

M S Ramaiah Institute of Technology

Department of Information Science & Engineering

IS523 – Intellectual Property Rights

Unit -3

1. How a trademark differs from a brand name? Give the functions of a trademark.

A brand name identifies a specific product or name of a company. Whereas the trademark is a legal registration of that brand or trade name. The trademark offers a property right, meanwhile the brand is a relation between an audience group and a product, idea, service, with the aim of adding value to a business

Trademark is a visual symbol in the form of a word, phrase, design, sound, smell, colour, product configuration, numbers, combinations of those, a device, or a label applied to articles of commerce, which is capable of distinguishing the goods or services of one person from those of others. A trade mark provides protection to the owner of the mark by ensuring the exclusive right to use it or to authorize another to use the same in return for payment.

Brand, it is a set of promises made by a business to its target client. The brand makes it easy for consumers to identify the product and promises consistency and quality as well as any other brand values the company promotes.

For example: Nestle is a trademark and it owning some brands called Maggie, Milky bar etc. which their competitors cannot use the registered brand name, the logo, the slogan or any other item included in the trademark.

Functions of Trademark:

Origin Function: Helps to identify the source and those responsible for the products and services sold in the market.

Choice Function: Enable consumers to choose goods and services with ease while shopping.

Quality Function: Consumers choose a particular trademark for its known quality. It proposes to guarantee its quality.

Marketing Function: Plays an important role in advertising.

Economic Function: Established trademark is a valuable asset. Trademarks may be licensed or franchised.

2. Explain the registration and renewal process of a trademark.

Who Can Apply?

Any person who claims to be a proprietor of a trademark and is desirous of registration of the mark can apply. The application may be made in the name of an individual, partners of a firm, a Corporation, any Government Department, a trust or joint applicants.

A mark which satisfies the prescribed requirements by the trademark office could be registered provided it does not fall under the category of prohibited marks.

The registration of a Trademark involves the following process:

1. Trademark application filing:

An application for registration of a trade mark may be made on Form TM-1 with prescribed fee of 2500/- at one of the five office of the Trade Marks Registry located at Mumbai, Delhi, Kolkata, Chennai and Ahmedabad depending on the place where the applicant resides or has his principal place of business. The office enables registration of two or more persons to be registered as joint proprietors of the trade mark. Every application for registration of a trademark shall contain a representation of the mark in the place provided in the form for the purpose. Ten additional representations of the mark have to be supplied with the application. Upon filing of the application, the registry will issue us with an official receipt with the filing date and number allotted to the application.

2. Examination report by the registry:

The application is then formally examined by the Indian Trade Marks Office, as to its inherent registrability and/or any similarity with existing marks. If an objection to registration is raised, an official examination report will issue. To overcome the objection, it is necessary to file a written response or presenting evidence of acquired distinctiveness and in most cases, an interview/hearing with the examiner is posted. The Registrar may require the applicant to file an affidavit testifying to such user with exhibits showing the mark as used. If, following examination, the trademark application is considered allowable, a Letter of Acceptance (TLA order) will issue, after which the trademark will be published.

3. Reply to the examination report:

An examination report will be issued by the registry and the Applicant must respond to the objections that have been raised in the examination report within a period of one month from the issuance of the examination report. Thereafter and based on the response to the examination report by the applicant the application is sent for advertisement.

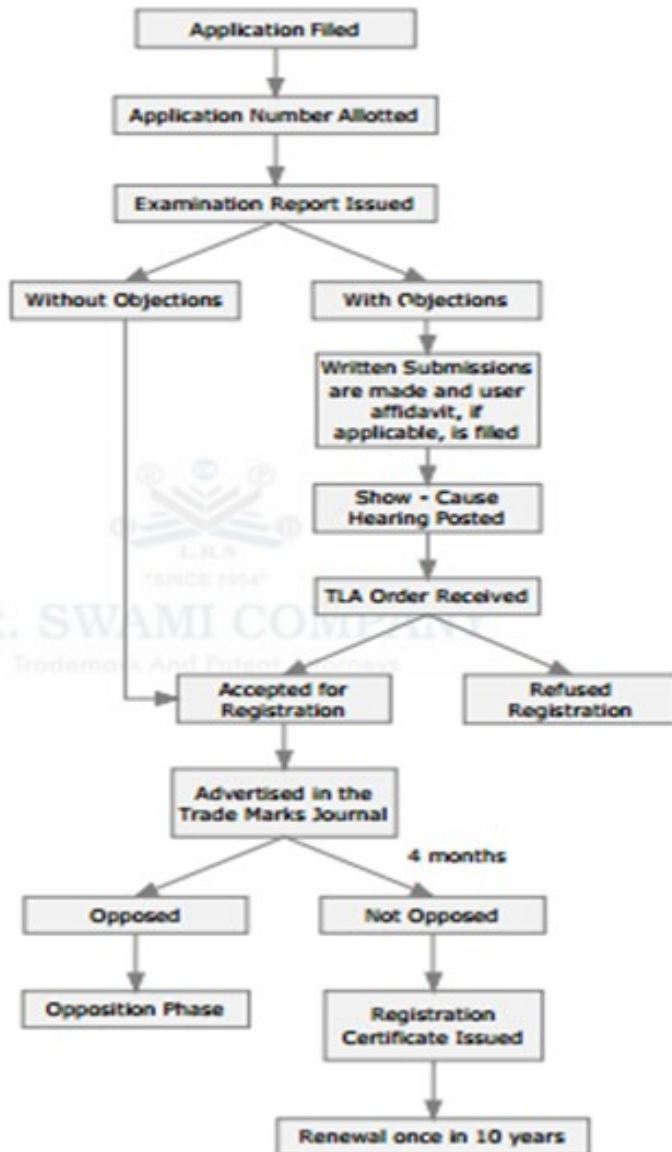
4. Advertisement in Indian trademark journals:

An application is advertised in the Trademark journals so as to invite the public to filling the opposition for the Trademark.

5.Opposition and Registration:

If there are no oppositions within 4 months from the date of advertisement in the Trade Marks Journal, then the trademark registration certificate will be issued. Trademark Registration is a tedious process and it takes around 18-24 months to obtain registration in a straight-forward case, without any objections or oppositions. However, once the trademark application is filed, an application number is allotted immediately.

Trade Mark Registration Process



Duration and renewal process of Trademarks:

The registration when granted is valid for a period of ten years from the date of registration (i.e. the date of application). It is imperative for a proprietor to seek renewal of registration before the expiry of the validity, failing which the mark becomes liable to be removed from the Register on account of non-renewal.

The request for renewal of a trademark can be filed six months prior to the expiry of the validity of registration. The law also permits renewal and restoration of lapsed trademark provided such a request is made within the maximum period of one year after the expiry of the validity.

If the registered applicant of the trademark is not careful in renewing the registration either prior to the expiry or within one year after the expiry of validity, the mark shall stand removed from the register of trademark and would not qualify to be renewed. In such a scenario, the applicant will have no other option but to file a fresh application.

3. How can trademarks be protected?

The Trademarks have to be protected from infringements and passing off. Infringement is an unauthorized use of the registered trademark. Without the consent or authorization of the owner if anyone uses the registered mark commits infringement.

There three major cases when the Trademark is said to be infringed:

1. The Infringed-Trademark is identical to registered proprietor's Trade Mark.
2. The infringed Trade Mark contains complete or a part of registered proprietor's Trade Mark features combined with other matter.
3. The infringed Trade Mark is deceptively similar to registered proprietor's Trade Mark. For example, in phonetics, like Lakme and Like-me or in brand spelling like Britannia and Bricannia.

The proprietor of a trademark has a right to file a suit for infringement of his right and obtain

1. Injunction - An injunction restrains the defendant from using the offending mark pending the trial of the suit or until further orders.
2. Damages - In assessing the damages the important question is what is the loss sustained by the plaintiff. The loss must be the natural and direct consequence of the defendant's acts. The object of damages is to compensate for loss or injury.
3. Accounts of profits - Where a plaintiff claims the profits made by the unauthorized use of his trademark, it is important to ascertain to what extent the trademark was used, in order to determine what proportion of the net profits realized by the infringer was attributable to its use.

No Action for Infringement of Unregistered Trade Mark:

No person shall be entitled to institute any proceeding to prevent, or recover damages for, the infringement of an unregistered Trade Mark.

Jurisdiction:

A suit for infringement of registered trademark is filed in District Court having jurisdiction or in a High Court having original jurisdiction to entertain such suits. The infringement must have taken place within the territorial jurisdiction of the Court.

Limitation

The period of limitation for filing the suit is three years from the date of infringement.

4. Explain the following with respect to trademark.

i. Acquisition of trademark:

Your company can acquire a trademark several other ways. One method requires researching the name in the geographic region where your company does business or offers services. If the name isn't in use in that geographic region, and isn't registered as an active trademark with the USPTO or other trademark offices recognized under international treaties, then your firm can do business using the name and file a trademark application request.

Other trademark acquisition methods include purchasing the mark, licensing the mark for specific uses or acquiring the mark as part of a firm acquisition. The legal documents in the business acquisition must ensure the mark remains with the firm in the business transfer. When licensing a mark, your firm must confirm the person or firm holding rights to the name and investigate the current and specific rights granted to others. Marks are considered assets, so the required research must include a search of any liens; licenses; consent agreements; court cases, pending or closed; and settlements involving the use of the acquired mark. An attorney with trademark experience can offer guidance in completing a contract meeting both federal and state trademark acquisition guidelines, as well as protecting your business interests. If your company plans to do business or provide services in all states and also in foreign countries, your transfer documents must specify the acquisition in all markets.

ii. The implication and benefits of registration:

1.Exclusive rights:

Trade mark registration gives the proprietor the right to exclusive use of the mark in respect of the goods or services covered by it. Possibly the most important reason for registration of a trade mark is the powerful remedies against unauthorised use. A trade mark registration allows the proprietor to sue for infringement and to obtain very powerful remedies such as interdict, deliver up infringing articles and damages. At the same time, the trade mark infringement provisions do not preclude a person.

2.Hypothecation / security:

A registered trade mark can be hypothecated as security, meaning that a registered trade mark can be pledged as security to secure loan facilities much the same way as immovable property can be bonded.

3.Intangible property:

A very important reason for registration is to create the trademark as an identifiable intangible property in the legal sense. Trademark registration is a value store or receptacle of the value attaching to the reputation or goodwill that the product enjoys.

A common law trademark attaches to the goodwill and, generally speaking, the goodwill is not severable from the business in its entirety. This has the practical effect that an unregistered trade mark will never have a separate and independent existence. It will always form part of the goodwill and it will always be attached to the business. The only way in which to acquire a common law trade mark is to acquire the business as a going concern. Trademark registration, by contrast, can be transferred like any other asset owned by a person or a company.

4.Licensing:

A registered trade mark can be licensed. A trade mark licence can be recorded on the trade mark register, giving the licensee rights to institute legal proceedings in the event of infringement.

5.Assignment:

A registered trade mark can be transferred. The same is not possible for a common law trademark, which can only be transferred with the business.

6.Deterrent:

Trademark registration deters other traders from using trademarks that are similar or identical to yours in relation to goods and services like yours. By using the ® symbol, you put others on notice of your rights. Moreover, a registered mark can be found when others search the official register before choosing to commence using a particular name.

7.Use in proceedings:

A trade mark registration is prima facie evidence of validity of the registration and the rights conveyed by registration. In legal proceedings relating to a registered trademarks the fact that a person is registered as the proprietor of the trade mark is evidence of the validity of the original registration of the trade mark, unless the contrary is proved.

8.The right to use the symbol ® or “R” or word registered:

Once the trademarks are registered the symbol ® or “R” or word “Registered” may be used for the goods and services listed in the registration.

iii. Procedure for registration:

The registration of a Trademark involves the following process:

1. Trademark application filing:

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2. Examination report by the registry:

The application is then formally examined by the Indian Trade Marks Office, as to its inherent registrability and/or any similarity with existing marks. If an objection to registration is raised, an official examination report will issue. To overcome the objection, it is necessary to file a written response or presenting evidence of acquired distinctiveness and in most cases, an interview/hearing with the examiner is posted. The Registrar may require the applicant to file an affidavit testifying to such use with exhibits showing the mark as used. If, following examination, the trade mark application is considered allowable, a Letter of Acceptance (TLA order) will issue, after which the trademark will be published.

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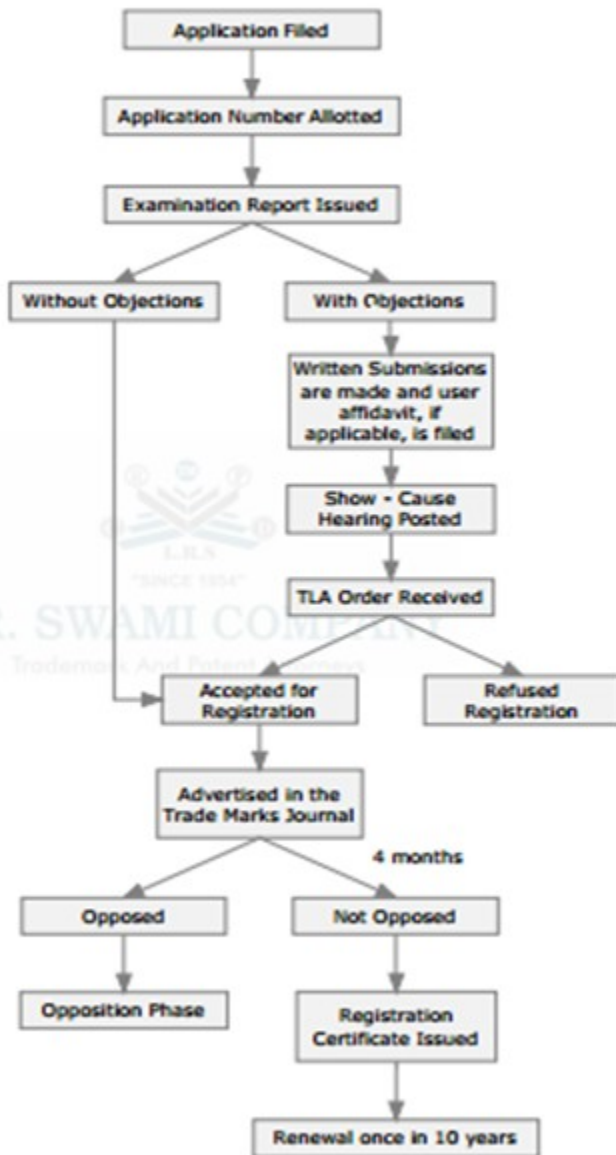
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5. Opposition and Registration:

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tedious process and it takes around 18-24 months to obtain registration in a straightforward case, without any objections or oppositions. However, once the trademark application is filed, an application number is allotted immediately.

Trade Mark Registration Process



5. What are the special trademarks granted in India apart from words and logos?

1. As per Indian trademark law 3-D marks or three dimensional can be registered in India.
2. Sound and Smell can have registered as a trademark in India.
3. Domain name can be used a trademark or service mark in India. If it is merely used to indicate the URL or address at which a web site may be found, such is not sufficient. It must be used as a source identifier for the goods or services.
4. Service mark can also be used it is similar to trademark except it identifies and distinguishes the service.
5. Collective mark can also be used as a trademark owned by an organisation, whose members use it to identify themselves with a level of quality or accuracy, geographical origin, or other characteristics set by the organisation. Example “CA” device used by the Institute of chartered Accountants.

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6. Explain in detail the items which are excluded from trademark in India.

The following are the list of items that cannot be trademarked in India

- Descriptive words i.e words that describe the quality, size, intended purpose, character etc of service or product. Eg. Best Ice cream, S, M, L for clothes sizes
- Trademarks that suggest number or quantity . Eg. 12 eggs
- Trademarks that sound/look similar to existing trademarks in the same category i.e they are deceptively similar to existing trademarks or cause confusion.
- Values cannot be trademark. Eg. Honest Hairdressers
- Geographical names cannot be trademarked if it is a Geographical Indicator, population or region > 3000, region is already popular or has previous association
- Trademarks with direct association to product. Eg. Cauvery Water

- No trademark with year, dates etc, time of provision – 24/7, speed or any other indication of quality.
- No trademarks comprising of God's names or Surnames
- No misspellings. Eg smartt books
- Entire urls are not trademarkable. eg www.flipkart.com . however domain names like 'flipkart' are trademarkable
- Slogans and election symbols cannot be trademarked
- Names starting with “Indian Institute of”/ “Indian Council of” cannot be trademarked unless started by Government
- Trademark should not belong to the class of marks prohibited by registration eg. Mark prohibited by the the Emblems and Names Act 1950.
- Trademark containing or comprising of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India is prohibited
- Trade mark comprising or containing scandalous or obscene matter is not allowed

7. With a neat flow chart explain the process of trademarks prosecution in India

Trademark prosecution in India involves the following steps :

1) Filling : The application for trademark registration can be filed for a single or multi-class trademark with the Trademark Registrar. The application should be in the prescribed manner and can be filed at one of the five Trademark Registrar Offices or online.

Once the Trademark registration is filed with the Trademark Registrar, a trademark application allotment number is provided within one or two working days.

2) Examination : The application is examined by the Registrar in accordance to the provision of Trademark Act and an Examination Report is issued. The Registrar can accept or object the application. If accepted, the proposed trademark is published in the Trademark Journal.

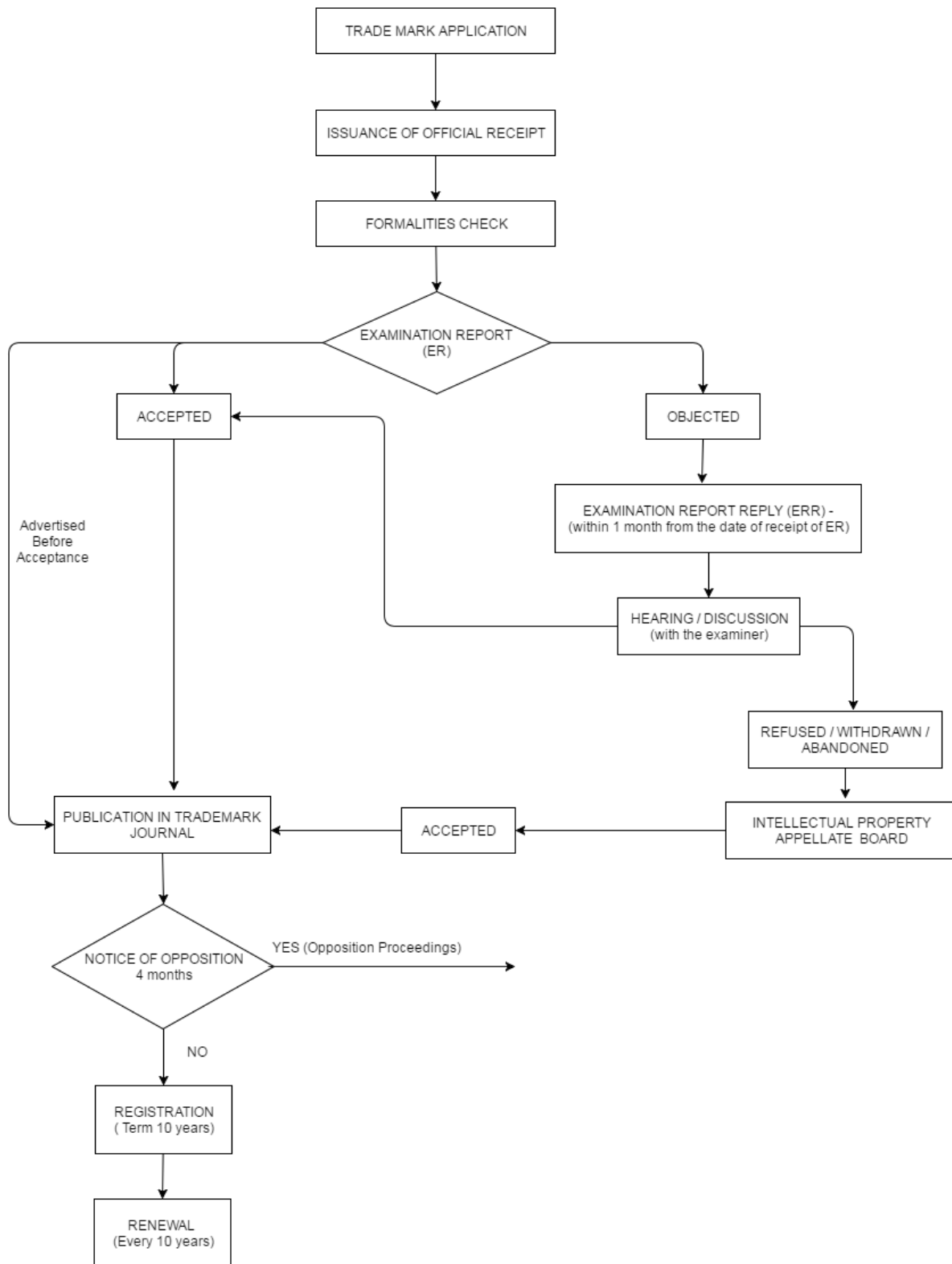
If the application is objected the trademark applicant has the right to appear before the Registrar and address the objections. If the Registrar is satisfied then the trademark can be published, otherwise the applicant has the right to appeal before the Intellectual Property Appellate Board.

3) Advertisement : Once the trademark registration application is accepted by the Registrar, it is filled in the Trademark Journal so as to invite public to file opposition against registration of a mark. If no objections are filed within 90 days of publication, the mark will typically be registered.

4) Opposition : Any aggrieved person can oppose the registration of a trademark by filing a notice of opposition within a prescribed time with the Registry. A hearing will be called where both trademark applicant and the opposing party can provide their justification. The Trademark Hearing Officer will determine whether the application is accepted or rejected.

5) Registration and Renewal : Once there are no objections or oppositions to the trademark registration application, the application is registered. The mark is then issued as a registered trademark for a period of 10 years from the date of filing of application and the registration certificate is issued.

It can be renewed from time to time for an unlimited period. Each renewal term is for a period of 10 years.



8. Can a company register a single trademark across different categories? Explain with the relevant procedure.

Yes, a company can register for a single trademark across different categories, it is called a Multi-Class Trademark.

Multiple-class application is an application for trademark registration in which the applicant seeks registration for more than one class. A single application reduces the time and effort it takes to file several applications and it is easier to keep track of a single application than multiple applications.

Multi-class applications are allowed, but statutory fees remain the same whether a single application is filed for goods/services falling in different classes or a separate application is filed with respect to each class of goods/services as the Indian Trademark Office charges approximately Rs.4000 per class.

Once a trademark application is filed, it is examined as to its registrability which includes distinctiveness, deceptiveness, etc. and availability based on the existence of prior trademarks registered or pending applications. The registration procedure is similar to that of a single class application.

Opposition filed against one class stalls the entire application. When an opposition is filed by a third party against any one of the classes, the other classes in the same application are stalled from proceeding towards registration. A divisional application would have to be filed to divide the other unopposed classes so that they can proceed to registration.

9. What are shape trademarks? What is the procedure for its registration?

In India, the definition of trade marks under the Trade Marks Act, includes shapes and packaging as long as it is capable of being represented graphically and is able to distinguish goods and services of one person from those of another. The registrability of the shape mark, therefore, has to satisfy the basic test of being a trade mark as laid down in the Act.

Three dimensional marks or shapes which are capable of distinguishing the goods and services of one trader from those of another have been registrable as trademarks since 1996 and continue to be so. Apart from the basic test of being a trademark in terms of Section 2 of the Act, a shape mark has also to satisfy the following additional tests as laid down in Section 9:

1. The shape should not result from the nature of goods themselves. The shape in question has to be distinctive in relation to the goods and services for which it is used. For example, the shape of water bottle which emanates from its very nature will be barred from registration.
2. The shape in question has to be unique for registering on an intent to use basis. However, this can be proved by showing distinctiveness acquired through use as evidenced by trade magazines,

catalogues and industry specific publications which illustrates that the shape mark is solely associated with that industry.

3. The shape should not be such as is necessary to obtain a technical result. No trademark protection can be accorded if essential components of any goods are influenced by functional considerations required for achieving a technical result. Eg. Lego Blocks

4. The shape in question should not be a shape which is the result of a functionality.

5. The shape should not be such as to give substantial value to the goods. This is to exclude aesthetic shapes or shapes which add some values either in the design or appearance of the goods. This is determined by a comparison between the shapes sought to be registered and the shapes of equivalent articles.

Procedural Requirements:

The Indian Trade Marks Rules, 2002 lays down the procedural requirements for filing a shape mark application in India which include:

1. The reproduction of the mark should consist of a two dimensional graphic or photographic reproduction and at least three different views of the shape in question along with a written description.

2. Where the Registrar is not satisfied, he may call upon the Applicant to produce up to five further views of the mark and a description by words of the mark.

3. If the Registrar is still not satisfied, he may call upon the Applicant to produce a specimen of the trademark.

An example of a trademark which registered a shape in India is the classical Zippo lighters which registered their lighter shape as a trademark and the shape of the Gorbatschow Wodka bottle.

10. Justify whether the following can obtain trademark in India

i) Holy Cross Candles.

The name indicates a direct association i.e. being related to Christianity. Moreover it also uses the word holy which is suggestive of the intended purpose/character/value of the product. Thus it cannot be trademarked.

ii) Excellent Tyres.

The name contains the descriptive word excellent which is suggestive of the quality of the tyres. Since it is deceiving in this regard it cannot be trademarked.

iii) Cool Chill Ice creams

The name contains the descriptive words cool and chill which describe the quality and character of the ice creams. Such indirect suggestions are prohibited and thus the above name cannot obtain a trademark.

iv) A to Z Services 24/7

The name 'A - Z' suggests provision of all type of services. The 24/7 indicates the frequency of provision. Since both these phrases are descriptive and misdirecting the name cannot be trademarked.

v) Quick Dry Laundry

The name contains the descriptive words quick and dry which describe the quality, speed, intended purpose and character of the laundry service. Such indirect suggestions are prohibited and thus the above name cannot obtain a trademark.

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UNIT-4

1.Explain the evolution of copyright law in India.

The idea of Copyright protection only began to emerge with the invention of printing, which made it for literary works to be duplicated by mechanical processes instead of being copied by hand. This led to the grant of privileges, by authorities and kings, entitling beneficiaries exclusive rights of reproduction and distribution, for limited period, with remedies in the form of fines, seizure, confiscation of infringing copies and possibly damages.

However, the criticism of the system of privileges led to the adoption of the Statute of Anne in 1709, the first copyright Statute. In the 18th century there was dispute over the relationship between copyright subsisting in common law and copyright under the Statute of Anne. This was finally settled by House of Lords in 1774 which ruled that at common law the author had the sole right of printing and publishing his book, but that once a book was published the rights in it were exclusively regulated by the Statute. This common law right in unpublished works lasted until the Copyright Act, 1911, which abolished the Statute of Anne.

Copyright as the name suggests arose as an exclusive right of the author to copy the literature produced by him and stop others from doing so. There are well-known instances of legal intervention to punish a person for copying literary or aesthetic output of another even before the concept of copyright took shape. The concept of idea was originally concerned with the field of literature and arts. Today, copyright law has extended protection not only to literary, dramatic, musical and artistic works but also sound recordings, films, broadcasts, cable programmes and typographical arrangements of publications. Computer programs have also been brought within the purview of copyright law.

In India, the law relating to copyright is governed by the Copyright Act, 1957 which has been amended in 1983, 1984, 1985, 1991, 1992, 1994, 1999 and 2012 to meet with the national and international requirements. The amendment introduced in 1984 included computer program within the definition of literary work and a new definition of computer program was inserted by the 1994 amendment. The philosophical justification for including computer programs under literary work has been that computer programs are also products of intellectual skill like any other literary work.

In 1999, the Copyright Act, 1957 was further amended to give effect to the provisions of the TRIPs agreement providing for term of protection to performers rights at least until the end of a period of fifty years computed from the end of the calendar year in which the performance took place. The Amendment Act also inserted new Section 40A empowering the Central Government to extend the provisions of the Copyright Act to broadcasts and performances made in other countries subject to the condition however that such countries extend similar protection to broadcasts and performances made in India. Another new Section 42A empowers the Central Government to restrict rights of foreign broadcasting organisations and performers.

The Act is now amended in 2012 with the object of making certain changes for clarity, to remove operational difficulties and also to address certain newer issues that have emerged in the context of digital technologies and the Internet. Moreover, the main object to amendments the Act is that in the knowledge society in which we live today, it is imperative to encourage creativity for

promotion of culture of enterprise and innovation so that creative people realise their potential and it is necessary to keep pace with the challenges for a fast growing knowledge and modern society

2. Briefly explain the scope of copyright law.

- In the case of literary, dramatic or musical work (except computer programme):

1. reproducing the work in any material form which includes storing of it in any medium by electronic means;
2. issuing copies of the work to the public which are not already in circulation;
3. performing the work in public or communicating it to the public;
4. making any cinematograph film or sound recording in respect of the work;
5. Making any translation or adaptation of the work.

- In the case of a computer programme:

1. to do any of the acts specified in respect of a literary, dramatic or musical work; and
2. To sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme. However, such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

- In the case of an artistic work:

1. reproducing the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;
2. communicating the work to the public;
3. issuing copies of work to the public which are not already in existence;
4. including work in any cinematograph film;
5. making adaptation of the work, and to do any of the above acts in relation to an adaptation of the work.

- In the case of cinematograph film

1. making a copy of the film including a photograph of any image or making any other sound recording embodying it;
2. selling or giving on hire or offer for sale or hire any copy of the film/sound recording even if such copy has been sold or given on hire on earlier occasions; and
3. Communicating the film/sound recording to the public.

- In the case of a sound recording:

1. To make any other sound recording embodying it
2. To sell or give on hire, or offer for sale or hire, any copy of the sound recording
3. To communicate the sound recording to the public.

3. How do you avoid infringement of copyright?

- Stay up to Date on Copyright Law

Although the laws don't change often regarding copyrights, there may be things you don't know. For instance, if an employee creates a unique work while working *for you*, the copyright will belong to your company. This is not the case if a contractor creates the work. Know your rights and learn about the law

- Where you are developing material of your own but are drawing on the work of others, every effort should be made to make your material as distinct and separate from the source material as possible. The greater the degree of similarity the higher the risk of a complaint.
- Register your Work : Register for a copyright don't just put a copyright symbol on your work. Having written proof in the form of a certificate is all you'll need to make a copyright violator "cease and desist" using your work if and when it happens.
- No copyright subsists in the work of alleged to be infringed
- Registering your copyright preserves your right to sue infringers and, if your suit is successful collect damages and attorney's fees.
- The author's work is independent and is not copied from the others work

4. Write a note on "Copyright as fair play to the author" .

The copyright protection finds its justification in fair play. When a person produces something with his skill and labour, it normally belongs to him and the other person would not be permitted to make profit out of his skill and labour of the original author and it is for this reason the copyright Act, 1957 gives to the authors certain rights. The object of the Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity. The protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to create more and motivates others to create. The author who creates the work will of the first owner of the work. Copyright provides a bundle of rights enjoyed by the original author: To produce the work in a material form like books , to publish the work , To perform work in public, To produce, reproduce, perform or publish any translation of the work, To make any cinematograph film, or a record in respect of the work, To make any adaptation of the work, Make derivative work based on the original work. The author can sell or give on hire or offer for sale or hire a copy of work and make profit. In addition to these rights the copyright owner is entitled to seek statutory damages and attorney's fees in the federal court. The author can sell or give on hire or offer for sale or hire a copy of work and make profit.

5. Explain the infringement of copyright and the available legal recourse in India.

Copyright infringement is the use of works protected by copyright law without permission, infringing certain exclusive rights granted to the copyright holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative works. The copyright holder is typically the work's creator, or a publisher or other business to whom copyright has been assigned. Copyright holders routinely invoke legal and technological measures to prevent and penalize copyright infringement.

Section 51 of the Act contemplates situations where copyright in a work shall be deemed to be infringed. As per this section copyright in a work is infringed when any person without a licence

granted by the owner of the copyright or the Registrar of Copyright or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority does —

- (1) Anything for which the exclusive right is conferred upon the owner of the copyright, or
- (2) Permits for profit any place to be used for the communication of the work to public where such a communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication would be an infringement of copyright.
- (3) When any person (i) makes for sale or hire or lets for hire or by way of trade display or offers for sale or hire, or (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or (iii) by way of trade, exhibits in public, or (iv) imports into India any infringing copies of the work.

The available legal recourse in India are:

- Section 54 to Section 62 of the Copyright Act provide for civil remedies.
- Section 55 provides that where copyright in any work has been infringed, the owner of the copyright can, except as otherwise provided in the Act, be entitled to all remedies like injunctions, damages and accounts as are conferred by law for the infringement of a right.
- Section 62 (2) further provides that notwithstanding anything contained in the Civil Procedure Code, 1908 or any other law for the time being in force, the District Court within the local limits of whose jurisdiction the person instituting the suit is actually or voluntarily residing or carrying on business or personally working for gain will have jurisdiction in the matter.
- Section 58 entitles the owner of the copyright to initiate proceedings for the possession of infringing copies and other materials related thereto. In this context, the section clarifies that all infringing copies of any work in which copyright subsists and all plates used or intended to be used for the production of such infringing copies shall be deemed to be the property of the owner of the copyright.
- **Administrative remedies** consist of moving the Registrar of Copyrights under Section 53 to ban the import of infringing copies into India and the delivery of infringing copies confiscated to the owner of the copyright.
- **Criminal remedies** provide for the imprisonment of the accused or imposition of fine or both, seizure of infringing Copies and delivery of infringing copies to the owner of the copyright
- Under the Copyright Act, 1957 the following remedies are provided for infringement
 - Imprisonment up to 3 years but, not less than 6 months
 - Fine which may not be less than 50,000 but, may extend up to 2,00,000
 - Search and seizure of infringing goods
 - Delivery of infringing goods to the copyright owner

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6. “Copyright is better than patent for protecting software”-Debate.

Ans. Computer programs are literary works and are thus entitled to copyright protection. The literal copying of a copyrighted computer program’s source or object code will result in a copyright infringement but the law may not provide any further protection beyond this point. Thus we can safely say that protection offered by the copyright law is rather limited.

On the other hand, by obtaining patent protection, software developers can assert an exclusive right over a process, method of operation or functional system although patent protection cannot be expanded to laws of nature, abstract ideas and physical phenomena.

We can say that copyright law enables software developers to protect the expression of an idea but not the idea itself. This provides for protection at the literal level but competitors may express the ideas in different ways. Patent protection gives the patentee rights over the underlying processes and inventive features, thereby a better way to protect the actual invention expressed in the source or object code. Hence we can safely say that if the motivation of IP protection is to protect the logic, behavior or functions of the software program then patent protection is probably better than copyright law protection.

7. What artifacts created during software development can be protected by copyright laws in India?

Ans. The fundamental law provided in the constitution governing copyright law in The Copyright Act, 1957. According to this act, the copyrights owner is entitled to reproduce the work, issue copies of the work to public, make any cinematographic films or sound or adaptation of the work apart from sale or rent of the commercial software.

Computer programs are considered as literary works and come directly under copyright protection. Also, tables, compilations including computer databases are entitled to protection under the copyright law. Software contracts are governed by the common-law principle and if a commercial computer program is considered as a good, then the copyright owner is entitled to pay sales tax.

8. In detail, who can obtain copyright for different kinds of artistic and commercial works?

Ans. The author or original artist is entitled to the copyright of his/her artistic work. Photographs, software programs, art works such as songs and paintings are all copyrightable and the creators of these artworks are the sole owners of the copyright.

If a group of people are the creators of an artwork, then they exercise equal assertion over the copyright of their work.

Photographs maybe copyrighted and these copyrights maybe given to the client or the photographer. In order to resolve this issue, contracts are signed by both the parties in some cases and clauses in the contracts determine with whom the copyrights of the photograph lie.

In business establishments, it is debatable as to whom the copyrights of the software belong to- the employer or employee. In cases where in the employee is bounded by contract of service with the employer etc., the copyrights of the product rest with the employer.

9. Explain the following concepts with respect to copyright

i. Idea Expression Dichotomy

ii. Originality

iii. Rationale for fair use

Ans. Idea expression Dichotomy

One of the concepts under the copyright law states that it will protect only the expression of the ideas and not the ideas themselves and this concept is termed as the idea expression dichotomy and is one of the most debated concepts under the copyright law.

Courts themselves have opined that ideas per se are not copyrightable. While many people may have the same ideas, the way in which they express their idea maybe copyrightable and not their idea itself. This expression maybe in the form of designs or a particular sequence of words etc. and thus there maybe several different methods of expression for the same idea.

Originality

Originality is an important legal concept with respect to copyright. An original work is new or novel and distinguishable from copies or clones. An original work needs some minimal creativity in it and that the author has not derived this work from some other source. Copyrights protect only original works of authorship.

Rationale for fair use

Fair use is any copying of copyrighted material done for a limited purpose, such as to comment upon, criticize, or parody a copyrighted work. Fair use is a defense against claim of copyright

infringement. As long as the entire copyrighted work is not being used for monetary purposes and is being used for transformative purposes claim for copyright infringement maybe rejected. Quoting a few lines from a copyrighted book or song, or copying of a few paragraphs from a news article by a teacher for teaching purposes are examples of fair use. Parody of a copyrighted work, that is a work that ridicules the original may use extensive parts of the original work in order to achieve its purpose.

10. Justify whether the following can obtain copyright in India

- **Commissioned Photograph**
- **Blueprint of a building**
- **Flowchart of a program**
- **Parameter list of a function**
- **Title of a film**

Ans. Commissioned Photograph

Yes. A commissioned photograph maybe copyrighted in India as it comes under art work and is an original work of the photographer.

Blueprint of a Building

Yes. A blueprint of a building maybe copyright as it is the expression of an idea of how the building maybe constructed.

Flowchart of a program

Yes. The flowchart of a program maybe copyrighted as the software developer expresses his idea of the program.

Parameter list of a function

No. The functionalities of a computer program or a programming language may not be protected under the copyright law.

Title of a Film

No. You cannot copyright the title of a film because it is too short. You can rather trademark it for protection.

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Unit - 5

1. What are the international norms available for protecting software?

Ans. Copyright Protection:

In the early 1980's, a number of governments in the developed world decided, after extensive lobbying by some (though not all) sections of the software industry, that computer software was analogous to the traditional copyright category of an original literary work of authorship and hence should be protected as a literary copyright.

The national copyright legislation in a number of developed countries, such as Japan, the US and across Europe, was amended in the 1980s to explicitly put computer software under the copyright umbrella as a literary work. Acting on the recommendations contained in the 1978 report of the National Commission on New Technological Uses of Copyrighted Works (CONTU), a 1980 amendment to the US Copyright Act, Section 117, expressly recognized the copyrightability of computer programs.

Large multinational software companies spent extensive time and resources lobbying for the creation of similar standards and approaches in international copyright agreements; their efforts also extended to countries of the South. Both the 1995 TRIPS agreement and the 1996 WIPO Copyright Treaty state that computer programs, both in source and object code, must be protected by copyright. Although TRIPS (Art. 66 (1)) states that least developed countries will not be required to apply this section until 2006, this deadline is fast approaching and, in the end, they and all other WTO members will have no alternative but to protect computer software under their own national copyright laws.

Patent Protection:

A limited number of other countries, such as Japan, also permit the patenting of software. In Europe, standalone software patents or programs has such are not permitted by statute, but software which is an integral or functional part of some other machinery or invention can be patented. The skillful drafting of software patent applications can often bring such patents into the requisite integral category. For the last several years in Europe, there has been a sharp debate, chiefly pitting large multinational software companies against small and medium-sized software developers, as to whether the US and Japanese approach to software patents should also be adopted in Europe. Unlike the legal situation with copyright, the fact that a particular software program is protected by a patent in one country, such as the United States, does not give that program patent protection in another country unless there has been a specific patent granted for that patent, most countries in the South do not allow software patents, although this situation is beginning to change.

Trade Secret Protection:

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Trade secret law protects the owner of the certain information against its misappropriation. Others who have not obtain the information by improper are free to use the information and associated ideas. Trade secret has been the traditional form of protection for main frame and many computer software. From the viewpoint of software developer, the advantage of trade secret are that it protects the program underlying ideas, logic and structure.

In United States trade secret are protected by the individual state law although there is uniform trade secret act enacted in many states with minor variations. However much of what secret law does can be accomplished by contract and by enforcing licensing terms against the disclosure.

2. What legal options are available for protecting software in India?

Ans. The major statutes that cover [software protection in India](#) are the Copyrights Act, 1957 and Patents Act, 1970.

Copyrights Act, 1957

The Copyright Act of 1957 is the law governing copyrights in India. The Act was amended in 1999 so as to make the Act compatible with the provisions of TRIPS. The Act defines computer and computer programs. Computer Program means 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. “Literary work” is defined as that which includes computer programs, tables and compilations including computer databases. Copyright, in relation to a computer program means the exclusive right to do or authorize to do any of the following acts:

- (1) To reproduce the work in any material form including the storing of it in any medium by electronic means;
- (2) To issue copies of the work to the public not being copies already in circulation;
- (3) To perform the work in public, or communicate it to the public;
- (4) To make any cinematographic film or sound recording in respect of the work;
- (5) To make any translation of the work;
- (6) To make any adaptation of the work;
- (7) To do, in relation to a translation or an adaptation of the work any of the acts specified in relation to the work in the above;
- (8) To sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer program. Commercial renting does not apply to computer programs where the program itself is not the essential object of the rental.

Patents Act, 1970

The Patents Act, 1970 states that a computer program per se other than its technical application to industry or a combination with hardware is not patentable. Thus, software can be registered as a patent only if it is in combination with hardware and not otherwise.

3.How is copyright compromised in cyberspace? What are the remedies available for this?

Ans. The growth of Information Technology has led to proliferation of e-businesses due to its cost effectiveness, accessibility, convenience and vast user base. The global nature of internet has provided immense visibility to start up enterprises and medium size businesses on the internet to efficaciously showcase its products and services. The touchscreen age today knows very well the importance of software, multimedia, trademarks, artwork and icons. Mobile phones have become smartphones and computers are now tablets, diminishing the utility differences in the two gadgets as a precursor to converging technologies.

While the digital age has its multiple advantages, the flipside is that the ease of availability of information online and ease of duplicating it along with anonymity pose a continuous threat to the protection of Intellectual property rights including copyrights on the internet.

Intellectual property infringements in cyberspace may comprise of any unauthorized use or copying of trademarks, service marks protected by (Trademark Act, 1999), or original music, films, art work, software, multimedia or literary matter (protected by the Copyright Act, 1957). The unique matrix of the cyberspace has produced different categories of infringements including Deep linking, Framing, piracy of music, software, video, and other Digital Copyrights infringements. There are international bodies such as WIPO that have made important initiatives to bring harmonization in copyright regimes across various jurisdictions. One important treaty is the WIPO copyright treaty which entered force on 6th march 2002. Although India is not a signatory to the Treaty, India is a party to the Berne Convention that protects copyrights in various works across many countries that are its member signatories. Also, WTO initiatives led to creation of the TRIPS Agreement, another instrument that has made several strides in protection of copyrights apart from other forms of intellectual property rights. India is a signatory of the TRIPS Agreement.

Copyright Infringement and Remedies

Where copyright is infringed, owner of copyright is entitled to sue for remedies including injunction, damages, profit of accounts and delivery up of infringing goods. Section 51 states copyright in a work is considered infringed when a person without a license from owner or registrar of copyrights or contravening conditions of a license does anything the exclusive right to do which is the right of the owner as per the Act or permits for profit a place to be used for communication of work to public where such communication constitutes infringement of copyright

in the work unless he was not aware and had no reasonable ground to believe such communication will be infringement of copyright.

It also amounts to an infringement where a person makes for sale or hire or displays or offers for sale, or distributes for trade or to prejudicially affect the owner of copyright or by way of trade exhibit in public or import into India infringing copies of work (excluding one copy for personal use of importer).

As registration is not compulsory, suits for infringement can be filed even if plaintiff has secured no registration of the work. Civil remedies available to owner of copyright are also available to exclusive licensee. Electronic contracts are considered legally valid in most jurisdictions such as India and electronic licensing or assignment is also legally valid.

4.What are the options for protecting Intellectual Property in e-commerce?

Ans.

Protecting the Company IP Rights:

The company should develop appropriate strategies to protect IP rights in early stage so as not to lose its legal rights in them. It should

- A) Register its trademark
- B) Register a domain name that is user-friendly and reflects the trademark, business name or character of the company's business. If the domain name can be registered as a trademark, then it is advisable to do so, since it strengthens the company's power to enforce its rights against anyone else who tries to use the name to market similar products and services, and prevents someone else from registering the same name as a trademark.
- C) Think about patenting online business methods, in countries where such protection is available
- D) Register its website and copyright material in countries which provide this option at the national copyright office
- E) Take precautions about disclosure of trade secrets. Make sure that all who might get to know about your confidential business information (such as, employees, maintenance contractors, website hosts, Internet providers) are bound by a confidentiality or non-disclosure agreement
- F) Consider to take an IP insurance policy that would cover the legal costs should the company need to take enforcement action against infringers. Make sure that its existence is known about, for example by posting a notice on your website. This could deter potential infringers.

Letting people know that the content is protected :

Many people assume that material on websites can be used freely. Remind viewers of your IP rights.

- It is a good idea to mark your trademarks with the trademark symbol ®, TM, SM or equivalent symbols.

Letting people know what use they can make of the content :

Controlling access and use of your website content :

You may use technological protection measures to limit access to the works published on your website only to those visitors who accept certain conditions upon the use of the works and/or have paid for such use. The following techniques are commonly used:

- Online agreements are frequently used to grant visitors only a limited license to use content available on or through your website.
- Encryption. Typically, software products, phonograms and audiovisual works may include encryption to safeguard them from unlicensed use. When a customer downloads a content file, a special software contacts a clearinghouse to arrange payment, decrypts the file, and assigns an individual key - such as a password - to the customer for viewing or listening to the content.
- Access control or conditional access systems. In its simplest form, such systems check the identity of the user, the identities of the content files, and the privileges (reading, altering, executing, etc.) that each user has for each file. You may configure access to your electronic content in numerous ways. For example, a document might be viewable but not printable; may be only used for a limited time; or may be tethered to the computer on which it was originally downloaded.
- You may release only versions of insufficient quality for the suspected misuses. For instance, you can post images on your website with sufficient detail to determine whether they would be useful, for example, in an advertising layout, but with insufficient detail and quality to allow reproduction in a magazine.
- Fingerprints are like hidden serial numbers which enable you to identify which customer broke his/her license agreement by supplying the property to third parties.

5.What are the options available for protecting databases?

Ans. A database as a commercial asset is protected by law in two ways:

- Protection of databases under the law of copyright.
- Protection of databases under a specific database right.

Protection of databases under the law of copyright:

Copyright protection applies to databases (collections of data) that are creative/original in the selection and arrangement of the contents and constitute their author's own intellectual creation.

Copyright protection over a database entails a level of creativity/originality in the arrangement of contents. This means that contents which have simply been put together in a methodical way will most probably not be considered as an original work, nor be eligible for copyright protection. Please note that this protection would apply to the originality and creativity of expression of the arrangement only and would in no way extend to the contents of the database. Such contents (depending on their nature) might be subject to individual copyright protection (e.g. an article) or might not be protectable as such by intellectual property (e.g. raw data or values).

If applicable, copyright protection prevents any unauthorized reproduction, distribution, communication, display or performance to the public of the database. Such protection has an international character databases are protected by copyright in almost all countries in the world. The conditions of protection may however vary from jurisdiction to jurisdiction.

Protection of databases under the specific database right

Provided a set of data comes within the definition of a database, it will qualify for protection in its own right under the Regulations (irrespective of whether it benefits from protection under copyright) if there has been a substantial investment in obtaining, verifying or presenting the contents of the database.

The maker of a database is defined as the person who "takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation" and such person is the first owner of the database right. This definition is in contrast to that of an owner in copyright since where a database is commissioned, the commissioner will usually be the maker and first owner of the database right. If the database is made by an employee in the course of his employment, the employer will be regarded as the maker and therefore the owner of the database right subject to any agreement to the contrary.

A person infringes a database right if they extract or re-utilize all or a substantial part of the contents of a protected database without the consent of the owner. It should be noted, however, that extracting or re-utilizing a substantial part of the contents can result from the repeated and systematic extraction or re-utilization of insubstantial parts of the contents of a database.

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6. Mention the salient points of IT ACT 2000?

Salient features of IT Act 2000:-

- 1) The IT ACT contains 13 chapters and 90 sections.
- 2) The Act is embedded with two schedules. The first schedule deals with documents or Transactions to which the Act shall not apply. The second schedule deals with electronic signature

or electronic authentication technique and procedure. The third and fourth schedule are omitted.

3) It elaborates on offenses , penalties and breaches.

4) It outlines the Justice Dispensation Systems for cyber-crimes.

5) It defines in a new section that cyber cafe is any facility from where the access to the internet is offered by any person in the ordinary course of business to the members of the public.

6) It provides for the constitution of the Cyber Regulations Advisory Committee.

7) It is based on the Indian Penal Code 1860 , The Indian Evidence Act,1872 ,The Reserve Bank of India Act,1934 etc.

8) It adds a provision to section 81 , which states that the provisions of the Act shall have overriding effect . The provision states that nothing contained in the Act shall restrict any person from exercising any right conferred under the Copyright Act ,1957.

7. Write a note on Section 66A of IT Act 2000 highlighting its current status.

Section 66A defines the punishment for sending “offensive” messages through a computer or any other communication device like a mobile phone or a tablet. A conviction can fetch a maximum of three years in jail and a fine .

The problem of the act is the vagueness about what is “offensive”. The word has a wide variety of connotation, and is open to distinct interpretations . It is subjective ,and what may be innocuous for one person ,may lead to a complaint from someone else and ,consequently,an arrest under section 66A if the police accepts the later person's view.

The first petition came up due to the arrest of two girls in Maharashtra over a facebook post .The arrests triggered outrage from all quarters over the manner in which the cyber laws were used. Article 66A is frequently being used .Most cases of arrest were reported in 2012 a University professor was arrested for forwarding caricatures on a minister on Facebook. An Activist was arrested for drawing cartoons lampooning Parliament and the Constitution to depict their ineffectiveness.

The objective behind the 2008 amendment was to prevent the misuse of information technology ,particularly through social media. section 66A comes with extremely wide parameters which allow whimsical interpretations by law enforcement agencies .Most of the terms used in the section have not been specifically defined under the Act. The petitions have argued that it is a potential tool to gag legitimate free speech online, and to curtail freedom of speech and expression guaranteed

under the constitution,going far beyond the ambit of Reasonable restrictions on that freedom. The Supreme Court in the preliminary hearing ,accepted the contention that the provision was widely drafted ,and gave arbitrary powers to police officers to make arrests.Nudged by the court, the central government issued a set of guidelines in January 2013,intended to prevent misuse of the provision .The guidelines mandated that only senior police personnel could order arrests.

8.What is software licensing ? How propitiatory software uses this to restrict users?

Software licensing is a way of documenting legally binding guidelines for the use and distribution of softwares .

Software licenses typically provide end users with the right to one or more copies of the software without copyrights. The license also defines the responsibilities of the parties entering into to license agreement and may impose restrictions on how software can be used .Software licensing terms and conditions usually include fair use of the software,the limitations of liability,warranties and disclaimers and protection if the software or its use infringes on the intellectual property rights of others.

Software licenses typically are either propitiatory,free or open source.

The benefit of proprietary software licenses is that the software publisher grants the use of one or more copies of software under the end-user license agreement(EULA),but ownership of those copies remains with the software publisher.

The most significant effect of this form of licensing is that ,if ownership of the software remains with the software publisher ,then the end user must accept software license .In other words without accepting the end user may use the the software at all.One example of such a propitiatory software is the license for Microsoft Windows.

Q9) Explain “Copyleft” and describe how it can be used to effectively protect software.

Ans: Copyleft is a form of licensing which is used for maintaining copyright conditions for works ranging from computer software,to documents,to art.Under copyleft an author may give every person who receives a copy of the work permission to reproduce,adapt,or distribute it,with the accompanying requirement that any resulting copies or adaptations are also bound by the same licensing agreement.

Copyleft typically gives each person possessing a copy of the work the same freedoms as the author .These freedoms do not ensure that a derivative work will be distributed under the same liberal terms.In order for the work to be truely copyleft the liscense has to ensure that the author of a derived work can only distribute such works under the same or equivalent license.

In addition to restrictions on copying copyleft addresses other possible impediments,which means that rights cannot be later revoked and the work and its derivatives must be provided in the form of facilitates modification(source code to be available with the software itself).

Copyleft makes use of relevant laws and regulations to adhere to software protection
Laws used for copyleft licenses vary from one country to another, and may also be granted in terms that vary from country to country (selling a software product without warranty may be permitted in one country while in some countries it is not permitted for a software distributor to waive without warranty).

10) How do licenses like GPL help developers to legally distribute software?

The General Public License is a widely used free software license, which guarantees end users the freedom to run, study, share and modify the software. The GPL is a copyleft license, which means that derivative work can only be distributed under the same license terms.

The distribution rights granted by the GPL for modified versions of work are not unconditional.

Distributors of GPL'ed programs bundle the source code with executables.

GPL also uses the features of copyright and copyleft.

The developers can use this for softwares and not the output unless the output is a derivative work of the program.

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