UNIT 6 IPR ISSUES IN CYBER SPACE

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6.0 INTRODUCTION

Management of Intellectual Property Rights in cyberspace is an important issue to combat property infringements in the virtual space ensuring security to the Intellectual Property Rights holders that they can control the use of their intellectual property and be protected from unauthorised or unlicensed use of literary work, trademarks, trade names, service marks, images, music or sound, piracy of software's. The Infringements in digital media may take different forms that include Copyright's violations, Deep Hyper linking, Framing, Meta-tags, spamming. The Trademark violation is the most crucial issue giving rise to Domain Name Disputes and cybersquatting, where the defendant/infringer intentionally gets the domain name registered that includes the trademarked words, company name, brand name etc. of the plaintiff company.

The traditional laws for protecting intellectual property have been also applicable to the infringements taking place in digital media. However, due to inherent nature of the internet, the relative anonymity afforded to the digital transactions , jurisdiction issues, the ease of copying and distribution of copies, several pertinent issues have emerged in recognizing various forms of online infringements and resolving conflicts of owner of the right holders, of authors, publishers, film producers, music creators and software developers exploring ways to make their products available online, while protecting their rights and recouping their investment.

One cannot deny that the Information Technology Act, 2000 has proven to be successful in setting down the framework of laws and regulation in cyber space and addresses numerous concerns related to the misuse of technology, but at the same time the particular Information Technology Act, 2000 suffers from some of the serious lacunae which all have not been primarily discussed, known as intellectual property issues. Further, Intellectual property is considered as an intangible asset therefore, there has to be specific penal provisions under Information Technology Act, 2000, as the infringement of the intellectual property is very easy in the cyberspace.

6.1 OBJECTIVES

After studying this unit learner will be able to:

- Discuss the basic concept and various forms of Intellectual Property Rights.
- Analyse the copyright issues in digital- medium, music and goods.
- Discuss the concept and issues of Linking, In-lining and Framing
- Discuss patent infringement through digital medium
- Describe Trademark issues and Domain Name Disputes – Cyber squatting
- Explain the functions of Search Engines and their Abuse.
- Discuss the IPR regulatory framework at the National and at International level.

6.2 BASIC CONCEPT: IPRS

The term Intellectual Property can be defined as intangible property which is creations of one's mind and is not merely an idea but an expression of it viz; musical, literary and artistic works; inventions; designs; symbols, names and images. Novelty is considered as the main ingredient for fulfilling the condition of the intellectual property. The rationale behind providing Intellectual Property rights and legal protection to the creators and inventors is to give them, the due recognition for their intellectual work and also the monetary benefits for certain period of time. This will further encourage more innovations; economic and technological growth, facilitate the transfer of technology providing more job opportunities, growth in industry, joint ventures and licensing.

6.2.1 Forms of IPR

There are basically seven forms of intellectual property: copyright and related rights; trademarks, patent, industrial design, geographical indications, trade secrets and plant variety. **(https://www.wipo.int).**

I. **Copyright and related rights**

a. A copyright is used to protect creative literary, musical, dramatic, or other artistic works like cinematographs films and sound recordings inclusive of musical compositions, audio recordings, paintings, photos, sculptures, books, articles, diagrams, movies, website content and even computer software and programmes though the inventions related to software are protected under patent law.

b. **Rights Granted**: provides economic and moral rights. The copyright owner has exclusive rights pertaining to reproduction and distribution of their literary and artistic work; Public performance of the work; Broadcasting of the work; communicating the work to public by wire or wireless means; Commercial rental of the work.

c. **Copyright protection is available** if the work is original and exists in some tangible form based on the national laws. It does not necessarily require registration except for evidence that establishes ownership. The right is granted for specific period and may vary from country to country and from aparticular class of work to another class of work.

II. **Patents**

a) A patent is an exclusive right granted to protect an invention which is a product or a process and can also be applicable to newly engineered plant species or strain however a discovery, scientific theory or mathematical method is excluded from patentability, but its application or use can be patentable.

b) **Rights Granted**: are territorial in nature and patent protection is granted for a limited period.

c) **Patentable and non-patentable inventions** -*An invention is patentable*, if it is Novel, has Inventive step (non- obvious) and capable of industrially application. However, the methods of doing somethinglike book keeping, trading of stocks; Diagnostic, therapeutic and surgical methods for the treatment of humans and animals; Inventions contrary to humanity, public order, morality, public health, environment and safety are not patentable. For example, process of cloning.

d) There are certain products or process which are Novel and have Industrial application and are protected as **Utility Model not as patent**, for a shorter period, generally 10 years and do not require inventive step as the protection requirement like patents.

III. **Trademarks**

a) A trademark is a distinctive sign, word, symbol or mark used in trade to distinguish the goods or services. Trademarks help consumers to identify the source of products or services.It could be name, signature, logo, brand label, phrase, slogan, letter, a numeral or any combination of them.

b) **For registration of trademark,** it should be (i) distinctive in nature (distinguishable from other goods and service). Registration of trade mark is valid for specific period and needs to be renewed.

c) **Registered trademark owner** has exclusive right to use and is also entitled to complete or partial assignments of rights in relation to the mark to another person, including the right to earn royalties.Trade mark owner can also permit restricted use of trademark by way of trademark licensing.

IV. **Industrial designs**

a) Consists of appearance of a product/logo; the shape of an object; composition of design, pattern of cloth. The industrial design may have three-dimensional features, such as the shape or surface of an article, or two-dimensional features, such as patterns, lines or color.

b) **For protection**, an industrial design must be (i) new or original and (ii) aesthetic and requires mandatory registration.

V. **Geographical Indication (GI)**–

a) It is a name or sign used on certain products which corresponds to a specific geographical location or origin (e.g. a region, or country). A Geographical Indication should have special quality or reputation.

b) Geographical indications are typically used for agricultural products, foodstuffs, wine and spirit drinks, handicrafts, and industrial products. Examples: Basmati rice, Swiss watches, Ethiopian coffee, Tequila for spirits produced in Mexico, Electrical appliance Made in UK.

c) In order to function as a GI, a sign must identify a product as originating in a given place and the qualities, characteristics or reputation of the product should essentially be due to the place of origin.

VI. **Trade Secrets**

a) **A trade secret** is any confidential secret information having inherent economic advantage to company and is used in business that gives a competitive edgeby reason of it being secret. Examples include formulae, practice,program, process, recipes, pattern, technique, compilation, method, and device or product mechanism.

b) **To qualify trade secret protection,** no registration is required. However, to protect a trade secret having commercial value the businessesmust limit the number of persons who knows or access the information and get the non-disclosureagreements signed by employees.Trade secret remains valid as long as one does not discover it independently.

Among all the intellectual properties copyright, trademark and patent are three of the most commonly considered intellectual property, but nowadays Geographical indication is also gaining a lot of attention as it is related to specific region or any specific nature of work and by protecting those specific regional work the intellectual rights of those regional people are protected and this protection is promoting the work of all these regional people.

The Information Technology Act, 2000 does not mention any thing about intellectual property rights. On the other hand, it can be taken into consideration that infringement of intellectual property rights is a very common practice in the cyberspace and it is very easy to practice any kind of infringement over cyberspace. There are some categories of intellectual property that needs lawto regulate the protection of intellectual works in cyberspace. They are:

- Intellectual works in digital form can easily be replicated.
- Intellectual works in digital form can easily be transmitted.
- Intellectual works in digital form can easily be modified and manipulated.
- Intellectual works in digital form can easily be form in resemblance or equivalence can easily be created.
- One can easily search anything in digital space and link their own work with someone else's work.

Apart from the infringements stated above, Intellectual property infringements in cyberspace comprise of any unauthorized or unlicensed use of: Trademarks, Trade names, Service marks, Images, Music or sound or literary matter.

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1. What is trademark?

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6.3 COPYRIGHT ISSUES IN DIGITAL- MEDIUM, MUSIC AND GOODS.

The global usage of Internet makes it feasible for any user to share information in cyberspace through various social media means leading to various concerns and issues related to piracy and counterfeited goods leading to huge monetary losses and as a result fake and pirated products in market**. Gulla, R. K., 2007** has rightly pointed out that "the Internet in a way presents a troublesome situation for copyright holders as the users become mass disseminators of others copyright material and creates disequilibrium between the authors and users".

The copyrights owner has certain rights as discussed above but the reproduction right is considered as very important and a very fundamental right

that grants the copyright owner the right to exclusive right to control the making of a copy of the work or to grant permission for its reproduction. The right to communication to public is also the right of copyright owner however growth in digital technology, use of computer system and networks that allows easy access and transmission of work makes the copyrighted work less distinct and is communicated to the public may lead to infringement of right of the copyright owner.

In cases where the defendant copies cd's onto its servers and do not create any new form of aesthetics, expression but rather to repackage and retransmit the same expression through another medium leads to infringement of copyright as held in *Books, Inc. V. Kinko's Graphics Corp,*1991 that repetition of copyrighted material that "merely repackages or republishes the original" is unlikely to be deemed a fair use. It was retreated in Infinity *Broadcast Corp. V. Kirkwood,* 2d Cir.1998, where court rejecting the fair use defense by operator of a service that retransmitted copyrighted radio broadcasts over telephone lines as cited in the case UMG Recordings, Inc 2000, in this case Utilizing the technology "MP3" which permits rapid and efficient conversion of compact disc recordings ("CDs") to computer files easily accessed over the Internet the defendant or around in January 2000, launched its "My.MP3.com" service, which is advertised as permitting subscribers to store, customize and listen to the recordings contained on their CDs from any place where they have an Internet connection. To make good on this offer, defendant purchased tens of thousands of popular CDs in which plaintiffs held the copyrights, and, without authorization, copied their recordings onto its computer servers so as to be able to replay the recordings for its subscribers. In this case court held that "defendant's "fair use" defense is indefensible and must be denied as a matter of law". Further other affirmative defenses, such as copyright misuse, abandonment, unclean hands-on part of plaintiff, and estoppel, are considered to be essentially frivolous and accordingly disposed of**. (UMG Recordings, Inc. v. MP3.Com, Inc. (harvard.edu**)).

6.4 PATENT MISUSE

A patent ensures total protection of the patented invention under the legal system of a country under the legislation of which it is obtained.

A patent represents monopoly to the patentee that they have the exclusive right to presents to the public the knowledge they have and the patented invention can't be commercially used by any one, or made, distributed or sold without the consent of patent holder. The object of the grant of Patent is to encourage research and development, new innovation and industrial progress. Any kind of practical application in the computer device is known to be patentable but not all software's are patentable but devices like pacemakers are very much patentable, but a computer program is authorized for patenting only

when it contributes to a particular art or a computer program creates a value edition within the existing program and enhances the speed and efficiency of the existing program. In the Indian Patent Law, there is no specific provision pertaining to the protection of software. The United States of America has though recognises the patents for businesses like online stock trading, gambling, e-commerce. Patent can also be misused by patent holder which means an illegal behavior of patentee that leads to violations of the antitrust law or when he tries to expand his product with the actual patent by getting into other licensing agreements. When a patent misuse has been constituted, the patent would be deemed useless. With the advent of digitized media, the various patent infringements are seen in technology industries as given below:

- "Amazon tried to patent its one-click payment option. However, the court decided it was too obvious an idea to patent.
- The file-sharing company Napster settled a lawsuit accusing it of unauthorized distribution of music. It later filed bankruptcy.
- Nintendo was forced to pay a large sum to Tomita Technologies International, Inc. for its 3DS gaming-system technology.
- Microsoft and Google dueled for five years over patent issues involving the Xbox gaming system and Motorola smartphones". (**Famous Patent Infringement Cases (upcounsel.com)**).

6.5 LINKING, IN-LINING AND FRAMING

The Linking, In-lining and framing have become so common since in linking person is providing link and is not making any copies of material available online but the link here allows visitors to bypass information and advertisements at the relevant home page, inlining allows display of graphics on other website and framing often used in conjunction with inlining give picture to picture image and the user can surf directly to the information contained in another site without visiting its home page that may leads to copyright or trademark infringement since it may cause loss of income to businesses; create confusion among the users that the sites endorse each other or are associated with each other which might not be correct and lead to confusion as to original source and loss of reputation and goodwill of the original information holder/ businesses.

""Linking" allows a Web site user to visit another location on the Internet. By simply clicking on a "live" word or image in one Web page, the user can view another Web page elsewhere in the world, or simply elsewhere on the same server as the original page. This technique is what gives the Web its unique communicative power. At the same time, however, linking may undermine the rights or interests of the owner of the page that is linked to. Suppose, for example, that X sets up a homepage for her site. On the homepage she places some advertisements, from which she hopes to make some money. The

homepage also contains links to various subordinate pages, which contain content that X believes consumers wish to see. Y then creates his own Web site, which contains links to X's subordinate pages. The net result is that visitors to Y's site will be able to gain access to X's material, without ever seeing X's advertisements. This type of activity is called "deep linking."" (**Intellectual Property in Cyberspace (harvard.edu)).**

Inlining

""Inlining" is the process of displaying a graphic file on one website that originates at another. For example, inlining occurs if a user at site A can, without leaving site A, view a "cartoon of the day" featured on site B. IMG links -- a special type of link -- can be used to display graphic files on one site that are stored on another". **(Playboy Enterprises v - NYU Law)**

Kelly v. Arriba Soft Corp,2003, a federal court of appeals ruled that it was not an infringement to provide inlined links to "thumbnail" reproductions (here an image search engine called ditto.com used inline links to reproduce full-size photographic images from a photographer's website) based on fair use principlesbut there was no clarity as to whether inlined links to full-sized reproductions constitute an infringement and are not automatically excused as a fair use. In *Perfect 10, Inc. v. Amazon.com, Inc* ,2007, a federal court of appeal again permitted the use of inlined links (reproductions of images from an adult men's magazine website) for thumbnail reproductions.

Framing

""Framing" is the process of allowing a user to view the contents of one website while it is framed by information from another site, similar to the "picture-in-picture" feature offered on some televisions. Framing may trigger a dispute under copyright and trademark law theories, because a framed site arguably alters the appearance of the content and creates the impression that its owner endorses or voluntarily chooses to associate with the framer". **(Playboy Enterprises v - NYU Law).**

In *Futuredontics Inc. v. Applied Anagramic Inc, 2007,* A district court ruled that the addition of the reproduced Web pages within a "frame" by dental website containing contents of other website detailing AppliedAnagramic as well as its trademark and links to all of its Web pagesleads to modificationin the appearance of the linked site and such modifications could, without authorization, amount to infringement of derivative work.

Toavoid linking, framing, and inliningviolations one must seek permission from original owner of content / information /graphics to for deep linking, inlining, pulling full size images and framing graphic links comprising trademarks that tends to side step the linked site's home page and need to sign a linking agreement that give them right to display the Link and trademarks or images in the Link at their Site.In case one could not obtain the required

permission from the linked site, disclaimerclearly and prominently displayed and stating the source of information canreduce the liabilityfor unauthorised use and compensatory damage.

6.6 TRADE MARK ISSUES

Trademark infringement issues arise when some other party uses the trademark having deceptive similarity with the registered trademark of popular brand with intent to confuse consumers as to the producer or manufactures of goods or services. In cases of linking, framing apart from copyright infringement trademark issues also arises. "Attempted enforcement of trademark rights against persons who use marks or content to divert traffic from a trademark owner's site, whether the troublesome use is by friend or foe, requires careful consideration of First Amendment (freedom of speech) concerns as well as of trademark principles of fair use. The public relations nightmare that could result from a misstep in this area should be balanced against both the perceived need to police trademark rights and the proposed policing method." **(Sally M. Abel,1999, p127)**

6.7 DOMAIN NAME DISPUTES – CYBER SQUATTING

Domain name is the internet/web address of a website, is a component of URL (Uniform Resource Locator) which makes it easy to identify the Internet protocol or IP address. It and may represents the trademark of an organization or trade. Trademarks and domain names represent prominent marketing tool, an identity of a business or an organization carrying the goodwill and reputation attached with the business, organization, trade and service. It provides a web address to the trademark in virtual world. For example, in the URL: http://www.ignou.ac.in/ignou/studentzone/results/1, the domain name would be: ignou.ac.in.

Cybersquatting, also known as "domain name hijacking" is a form of domain name misuse and constitutes as an act of registering a domain name with *malafide* intention which is actually someone else' trademark. People create and register domain names of other real owners as their own and take advantage of it by selling them to the real trade owner on excessive price. It is an unscrupulous practicethat leads to misrepresentation in the eyes of potential buyers or services users impacting global trade and infringe the right ofthe particular trademark.

In a famous case, *Yahoo! Inc. v. Akash Arora*, 1999, the defendant created and registered a similar website on domain name "YahooIndia.com" and started providing similar services under the name"Yahoo India" as a trade mark. It

was deceptively identical to the plaintiff's website Yahoo. Inc. which is based in U.S.The High Court of Delhi held that the defendant is liable for deceptively using Yahoo as a domain name and passed an injunction order to restraint the defendant from misusing the trade mark. Thus, trademarks or domain names are equally protected in cyberspace. In*Tata Sons Ltd v. MonuKosuri and others,*2001, the defendant registered the domain name which was deceptively identical to the plaintiff's trademark, "Tata". The court passed an ad interim injunction in favour of the plaintiff. In *Acqua Minerals Ltd. v. Pramod Borse and others*, 2001, the defendant knowingly registered "Bisleri.com" as its domain name who was not the real owner of the trademark. When the real owner came to know about it, they filed an action against the defendant. The court passed an injunction order against the defendant to protect the domain name. **(Seth, 2012,259-260).**

It is considered as the easiest way of IP misuse which is committed in cyberspace and the increasing cases of cybersquatting is becoming a concern for protecting the identity and goodwill over cyberspace. Domain name is beneficial for universal connection as it givesa worldwide recognition. There are many international regulations which gets effected through WIPO to effectively protect a domain name.

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1. What is meant by domain name?

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6.8 SEARCH ENGINES AND THEIR ABUSE

Cyberspace is a virtual place with endless possibilities, where Internet offers search engine to search and find data in cyberspace. Search engine is a 'searchable index of resources available on internet'. **(Sharma, 2015, 525).**Search engines connects the user with World Wide Web in one place and is a tool which searches online data or content, for example, Google andYahoo. When any website's keyword is searched the user is tuned with the original page of the websites or the domain name. However, there is possibility of unfairness in this process that can lead to trademark infringement issues. The main source of income for such search engine is advertisements showed on the side of the search content. These search engines allow the advertisers to purchase the advertising space on the page of the trademark actually searched

online by the users.These days search engines follow the fashion of showing sponsored ads or links on the webpage searched or the keywords mentioned by the user. Such practice of search engine is objected by trademark owners as violation of trademark in cyberspace being unfair trade practice and misleading. It has potential to create confusion in the mind of the consumer regarding the trademark or keyword searched.

'The *meta tag* helps one to preview that how the webpage will render on the browser. The <meta> tag is placed within the <head> tag, and it can be used more than one times in a document. The metadata does not display on the webpage, but it is used by search engines, browsers and other web services which scan the site or webpage to know about the webpage'**(HTML meta Tag - javatpoint**).

Meta tags do not affect the appearance of a website and are not visible to the Internet user but have been the subject of trademark infringementbecause it can be used by companies in a deceptive manner by putting misleading terms in hidden text or metatags on a web site to divert or confuse e-consumers, internet users where the name of competing companies is substituted with the actual terms that should be used to describing the website. For example, a shoe manufacturing company may bury the meta tag "Bata" in its Web page to lure internet users searching for Bata products.Besides the infringement issues, the exercise of territorial jurisdiction over a domain name dispute and choice of law is the major concern.

It is clear that the ranking over cyberspace can be manipulated and distorted with the help of some illegitimate tricks. Therefore, a proper legal recourse is necessary to overcome all such issues related to the search engine manipulation and the consumers have to remain aware and be conscious at all times about the fact that the information they are getting by using any search engine can be misleading.

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1. Enlist copyright issues in cyberspace.

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6.9 REGULATORY FRAME WORK- NATIONAL AND INTERNATIONAL SCENARIO

6.9.1 Legal Protection in India

IPR Issues in Cyber Space

The internet has created a new virtual world and Information Technology Act, 2000 maintains that world in cyberspace by giving protection to various legal challenges and their suitable solution. Intellectual Properties such as copyright, trademark, patent, layout and circuit designs are the new members of this virtual world which exists in the cyberspace. Therefore, the protection of these rights is as essential as any other right within the cyberspace and with the ever-changingtimes, the demand for protection and remedies is also changing and the need of new and effective law to protect the new inventions is in demand**.(Aiswarya etall ,2018).**

Copyright -In India copyright law is governed by Copyright Act 1957 as amended from time to time. The act prohibits the unauthorized acts of making Xerox copy of a book, copying a computer software program, and incorporation of a portion of another's song into a new song. TheCopyright Act is applicable to original Literary, Dramatic, Musical, Cinematograph films, sound records and Artistic works (*see sec 13 of copyright act*). It also covers Anonymous and pseudonymous works and Posthumous work at presents the act is compatible with Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement and is in harmony with WCT and WPPT. *Section 52 of the Copyright Act, 1957* includes in itself the principle of limitation and exception to infringement of copyright as envisaged under Article 10 of WCT. The acts allow fair use /fair dealing of a literary, dramatic, musical or artistic work (not including a computer program) for the limited use like for private and personal use including research, criticism or review whether of that work or of any other work, reporting current events, for the purpose of a judicial proceeding / a report of a judicial proceeding.The section further provides that the following acts do not amount to copyrights infringement;-(a)making of copies or adaptation of a computer Programme by the lawful possessor of a copy of such computer Programme from such copy in order to utilize the computer Programme for the purpose for which it was supplied or to make back-up copies purely as a temporary protection against loss, destruction, or damage in order only to utilize the computer Programme for the purpose for which it was supplied;(b) the doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer Programme with other programmed by a lawful possessor of a computer Programme, if such information is not otherwise readily available;(c) in the observation, study or test of functioning of the computer Programme in order to determine the ideas and principles, which underline any elements of the Programme while performing such acts necessary for the functions for which the computer Programme was supplied; (d) making of copies or adaptation of the computer Programme from a personally legally obtained copy for non-commercial personal use.Thus,the Copyright, can be assigned or transferred or the owner of the work can license specific uses to another person and accordingly specify the gravity of ownership being given to another

person.The Copyright expires after 60 years from the end of the calendar year in which the author diesLiterary, dramatic, musical or artistic works; The Copyright shall subsist until 60 years from the beginning of the calendar year following the year in which the film/sound recording /photographs/computer programs is made available or first published as the case may be to the public.

The act provides economic rights under sec 14 of act to commercially exploit his creationand also grants moral rights as envisaged under Section 57 of the Act which are special rights of the author of the work viz., (i) Right to claim authorship of the work; and (ii) Right to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honor or reputation ("Right Against Distortion"). The moral rights can also be exercised by legal representatives post death of the author. As per the Amendment, the right against distortion is available even after the expiry of the term of copyright.

With the advent of the information technologies and Internet, copyright disputes infringement of copyrighted works in digital medium do arise but the existing Copyright Law is also applicable to copyright challenges arising due to use of digitaltechnologies and Internetand can be construed to cover electronic publication. In addition to the Copyright Act, 1957, there is also Copyright Rules, 1958 and the International Copyright Order, 1999. The Copyright Rules contain the rules and regulations and provides various procedures and where, the International Copyright Order is concerned, it deals with the protection of copyright works of nationals of various foreign countries.

Patent- It is governed by the Patents Act 1970; Patents Rules 1972. Section 2(m) of the Patent Act, 1970 provides for the definition of Patent which states that: - "*Patent means patent for any invention granted under this Act".*
To strengthen the patent law, India became signatory to many international agreements like Trade Related Intellectual Property Rights (TRIPS), Paris Convention and the Patent Cooperation Treaty and Budapest Treaty. The Act provides for period of 20 years for every patent from the from the date of application of patent irrespective of whether it is filed with provisional or complete specification. However, in case of applications filed under PCT the term of 20 years begins from the International filing date accorded under PCT.Under the Patent Act, both processes and products are entitled to qualify as inventions if they are new, involve an inventive step and are capable of industrial application. however before grant of patent, Act allows both pre-grant and postgrant opposition. Section 48 of the Indian Patents Act 1970, confers exclusive rights upon the patentee to exclude third parties from making, importing, using, offering for sale or selling the patented invention, patented product or patented process and use of patented invention without the

prior permission from the patent holder may amount to infringement. the patent owner can however grant permission in the form of a license.

It is interesting to note that in some countries Industrial design is also protected under patent, because these designs are created with some specific purpose and they impact consumers' choice between products. According to World Intellectual Property Organization (WIPO), industrial designs impact marketability and commercial value of product

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1. What is termed as 'patent' according to the Patent Act, 1970?

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Trademark-Trade Marks Act (TMA), 1999 protects the rights of the trademark owners or business entities for a term of 10 **years** from the date of application, renewable every 10 years on payment of the requisite fee.Sec 135 of the provides remedy in suits for infringement or for passing off in form of injunctions and damages. Section 103 imposes penalty for applying false trademarks, trade descriptions which shall be punishable with imprisonment for a term not less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees. Further, section 104 of TMA imposes penalty for selling goods or providing services to which false trade mark or false trade description is applied punishable with imprisonment for a term not less than six months which may be extended to three years and with fine which shall not be less than fifty thousand rupees which may be extended to two lakh rupees. In cases where trademark is unregistered in such situation common law remedy of passing off is provided to the owner of the trademark. Section 29 of the Trademark Act, 1999 deals with circumstances leading to infringement of registered trade mark as where person affixes it to goods or the packaging thereof; offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark; imports or exports goods under the mark; or uses the registered trade mark on business papers or in advertising. Section 29(7) deals with violation of trade mark through labelling or packaging goods, as a business paper, or for advertising goods or services, advertising , Sec27(8) provides that a registered trade mark is infringed by any advertising of that trade mark if such advertising(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or(b) is

detrimental to its distinctive character; or (c) is against the reputation of the trade mark. **(www.indiankanoon.org).**

Three types of remedies are available against infringement of IPR 1. *Civil Remedies*- injunctions, damages, rendition of accounts, exparte order, seizure, destruction or forfeiture of infringing goods. 2. *Criminal remedies*- section 63 of the Copyright Act, 1957 deals with Offences of infringement of copyright and Chapter XII of the Trademarks Act, 1999 deals with offences, penalties and procedures pertaining to trademark infringement. 3. *Administrative Remedies*- import/ export of goods including protection of patents, trademarks and copyrights under Indian Customs Act, 1962; Confiscation of infringing material by Custom Authorities; Restrictions against parallel importation of goods.

Trademark infringement through search engine is also subject of trademark litigation. Considered as unfair trade practice and a matter of great concern for judiciary to provide adequate protection to trademark owners in digitized medium. The advancement of digital technology, therefore presents legislators with a choice, either to expand or modify the existing law taking into account the new concerns that emerged due to cyberspace.

The following laws govern other form of IPR for ex: Designs Act, 2000 deals with laws relating to Industrial Designs; The geographical Indications of (Registration and Protection) Act, 1999 for Laws relating to Geographical Indication; Information Technology Act, 2000 deals with electronic records.

☞ **Check your progress 5:** *Spend 2 min*

1. What remedies are available against infringement of IPR?

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6.9.2 International scenario

Important treaties which provide international protection to Copyright are: -

i. Berne Convention for protection of Literary and Artistic Works, 1886.
ii. Universal Copyright Convention, 1952
iii. Agreement on Trade Related Aspects of Intellectual Property Rights, 1994.

The purpose of making these treaties is to create uniformity in dealing with the disputes related to the Intellectual Property Rights, because copyright is governed within the country according to the internal laws of the country and with the help of these treaties, uniform protection is given to all member

countries of that particular treaty. It is an important remedy against infringements and provides protection to copyright internationally. India is a member country to these treaties and has given protection against all member countries if any infringement of the copyright takes place. However, the registration process of the copyright may differ from one member country to another member country.

The Universal Copyright Convention (UCC) -was adopted in 1952 under the support and protection of United Nations Educational, Scientific and Cultural Organization (UNESCO) with a view to extend international copyright protection universally. After the entry into force of the Revision Act, in 1971, the members have to strictly comply in accordance to the revised version. The Intergovernmental Copyright Committee has been also established in compliance with Art. 11 of the UCC consisting of the representatives of 18 Contracting States. (**Universal Copyright Convention. United Nations Educational, Scientific and Cultural Organization (unesco.org))**

Berne Convention-

The Berne Convention deals with the protection of works and the rights of their authors. It is based on three basic principles: (1)Works originating in one of the Contracting States (that is, works the author of which is a national of such a State or works first published in such a State) must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals (**principle of "National treatment"),** (2) Protection must not be conditional upon compliance with any formality (principle of "**Automatic" protection),(**3) Protection is independent of the existence of protection in the country of origin of the work (**principle of "Independence" of protection**). If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country-of-originceases. Berne convention contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them. The Berne Convention allows certain limitations and exceptions on economic rights, that is, cases in which protected works may be used without the authorization of the owner of the copyright, and without payment of compensation. These limitations are commonly referred to as "free uses" of protected works, and are set forth in Articles 9(2) (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10bis (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events) and 11bis(3) (ephemeral recordings for broadcasting purposes).As to the duration of protection, the general rule is that protection must be granted until the expiration of the 50th year after the author's death. There are, however, exceptions to this general rule. In the case of anonymous or pseudonymous

works, the term of protection expires 50 years after the work has been lawfully made available to the public, except if the pseudonym leaves no doubt as to the author's identity or if the author discloses his or her identity during that period; in the latter case, the general rule applies. In the case of audiovisual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public ("release") or – failing such an event – from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of the work. **(https://www.wipo.int/treaties/en/ip/berne/summary_berne.html).**

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), it provides that the principles of national treatment, automatic protection and independence of protection also bind those World Trade Organization (WTO) Members not party to the Berne Convention. In addition, the TRIPS Agreement imposes an obligation of "most-favored-nation treatment", under which advantages accorded by a WTO Member to the nationals of any other country must also be accorded to the nationals of all WTO Members. Under the TRIPS Agreement, an exclusive right of rental must be recognized in respect of computer programs and, under certain conditions, audiovisual works. Under the TRIPS Agreement, any term of protection that is calculated on a basis other than the life of a natural person must be at least 50 years from the first authorized publication of the work, or – failing such an event – 50 years from the making of the work. However, this rule does not apply to photographic works, or to works of applied art. (**https://www.wipo.int/treaties/en/ip/berne/summary_berne.html).**

The U.S. Copyright Act states that a copyright exists once an "original work of authorship [is] fixed in any tangible medium of expression . . . from which [it] can be perceived, reproduced or otherwise communicated."**17 U.S.C. 102(a).**Copyright owners (or their assignees) have the right to carry out or authorize reproduction and distribution of their work; preparation of derivative works; and, for literary, musical, and various visually based works, the public performance or display of their work. Copyright law also imposes limitations on the exclusive rights that copyright owners enjoy during the life of a copyright. Some of those limitations apply to the use of a particular product, such as consumers' ability to make an archival copy of a computer program without authorization of the copyright owner**(17 U.S.C. 117).**

The Digital Millennium Copyright Act (DMCA), 1998

'The Act modifies the details of copyright law in a variety of ways, including instituting a royalty-setting process for Internet music broadcasts (Webcasts) and specifying exemptions for library and archival copying. It also established two major provisions of current digital copyright law—the ant circumvention prohibitions and the safe-harbor requirements for Internet Service Providers (ISPs)—that are intended to enhance the ability of copyright owners to protect

their work from infringing uses and to identify and prosecute those users found to be infringing copyright. The DMCA makes it illegal to circumvent a technology that controls access to copyrighted materials—for example, an encryption program that prevents unauthorized viewing of a movie on the Internet."[17 U.S.C. 1201(a)(1).]. The DMCA further prohibits manufacturing or trafficking in products "primarily designed or produced for the purpose of circumventing" technologies that are designed either to control access to copyrighted material (as in the previous example of a movie distributed via the Internet) or to prevent the use of such material in an infringing way. [17 U.S.C. 1201(a)(2) and (b)].In contrast, the DMCA does permit some circumvention activities or products that do not infringe copyright. For example, copyright law explicitly recognizes copying a computer program for archival purposes as a limitation on the exclusive rights of owners of copyright on computer programs. Hence, if a manufacturer of computer programs applied a copy-control technology to prevent unauthorized copying of its product, a lawful purchaser could legally circumvent that technology to make an archival copy. The example of software copying illustrates a central principle of copyright law: copyright owners have no legal obligation to facilitate any activity that qualifies either as a limitation on their exclusive rights or as fair use generally. At the same time, if the DMCA's prohibitions are to be effective legal instruments for deterring infringement, copyright owners must take measures to protect their intellectual property from unauthorized access and use. Thus, the fair use and other consumer concerns, such as personal privacy on the Internet was taken into account while crafting the anticircumvention provisions. However, technological progress is placing growing strains on whatever balance had previously been achieved between the rights of copyright owners and the interests of consumers.' **(Copyright Issues in Digital Media, Aug2004).**

International Patent protection Regime- There are many Patent-related treaties: WIPO-administered treaties; Paris Convention (concluded 1883); Patent Cooperation Treaty (1970); Strasbourg Agreement (1971); Budapest Treaty (1977): Patent Law Treaty (2000);WTO TRIPS Agreement (1994); Treaties outside WIPO; Regional treaties. Many inventors and other patent owners provide products or services around the world. However, the protection of a patent granted by the U.S. Patent and Trademark Office ends at the U.S. border and cannot be usedin other countries to prevent the use of the particular invention, owner of the patent needs to seek individual protection in each of the country in absence of any single international patent. But if both the foreign national's home country and the country granting the patent have signed an international treaty the rules of reciprocity to file patent application may apply that requires a country that issues a patent to a foreign national to provide the foreign national with the same rights as a patent owner that a citizen of that country will have. For example, most of the nations have signed the *Paris Convention*that deals with reciprocal rights in relation to patent

applications though an inventor still needs to file a separate application in each country that has signed the Convention, but each country will use the U.S. filing date for the application and to get advantage of this protection, a U.S. inventor must file their application in the foreign country within a year of filing in the U.S and the inventors of design patents must file application within six months of the U.S. filing.However, filing for multiple patents to enforce one's patent rights in foreign countries by way of infringementsuits is very expensive including hiring of lawyer fee.(**International Patent Law and Protection. Justia)**

The Patent Cooperation Treaty is another international treaty that allows patent protection for an invention simultaneously in each of a large number of countries by filing an "international" patent application. Such an application may be filed by anyone who is a national or resident of a PCT Contracting State.t may generally be filed with the national patent office of the Contracting State of which the applicant is a national or resident or, at the applicant's option, with the International Bureau of WIPO in Geneva. If the applicant is a national or resident of a Contracting State party to the European Patent Convention, the Harare Protocol on Patents and Industrial Designs (Harare Protocol), the Bangui Agreement, or the Eurasian Patent Convention, the international application may also be filed with the European Patent Office (EPO), the African Regional Intellectual Property Organization (ARIPO), the African Intellectual Property Organization (OAPI) or the Eurasian Patent Office (EAPO), respectively. The Treaty regulates in detail the formal requirements with which international applications must comply. Filing a PCT application has the effect of automatically designating all Contracting States bound by the PCT on the international filing date.The international application is subjected to an international search. (**Summary of the Patent Cooperation Treaty (PCT) (1970) (wipo.int))**

Protection in cases of Domain Name Disputes-The WIPO provides for the effective and speedy online complaint resolution mechanism and relief to the victim in cases of domain name disputes which is known the 'Uniform Domain Name Dispute Resolution Policy' adopted by ICANN on October 24, 1999.

The procedure introduced by the policy allows trademark owners to settle cases of disputed domain name registration without resorting to national courts. On ICANN's authorization, the WIPO Arbitration and Mediation Centre started offering its services for resolving the issues. **(Sople, 2016, 287).**
"All registrars must follow the Uniform Domain-Name Dispute-Resolution Policy (often referred to as the "UDRP"). Under the policy, most types of trademark-based domain-name disputes must be resolved by agreement, court action, or arbitration before a registrar will cancel, suspend, or transfer a domain name. Disputes alleged to arise from abusive registrations of domain names (for example, cybersquatting) may be addressed by expedited administrative proceedings that the holder of trademark rights initiates by

filing a complaint with an approved dispute-resolution service provider.To invoke the policy, a trademark owner should either (a) file a complaint in a court of proper jurisdiction against the domain-name holder (or where appropriate an in-rem action concerning the domain name) or (b) in cases of abusive registration submit a complaint to an approved dispute-resolution service provider".**(Uniform Domain-Name Dispute-Resolution Policy - ICANN).**

6.10 SUMMARY

The terms Intellectual Properties and Cyberspace is entirely different but in digital world almost every information is available over cyberspace and because of this many of the intellectual property works are getting infringed or being misused which results in consumers being misled and violation of the rights of the owners of the intellectual property. The rationale behind providing Intellectual Property rights and legal protection to the creators and inventors is to give them the due recognition for their intellectual work and also the monetary benefits for certain period of time to encourage further innovations; economic and technological growth but the IPR violations in digital media like Copyright's violations, Deep Hyper linking, Framing, abuse of search engines by use of Meta-tags, spamming and especially trademark violation giving rise to Domain Name Disputes are major concerns. Therefore, Management of Intellectual Property rights in cyberspace is an important issue to combat property infringements in the virtual space. It is seen that conventional laws for protecting intellectual property in India and at International level is also applicable to the infringements taking place in cyberspace.

6.11 SOLUTION/ANSWERS

Check your progress

1. A trademark is a distinctive sign, word, symbol or mark used in trade to distinguish the goods or services. Trademarks help consumers to identify the source of products or services. It could be name, signature, logo, brand label, phrase, slogan, letter, a numeral or any combination of them.
2. The domain name is a component of a uniform resource locator (URL) used to access web sites, for example: URL: http://www.example.net/index.html. It is Top-level domain,i.e . net. Domain name: example.net.
3. The following IPR issues arises in cyberspace: Copyright issues; Patent's infringement; Linking, In-lining and framing; Trade Mark

disputes including domain Name Disputes – Cybersquatting and abuse of Search Engines.

4. As per section 2(1)(m) of Patent Act, 1970 patent means a patent for any invention granted under this Act.
5. Civil Remedies- injunctions, damages, rendition of accounts, exparte order, seizure, destruction or forfeiture of infringing goods. 2. Criminal remedies- section 63 of the Copyright Act, 1957 deals with Offences of infringement of copyright and Chapter XII of the Trademarks Act, 1999 deals with offences, penalties and procedures pertaining to trademark infringement. 3. Administrative Remedies- import/ export of goods including protection of patents, trademarks and copyrights under Indian Customs Act, 1962; Confiscation of infringing material by Custom Authorities; Restrictions against parallel importation of goods.

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