# Intellectual Property

## Introduction

Intellectual property refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce. Intellectual property is divided into two categories: Industrial Property includes patents for inventions, trademarks, industrial designs and geographical indications. Copyright covers literary works (such as novels, poems and plays), films, music, artistic works (e.g., drawings, paintings, photographs and sculptures) and architectural design. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and broadcasters in their radio and television.

## Objectives

Objectives by the end of this topic you should be able to:

* Describe the concepts of intellectual property.
* Explain the importance of protecting intellectual properties.
* Differentiate between the various intellectual properties

# Intellectual Property Rights (IPR)

## Introduction

Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trademarks or copyrighted works to benefit from their own work or investment in a creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions.

**1 Introduction**

The emergence of the Internet has caused policymakers, legislators, rights holders, content creators, businesses, content users and others to rethink the way intellectual property should operate in a modern inter-connected society.

The range of new technologies and the speed of innovation raises intellectual property issues: domain names are often inextricably linked with trademark issues; and the ease with which digital technologies allow for copying and distribution challenges copyright law enforcement.

Intellectual property is currently at the center of an international debate in many different forums regarding how to reconcile the potential of the Internet with traditional intellectual property approaches, including how to stop unlawful transactions on the Internet.

Two principal approaches have emerged: involving Internet intermediaries in enforcement and using Internet technical measures to prevent access to unauthorised content.

**5.2 Importance of IP**

**Incentive to create:**

The economic philosophy behind the legislations empowering States to grant IP rights is the conviction that encouragement of individual efforts by direct personal gains is the best way to advance public welfare through the talents of authors and inventors in Science and useful Art”1.

**Works against the ‘lazy’ in you!**

It prevents free riding on works or reputation of others and

**Frees your creative mind**

Prevents possible holdout of life enriching ideas from learned and ingenious minds.

Why Protect your Intellectual Property?

* + Incentive to create
  + Prevent unjust enrichment
  + Prevent “hold out” of life enriching ideas

**5.3 Legal basis of Protecting IP**

Domestic Obligations:

The Constitution of Kenya:

The fundamental rights in the Cconstitution provide every person with the right to property; which must be understood to also include intellectual property.

* 1. **Different aspects of IP**

Type of IPIP Rights

Inventions **Patents**

works of Art and Authorship **Copyright**

Source identification/Brand names **Trademarks**

Aesthetics/Ornamental features **Designs**

Proprietary information **Trade secrets**

**5.4.1PATENT**

A Patent is a legal document granted by a State that secures to the holder, for a limited period, the right to exclude others from making, using, selling, offering for sale, and importing the patented subject matter

**Patentable subject matter**

Any new and useful process, product, composition of matter, or any improvement thereof, may be patented, on condition that such invention is:

* + **Novel**
  + **involves an inventive step** i.e must not be obvious to a person of ordinary skills in that field of art, and
  + **industrially applicable**

**What is not Patentable?**

* Discoveries or findings that are products or processes of nature, where mankind has not participated in their creations
* Scientific theories and mathematical methods
* Schemes, rules or methods of doing businesses or playing games or purely performing mental acts.
* Methods of treatments of both human and animals by surgery or therapy as well as diagnostic methods practice thereto, except products for use thereof.
* Inventions contrary to public order, morality, public health and safety, principles of humanity and environmental conservation
  1. **COPYRIGHT**

Copyright is Simply “the right to make copies”

Copyright protection subsist in any original works of art and authorship once fixed in any tangible medium of expression, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device . Copyright only extent as much to the expressions of and NOT to the underlying ideas or facts.

Copyright is also defned as a legal device that provides the creator of a work of art or literature, or a work that conveys information or ideas, the right to control how the work is used."

**Why Protect your Copyright?**

* Economic rights:
  + Incentive to create
  + Prevent unjust enrichment
  + Prevent “hold out” of life enriching ideas from learned and ingenious minds
* Moral rights:
  + The Rights to **claim authorship**
  + The Right to object to any **distortion, mutilation** nor other actions defacing the original work

**5.5.1 Subject matter of Copyright**

1. Literary works which include:-
   * novels, stories and poetic works,
   * plays, stage directions, film sceneries and
   * broadcasting scripts,
   * textbooks, treatises, histories, biographies, essays and articles;
   * encyclopedias and dictionaries,
2. Artistic works, which include:-
   * paintings, drawings, etchings, lithographs, woodcuts, engravings and prints,
   * maps, plans and diagrams,
   * works of sculpture,
   * photographs not comprised in audio-visual works,
   * works of architecture in the form of buildings or models, and
   * work of artistic craftsmanship, pictorial woven tissues and articles of applied handcraft and industrial art;
3. Musical works which includes:-
   * Dramatic works, including any music
   * Pantomimes
   * choreographic
4. Audio-visual works,
5. Sound recordings, and
6. Broadcasts.

**5.5.2 What does copyright protect?**

Copyright law protect the author of work against wilful acts of:

* + Copying, reprinting, publishing and vending the copyrighted work
  + Displaying, delivering, reading or presenting copyrighted work in public
  + Performing publicly e.g drama, musical composition
  + Producing and distributing to the public
  + Adapting, compiling, arranging, dramatizing translating or any other version of copyrighted works in public

Exemptions (Fair use doctrine)

1. Use of the works for educational and scientific purposes
2. Private use
3. Criticism or review
4. Reporting of current events subject to acknowledgement of the source
   * 1. **Requirements for copyright Protection**
5. Originality
   * Independent creation
   * modest quantum of creativity
6. Fixation
   * Works of authorship(intangible)
   * Material object

**Computer Software and Copyright**

As computer scientists and information technology professionals, our interest in the Copyright Act is twofold. First, as members of this society, it provides a legal framework to determine how we should respect works produced by others. Secondly, it provides a basis for determining our own rights as producers of works which are copyrightable

According to the Copyright Act, there are five types of works that are eligible for copyright:

1. artistic works;
2. audiovisual works;
3. databases;
4. literary works;
5. musical works.

Computer programs are included in literary works. Additionally, the computer program, along with other literary works, must have "an original character", and must have been "written down, recorded, fixed, or otherwise reduced to material form". (The Copyright Act, article 3(2)). We shall not consider databases, because the Act refers to the collection of data, rather than the software itself (the software itself is, of course, covered by the meaning of "computer program").

**4.5 What does copyright cover?**

Under Maltese Law, copyright gives the copyright holder the exclusive right to authorise or prohibit the following (summarised from The Copyright Act, article 7):

1. reproduction of all or part of the work;
2. rental and lending;
3. distribution;
4. translation into other languages, including other programming languages;
5. modification, and the application of this law to the modification;
6. broadcast or communication;
7. display or performance.

The copyright holder can extend limited rights to third-parties through a *licence agreement*.

Consider the translation of a novel into a foreign language, and consider the translation of a C program into a Pascal program. Maltese Law prohibits both. However, copyright (in any country) is not meant to prohibit works which, although they may resemble other works, are in fact derived totally independently of each other. Although it may not be possible to make the claim for certain novels or poems, it is quite possible that artists may be inspired to paint similar paintings of the same landscape. Identical paintings, however, are quite unlikely. However, it is possible to write completely different computer code (in the same or different languages), but the outcome of each program is identical.

**4.6 What does copyright *not* cover?**

In the case of computer programs, there is nothing to stop a licensed user from figuring out how a program works, or what it does, as long as it is done through "normal" use which does not include disassembly. A licensed user is also allowed to reproduce or translate copyrighted code to achieve interoperability with other code, if this is not made readily available. (NB: I presume this is meant to cover proprietary code that is "made to order", rather than off-the-shelf software packages, but the Act does not appear to differentiate between the two).

**4.7 Who holds the copyright?**

In all cases other than computer programs, copyright is held by the author or joint authors, unless there is an agreement to the contrary. For computer programs, however, if the program is written "in the course of the author's employment, in the execution of his duties or following the instructions given by his employer", then the economic rights transfer to the employer unless agreed otherwise.

**4.8 Burden of proof**

The burden of proof in cases of copyright infringement lies squarely on the shoulders of the entity claiming the infringement.

**5.6 TRADEMARK**

Trademarkis a distinctive sign, used by a merchant to **identify** its goods or services and to **distinguish** them from those produced or provided by others.

**Subject matter of Trademark?**

1. It includes any distinctive sign: word, letter, slogan, device, brand-name, heading, label, ticket, name, signature or numeral or any combination thereof, whether in 2D or 3D form.
2. some countries allow registration of: single colours, audible signs(sounds) or olfactory signs (smells), Holograms, Scent or even Motion signs.

**Why protect your trademark?**

1. Registration gives your company the *right to exclude* others from marketing identical or similar **products** under an identical or a confusingly similar **mark**.

**What are trademarks for?**

1. To the producers:
   * Enables companies to differentiate their products
   * Is a marketing tool and the basis for building brand image and reputation
   * Encourage companies to invest in maintaining product quality
   * a valuable business asset
   * May be licensed to provide a direct source of revenue through royalties
   * is a critical element in franchising agreements
   * Can be use as collateral for obtaining financing
   * Cont/ **What are trademarks for?**
2. To the Consumers:
   * Ensure that consumers can identify the origin of products
   * Aid consumers in distinguishing between products from different manufacturers
   * Acts as an indication of quality
   * Acts as an assurance of genuineness
   * Source of information

**5.7 INDUSTRIAL DESIGN**

An industrial design refers to the ornamental or aesthetic features of a product. In other words, it refers only to the appearance of a product and NOT the technical or functional aspects.

**5.7.1 Subject matter of Industrial Designs**

Any products of industry: fashions, handicrafts, technical and medical instruments, watches, jewellery, household products, toys, furniture, electrical appliances, cars; architectural structures; textile designs; sports equipment; packaging; containers and “get–up” of products

**Importance of Industrial Designs in Business**

1. Customize products to appeal to specific market segments
2. Create a new niche market.
3. Strengthen their brands images.
4. It adds value to a product.

**Why protect an ID?**

The creator is granted the exclusive right to prevent others from unauthorized copying, imitating, making, selling, or importing any product in which the design is incorporated or to which it is applied

Requirements for ID registration

1. **New**
2. **Original** – independently created
3. Design must have “**individual character**” – when overall impression is evaluated against others.

5.8 TRADE SECRETS

trade Secrets 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 others.

**Subject matter of Trade Secrets**

It includes; formulae, pattern, compilation, data, devices, methods, techniques, or processes

**Requirements for protecting Trade Secret**

1. Subject matter must not be generally known or available
2. Affirmative measures must be in place to safeguard them
3. Must be of sufficient economic value or competitive advantage
4. But **secrecy** is the most important- a *sin qua non*

**5.9 Problems from New Technologies That Affect Intellectual Property Owners**

* + High-quality copying.
  + High-quantity distribution.
  + Easier to use.
  + Less expensive.

**5.10 Technology, Markets and Management, and Regulations and Enforcement**

* + **Technological Solutions:**
    - Expiration date encoded.
    - Hardware dongle required.
    - Copy-protection schemes.
    - “Activation” features.
    - Encryption schemes; digital-rights management (DRM).
  + Markets and Management:
    - Subscribe to services.
    - Collect fees from users and large organizations.
    - Meter usage of intellectual property on a network.
    - Offer discounts to educational users.
    - Educate the public about the value of intellectual property belonging to creators and publishers.
  + Regulations and Enforcement:
    - The Digital Millennium Copyright Act (DMCA) and other laws.
    - Identify abusers and shut them down in high-publicity raids.
    - Monitor abuses.
    - Enforce current laws and punish abusers.

**Restrictions and Bans on Technology**

In the past, lawsuits have delayed, restricted, or banned the release of new technologies, including:

* + - CD-recording devices.
    - Digital Audio Tape (DAT) systems.
    - DVD recorders.
    - DVD players.
    - MP3 players.

In an attempt to reduce or prevent unauthorized copying and distribution of intellectual property, some governments have levied taxes on:

* + - Audio tapes, CD recorders, Personal computers, Printers.
    - Scanners.