⁴ The Copyright Act, 1957, § 55.

¹⁵ The Copyright Act, 1957, § 63B.

¹⁶ Puneet Industrial Controls (P) Ltd. v. Aditya Enterprises Pvt. Ltd., 78 (1999) DLT 811.

to the court. The court went on to say that the plaintiffs were the genuine owners of the copyright and that they had the right to stop the defendants from copying their products.

- Tractors and Farm Equipment Ltd. v. Green Field Farm Equipments Pvt. Ltd.¹⁷

In this case, the plaintiff sought an injunction prohibiting the respondents/defendants from production, selling, offering for sale, marketing, or explicitly or implicitly dealing in Maharaja tractors, as well as significant imitation and procreation of the applicant's Hunter tractor's digital photos, images, and illustrations, thereby infringing on the applicant's copyright. The second defendant was also a former employee who was accused of leaking on the plaintiff's trade secrets to the respondent. The claim was filed under sections 51, 55, and 62 of the Copyright Act, but because the Hunter tractor was still an unfinished notion, it was not a production model, and because of this, the first respondent/defendant could not pass their products off as the applicant's.

Indian Designs Act 2000 - 390 - Sankalp

The Designs Act, 2000 ("the Act"), is a complete code in itself and protection under it is wholly statutory in nature. It protects the visual design of objects that are not purely utilitarian. Section 2(d) of the Act, defines a Design as:

"design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of subsection (1) of section 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in section 479 of the Indian Penal Code (45 of 1860) or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 (14 of 1957). The prerequisites for a design to qualify for protection are as follows

It should be novel and original. It should be applicable to a functional article. It should appear on the finished product. There must be no prior disclosure or disclosure of the design. Local classification

According to the Locarno Agreement, designs are enrolled in different classes. Used to classify products for the purpose of design registration, it further assists in design search. These classes are primarily function oriented.

¹⁷ Tractors and Farm Equipment Ltd. v. Green Field Farm Equipments Pvt. Ltd., AIR 2005 Mad. 19.

Protection period

The copyright of the registered design is 15 years in total. The copyright of the design is initially registered for 10 years and can be extended for another 5 years by applying for renewal.

Design right

Like all other intellectual property rights, design registration gives the owner exclusive rights, and the owner may legally exclude others from copying, manufacturing, selling, or trading without prior consent. I can do it. Design registration is especially useful for companies that have an aesthetic value in the shape of the product and want to have exclusive rights to the new original design that applies to the product or item.

In addition, the protected design must be new or original. Not open to the public in India or elsewhere in the world by prior issuance, prior use or other means. Designs must be clearly distinguishable from designs or combinations of designs that are already registered, already exist, or are generally known. In addition, the design should not include scandalous or obscene content or purely functional features.

Relief

Under Article 19 of the Design Act 2000, a request for cancellation of a design registration may be made at any time during the validity period of the design registration by petitioning the Commissioner for the following reasons. ..

- (A) The design has previously been registered in India. or
- (B) Issued in India or any other country prior to the date of registration. also
- (C) The design is not new or original. also
- (D) The design cannot be registered based on this law. also
- (E) The design is not within the meaning of Section (d) of Section 2 ... "

In addition, the Secretary's order may be appealed to the High Court.

The Information Technology Act & Privacy

India's sensitivity for data protection and privacy liberties are represented within the information technology industry, which is available even to private individuals, as stated out in the IT Act 2000:

The Long Arm Jurisdiction:

The provisions of the Act are implemented externally, according to Sec. 1(2) and Sec. 75 of the IT Act.¹⁸ As a result, if an individual (even a foreign citizen) infringes an user's data and privacy in India using a gadget, computer, or a network, he would be held accountable under this Act's provisions.¹⁹

Modification of the computer:

When an user's device's source documents have been deleted, it affects his data as well as his privacy rights. Persons who tamper with those computer's source documents can face a sentence of up to three years of imprisonment or a penalty of up to Rs two lakh, or both.²⁰

Responsibility of network service provider:

A network service provider is accountable for violation of a third party's data protection as well as privacy rights when that third party's data or information is made accessible to a 3rd party for the purpose of committing an offense or breach. Nobody can publicly reveal anything about the user without the user's consent, whether real or not, and regardless appreciative or criticizing. If they have, they would be infringing on the user's privacy rights and may be held liable for compensation in the event of a lawsuit. The network service provider, on the other hand, is not held accountable if it demonstrates or executes adequate reasonable care to prevent the offense or infraction from being committed.²¹

Unauthorized use:

If an individual accesses, uploads, adds computer pollutants, destroys, disturbs, refuses access, or otherwise makes unauthorised use of another person's instrument, computer, or network, he or she would instantly encroach upon the user's privacy. Such an individual is liable to the user for reimbursement for injuries in monetary form. As a result, data protection and privacy rights

¹⁸ Information Technology Act, 2000, § 1(2) & § 75.

¹⁹ Jaya Vats, *Data privacy and intellectual property rights*, iPleaders, (Dec. 14, 2020)

https://blog.iplayers.in/data-privacy-intellectual-property-rights/#Important_provisions_of_the_IT_Act_2000

²⁰ Vinod Joseph and Deeya Ray, *India: Cyber Crimes Under The IPC And IT Act - An Uneasy Co-Existence*, Mondaq, (Feb, 10, 2020) [https://www.mondaq.com/india/it-and-internet/891738/cyber-crimes-under-the-ipc-and-it-act--an-uneasy-co-](https://www.mondaq.com/india/it-and-internet/891738/cyber-crimes-under-the-ipc-and-it-act--an-uneasy-co-existence#:~:text=Section%2065%20of%20the%20IT,computer%20source%20code%20(i.e.%20a)

[existence#:~:text=Section%2065%20of%20the%20IT,computer%20source%20code%20\(i.e.%20a](https://www.mondaq.com/india/it-and-internet/891738/cyber-crimes-under-the-ipc-and-it-act--an-uneasy-co-existence#:~:text=Section%2065%20of%20the%20IT,computer%20source%20code%20(i.e.%20a)

²¹ Rohas Nagpal, *Cyber Crime & Digital Evidence – Indian Perspective*, Pg. 121, (1st ed., 2008) <https://dict.mizoram.gov.in/uploads/attachments/af43c3545aa589df3c250912b132cbc3/liability-network-service-providers.pdf>

encompass a user's ability to be secure of limits or invasions on their person or property, regardless direct or indirect resulting from determined measures.²²

Hacking of the device:

An individual commits hacking and thus infringes the user's data protection as well as privacy rights if the individual induces wrongful perdition or damage by destroying, extracting, or changing data or personal details that is present in the user's computer resources, or by other methods destructing or impacting the user's value or utilities.²³

The Indian Penal Code, 1850 [Sec. 408 & 415] - 390 - Sankalp

IPC Chapter XVII, Sec. 408: Infringement of criminal trust by employees or employees

Explanation:

Any person employed as an employee or employee, or in that position employed as an employee or employee and delegated power over property or property, shall be imprisoned and fined for any period not exceeding 7 years. Shall be imposed.

Section 415: Cheating.

Anyone, anyone, who is fraudulently or fraudulently deceived, induces the deceived person to give property to others, agrees with the person who holds the property, or is deceived. In addition, you or she will not do or fail unless he is fooled that way. Any act or omission that may damage or cause the person's physical, mental, reputation or property is called "fraud." Description: Unauthorized concealment of facts is a deception for the purposes of this section. figure:

It deliberately tricks Z into pretending to be a civil servant, thereby fraudulently tempting Z to give him credit for goods he doesn't want to pay.

²² Aaruni Goel, et al, *In-depth Analysis of an Indian I.T. Act Related to Unauthorized Access*, 58, International Journal of Computer Applications, 12, 12-15, (2012)

<https://research.ijcaonline.org/volume58/number7/pxc3883507.pdf>

²³ Abhishek Jaiswal, *Cyber Hacking law in India*, Legal Services India, <http://www.legalservicesindia.com/articles/cyhac.htm>

Contracts and Agreements

Confidentiality or Non-Disclosure Agreements (NDAs) and Non-Compete Agreements may be required by an proprietor or institution when engaging in commercial contracts or commencing negotiations with possible investors, clientele, staff, or franchisees.

Non Disclosure Agreements

Non-Disclosure Agreements are valuable instruments for maintaining secrecy for anyone discussing or disclosing important and vital information about their firm or innovative concepts with another party. NDAs identify any information that must be kept private and put responsibilities and requirements on the receiver to keep the data private. In uncomplicated contracts, a secrecy provision could be incorporated in the primary agreement; nevertheless, in more intricate business dealings, businesses tend to engage into a distinct non-disclosure agreement prior to engaging in any type of conversation.²⁴

Confidentiality Agreement

When only one party needs to share delicate and classified data, the parties should consider establishing a single-way confidentiality agreement rather than a non-disclosure agreement. The non-disclosure agreement as well as the confidentiality agreement serves identical goals. A letter of confidentiality can also be used by businesses for simpler situations or to initiate a confidentiality or non-disclosure agreement.²⁵

Non-Compete Agreements

These agreements are generally made among the employers and employees. They prohibit the employees from trying to work for a rival or starting their own firm in the relevant industry sector after they have been fired. Non-compete provisions are usually incorporated in the primary agreement, but in complicated deals, a supplementary non-compete agreement could be

²⁴ Sanjana, *India: The Relevance Of A Non-Disclosure Agreement In Protecting Your Intellectual Property*, Mondaq, (Sep. 02, 2021)

<https://cleartax.in/s/non-disclosure-agreement-format-download#:~:text=A%20non%2Ddisclosure%20agreement%20is,made%20to%20protect%20business%20confidential.&text=It%20is%20a%20legally%20binding%20contract%20between%20the%20two%20parties.>

²⁵ Shoronya Banerjee, *Enforceability of confidentiality agreements and section 27 of the Indian Contract Act, 1872*, iPleaders, (May 15, 2021) <https://blog.ipleaders.in/enforceability-confidentiality-agreements-section-27-indian-contract-act-1872-2/>

required. This aids businesses in safeguarding trade secrets, marketing techniques, valuable information related to Intellectual Property, as well as clients and customer information.²⁶

Non-compete agreements or provisions are a sensitive matter in Indian courts, yet they are nonetheless commonly employed in business contracts and employment contracts. Contracts constraining trade, commerce, or any profession are void ab initio, as per the Indian Contract Act's sec. 27.²⁷ Even so, there are exclusions to this rule, one of which is whenever an institution sells the goodwill of a company with a purchaser agreeing not to carry on a nearly identical business inside of stipulated confines if the constraints are rational. Non-compete agreements or provisions must therefore be rational and equitable to satisfy the enforceability test.²⁸

The Competition Act, 2002 [Sec. 3] - 390 - Sankalp

Competition is the act of a seller seeking sponsorship from a buyer in order to gain profit or market share. The 2002 Competition Law was enacted by the Parliament of India and replaced the 1969 Antimonopoly and Restricted Trade Practices Act. This applies to Indian competition law.

Following the enactment of the Competition Law (“Law”) in 2002, the Competition (Revised) Law of 2007 and the Competition (Revised) Law of 2009 were revised twice. Two key features of the competition law, 2002 is its framework, which provides tools to establish a competition committee and prevent anti-competitive practices and promote active competition in the Indian market.²⁹ Purpose of competition law

The law aims to ensure compliance with competition policies, prevent anti-competitive practices, and provide legal frameworks and tools to provide penalties for such conduct. The law protects free and fair competition, which protects trade freedom.

Law aims to prevent monopoly and unnecessary state intervention. The main objectives of the 2002 Competition Law are:

- To provide a framework for the establishment of a competition committee.
- To prevent monopoly and promote competition in the market.
- To protect the trade freedom of natural and legal persons participating in the market.

²⁶ Ms. Vasundhara Shankar and Ms. Aastha Arora, *Non-competition clauses and employment laws in India*, Lexology, (Oct. 22, 2021) <https://www.lexology.com/library/detail.aspx?g=09e8927d-4580-4fe287e98088e8dad20>

²⁷ Indian Contract Act, 1872, § 27

²⁸ Uditi Chopra, *Legal agreements that can protect IPRs*, iPleaders, (Feb. 14, 2021) <https://blog.iplayers.in/legal-agreements-can-protect-iprs/>

²⁹ *Protecting Trade Secrets In India In The Absence Of A Regime*, Khurana & Khurana (Jun. 9, 2020, 01:22 p.m), [https://www.khuranaandkhurana.com/2020/06/09/protecting-trade-secrets-in-india-in-the-absence-of-a-regime/...](https://www.khuranaandkhurana.com/2020/06/09/protecting-trade-secrets-in-india-in-the-absence-of-a-regime/)

- To protect the interests of consumers.

The 2002 Competition Law defines anti-competitive agreements in Section 3, stating: Or the management of goods or goods, the provision of services that may affect competition in the Indian market.

Such contracts, called AAEC contracts, mean contracts that significantly limit competition. The law clearly states that such an agreement is invalid. AAEC contracts are categorized as contracts with the following results:

- Direct impact on purchase or selling price.
- It indirectly affects the purchase or selling price.
- Limits production.
- Limits supply.
- Limits technical development.
- Limits service provision in the market.
- Leads to the rigging of bids.
- Leads to an agreed offer.

Abuse of dominant position

Abuse of dominant bargaining position is prohibited by Article 4 of the Competition Law. Abuse of dominant positions is defined in the second part of the same section. According to the law, a dominant position is a company that enjoys its position and power in the Indian market and enables:

Operate independently of the competitiveness of related markets. It affects its competition, its consumers or its favorable related markets. For example, predatory pricing is a practice that is seen to be an abuse of the dominant position. In simple words when a dominant enterprise engages in AAEC acts, it is considered an abuse of the dominant position.

Conclusion (must including findings)- 300 - Sankalp

At present, Indian alternate secrets and techniques regulation is a judiciary-made regulation, primarily based totally at the precept of fairness and not unusual place regulation movements in opposition to breach of self-assurance, with the jurisprudence as an entire revolving round an employee`s duties and responsibilities closer to the enterprise concerning personal records won all through the route of employment. Indian jurisprudence concerning alternate secrets and techniques is doubtful on some of essential aspects, including:

- the scope of damages within side the case of a breach of personal records;
- robbery of alternate secrets and techniques with the aid of using commercial enterprise competitors; and
- procedural safeguards all through courtroom docket litigation.

Further, within side the absence of a selected alternate secrets and techniques regulation, the courts have dominated in favour of the owner of records as literary paintings as described below copyright regulation.

The current introduction of the National IP Rights Policy has raised hopes for the enactment of an alternate secrets and techniques regulation, in view that that is one of the goals of the policy. Although no time frame has been furnished for the fulfillment of this objective, one may be positive that there may be an alternate secrets and techniques regulation within side the close to future.

Practical recommendations to defend alternate secrets and techniques

- Label the records to be included as “personal”, in order that personnel are conscious that they may be managing touchy commercial enterprise records.
- Restrict get entry to databases, servers and pc packages that shop alternate secrets and techniques.
- Ensure that get entry to servers is password included and that an appropriate observe is displayed on pc displays while having access to touchy areas.
- Educate personnel on why protective alternate secrets and techniques are essential for commercial enterprise.
- Sign non-disclosure agreements with any events with which industrial commercial enterprise records are shared.
- Use a mixture of technical and prison answers to defend databases.³⁰

Though the regulation of alternate secrets and techniques suits into the prevailing framework of regulation of torts, regulation of contracts and opposition regulation, there are positive issues with recognize to its inception within side the area of highbrow assets rights. However, a separate law for alternate secrets and techniques might do away with that disparity as well. India, being a growing kingdom have to have a strong regulation for protective alternate secrets and techniques. The TRIPS Agreement mandated that its Member States must change their legal guidelines and bring in new law to satisfy the duties as below the TRIPS Agreement. It is time now for a statutory regulation to return back into pressure in India that now no longer handiest

³⁰ Dhruv Gupta, *Trade secrets and their protection under IPR law*, (AUG 31,2019)
<https://www.latestlaws.com/articles/trade-secrets-and-their-protection-under-ipr-law-by-dhruv-gupta/>

protects alternate secrets and techniques and confidentiality however additionally makes appropriate amendments within side the current framework of Competition Act in opposition to misappropriation and law of such personal records.

The crook regulation of the United States, the Indian Penal Code, 1860, additionally desires amending that affords for crook legal responsibility in instances in which there's breach of self-assurance or disclosure of alternate secrets and techniques much like what exists in specific Countries. The mere presence of a crook regulation does now no longer act as deterrence for those who take pleasure in such practices and for this reason in depth motion and exercise is likewise had to hold such incidents at bay. The Companies Act, 1956 need to additionally be amended with comparable provisions that take due diligence with recognize to alternate secrets and techniques into its ambit. Thus, the Companies may be pro-lively and vigilant at the same time as protective their alternate secrets and techniques. Companies, on this way and for this purpose, have to construct a robust safety device round such records. Companies have to additionally set up robust mental loyalty among its personnel to in order that nondisclosure and/or non-compete agreements are extra powerful and for this reason safeguarding its alternate secrets and techniques is easier.

Taking the above issues into effect, it's miles affordable to be of the opinion that Trade Secret safety in India is in its nascent level and it's miles important for it to broaden retaining in thoughts that India as a growing united states desires legal guidelines and law to be conducive to the commercial enterprise surroundings as a way to rework the united states right into a mattress of possibilities for organizations off-shoring in addition to marketers which can be searching out opposition conducive to their organizations without the concern of misappropriation in their alternate secrets and techniques and personal commercial enterprise records, the very foundation that they thrive on.³¹

³¹ IPTSE, *Data and Intellectual Property Rights*, (Jan 28, 2011) <https://iptse.com/data-and-intellectual-property-rights/#:~:text=Indian%20Courts%20have%20very%20well,be%20protected%20under%20Copyright%20law>