

# Module 2

# Syllabus

- **Trademarks**— Introduction — Guidelines for registration-requirements for filing trademarks — Trademark Infringement — Protection of trademarks
- **Copyright** — Introduction — Rights conferred by copyright — registration — ownerships — terms — transfer of copyrights — copyright infringement — databases and copyright-
- **Software Copyright**—Introduction — Need of software copyright — classification of software according to copyright —software auditing —copyright notice — transfer of copyright.

- A trademark is a distinctive sign that identifies certain goods or services as those produced or provided by a specific person or enterprise.
- It may be one or a combination of words, letters, and numerals.
- They may consist of drawings, symbols, three-dimensional signs such as the shape and packaging of goods, audible signs such as music or vocal sounds, fragrances, or colours used as distinguishing features.
- It provides protection to the owner of the mark by ensuring the exclusive right to use it to identify goods or services, or to authorize another to use it in return for payment

- It helps consumers identify and purchase a product or service because its nature and quality, indicated by its unique trademark, meets their needs.
- Registration of trademark is prima facie proof of its ownership giving statutory right to the proprietor.
- Trademark rights may be held in perpetuity.
- The initial term of registration is for 10 years; thereafter it may be renewed from time to time.
- General Principles governing the Trademarks System in India and further details can be viewed at :  
[http://ipindia.nic.in/tmr\\_new/default.htm](http://ipindia.nic.in/tmr_new/default.htm)



- Trade mark is defined conventionally as a distinctive sign of some kind, whether that sign comprises a name, word, phrase, logo, symbol, design, picture, styling or a combination of one or more of these elements.
- A trademark is used by a business to identify itself and its products or services to consumers, and to set itself and its products or services apart from other businesses.
- The essential function of a trademark is to uniquely identify the commercial source or origin of products or services, such that a trademark, properly called, is used to '*indicate source*' or act as a '*badge of origin*'.
- *The* use of a trademark in this way is known as '*trademark use*' and a trademark owner seeks to enforce its rights or interests in a trademark by preventing unauthorized trademark use.

- Functions and characteristics of trademark.
  - 4 functions and 9 characteristics

## Infringement of trademark

- Taking any essential feature or whole of the mark and then making a few additions and alterations
- The infringing mark must be used in the course of trade
- Printed or representation of mark in advertisements, invoices or bills.
- All of the above

## The Coca Cola Company vs Bisleri International Pvt Ltd.

- The famous case of coca cola and bisleri over the trademark Maaza where Bisleri assigned its trademark Maaza to Coca Cola to sell and export products in and from India and immediately after, filed a trademark Application in Turkey. It was held that the rights over the trademark were completely assigned to Coca Cola and Bisleri cannot use the trademark in or outside India.
- <https://iprlawindia.org/cadila-health-care-ltd-v-cadila-pharmaceuticals-2001-2-ptc-541-sc/>

# Guidelines for registration of Trademark

1. Trademark application can be filed for a mark which is in “USE” or “PROPOSED TO BE USED”
  1. It is considered as an inseparable part of the goodwill of the business and is being considered as “Movable Property” .
2. The proprietor/director/managing partner should authorize your attorney/agent under form **TM-48** on a non-judicial stamp paper.
3. Furnish the FIRST DATE from which the mark is being continuously used – first sales invoice can be used.
4. Furnish the name of the proprietor/name of all partners in the firm and address of the firm/company.
5. Furnish 20 labels of your mark, if it contains any lettering style/logo/device/label, it should be small in size.
6. Furnish the specification of goods to which the mark is applicable.



7. After filing, an application number will be allotted within 40 days from date of filing of the application. Then following 3 stages have to pass in the period of 4 to 5 years or to some extend.
  - Examination stage
  - Enquiry stage by Registrar
  - Advertisement stage in the Trademarks Journal
  - Opposition stage if any.
8. While the case is pending, the trademark can be used by the applicant.

# Registration of Trademark

## Registrability and distinctive character

- A trademark maybe eligible for registration or registrable, if amongst other things, it performs the essential trademark function and has distinctive character.
- A **fanciful/inherently distinctive** trademark is prima facie registrable and comprises an entirely invented or fanciful sign.

Eg: Kodak

- An **arbitrary** trademark is a common word which is used in a meaningless context.

Eg: Apple for computers

- A **suggestive** trademark tends to indicate the nature, quality or characteristic of the products or services in relation to which it is used, but requires imagination on the part of the consumer to identify the characteristic.

Eg: Blu-Ray

- A **descriptive** mark is a term with a dictionary meaning which is used in connection with products or services directly related to that meaning.
- Eg: salty for salt biscuits
- A **generic** term is the common name for the products or services in connection with which it is used.

Eg: 'salt' when used in connection with sodium chloride

- Registered trademarks also fall prey to common usage and journey into the public domain. Consequently, the trademark owner loses all his rights over the trademark.
- Trademark Genericide can be defined as *the loss of trademark rights when a term enters common usage and consumers begin to denote a particular product than its source*. When a trademark becomes the "common descriptive name" of a certain product, the trademark owner will no longer have an exclusive right to its use.

Eg: The term Escalator was formerly a trademark of the Otis Elevator company before it became a victim to its own success and died a generic death

## The reason behind Trademark Genericide :

- The trademark becomes genericized due to the continuous use by the public who use the term to denote a particular product rather than its source.
- The more popular the product, the chances of it dying a generic death increase. Some of the popular trademarked names that have now become generic because of the wrongful and continuous use by the public are – Aspirin, Cellophane, Zipper, Kleenex, Thermos, Popsicle etc.

## Google it

- The Google trademark ranks as one of the most valuable trademarks in the world. Google is so conscious of the problem that it has published "rules for proper usage" of all its trademarks, partly to help stem the use of "Google" as a verb.
- In 2012, Google filed a Uniform Domain Name Dispute Resolution Policy (UDRP) Complaint following the registration by a third party of several hundred domain names which combined the word Google' with another word element.
- The Administrative panel ruled in favour of Google and ordered that the registrant transfer all the domain names to Google.
- The Registrant, Mr David Elliot then filed a suit in the US district court in Arizona seeking cancellation of the trademark registration of Google saying that the term Google had become generic.
- In supporting his claim, Elliot contended that the GOOGLE mark had become generic because the public frequently uses the wording "Google" as a verb.

## Steps that can be taken to avoid Trademark Genericide:

- Trademark owners should avoid using the trademark as a verb or a noun which implies that the word is generic.
- Trademark owners should give a new product an easily recognized generic name in addition to the fancy trademark name.
- Trademark owners should be extremely vigilant and must keep a check on improper use of their mark.
- Trademark owners can add the word "brand" after the trademark on the product packaging.
- Trademark owners must establish guidelines for the usage of their trademarks and make sure that they are followed strictly. Companies should implement a strong trademark regimen which may help them in prevention of their trademark becoming generic.

# Acquired distinctiveness

- A trademark with no distinctive character is prima facie not registrable.
- However, most jurisdictions still allow such marks to be registered if the trademark owner can demonstrate , typically by reference to *evidence of use*, that consumers exclusively associate the mark, as used in the identified goods or services with a particular commercial origin of source.
- If trademarks office is satisfied that the evidence demonstrates that a mark has “acquired” distinctive character, then it can be accepted for registration on the basis of **Acquired distinctiveness**.

- There are two main grounds for rejection of a trademark application:

## 1. Absolute grounds

## 2. Relative grounds

- Trademarks may be refused for reasons inherent to the trademark itself when they are:
- generic – for example, the word PHONE filed as a trademark for mobile phones.
- devoid of any distinctive character – in the sense that the sign is not capable of distinguishing the products of one enterprise from those of others. Descriptive words, signs and advertising slogans are generally devoid of distinctive character.
- deceptive – signs likely to deceive or mislead consumers as to the nature, quality or geographical origin of the product.
- functional features of a product's shape or packaging – as opposed to purely decorative elements. When the shape of a product has significant functional features, it cannot be registered as a trademark.



- considered to be contrary to public order or morality. Words and illustrations that are considered to violate commonly accepted norms of morality and religion are generally not allowed to be registered as trademarks.
- among the list of prohibited names or symbols. Some countries have a list of specific signs that are excluded from registration, including: business names, names of famous people, well-known marks, protected geographical indications, signs of indigenous peoples, and foreign words or expressions.

## Relative grounds

- Trademarks may be refused due to the existence of prior rights when they are:
- in conflict with prior trademark rights. Having two identical (or very similar) trademarks for the same type of product could cause confusion among consumers. Some trademark offices check for conflict with existing trademarks, including unregistered trademarks and well-known marks, as a regular part of the registration process, while many others do so only when the trademark is challenged by another business after publication of the trademark. In either case, if your trademark is considered to be identical or confusingly similar to an existing trademark for identical or similar products, it will be rejected or cancelled.
- in conflict with other prior rights

Eg: industrial design, copyright, personal/company/business names, commercial designation, geographical indication or signs of indigenous peoples.

## Requirements for filing trademarks

1. The name, address and nationality of the applicant. If the applicant is a partnership firm, the names of all the partners.
  - Also mention whether any minor is a partner.
2. If the applicant is a company, the country or state of incorporation.
3. A list of goods and/or services for which registration is required.
4. Soft copy of the trademark to be registered.
5. If the mark contains or consists of non-English words, a translation of those words into English is required.
6. If the application is to claim priority from an earlier filed convention application, details of that application is also required (application number, filing date, country and goods/services).
  - A certified priority document or its duly notarized copy is to be submitted. If the certificate is not in English, a certified/notarized English translation is also required.
  - If it is not readily available, the application can be filed based on the basic application number, date of the application and country of the application.
  - A copy of the priority document can be submitted within 1 month from the filing date of the application.

7. Date of first use of the trademark in India, if at all used
8. Power of attorney simply signed by the applicant (no legalization or notarization is required).
  - For Indian clients, power of attorney to be executed in 100 Rs. stamp paper and signed by the applicant.
  - The power of attorney is not required at the time of lodging the application and can be submitted later with no additional cost.

## Protection of trademarks

Trademarks are protected through:

- Registration
- Maintenance
- Watching
- Enforcement

### Information Required For Registration of Trade Mark/Service Mark in INDIA



1.	Name of the Company (Applicant)	:	
2.	Constitution of the Applicant [Tick the appropriate entry]	:	Individual/ Sole Proprietorship/ Partnership/ Society / Limited Company/ Trust
3.	Name(s) of Proprietor/Partners/ Managing Director  (If partnership , mention all the names; kindly also mention whether any minor is a partner)	:	
4.	Address	:	
5.	Name of the Contact Person With Designation/Telephone/Mobile/Fax/Email	:	
6.	Nationality of the Applicant	:	
7.	Mention the Trade Mark to be registered  (If the Trade Mark is a label or a logo, kindly send 25 labels / prints)  (If the Trade Mark is a word per se, kindly specify)	:	
8.	Mention Goods/ Services in respect of which the Trade Mark is to be registered	:	
9.	Date of first use of the Mark by you in India (If proposed to be used, kindly specify)	:	
10.	Previous owners and other particulars, if any	:	
11.	Referred By	:	

Date:

Signature of the Applicant

**FORMTM48**

Agent Code No. 6006

TRADE MARKS ACT, 1999  
Form of authorization of agent in a matter  
or proceeding under the Act,  
Sec.123, Rule 21.

**GENERAL POWER OF ATTORNEY**

I/We \_\_\_\_\_ having office at \_\_\_\_\_ do hereby authorize Mr. V. Balakrishnan, Mrs. S. Geetha, Mr. S. Srinath, Mr. V. Sathish, and Mr. B. Srinivasan, Registered Trade Marks Agents, and Mrs. S. Archana, Mr. S. Balachandran and Mrs. T.K. Anuradha, Advocates and/or their duly authorized persons at L.R.SWAMI CO., No.3, Playground View Street, Nandanam Extension, Chennai-600035, to act as my/our agents for filing of new applications and necessary registrations of all my/our applications, conduct oppositions, to maintain registrations in force and to attend to all post-registration works connected with all my/our applications and registrations and we request that all notices, requisitions and communications relating thereto may be sent to such agents at the above address.

We hereby ratify all the acts done by the said agents so far in the above matter.

We hereby revoke all previous authorizations, if any in respect of the same matter or proceeding.

All communications relating to this application may be sent to the following address in India:

**"L.R. SWAMI CO.,**  
3 Playground View Street,  
Nandanam Extension,  
Chennai – 600 035"  
**Email:trademark@Lrswami.com**

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

Signature

To  
The Registrar of Trade Marks.

- Registration : maybe registered with USPTO and similar agencies throughout the world.
- Maintenance: just as registrations are maintained through affidavits, fees, and renewals, marks also must be maintained through proper use and diligence.
  - Minimize the possibility that trademark become generic or be abandoned.
- Watching: watching services notify trademark counsel of attempts to register conflicting marks, so that timely opposition to adverse applications maybe filed.
- Enforcement: pursuing adverse users.
  - An adverse user is one who is not authorized to use a mark, but uses it anyway or who is authorized to use the mark, but uses it improperly.
  - cease and desist order can help

# COPYRIGHT

- A right which is available for creating an original literary/dramatic/artistic/musical work.  
eg: cinematographic films including sound track and video, recordings on disks, tapes, other devices.
- Computer programs and software are covered under literary works and are protected in India under copyrights.
- The Copyright Act, 1957 as amended in 1983, 1984, 1992, 1994 and 1999 governs Indian copyright protection.
- When a person creates a literary, musical, scientific or artistic work he/she is the owner of that work and is free to decide on its use.
- The creator/author/owner of rights can control the destiny of the work.



- Definition: Copyright is a protection that covers published and unpublished literary, scientific and artistic works, whatever form of expression, provided such work is fixed in a tangible or material form.

## How is a copyright different from a patent or a trademark?

- Copyright protects original works of authorship, while a patent protects inventions or discoveries.
- Ideas and discoveries are not protected by the copyright law, although the way in which they are expressed may be.
- A trademark protects words, phrases, symbols, or designs identifying the source of the goods or services of one party and distinguishing them from those of others.

# RIGHTS CONFERRED BY COPYRIGHT

- Statutory Right
- Negative Right
- Multiple Rights
- Economic Rights
- Moral Rights
- Economic Rights allow right owners to derive financial reward from the use of their works by others.
- Moral rights allow authors and creators to take certain actions to preserve and protect their link with their work.
- The author or creator may be the owner of the economic rights or those rights may be transferred to one or more copyright owners. Many countries do not allow the transfer of moral rights.

# REGISTRATION OF COPYRIGHT IN INDIA

- The author/publisher/owner of the work may make an application in the prescribed form accompanied by the prescribed fees to the Registrar of Copyrights for entering the particulars of the work in the 'Register of Copyrights'.
- There are some essential documents require for smooth registration. Though there are some special requirements for different kinds of work, broadly the essential requirements are:
- 3 copies of the work if the work is published;
- If the work is not published, then 2 copies of manuscripts;
- If the application is being filed by an attorney, then special power of attorney signed by the attorney and the party;
- Authorization in respect of work, if the work is not the work of the applicant;
- Information regarding the title and language of the work;
- Information regarding the name, address and nationality of the applicant;
- Applicant must also provide his mobile number and email address;

- If the applicant is not the author, a document containing the name, address and nationality of the author, and if the author is deceased, the date of his death;
- If the work is to be used on a product, then a no-objection certificate from the trademark office is required;
- If the applicant is other than the author, a no-objection certificate from the author is required. In this case, an authorization of the author may also be required;
- If a person's photo is appearing in the work, then a no-objection certificate from such person is required;
- In case the publisher is not the applicant, a no-objection certificate from the publisher is required;
- If the work is published, the year and address of first publication is also required;
- Information regarding the year and country of subsequent publications;
- In case of copyright is for software, then source code and object code are also required.

- How you can register your original work with the copyright registrar under Chapter X of the Indian Copyright Act, 1957 and Rule 70 of the Copyright Rules' 2013.
- The steps involved in the registration process are:

Step 1: File an Application

Step 2: Examination

Step 3: Registration

### Ownership of copyright

If you made a new painting using your mind and talent. Can anyone get a copyright for it? Let's see who is legally entitled to get a copyright for his/her work. The following people are entitled to submit an application to get a copyright:

- The author
- The owner of exclusive rights
- The copyright claimant
- The authorized agent

## The author of the work is:

- Either the person who actually created the work, or
- If made during the scope of employment, then the employer. This is considered as ‘work made for hire’.
- Such an author is legally allowed to get a copyright for his/her work.

## The owner of exclusive rights

- The copyright law can grant a person exclusive rights to control and use and distribution of an original work.
- These rights include the right to reproduce or make copies of the original work, the right to distribute copies of the work, the right to publicly display the work, the right to perform the work and the right to alter the work and make derivatives of the original work.
- The owner of such exclusive rights is permitted to apply for registering his or her claim in the work.

## The copyright claimant

- This is either:
- The author, or
- A person or an organization that has obtained ownership rights from the author through a written contract, will etc.

## The authorized agent

- This refers to any person authorized to act on behalf of either:
- The author, or
- The copyright claimant, or
- The owner of an exclusive right.

# Terms of copyright in India

- The general rule is that copyright lasts for 60 years.
- In the case of original literary, dramatic, musical and artistic works the 60-year period is counted from the year following the death of the author.
- In the case of cinematograph films, sound recordings, photographs, posthumous publications, anonymous and pseudonymous publications, works of government and works of international organizations, the 60-year period is counted from the date of publication.
- <https://copyright.gov.in/Documents/handbook.html>



# Neighbouring rights

- According to the WIPO, **related rights**, also referred to as neighboring rights, protect the legal interests of certain persons and legal entities that contribute to making works available to the public or that produce subject matter which, while not qualifying as works under the copyright systems of all countries, contains sufficient creativity or technical and organizational skill to justify recognition of a copyright-like property right.
- Traditionally, related rights have been granted to three categories of beneficiaries:
- Performers (actors/musicians);
- Producers of sound recordings (also referred to as phonograms); and
- Broadcasting organizations.

## **Transfer of copyright**

- The owner of the copyright of a work has the right to assign his copyright to any other person.
- The effect of assignment is that the assignee becomes entitled to all the rights related to the copyright to the assigned work.
- However, mere grant of right to publish and sell the copyrighted work amounts to publishing right and not assignment of copyright.
- Where the assignee of a copyright becomes entitled to any right comprised in the copyright, he shall be treated as the owner of the copyright in respect of those rights.
- The assignor shall also be treated as the owner of copyright with respect to unassigned rights.

# Copyright Infringement

- ✓ copyright is a form of intellectual property protection granted by law to creators (writer, composer, artist, producer, publisher) of original works of authorship, such as literary works, dramatic, musical and artistic works, cinematograph films and sound recordings.
- ✓ Typically, it lasts for 60 years from the end of the calendar year in which the author dies.
- Copyright infringement is the use or production of copyright-protected material without the permission of the copyright holder.
- It implies that the rights afforded to a copyright holder, such as the exclusive use of a 'work' for a set period of time, are being breached by a third party.

- It is an infringement of copyright to do any of the following with copyrighted content:
  - ✓ Copying it.
  - ✓ Issuing copies of it to the public.
  - ✓ Renting or lending it to the public.
  - ✓ Performing or showing it to the public.
  - ✓ Communicating it to the public.
- Secondary infringement may occur if someone imports an infringing copy, possesses or deals with it, or provides means for making it without due permission.

- In cases of infringement, a copyright owner can seek civil remedies, as well as file a criminal complaint. Civil remedies include:
  1. Seeking injunctions to prohibit further infringement.
  2. Delivering all infringing articles to the owner.
  3. Right to seize copies of such infringing articles.
  4. Recovering damages for loss from the account of the infringer's profits.

# Databases and Copyright

- 3 broad approaches for database protection:
  1. Protection of databases through contracts
  2. Protection of databases through copyright laws
  3. *Sui generis* system of protection of databases
- International copyright protection
- India is a member of both Berne and Universal conventions and Indian law extends protection to all copyrighted works originating from any of the convention countries.
- Foreign works first published in a country that is a member of either of the conventions would be accorded the same copyright protection in India as Indian works without undergoing any formalities, on the assumption that the home country accords reciprocity to Indian works.

# Digital Millennium Copyright Act, 1998

- DMCA was signed into law by US President Clinton on October 28, 1998.
- The legislation implements two 1996 World Intellectual Property Organization (WIPO) treaties:
  1. the WIPO Copyright Treaty and
  2. the WIPO Performances and Phonograms Treaty.
- The DMCA also addresses a number of other significant copyright-related issues.
- The DMCA is divided into five titles:

- **Title I**, the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998,” implements the WIPO treaties.
- **Title II**, the “Online Copyright Infringement Liability Limitation Act,” creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities.
- **Title III**, the “Computer Maintenance Competition Assurance Act,” creates an exemption for making a copy of a computer program by activating a computer for purposes of maintenance or repair.
- **Title IV** contains six miscellaneous provisions, relating to the functions of the Copyright Office, distance education, the exceptions in the Copyright Act for libraries and for making ephemeral recordings, “webcasting” of sound recordings on the Internet, and the applicability of collective bargaining agreement obligations in the case of transfers of rights in motion pictures.
- **Title V**, the “Vessel Hull Design Protection Act,” creates a new form of protection for the design of vessel hulls.



# COMPARING TRADEMARK WITH PATENTS, DESIGN AND COPYRIGHT

- While trademark law seeks to protect indications of the **commercial source of products or services**, patent law generally seeks to protect **new and useful inventions**, and registered designs law generally seeks to protect the **look or appearance of a manufactured article**.
- Trademarks, patents, and designs collectively form a subset of intellectual property known as industrial property because they are often created and used in an industrial or commercial context.
- Copyright law generally seeks to protect original literary, artistic, and other creative works.
- Continued active use and re-registration can make a trademark perpetual, whereas copyright usually lasts for the duration of the author's lifespan plus 50-70 years for works by individuals, and some limited time after creation for works by bodies corporate.
  - This can lead to confusion in cases where a work passes into the public domain but the character in question remains a registered trademark.

- Although intellectual property laws such as these are theoretically distinct, more than one type may afford protection to the same article.

Eg: the particular design of a bottle may qualify for copyright protection as a non-utilitarian [sculpture], or trademark protection based on its shape, or the 'trade dress' appearance of the bottle as a whole may be protectable.

- Titles and character names from books or movies may also be protectable as trademarks while the works from which they are drawn may qualify for copyright protection as a whole.
- Trademark protection does not apply to utilitarian features of a product such as the plastic interlocking studs on Lego bricks.
- As a trademark must be used to maintain rights about that mark, a trademark can be 'abandoned' or its registration can be canceled or revoked if the mark is not continuously used.

- By comparison, patents and copyrights cannot be 'abandoned' and a patent holder or copyright owner can generally enforce their rights without taking any particular action to maintain the patent or copyright.
- Additionally, patent holders and copyright owners may not necessarily need to actively police their rights. However, a failure to bring a timely infringement suit or action against a known infringer may give the defendant a defense of implied consent or estoppel when the suit is finally brought.
- Like patents and copyrights, trademarks can be bought, sold, and transferred from one company or another.
- Unlike patents and copyrights, trademarks may not remain intact through this process. Where trademarks have been acquired for marketing generic (non-distinctive) products, courts have refused to enforce them.

Eg: Edgar Rice Burroughs and his fictitious character Tarzan

# SOFTWARE COPYRIGHT

- Affects anyone using a computer and most particularly businesses.
- Primary source is – Copyright, Designs and Patents Act 1988.
- Terms: Software, hardware, source code, object code
- Software copyright is similar to any other sort of copyright. But different in certain aspects.
- Copyright law gives a programmer a high degree of control over the program they creates.
- The permission of the rights owner is necessary to run the program
- Permission is necessary for ‘copying’.

# Need of software copyright

- if someone infringes on your copyright.
- Then, suddenly, the protection is no longer automatic. It's up to you to file a lawsuit in federal court and to convince the judge to order the other party to stop the infringement and compensate you for your losses.
- Classification of Software according to copyright
- 4 broad classifications
  1. Commercial
  2. Shareware
  3. Freeware
  4. Public Domain

- In a broad sense, software or programs are the set of instructions given to the computer to perform certain operations. The process falls under the category of literary work.
- As per The Indian Copyright Act, 1957, section 2 (O), you can protect your work of the software coding and programming from reproducing, copying, translating, or adapting. It is the Intellectual Property Right in India.
- All the graphics, audio, videos, and coding used in the software are protected under the act.
- The Indian Copyright Act protects the owner's (of software, program) economic and moral rights by providing validation, ownership, and royalties for the developed software.
- As per the act if anyone copies the original work without the owner's permission, then the Registrar of copyrights has authority to send the notice of Infringement and further legal action is taken against the violator.

- Software piracy is the known name for the copyright violation or Infringement of original software. It is nothing but the reproduction, copying of someone's original work without their consent in an unauthorized manner.
- examples of software infringement:
  - ✓ Downloading the software or programs from the internet is a typical example of Infringement. Third parties upload the software on the internet for free or at very few charges.
  - ✓ End-user piracy. The end-users, utilizing the unlicensed software on their systems are the violators.
  - ✓ Many times, the computer dealers pre-install software on the systems even before the sale. Also, some dealers use one licenced copy of the software for many systems. This is also a form of copyright infringement.
  - ✓ The sale of illegal duplicate copies of software is the most common violation of copyright.

- However, the following activities do not constitute software copyright infringement,
  - ✓ Making backup copies by the owner of software/program as a safety measure against loss or damage.
  - ✓ Creating software copies for personal use only.
  - ✓ To study the information and future scope of the software (intimating owner).
  - ✓ To test the feasibility, functionality of the software.



# Legal remedies for software copyright infringement in India

- If any owner of the software finds the Infringement, he/she can take legal action against it. The legal remedies are,
  - ✓ Permanent or temporary injunctions on the violators.
  - ✓ Destruction of all infringed copies of the software or program.
  - ✓ Monetary compensation.
  - ✓ Criminal prosecution.
- According to The Indian Copyright Act, 1957, the criminal prosecution for software copyright infringement involves imprisonment for six months with a minimum fine of Rs 50,000/.
- If the violator is found guilty for the second time, the minimum imprisonment is for one year and a fine of Rs 1,00,000/.
- For the person using the violated software copies is also punishable by The Act.
- Moreover, the prosecution with a minimum imprisonment of at least seven days up to three years and a minimum fine of Rs 50,000/.

# What happens if someone receives a copyright infringement notice?

- The notice for software infringement means the attempt to avoid the court procedure and settling the issue without the intervention of the court.
- Moreover, the notice means to bring the matter to your attention and it acts as a legal threat. If you get the notice, the issue that raises to the court, then you should submit all the details of your software program.
- Further, reviewers appointed by the legal authority will scrutinize your documents related to software, codes, and programs.
- If the reviewer finds you guilty then, permanent or temporary injunction, financial compensation, and criminal prosecution will be conducted.
- Additionally, if you have not been found guilty, then you may ask for the reimbursement of court proceeding charges and other monetary repayments for your losses.

# Software Copyright Compliance Policy for Business

- Most of the infringement cases are caused by ignorance than wilful disregard of law.
  - To ensure that your business does not infringe, following guidelines may help.
1. Having a written policy on compliance with software law.
  2. Appointing a senior employee who is familiar with software copyright law as the compliance officer.
  3. Maintain a record of all the software used by the company, together with licence terms for that software and ensure that licence terms are complied with.
  4. Except where the software carries a “copyleft”, acquire softwares only from reputable dealers.

5. If any software has particularly restrictive licence terms, procedures for ensuring that those terms are complied-with should be put in place.
6. Employees should be made aware of the importance of respecting software copyright.

Recognise problematic activities like:

- Downloading a copyrighted version over internet
- Making copies
- Transferring licence from a computer to other
- Taking company software to work at home

# Software Auditing

- Audit means an independent examination of a software product or processes to assess compliance with specifications, standards, contractual agreements, or other criteria.
- The terminology, Audit in the field of software can relate to any of the following:
  - ✓ A software Quality Assurance, where the software is audited for quality
  - ✓ A software licensing audit, where a user of software is audited for licence compliance
  - ✓ A Physical Configuration Audit (PCA) is the formal examination to verify the configuration item's product baseline

## Objectives of Audit:

- The aim of a conducting software audit is to provide an independent evaluation of the software products and processes to applicable standards, guidelines, plans, and procedures against compliance.

# Indian Copyright laws and procedure

## IPR Law in India

- The programmer(s) invest time and effort in developing a software.
  - As the main purpose of software is to make process easy, therefore it is important to value the creation and protect such software in the name of the owner of the work.
- Section 2(ffc) of the Copyright Act 1957 which defines "computer programme" as *"a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result"*, read with section 2(o) of the Copyright Act 1957 which defines *"literary works" includes computer programs, tables and compilations including computer databases.*", protects software or computer programs as "Software work" under "Literary works" as per the Copyright law of India.

- Software protection under Indian law is fairly simple process, all you need is duly filed copyright application along with copies of work (source code and object code) in its programming language and machine-readable format (not written or text form).
- Even a new version of the software is protected with the above said simple procedure in India, whereas in few jurisdictions the difference of new version and old version must be clearly defined and mentioned with the Copyright Application.
- In India, as practice it is suggested that the source code and object code submitted must be the final compilation,
  - i.e. complete coding, whereas, under rule 70(5) Copyright Rules 2013, the requirement is mentioned as "Every application for registration of a computer programme shall be accompanied by the source and object code."
- Even though, there is no requirement of complete source and object code, the Copyright Office has at instances taken objection for incomplete source and object code.
- The regime looks similar as to the stand with United Kingdom Copyright Office, where the requirement is to provide with complete source code of the program.

- A copyright protection is extended to the expression of an idea,
  - wherein the expression in its entirety is protected for the applicant, however, where a work is modified by third party with basic alterations/ adjustments, and without any creativity of its own,
  - then the original copyright holder will be eligible to claim infringement on the grounds of substantial copying and absence of "flavour of minimum requirement of creativity".
- In view thereof, protection of software under the copyright laws of India, protects the expression of the idea, in form of coding, and is also protected against any substantial copying of the expression in an infringed work.



- Software or computer programs are *per se* not protectable as Patentable subject matter.
- However, there can be certain exceptional situations wherein the computer programs or software may qualify as patentable. In order to claim patent for a software work, one must show the following important determining factors:
  - the invention must consist of patentable subject matter;
  - the invention must be capable of industrial application;
  - it must be new (novel);
  - it must involve an inventive step (be non-obvious); and
  - the disclosure of the invention in the patent application must meet certain formal and substantive standards

- since Patents Act 1970 includes computer programs under the list of non-patentable subject matter, therefore in order to make the software patentable then the following parameters are to be ensured:
  - **INVENTION:** Invention is related to computer where software is essential and gives a technical effect; AND
  - **SOMETHING MORE:** That the invention is more than mere technical effect by software,
    - i.e. there is a tangible element which interacts with the software and thus making the set of software and tangible element a software.
- Software or computer programmes are mainly copyright subject matter, however, if the conditions for patentability are satisfied then the computer programme may be protected as Patents.
- Even though, Patent gives better protection over the use of the work, however, copyright is the first right of the software, which is automatic once the work is created.
- Unless, the owner is able to satisfy the conditions of patent, the software so created (if original creation) will be protected under the Copyright laws.

## Import duty on computer software

- Generally, organizations enter into licensing agreements under which software is imported for using the same for business purposes.
- There are generally two ways of importing the software either by downloading it electronically or by loading it on CD.
- If supply of software in the physical form (i.e. CD, DVD Packages) of Information Technology Software (branded as well as tailor-made) shall apply as goods under the Customs Tariff Act with HSN Code 8523 80 20. The GST rate for software sold in physical form is also 18%.

# Policy of legal reproduction/duplication of imported software in India

- Tax liability of foreign software seller without a permanent establishment in India would reduce to the 2% equalisation levy introduced via Finance Act 2020, from the 10% royalty tax, which the Indian buyer has hitherto been liable to withhold.
- The Supreme Court ruled that payments made to non-residents for software purchase can't be taxed as royalty, setting at rest a long-standing row.
  - This means tax liability of foreign software seller without a permanent establishment in India would reduce to the 2% equalisation levy introduced via Finance Act 2020, from the 10% royalty tax, which the Indian buyer has hitherto been liable to withhold.
- The ruling will lower the cost of software purchases for Indian firms as the overseas sellers may chose to lower prices, taking advantage of the tax relief.
- Software firms such as IBM India, Samsung Electronics, GE India, Hewlett Packard India, Mphasis and others, which import software for sale in India, are among the principal beneficiaries.

- **Software Piracy** is the illegal approach of copying, distributing, modifying, selling, or using the software which is legally protected.
- So in a simple term, we can say Software piracy is the act of stealing legal software.
- 1. **End user piracy:** The most common type of piracy.
  - Also known as softlifting/softloading, means sharing a program with someone who is not authorized by the license agreement to use it.
  - A common form is purchasing a single licensed copy of software and then loading the software onto several computers, in violation of licensing terms.
  - lending programs to their roommates and friends, either not realizing it's wrong, or not thinking that it's a big deal.
    - common in both businesses and homes.

## 2. Hard disk loading

- Often committed by hardware dealers, this form of piracy involves loading an unauthorized copy of software onto a computer being sold to the end user.
- This makes the deal more attractive to the buyer, at virtually no cost to the dealer.
- The dealer usually does not provide the buyer with manuals or the original CDs of the software.
- This is how operating systems, like Windows, are often pirated.

## 3. Software Counterfeiting

- Counterfeiting means producing fake copies of a software, making it look authentic.
- This involves providing the box, CDs, and manuals, all designed to look as much like the original product as possible.

- Microsoft products are the ones most commonly counterfeited, because of their widespread use.
- Most commonly, a copy of a CD is made with a CD-burner, and a photocopy of the manual is made. Counterfeit software is sold on street corners, and sometimes unknowingly sold even in retail stores. Counterfeit software is sold at prices far below the actual retail price.

#### 4. Online piracy

- The fastest-growing form of piracy is Internet piracy.
- With the growing number of users online, and with the rapidly increasing connection speeds, the exchange of software on the Internet has attracted an extensive following.
- In the past, bulletin board systems (BBS) were the only place where one could download pirated software. Currently, there are hundreds of thousands of "warez" sites providing unlimited downloads to any user.
- Often, the software provided through these "warez" sites is cracked to eliminate any copy protection schemes.

# Copyright procedure

- Registration Procedures for Filing Copyright
- An application for copyright registration contains three essential elements: a completed application form, a nonrefundable filing fee, and a nonrefundable deposit—that is, a copy or copies of the work being registered and “deposited” with the Copyright Office.
- A copyright registration is effective on the date the Copyright Office receives all required elements in acceptable form, regardless of how long it takes to process the application and mail the certificate of registration.
- The time needed to process applications varies depending on the amount of material the office is receiving and the method of application.

## Option for registering copyright software

1. Online Registration
2. Registration with Fill-In Form CO (copyright office)
3. Registration with Paper Forms



## • Requirements for Registration Of Copyright Software

### • Computer Programs without Trade Secrets

1. For published or unpublished computer programs, send one copy of identifying portions of the program (first 25 and last 25 pages of source code) reproduced in a form visually perceptible without the aid of a machine or device, either on paper or in microform, together with the page or equivalent unit containing the copyright notice.

2. For a program less than 50 pages in length, send a visually perceptible copy of the entire source code.

3. Where an applicant is unable or unwilling to deposit source code, he/she must state in writing that the work as deposited in object code contains copyrightable authorship.

The Office will then register the work under its rule of doubt since it has not determined the existence of copyrightable authorship.

4. When a computer program is embodied in a CD-ROM, ordinarily the entire CD-ROM package must be mailed to the Copyright Office, including a complete copy of any accompanying operating software and instructional manual.

- If registration is sought for the computer program, the deposit should also include a printout of the first 25 and last 25 pages of source code for the program.

- **Computer Programs Containing Trade Secrets**

1. First 25 and last 25 pages of source code with portions containing trade secrets blocked out; or

2. First 10 and last 10 pages of source code alone, with no blocked out portions; or

3. First 25 and last 25 pages of object code plus any 10 or more consecutive pages of source code, with no blocked-out portions; or

4. For programs 50 pages or less in length, entire source code with trade secret portions blocked out.

## Whenever Portions Of Code Are Blocked Out, The Following Requirements Must Be Met:

- the blocked out portions must be proportionately less than the material remaining; and
- the visible portion must represent an appreciable amount of original computer code.

## Effective Date of Registration

- A copyright registration is effective on the date the Copyright Office receives all the required elements in acceptable form.
- The time the Copyright Office requires to process an application varies, depending on the amount of material the Office is receiving.