

## UNIT V

### INTRODUCTION OF CYBER LAWS

#### INTRODUCTION: NEED FOR ENACTMENT OF INFORMATION TECHNOLOGY ACT, 2000

In the knowledge society of 21st century, computer, internet and ICT or e-revolution has changed the life style of the people. Today paper based communication has been substituted by e-communication, paper based commerce by e-commerce and paper based governance by e-governance. Accordingly, we have new terminologies like cyber world, netizens, e-transaction, e-banking, e-return and e-contracts. Apart from positive side of e-revolution there is seamy side also as computer; internet and ICT in the hands of criminals has become weapon of offence. Accordingly, a new branch of jurisprudence emerged to tackle the problems of cybercrimes in cyber space i.e. Cyber Law or Cyber Space Law or Information Technology Law or Internet Law.

For the first time, a Model Law on E-commerce was adopted in 1996 by United Nations Commission on International Trade and Law (UNCITRAL). It was further adopted by the General Assembly of the United Nations by passing a resolution on 31st January, 1997. Further, India was also a signatory to this Model Law and had to revise its national laws as per the said model law. Therefore, India enacted the Information Technology Act, 2000.

#### National reasons

Following are the main national reasons for the enactment of the IT Act, 2000:

- I. Increasing use of ICTs in conducting business transactions and entering into contracts, because it was easier, faster and cheaper to store, transact and communicate electronic information than the traditional paper documents.
- II. Business people were aware of these advantages but were reluctant to interact electronically because there was no legal protection under the existing laws.

#### International reasons

Following are the main international reasons for the enactment of the IT Act, 2000:

- I. International trade through electronic means was growing tremendously and many countries had switched over from traditional paper based commerce to e-commerce.
- II. The United Nations Commission on International Trade Law (UNCITRAL) had adopted a Model Law on Electronic Commerce in 1996, so as to bring uniformity in laws governing e-commerce across the globe.
- III. India, being a signatory to UNCITRAL, had to revise its national laws as per the said model law. Therefore, India also enacted the IT Act, 2000.
- IV. Because the World Trade Organization (WTO) was also likely to conduct its transactions only in electronic medium in future.

#### AIMS AND OBJECTIVES OF INFORMATION TECHNOLOGY ACT, 2000

Following were the main aims and objectives of the IT Act, 2000:



1. To suitably amend existing laws in India to facilitate e-commerce.
2. To provide legal recognition of electronic records and digital signatures.
3. To provide legal recognition to the transactions carried out by means of Electronic Data Interchange (EDI) and other means of electronic communication.
4. To provide legal recognition to business contacts and creation of rights and obligations through electronic media.
5. To establish a regulatory body to supervise the certifying authorities issuing digital signature certificates.
6. To create civil and criminal liabilities for contravention of the provisions of the Act and to prevent misuse of the e-business transactions.
7. To facilitate e-governance and to encourage the use and acceptance of electronic records and digital signatures in government offices and agencies. This would also make the citizen-government interaction more hassle free.
8. To make consequential amendments in the Indian Penal Code, 1860 and the Indian Evidence Act, 1872 to provide for necessary changes in the various provisions which deal with offences relating to documents and paper based transactions.
9. To amend the Reserve Bank of India Act, 1934 so as to facilitate electronic fund transfers between the financial institutions.
10. To amend the Banker's Books Evidence Act, 1891 so as to give legal sanctity for books of accounts maintained in the electronic form by the banks.
11. To make law in tune with Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law (UNCITRAL) adopted by the General Assembly of the United Nations

### Salient Features of I.T Act

The salient features of the I.T Act are as follows –

1. Digital signature has been replaced with electronic signature to make it a more technology neutral act.
2. It elaborates on offenses, penalties, and breaches.
3. It outlines the Justice Dispensation Systems for cyber-crimes.
4. It defines in a new section that cyber café 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.
5. It provides for the constitution of the Cyber Regulations Advisory Committee.
6. It is based on The Indian Penal Code, 1860, The Indian Evidence Act, 1872, The Bankers' Books Evidence Act, 1891, The Reserve Bank of India Act, 1934, etc.
7. 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.

### Scope IT act, 2000



Type of legal instrument used to create a security interest in real property and real estate.

An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.

It shall extend to the whole of India and, save as otherwise provided in this Act, it applies also to any offence or contravention thereunder committed outside India by any person.

**Application of the LT Act**

Act shall apply to documents or transactions specified in First Schedule. Following are the documents or transactions to which the Act shall not apply -

- Negotiable Instrument → promissory note, bill of exchange & a cheque payable either to order or to bearer.
- A power-of-attorney document; NRI's to authorize someone else to act on their behalf in India for property transactions, financial matters, legal proceedings.
- A trust deeds
- A will document including any other testamentary disposition; transfer of property by the testator by gift, deed, & will
- Any contract for the sale or conveyance of immovable property or any interest in such property; in which the ownership of a property is transferred from one person to another
- Any such class of documents or transactions as may be notified by the Central Government

✓ **Digital signature**

Basically, digital signature is a secure method of binding the identity of the signer with electronic record or message. This method uses a public key crypto system commonly known as 'asymmetric crypto system' to generate digital signature

**Definition of Digital Signature**

Digital signature means 'authentication of any electronic record by a subscriber by means of an electronic method or procedure.

**Functions of digital signature**

Following are the main functions of digital signature

1. To provide authenticity, integrity, secrecy and non-repudiation to electronic record or message.
2. To use the internet as a safe and secure medium without any violation or compromise for any e-transaction.

**iii. Legal provision relating to digital signature**



The IT Act, 2000 contains following provisions relating to digital signature:

**a. Authentication of electronic records**

Any subscriber may authenticate an electronic record by affixing his digital signature.

**b. Authentication by use of asymmetric crypto system and hash function**

The authentication of electronic record shall be affected by the use of asymmetric crypto system and hash function which envelop and transform the initial electronic record into another electronic record.

Hash function means "an algorithm mapping or translation of one sequence of bits into another, generally smaller, set known as 'hash result' such that an electronic record yields the same hash result every time the algorithm is executed with the same electronic record as its input making it computationally infeasible:

- To derive or reconstruct the original electronic record from the hash result produced by the algorithm;
- That two electronic records can produce the same hash result using the algorithm.

**c. Verification of electronic record**

Any person by the use of public key of the subscriber can verify the electronic record.

**d. Private key and public key are unique**

The private key and the public key are unique to the subscriber and constitute a functioning key pair.

① ✓ **E-Governance**

Computers, internet and ICTs have various advantages and had brought tremendous change in our lives. Today we have various new concepts like e-contract, e-communication, e-transaction, e-governance and so on.

**1. Meaning of E-governance**

E-governance is the application of ICTs to the processes of government functioning so as to have simple, accountable, speedy, responsive and transparent governance. Further, the World Bank defines e-governance as the use of information and communication technologies by government agencies to transform relations with citizens, business and other arms of the government. It involves information technology enabled initiatives that are used for improving:

- a. The interaction between government and citizens or government and business commonly known as e-services;
- b. The internal government operations commonly known as e-administration; and
- c. External interaction among the members of society commonly known as e-society.



According to CSR Prabhu, e-governance is a form of e-business, which involves delivery of electronic services to the public. It also involves collaborating with business partners of the government by conducting electronic transactions with them. It enables general public to interact with the government, through electronic means, for getting the desired services. In other words, e-governance means application of electronic means in the interactions between:

- a. Government and Citizens (G2C)
- b. Citizen and Government (C2G)
- c. Government and Business (G2B)
- d. Business and Government (B2G)
- e. Internal government operation (G2G)

## **2. Objectives of E-governance**

The main objective of e-governance is to simplify and improve governance and enable people's participation in governance through mail and internet. E-governance is much more than just preparing some websites. It ranges from the use of internet for the dissemination of plain web based information at its simplest level to services and online transactions on the one hand and utilizing IT in the democratic process itself, i.e., election on the other.

E-governance is not only providing information about the various activities of the government to its citizens and other organizations but it involves citizens to communicate with government and participate in government decision-making. E-governance is applied in following ways:

- a. Putting government laws and legislations online.
- b. Putting information relating to government plans, budgets, expenditures and performances online.
- c. Putting online key judicial decisions like environment decisions etc. which are important to citizens and create precedence for future actions.
- d. Making available contact addresses of local, regional, national and international officials online.
- e. Making available the reports of enquiry committees or commissions online

## **3. Advantages of E-governance**

It has the following advantages:

- a. Cheaper governance because it cuts financial and time costs.
- b. Quicker governance, by producing the same output at the same total cost in less time.
- c. Close monitoring of process performance.
- d. More accountability of public servants for their actions and decisions.



- e. Improves government efficiency and productivity.
- f. Facilitates the delivery of government services to the citizens through procedural simplicity, speed and convenience.
- g. Improves public image of the government by making government transparent.

#### **4. E-governance and Law in India**

Chapter 3 of the IT Act, 2000 (Sections 4-10A) deals with e-governance. Some important provisions are discussed as under:

1. Legal recognition of electronic records
2. Legal recognition of electronic signatures
3. Use of electronic records and electronic signatures in Government and its agencies
4. Delivery of services by service provider
5. Retention of electronic records
6. Audit of documents etc. maintained in electronic form
7. No right to insist government office etc. to interact in electronic form

#### **SUBSCRIBER**

##### **Definition of Subscriber**

Subscriber means a person in whose name the Electronic Signature Certificate is issued.

##### **Procedure for becoming a subscriber**

Following procedure is followed for becoming a subscriber under the Information Technology Act, 2000

- a. Apply to the Local Registration Authority of a licensed Certifying Authority in a prescribed application form for granting Digital Signature Certificate or Electronic Signature Certificate.
- b. Select the particular class of certificate in which the applicant is interested.
- c. Enter into an agreement with the Local Registration Authority.
- d. Generate key pair in a secure medium and prove the possession of private key corresponding to public key.
- e. The Local Registration Authority shall forward the application to licensed Certifying Authority, if he is satisfied, after verifying the relevant documents that the applicant is genuine and the application is in accordance with the provisions of law. Now the licensed Certifying Authority shall generate Digital Signature Certificate. Subscriber shall download the Digital Signature Certificate from licensed Certifying Authority's website.
- f. The subscriber shall verify the contents of Digital Signature Certificate and shall accept it.
- g. The Certifying Authority shall publish such Digital Signature Certificate.



## ✓ Duties of Subscriber

Following are the important duties of the subscriber under the IT Act, 2000:

### i. Generating Key Pair

Where any Digital Signature Certificate, the public key of which corresponds to the private key of that subscriber which is to be listed in the Digital Signature Certificate has been accepted by a subscriber, the subscriber shall generate that key pair by applying the security procedure.

ii. Duties of subscriber of Electronic Signature Certificate In respect of Electronic Signature Certificate, the subscriber shall perform such duties as may be prescribed.

### iii. Acceptance of Digital Signature Certificate

A subscriber shall be deemed to have accepted a Digital Signature Certificate if he publishes or authorizes the publication of a Digital Signature Certificate:

- a. To one or more persons;
- b. In a repository; or
- c. Otherwise demonstrates his approval of the Digital Signature Certificate in any manner.

By accepting a Digital Signature Certificate, the subscriber certifies to all who reasonably rely on the information contained in the Digital Signature Certificate that:

- a. The subscriber holds the private key corresponding to the public key listed in the Digital Signature Certificate and is entitled to hold the same;
- b. All representations made by the subscriber to the Certifying Authority and all material relevant to the information contained in the Digital Signature Certificate are true;
- c. All information in the Digital Signature Certificate, which is within the knowledge of the subscriber, is true.

### iv. Control of Private Key

Every subscriber shall exercise reasonable care to retain control of the private key corresponding to the public key listed in his Digital Signature Certificate and take all steps to prevent its disclosure.

If the private key corresponding to the public key listed in the Digital Signature Certificate has been compromised, then the subscriber shall communicate the same without any delay to the Certifying Authority in such manner as may be specified by the regulations.

The subscriber shall be liable till he has informed the Certifying Authority that the private key has been compromised.

## ✓ PENALTIES, COMPENSATION AND ADJUDICATION

### 1. Penalty and compensation for damage to computer, computer system, etc



If any person without permission of the owner or any other person who is in-charge of a computer, computer system or computer network does any of the following acts then he shall be liable to pay damages by way of compensation to the person so affected –

- a. Accesses or secures access to such computer, computer system or computer network or computer resource;
- b. Downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;
- c. Introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;
- d. Damages or causes to be damaged any computer, computer system or computer network, data, computer database or any other programmes residing in such computer, computer system or computer network.
- e. Disrupts or causes disruption of any computer, computer system or computer network;
- f. Denies or causes the denial of access to any person authorized to access any computer, computer system or computer network by any means;
- g. Provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;
- h. Charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system or computer network;
- i. Destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means;
- j. Steals, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used for a computer resource with an intention to cause damage.

## **2. Compensation for failure to protect data**

Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

## **3. Penalty for failure to furnish information, return etc.**

If any person who is required under this Act or any rules or regulations made thereunder to –

- a. Furnish any document, return or report to the Controller or the Certifying Authority, fails to furnish the same, then he shall be liable to a penalty not exceeding Rs. 1.5 lakhs for each such failure;
- b. File any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, then he shall be liable to a penalty not exceeding Rs. 5,000 for every day during which such failure continues;



c. Maintain books of account or records, fails to maintain the same, then he shall be liable to a penalty not exceeding Rs. 10,000 for every day during which the failure continues.

#### **4. Residuary penalty**

Whoever contravenes any rules or regulations made under this Act, for the contravention of which no penalty has been separately provided, shall be liable to pay compensation not exceeding Rs. 25,000 to the person affected by such contravention or a penalty not exceeding Rs. 25,000.

#### **5. Power to adjudicate**

In order to decide whether any person has committed a contravention of any of the provisions of this Act or of any rule, regulation, direction or order made thereunder which renders him liable to pay penalty or compensation, then the Central Government shall appoint any officer not below the rank of a Director to the Government of India or an equivalent officer of a State Government to be an adjudicating officer for holding an inquiry in the manner prescribed by the Central Government

The adjudicating officer shall exercise jurisdiction to adjudicate matters in which the claim for injury or damage does not exceed Rs. 5 crores.

However, where the claim for injury or damage exceeds Rs. 5 crores then the jurisdiction would vest with the competent court.

The adjudicating officer shall give the accused a reasonable opportunity for making representation in the matter. If, after inquiry, he is satisfied that the person has committed the contravention then he may impose such penalty or award such compensation as he thinks fit.

The person to be appointed as adjudicating officer shall possess such experience in the field of Information Technology and legal or judicial experience as may be prescribed by the Central Government.

Where more than one adjudicating officers are appointed, then the Central Government shall specify the matters and places with respect to which such officers shall exercise their jurisdiction. Every adjudicating officer shall have the powers of a civil court which are conferred on the Cyber Appellate Tribunal.

#### **6. Factors to be taken into account by the adjudicating officer**

While adjudging the quantum of compensation, the adjudicating officer shall have due regard to the following factors, namely –

- a. The amount of gain of unfair advantage, wherever quantifiable, made as a result of the default;
- b. The amount of loss caused to any person as a result of the default;
- c. The repetitive nature of the default

### **② ✓ CYBER REGULATIONS APPELLATE TRIBUNALS**

#### **1. Establishment of Cyber Appellate Tribunal**

The Central Government shall, by notification, establish one or more appellate tribunals to be known as the Cyber Appellate Tribunal.



The Central Government shall also specify in the notification, the matters and places in relation to which the Cyber Appellate Tribunal may exercise jurisdiction.

### **3. Composition of Cyber Appellate Tribunal**

The Cyber Appellate Tribunal shall consist of a Chairperson and such number of other members, as the Central Government may, by notification in the Official Gazette, appoint.

The selection of Chairperson and members of the Cyber Appellate Tribunal shall be made by the Central Government in consultation with the Chief Justice of India.

The jurisdiction, powers and authority of the Cyber Appellate Tribunal may be exercised by the Benches thereof. A Bench may be constituted by the Chairperson of the Cyber Appellate Tribunal with one or two members of such Tribunal as the Chairperson may deem fit.

The Benches of the Cyber Appellate Tribunal shall sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson of the Cyber Appellate Tribunal, specify by notification in the Official Gazette. By notification in the Official Gazette, the Central Government shall specify the areas in relation to which each Bench of the Cyber Appellate Tribunal may exercise its jurisdiction.

The Chairperson of the Cyber Appellate Tribunal may transfer a member of such Tribunal from one Bench to another Bench.

### **3. Qualification for appointment as Chairperson and Members of Cyber Appellate Tribunal**

A person can be appointed as a Chairperson of the Cyber Appellate Tribunal if he is, or has been, or is qualified to be, a Judge of a High Court.

The Members of the Cyber Appellate Tribunal, except the Judicial Member, shall be appointed by the Central Government from amongst persons, having special knowledge of, and professional experience in, information technology, telecommunication, industry, management or consumer affairs.

### **Appeal to Cyber Appellate Tribunal**

Any person aggrieved by an order made by the controller or an adjudicating officer under the IT act, 2000 may prefer an appeal to a Cyber Appellate Tribunal having jurisdiction in the matter.<sup>156</sup>

#### **i. No appeal against order made with the consent of parties**

No appeal shall lie to the Cyber Appellate Tribunal from an order made by an adjudicating officer with the consent of the parties.

#### **ii. Limitation period for filing an appeal**

Every appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Controller or the adjudicating officer is received by the person aggrieved and it shall be in such form and be accompanied by such fee as may be prescribed. However, the Cyber Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing it within that period.



## **Powers of the Cyber Appellate Tribunal**

- a. Summoning and enforcing the attendance of any person and examining him on oath;
- b. Requiring the discovery and production of documents or other electronic records;
- c. Receiving evidence on affidavits;
- d. Issuing commissions for the examination of witnesses or documents;
- e. Reviewing its decisions;
- f. Dismissing an application for default or deciding it *ex parte*;
- g. Any other matter which may be prescribed

## **INTRODUCTION TO IPR**

Intellectual property (IP) refers to the creations of the human mind like inventions, literary and artistic works, and symbols, names, images and designs used in commerce. Intellectual property is divided into two categories:

Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs. Intellectual property rights protect the interests of creators by giving them property rights over their creations.

The most noticeable difference between intellectual property and other forms of property, however, is that intellectual property is intangible, that is, it cannot be defined or identified by its own physical parameters. It must be expressed in some discernible way to be protectable. Generally, it encompasses four separate and distinct types of intangible property namely- patents, trademarks, copyrights, and trade secrets, which collectively are referred to as "intellectual property." However, the scope and definition of intellectual property is constantly evolving with the inclusion of newer forms under the gambit of intellectual property. In recent times, geographical indications, protection of plant varieties, protection for semi-conductors and integrated circuits, and undisclosed information have been brought under the umbrella of intellectual property.

### **The Concept of Intellectual Property**

The concept of intellectual property is not new as Renaissance northern Italy is thought to be the cradle of the Intellectual Property system. A Venetian Law of 1474 made the first systematic attempt to protect inventions by a form of patent, which granted an exclusive right to an individual for the first time. In the same century, the invention of movable type and the printing press by Johannes Gutenberg around 1450, contributed to the origin of the first copyright system in the world.



Towards the end of 19th century, new inventive ways of manufacture helped trigger large-scale industrialization accompanied by rapid growth of cities, expansion of railway networks, the investment of capital and a growing transoceanic trade. New ideals of industrialism, the emergence of stronger centralized governments, and nationalism led many countries to establish their modern Intellectual Property laws. At this point of time, the International Intellectual Property system also started to take shape with the setting up of the Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886. The premise underlying Intellectual Property throughout its history has been that the recognition and rewards associated with ownership of inventions and creative works stimulate further inventive and creative activity that, in turn, stimulates economic growth.

Over a period of time and particularly in contemporary corporate paradigm, ideas and knowledge have become increasingly important parts of trade. Most of the value of high technology products and new medicines lies in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not usually because of the plastic, metal or paper used to make them. Many products that used to be traded as low-technology goods or commodities now contain a higher proportion of invention and design in their value, for example, brand-named clothing or new varieties of plants. Therefore, creators are given the right to prevent others from using their inventions, designs or other creations. These rights are known as intellectual property rights.

The Convention establishing the World Intellectual Property Organization (1967) gives the following list of the

subject matter protected by intellectual property rights:

- literary, artistic and scientific works;
- performances of performing artists, phonograms, and broadcasts;
- inventions in all fields of human endeavor;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition; and
- "all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

With the establishment of the world trade Organization (WTO), the importance and role of the intellectual property protection has been crystallized in the Trade-Related Intellectual Property Systems (TRIPS)

Agreement. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994.



The TRIPS Agreement encompasses, in principle, all forms of intellectual property and aims at harmonizing and strengthening standards of protection and providing for effective enforcement at both national and international levels. It addresses applicability of general GATT principles as well as the provisions in international agreements on IP (Part I). It establishes standards for availability, scope, use (Part II), enforcement (Part III), acquisition and maintenance (Part IV) of Intellectual Property Rights. Furthermore, it addresses related dispute prevention and settlement mechanisms (Part V). Formal provisions are addressed in Part VI and VII of the Agreement, which cover transitional, and institutional arrangements, respectively.

The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property. The areas of intellectual property that it covers are:

- (i) Copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organisations);
- (ii) Trademarks including service marks;
- (iii) Geographical indications including appellations of origin;
- (iv) Industrial designs;
- (v) Patents including protection of new varieties of plants;
- (vi) The lay-out designs (topographies) of integrated circuits;
- (vii) The undisclosed information including trade secrets and test data.

## **PATENTS ACT, 1970**

### **CONCEPT OF PATENT**

A patent is an exclusive right granted by a country to the owner of an invention to make, use, manufacture and market the invention, provided the invention satisfies certain conditions stipulated in the law. Exclusivity of right implies that no one else can make, use, manufacture or market the invention without the consent of the patent holder. This right is available only for a limited period of time. However, the use or exploitation of a patent may be affected by other laws of the country which has awarded the patent.

These laws may relate to health, safety, food, security etc. Further, existing patents in similar area may also come in the way. A patent in the law is a property right and hence, can be gifted, inherited, assigned, sold or licensed. As the right is conferred by the State, it can be revoked by the State under very special circumstances even if the patent has been sold or licensed or manufactured or marketed in the meantime.

The patent right is territorial in nature and inventors/their assignees will have to file separate patent applications in countries of their interest, along with necessary fees, for obtaining patents in those countries.

A patent is an official document given to an inventor by the government allowing him to exclude anyone else from commercially exploiting his invention for a limited period which is 20 years at present. As per the Supreme Court, the object of Patent Law is to encourage scientific research,



new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period of the monopoly, passes into the public domain [*M/s Bishwanath Prasad v. Hindustan Metal Industries, AIR1982 SC 1444*]. By granting an exclusive right, patents provide incentives to individuals, offering them recognition for their creativity and material reward for their marketable inventions. In return for the exclusive right, the inventor has to adequately disclose the patented invention to the public, so that others can gain the new knowledge and can further develop the technology. The disclosure of the invention is thus an essential consideration in any patent granting procedure.

### **Product/Process Patents**

Section 5 of the Patent Act 1970 had provided for grant of only process patents in certain categories of inventions. It may be pointed out here that under the Patent Act, 1970, in all other areas product and process patents could be issued and have been issued.

### **DURATION OF PATENTS**

Section 53 provides that the term of every patent granted after the commencement of the Patents (Amendment) Act, 2002 and the term of every patent which has not expired and has not ceased to have effect, on the date of such commencement, shall be twenty years from the date of filing of application for the patent.

### **Elements of Patentability**

As stated above, a patent is granted for an invention which may be related to any process or product. An invention is different from a discovery. Discovery is something that already existed but had not been found.

Not all inventions are patentable. An invention must fulfill certain requirements known as conditions of patentability. The word "invention" under the Patents Act 1970 means "a new product or process involving an inventive step and capable of industrial application. (Section 2(1)(j)).

The patent must be in respect of an invention and not a discovery. The fundamental principle of Patent Law is that a patent is granted only for an invention which must be new and useful. That is to say, it must have novelty and utility. It is essential for the validity of a patent that it must be the inventor's own discovery as opposed to mere verification of what was already known before the date of the patent... It is important to bear in mind that in order to be patentable an improvement on something known before or a combination of different matters already known, should be something more than a mere workshop improvement; and must independently satisfy the test of invention or an "inventive step". To be patentable the improvement or the combination must produce a new result, or a new article or a better or cheaper article than before.

"New invention" is defined as any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art [Section 2(1)(l); Where, capable



of industrial application, in relation to an invention, means that the invention is capable of being made or used in an industry [Section 2(1)(ac)].

In *Raj Prakash v. Mangat Ram Choudhary AIR 1978 Del.1*, it was held that invention, as is well known, is to find out some thing or discover something not found or discovered by anyone before. It is not necessary that the invention should be anything complicated. The essential thing is that the inventor was first to adopt it.

The principal therefore, is that every simple invention that is claimed, so long as it is something which is novel or new, it would be an invention and the claims and specifications have to be read in that light.

Therefore, the conditions of patentability are:

- Novelty
- Inventive step (non-obviousness) and
- Industrial applicability (utility)

#### NON-PATENTABLE SUBJECT MATTER

An invention may satisfy the condition of novelty, inventiveness and usefulness but it may not qualify for a patent. The following are not inventions within the meaning of Section 3 of the Patents Act, 1970:

(a) an invention which is frivolous or which claims anything obviously contrary to well established natural laws;

(b) an invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment;

(c) the mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substances occurring in nature;

(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any property or mere new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant; Explanation to clause (d) clarifies that salts, esters, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy. → *not having any serious purpose & value*  
→ *The power to produce a desired result.*

(e) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;

(f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way;

(h) a method of agriculture or horticulture;



- (i) any process for the medicinal, surgical, curative, prophylactic diagnostic, therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products;
- (j) plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals;
- (k) a computer programme per se other than its technical application to industry or a combination with hardware;
- (l) a literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever including cinematographic works and television productions;
- (m) a mere scheme or rule or method of performing mental act or method of playing game;
- (n) a presentation of information;
- (o) topography of integrated circuits;
- (p) an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.

## TRADE MARKS

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. The period of protection varies, but a trademark can be renewed indefinitely beyond the time limit on payment of additional fees.

In a larger sense, trademarks promote initiative and enterprise worldwide by rewarding the owners of trademarks with recognition and financial profit. Trade mark protection also hinders the efforts of unfair competitors, such as counterfeiters, to use similar distinctive signs to market inferior or different products or services.

The system enables people with skill and enterprise to produce and market goods and services in the fairest possible conditions, thereby facilitating international trade.

With the advent of WTO, the law of trade marks is now modernized under the Trade Marks Act of 1999 and is in harmony with two major international treaties on the subject, namely, The Paris Convention for Protection of Industrial Property and TRIPS Agreement.

### Concept of Trade marks

A trade mark (popularly known as brand name in layman's language) is a visual symbol which may be a word to indicate the source of the goods, a signature, name, device, label, numerals, or combination of colors used, or services, or other articles of commerce to distinguish it from other similar goods or services originating from another.

It is a distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise. Its origin dates back to ancient times, when craftsmen reproduced



their signatures, or "marks" on their artistic or utilitarian products. Over the years these marks evolved into today's system of trade mark registration and protection. The system helps consumers identify and purchase a product or service because its nature and quality, indicated by its unique trade mark, meets their needs.

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### **Object of Trade Marks Law**

"The object of trade mark law is to protect the rights of persons who manufacture and sell goods with distinct trade marks against invasion by other persons passing off their goods fraudulently and with counterfeit trademarks as those of the manufacturers. Normally, the remedy for such infringement will be by action in Civil Courts.

But in view of the delay which is incidental to civil proceedings and the great injustice which might result if the rights of manufacturers are not promptly protected, the law gives them the right to take the matter before the Criminal Courts, and prosecute the offenders, so as to enable them to effectively and speedily vindicate their rights".

### **REGISTRATION OF TRADE MARKS**

The process whereby a trade mark is entered on the register of the trademarks is referred to as registration. Any person, claiming to be the proprietor of a trade mark used or proposed to be used by him, can apply for registration of a trade mark to the Trade Mark Registry under whose jurisdiction, the principal place of the business of the applicant falls, in the prescribed manner for the registration of his trade mark. In case of a company about to be formed, anyone may apply in his name for subsequent assignment of the registration in the company's favour.

### **RIGHTS CONFERRED BY REGISTRATION**

The registration of a trade mark confers on the registered proprietor of the trade mark the exclusive right to use the trade mark in relation to the goods or services in respect of which the trade mark is registered. While registration of a trade mark is not compulsory, it offers better legal protection for an action for infringement.

As per Section 17 of the Act, the registration of a trade mark confers the following rights on the registered proprietor:

- (i) It confers on the registered proprietor the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered.



- (ii) If the trade mark consists of several matters, there is an exclusive right to the use of the trade mark taken as a whole. If the trade mark contains matter common to trade or is not of a distinctive character, there shall be no exclusive right in such parts.
- (iii) It entitles the registered proprietor to obtain relief in respect of infringement of the trade mark in the manner provided by the Trade Marks Act, 1999 when a similar mark is used on (a) same goods or services, (b) similar goods or services, (c) in respect of dissimilar goods or services.
- (iv) Registration of a trade mark forbids every other person (except the registered or unregistered permitted user) to use or to obtain the registration of the same trade mark or a confusingly similar mark in relation to the same goods or services or the same description of goods or services in relation to which the trade mark is registered.
- (v) After registration of the trade mark for goods or services, there shall not be registered the same or confusingly similar trade mark not only for the same goods or services but also in respect of similar goods or services by virtue of Section 11(1) of Trade Marks Act, 1999.
- (vi) Moreover, after registration of the trade mark for goods or services, there shall not be registered the same or confusingly similar trade mark even in respect of dissimilar goods or services by virtue of Section 11(2) in case of well-known trademarks.
- (vii) Registered trade mark shall not be used by anyone else in business papers and in advertising. Use in comparative advertising should not take undue advantage of the trade mark. Such advertising should not be contrary to honest practices in industrial or commercial matters. The advertising should not be detrimental to the distinctive character or reputation of the trade mark.
- (viii) There is a right to restrict the import of goods or services marked with a trade mark similar to one's trade mark.
- (ix) There is a right to restrain use of the trade mark as trade name or part of trade name or name of business concern dealing in the same goods or services.

## ✓ COPYRIGHTS

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. Unlike the case with patents, copyright protects the expressions and not the ideas. There is no copyright in an idea.

Just as you would want to protect anything that you own, creators want to protect their works. Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity.

Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same. Economic and social development of a society is dependent on 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.

## MEANING OF COPYRIGHT AND THE RIGHTS CONFERRED



Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work. It means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever.

Section 14 of the Act defines the term Copyright as to mean the exclusive right to do or authorise the doing of the following acts in respect of a work or any substantial part thereof, namely

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

- (i) reproducing the work in any material form which includes storing of it in any medium by electronic means;
- (ii) issuing copies of the work to the public which are not already in circulation;
- (iii) performing the work in public or communicating it to the public;
- (iv) making any cinematograph film or sound recording in respect of the work; making any translation or adaptation of the work.

In the case of a computer programme:

- (i) to do any of the acts specified in respect of a literary, dramatic or musical work; and
- (ii) 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:

- (i) 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;
- (ii) communicating the work to the public;
- (iii) issuing copies of work to the public which are not already in existence;
- (iv) including work in any cinematograph film;

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 and sound recording:

- (i) making a copy of the film including a photograph of any image or making any other sound recording embodying it;
- (ii) 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



(iii) communicating the film/sound recording to the public.

In the case of a sound recording:

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

### **Works in Which Copyright Subsists**

Section 13 of the Copyright Act provides that copyright shall subsist throughout India in certain classes of

works which are enumerated in the section. Copyright subsists throughout India in the following classes of works:

- Original literary, dramatic, musical and artistic works;
- Cinematograph films; and
- Sound recordings.

### **Term of Copyright**

Sections 22 to 29 deal with term of copyright in respect of published literary, dramatic, musical and artistic works; anonymous and pseudonymous; posthumous, photographs, cinematograph films, sound recording,

Government works, works of PSUs and works of international organisations.

Literary, dramatic, musical or artistic works enjoy copyright protection for the life time of the author plus 60 years beyond i.e. 60 years after his death. In the case of joint authorship which implies collaboration of two or more authors in the production of the work, the term of copyright is to be construed as a reference to the author who dies last.

In the case of copyright in posthumous, anonymous and pseudonymous works, photographs, cinematograph films, sound recordings, works of Government, public undertaking and international organisations, the term of protection is 60 years from the beginning of the calendar year next following the year in which the work has been first published.

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