IPR 2 full notes

Environment Law, Evidence Law and IPR II (Karnataka State Law University)

AL-AMEEN COLLEGE OF LAW
Bangalore

INTELLECTUAL PROPERTY RIGHTS - II

UNIT 1: COPYRIGHT & RELATED RIGHTS

1. What is copyright? Explain the works in which copyright subsists.

The law does not permit one to appropriate to himself what has been produced by the labour, skill and capital of another. This is the very foundation of copyright law. The object of copyright law is to protect the author of the copyright work from an unlawful reproduction or exploitation of his work by others. Copyright protection is essential to encourage exploitation of copyright work for the benefit of the public. Copyright law is in essence concerned with the negative right of preventing copying of physical material existing in the field of literature and the arts. Copyright protection exists from the moment a work is created in a fixed, tangible form of expression. The copyright *immediately* becomes the property of the author who created the work. Only the author, or those deriving their rights through the author, can rightfully claim copyright. In the case of works made for hire, the employer—not the writer—is considered the author.

There is no copyright in ideas; copyright only subsists in the material form in which the ideas are expressed. It is not an infringement of copyright to adopt the ideas of another. Copyright does not ordinarily protect titles by themselves or names, short word combinations, slogans, short phrases, methods, plots or factual information. Copyright does not protect ideas or concepts.

Works in which copyright subsists:

Section 13(1) provides that, copyright shall subsist in the following classes of works, that is to say.

a) Original literary, dramatic, musical and artistic works;

"Literary work" includes computer programmes tables, compilations including computer database.

"dramatic work" includes any piece of recitation, choreographic work or entertainment in dumb show, the scenic arrangements or acting, form of which is fixed in writing or otherwise but doesn't include a Cinematograph films.

"musical work" means a work consisting of music and includes any graphical notation of such work but doesn't include any words or any action intended to be spoken, sung or performed with the music.

"Artistic work" means painting, a sculpture, a drawing, an engraving or a photograph, whether or not any such work possess artistic quality, a work of architecture and any other artistic craftsmanship.

(b) Cinematograph films;

Cinematograph films means any work of visual recording and includes a sound recording accompanying such visual recording.

(c) Sound recordings

Sound recording means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is the method by which the sounds are produced.

(d) Video recordings

Video recording has been added in the 2012 amendment

Qualification for copyright subsistence:

To qualify for copyright the work should be an original work, apart from that it should also satisfy the following conditions:

1) The work is first published in India,

2) Where the work is first published outside India, the author at the date of publication must be an Indian citizen.

3) In case of an unpublished work the author at the time of making the work should have been an Indian citizen or domiciled in India.

4) In case of an architectural work of art, the work is located in India.

In case of works of joint authorship the conditions regarding nationality should be satisfied by all the authors. (Sec 13(2))

Rights conferred by copyright:

Copyright is not a positive right but a negative right, which is the right to stop others from exploiting the work without the copyright owners consent or licence.

Copyright is not a single right but a bundle of rights which can be exploited independently. Further, the nature of these rights depends upon the category of work. the owner of the work may exploit the work himself or licence others to exploit anyone or more of the rights for consideration in the form of royalty or a lump sum payment.

There are two types of rights that an owner of copyright gets:

1. **Moral rights:** Sec 57 of the Copyright Act, 1957 provides for what are termed as "Author's Special Rights," better known as "Moral Rights." These rights remain with the author even if he after the transfer of copyright and the protection lasts during the whole of the copyright term. If the author desires to transfer these rights also he can do so specifically in writing in the deed of assignment.
   (a) To claim authorship of the work; and

   (b) To restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation:

Amar Nath Seghal v. Union of India, In this case, the plaintiff/author assigned his copyright in a bronze mural, to the Union of India. The mural was placed in Vigyan Bhavan, but was later pulled down and dumped. The author, Amar Nath Seghal, sued for violation of his moral rights.

The case was filed in the early 90's and an interim injunction was passed in favour of the Plaintiff. In response, the defendants made an application under the Arbitration Act, 1940 seeking stay of proceedings in the suit claiming that the dispute ought to be referred to arbitration in the light of a term in the assignment requiring arbitration of all disputes.

The defendants further argued that "the plaintiff had assigned his copyrights to the defendants and having purchased the same, the defendants are under no fetters while dealing with the mural in question."

The interim application was decided in 2002 and the case itself was finally decided in 2005. The court dismissed the claim under the Arbitration Act and further observed: "These [moral] rights are independent of the author's copyright. They exist even after the assignment of the copyright, either wholly or partially." The court quoted from Smt. Mannu Bhandari v. Kala Vikash Pictures Pvt. Ltd. and Anr. (1986): "Section 57 confers additional rights on the author of a literary work as compared to the owner of a general copyright. The special protection of the intellectual property is emphasised by the fact that the remedies of a restraint order or damages can be claimed "even after the assignment either wholly or partially of the said copyright." Section 57 thus clearly overrides the terms of the Contract of assignment of the copyright. To put it differently, the contract of assignment would be read subject to the provisions of Section 57 and the terms of contract cannot negate the special rights and remedies guaranteed by Section 57. The Contract of Assignment will have to be so construed as to be consistent with Section 57. The assignee of a copyright cannot claim any rights or immunities based on the contract which are inconsistent with the provisions of Section 57."

Economic rights (sec 14)

Copyright means the exclusive right subject to the provisions of this act to do or authorize the doing of the following in respect of a work or any substantial part:

In the case of a literary work, copyright means the exclusive right:

a) To issue copies of the work to the public.
b) To reproduce the work.
c) To perform the work in public.
d) To communicate the work to the public.

e) To make cinematograph film or sound recording in respect of the work
f) To make any translation of the work
g) To make any adaptation of the work.
h) In addition to all the rights applicable to a literary work, owner of the copyright in a computer programme enjoys the rights to sell or give on hire or offer for sale or hire, regardless of whether such a copy has been sold or given on hire on earlier occasion.

In the case of a dramatic work, copyright means the exclusive right:

a) To reproduce the work
b) To communicate the work to the public or perform the work in public
c) To issue copies of the work to the public
d) To include the work in any cinematograph film
e) To make any adaptation of the work
f) To make translation of the work.

In the case of a musical work, copyright means the exclusive right:

a) To reproduce the work.
b) To issue copies of the work to the public
c) To perform the work in public
d) To communicate the work to the public
e) To make cinematograph film or sound recording in respect of the work
f) To make any translation of the work
g) To make any adaptation of the work.

In the case of an artistic work, copyright means the exclusive right:

a) To reproduce the work
b) To communicate the work to the public
c) To issue copies of the work to the public
d) To include the work in any cinematograph film
e) To make any adaptation of the work.

In the case of a cinematograph film, copyright means the exclusive right:

a) To make a copy of the film including a photograph of any image forming part thereof
b) To sell or give on hire or offer for sale or hire a copy of the film
c) To communicate the cinematograph film to the public.

In the case of sound recording, copyright means the exclusive right to do:

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

2. Who is an infringer of copyright? What constitutes infringement? What are the remedies available for infringement? Explain.

A simple definition of copyright is that it is a bunch of rights in certain creative works such a literary, artistic works, music, computer programs, sound recordings and films. The people who are the creators are usually called "authors" even if they are really painters, photographers, writers, composers etc.

The owner of a copyright work has the exclusive right to do certain acts in respect of the work. If any person does any of these acts without the authority he will be committing an infringement of the copyright in the work. Copyright in a work is considered as infringed only if a substantial part is made use of unauthorizedly. What is 'substantial' varies from case to case. More often than not, it is a matter of quality rather than quantity. For example, if a lyricist copy a very catching phrase from another lyricist's song, there is likely to be infringement even if that phrase is very short.

Sec 51 provides situations when copyright in any work is deemed to be infringed, they are as follows:

i. When any person without license from the owner of the copyright, or the register of copyright, or in contravention of the conditions of a licence granted or any conditions imposed by a competent authority u/ the act,

ii. Does anything the exclusive right to do which is conferred upon the owner of the copyright, or

iii. Permits for profit any place to be used for the communication of the work, unless he was not aware and had no reasonable grounds for believing that such communication to the public would be an infringement of copyright,

iv. Where a person makes infringing copies for sale or hire or selling or letting them for hire,

v. Distributing infringing copies for the purpose of trade or to such an extent so as to affect prejudicially the interest of the owner of copyright,

vi. Public exhibition of infringing copies by way of trade, and

vii. Importation of infringing copies into India.

Exceptions to infringement of copyright:

The copyright act provides certain exceptions to infringement. These are popularly called the doctrine of fair dealing. Fair dealing is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work. It permits reproduction or use of copyrighted work in a manner, which, but for the exception carved out would have amounted to infringement of copyright. This doctrine is one of the most important aspects of Copyright Law which draws a line between a legitimate, bonafide fair use of a work from a malafide blatant copy of the work.

The main idea behind this doctrine is to prevent the stagnation of the growth of creativity for whose progress the law has been designed. They provide defences in an action for infringement of copyright.

Section 52 gives a long list of acts which do not constitute infringement of copyright. Few of them are as follows:

1) a fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of-
    (i) private use, including research;
    (ii) criticism or review, whether of that work or of any other work; "
    (iii) the making of copies or adaptation of a computer programmer

(iv) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied.

2) The reproduction of a literary, dramatic, musical or artistic work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding.
3) The reading or recitation in public of any reasonable extract from a published literary or dramatic work.
4) Publication in a collection for the use of educational institutions in certain circumstances.
5) Reproduction by teacher or pupil in the course of instructions or in question papers.
6) Performance in the course of the activities of educational institutions in certain circumstances.
7) The performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution.
8) The reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction.
9) The making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such book is not available for sale in India.
10) Reproduction or publication of any matter published in official gazette or reports of government commission or bodies appointed by government.
11) Reproduction of any judgment or order of court, tribunal or other judicial authority not prohibited from publication.
12) Production or publication of a translation of acts of legislature or rules.

Remedies for copyright infringement:

The remedies for copyright infringement are:

a) Civil (Section 55)

b) Criminal, (sec 63)and

c) Administrative

A. **Civil Remedies:**

The most importance civil remedy is the grant of interlocutory injunction since most actions start with an application for some interlocutory relief and in most cases the matter never goes beyond the interlocutory stage. The other civil remedies include damages – actual and conversion; rendition of accounts of profits and delivery up.

a) Interlocutory Injuctions: The principles on which interlocutory injunctions should be granted were discussed in detail in the English case of *American Cyanamid v Ethicon Ltd.* (1975). After this case, it was believed that the classic requirements for the grant of interim injunction, namely,

(i) Prima facie case

(ii) Balance of Convenience; and

(iii)Irreparable injury

b) Pecuniary Remedies: Under Indian law, however, there is a departure made and the plaintiff, under sections 55 and 58, can seek recovery of all three remedies, namely (a) account of profits (b) compensatory damages and (c) conversion damages which are assessed on the basis of value of the article converted.

c) Anton Piller Orders: The Anton Pillar Order derives its name from a Court of Appeal decision in Anton Pillar AG V. Manufacturing Processes [1976]. An Anton Piller Order has the following elements:

i. An injunction restraining the defendant from dealing in the infringing goods or destroying, them;

ii. An order that the plaintiffs solicitors be permitted to enter the premises of the defendants, search the same and take goods in their safe custody; and

iii. An order that defendant be directed to disclose the names and addresses of suppliers and customers and also to file an affidavit will a specified time giving this information.

B. Criminal Remedies: Sec 63-70

Criminal remedies for copyright violation include:

i. Punishment through imprisonment which, under Indian law, may not be less than six months but which may extend to three years;

ii. Fines which, under Indian law, shall not be less than Rs.50.000. and which may extend to Rs.200, 000.

iii. Search and seizure of the infringing goods including plates which are defined as including blocks, moulds, transfers, negatives, duplicating equipment or any other device used or intended to be used for printing or reproducing copies of the work.

iv. Delivery up of infringing copies or plates to the owner of the copyright.

C. Adminsitrative remedies:

Administrative remedies consist of moving the Registrar of copyrights to ban the import of infringing copies into India when the infringement is by way of such importation and the delivery of the confiscated infringing copies to the owner of the copyright and seeking the delivery.

3. Describe the various modes of transfer of copyright.

Nobody is entitled to copy, reproduce, publish or sell an original writing, painting, dramatic production, sculpture, etc. without the permission of the creator. Thus, law provides a right to the owner of the copyright (i.e. the creator) to transfer the ownership of the copyright to a third party. For instance, in the case of making a complete movie – all the creative persons with their idea turned into relevant works come to a producer, assign their rights that subsist in their work in return for a royalty. These works are then summed up to form a complete movie.

a) <u>Assignment of copyright</u>: (SEC 18-20)

The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof.

The requirements for an assignment to be enforced are:

(a) It must be in writing.

(b) It should be signed by the Assignor.

(c) The copyrighted work must be identified and must specify the rights assigned.

(d) It should have the terms regarding revision, royalty and termination.

(e) It should specify the amount of royalty payable, if any, to the author or his legal heirs.

(f) In the event the Assignee does not exercise the rights assigned to him within a period of one year, the assignment in respect of such rights is deemed to have lapsed unless otherwise specified in the Agreement.

(g) If the period of assignment is not stated, it is deemed to be five years from the date of assignment, and if no geographical limits are specified, it shall be presumed to extend within India.

The Delhi High Court in *Pine Labs Private Limited vs Gemalto Terminals India Limited* the Court has held that in case the duration of assignment is not specified, the duration shall be deemed to be five years and after five years the copyright shall revert to the author. In this case, Pine Labs had written some software for Gemalto under a Master Service Agreement (MSA).Though in the MSA Pine Labs had assigned the copyright in the works to Gemalto, the period of assignment was not specified.The Court held that though Gemalto may have paid for the software, Pine Labs, being the author was the first owner of the copyright and after five years, the copyright reverted to Pine Labs. It made no difference whether the MSA was treated as an assignment or an agreement to assign.

b) **<u>Licence</u>:**

The owner of a copyright in any existing work or the prospective owner of the copyright in any future work, may grant any interest in the right, by License in writing, signed by him or by his duly authorized agent. The requirements specified above for an assignment will apply for a License. The Copyright Board is empowered to grant compulsory licenses under certain circumstances on suitable terms and conditions in respect of 'Indian work'.

The circumstances necessary for grant of such a License are as follows:

(a) the work must have been published or performed in public.

(b) the author must have refused to republish or allow the republication of the work or must have refused to allow the performance in public, that by reason of such refusal the work is withheld from the public;

(c) the author must have refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable.

The Copyright Act states that in the case of unpublished Indian work, where the author was a citizen of India or is dead, unknown or cannot be traced, under such circumstances, any person may apply to the Copyright Board for a License to publish the work or translation thereof in any language according to the procedure laid down in the Act.

Compulsory licence:

Section 31: Section 31 of the Copyright Act, 1957 deals with the grant of compulsory licenses in respect of certain works withheld from the public. Under this section, if the owner of the copyright in an Indian work refuses to republish or allow the republication of such work or if he refuses to allow the performance of the work in public, and, if by reason of such refusal, the work is withheld from the public, a complaint may be made for the grant of a compulsory license.

Similarly if the copyright owner has refused to allow a work including one recorded in a sound recording to be communicated to the public by broadcast on terms which the complainant considers reasonable, a complaint may also be made. Thus, the Copyright Board may only go into such issues as whether the price is too high in respect of works which are broadcast, and not in other cases.

Once a complaint is made, the Copyright Board would be required to give the copyright holder reasonable opportunity of being heard and, on the basis of an inquiry, the Board may direct the Registrar of Copyrights to grant to the complainant a compulsory license.

It has been proposed to amend Section 31 of the Copyright Act so that a compulsory license may be granted under this Section in respect of not merely an Indian work but in respect of any work. Considering that a compulsory license may be granted in respect of any work, it

has been proposed to delete the explanation which defines what an Indian work is for the purposes of this Section. Further, it has been proposed to allow for the grant of a compulsory license under this Section not specifically to the complainant but to any person(s) who, in the opinion of the Copyright Board, is or are qualified to publish the concerned work. In order to do this, it has also been proposed to delete subsection (2) of Section 31 so as to allow for a compulsory license to be granted by the Copyright Board to more than one person.

Section 31A: Section 31A of the Copyright Act, 1957 deals with the grant of compulsory licenses with respect to unpublished Indian works. It has been proposed to amend section so as to considerably widen its scope. It has been proposed to do this by substituting the existing Section 31A(1) with a new provision which would read as follows:

Where, in the case of any unpublished work or any work published or communicated to the public and the work is withheld from the public in India, the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found, any person may apply to the Copyright Board for a licence to publish or communicate to the public such work or a translation thereof in any language.

4. Discuss the Powers & Functions of Copyright Board

The Copyright Board, a quasi-judicial body, was constituted in September 1958. The jurisdiction of the Copyright Board extends to the whole of India. The copyright board is a body constituted by the central govt. to discharge certain judicial function under the Act. The Board is entrusted with the task of adjudication of disputes pertaining to copyright registration, assignment of copyright, grant of Licenses in respect of works withheld from public, unpublished Indian works, production and publication of translations and works for certain specified purposes. It also hears cases in other miscellaneous matters instituted before it under the Copyright Act, 1957

It consists of a chairman and not more than fourteen other members. The Chairman and the members shall hold their office for five years. They may be reappointed on the expiry of the tenure. The chairman of the copyright board must be a person who is or has been judge of a High Court or is qualified for appointment as a judge of a High Court. There is no qualification mentioned about the members of the Board.

The Registrar of Copyright also plays a very important role. The Registrar of the copyright board will perform all secretarial functions of the copyright board. The Registrar of the Copyright is the authority under Section 9 of the Act who is the officer of the Copyright Office. The Registrar of Copyright has powers of the civil court. And every order made by the registrar of payment of money is deemed as a decree of a civil court and is executed as decree of such court.

Powers of Copyright Board

The copyright board has been constituted to perform judicial functions.

Therefore, the copyright board has been accredited with the powers of civil court for the purpose of **Sec. 345 & 346** of the **Code of Criminal Procedure, 1973**. All proceedings of the court are judicial proceedings within the meaning of **Sec. 193 & 228** of **Indian Penal Code, 1860.** In exercise of the civil court power, the copyright board may issue summons and enforce the attendance of any person and may examine him on oath, requiring the discovery and production of the document, receiving evidence on affidavit issuing commission for the examination of witness and documents and requisitioning public record or copy thereof from any court.

The Registrar of Copyright and the Copyright Board have the powers of a civil court in respect of the following matters:

(a) Summoning & enforcing the attendance of any person and examining him on oath (this jurisdiction extends to the whole of India);

(b) Requiring the discovery and production of any document;

(c) Receiving evidence on affidavit;

(d) Issuing commission for the examination of witnesses and document;

(e) Requisitioning any public record or copy thereof from any court or office;

(f) Any other matter which may be prescribed.

Functions of Copyright Board

The first and foremost function of the copyright board is to look after whether the provisions of the Act are followed without any violation or infringement and to adjudicate certain cases pertaining to copyrights.

Other than this, the copyright board has been provided direct jurisdiction in relation to matters:

(1) To decide the issue of publication and its date in order to determine the term of copyright

(2) To decide the term of copyright which shorter in any other country than that provided in respect of that work under the Act (The decision of the Copyright board on the above question will be final)

(3) To settle disputes related to assignment of copyright

(4) To grant compulsory licenses for Indian work

(5) To grant compulsory licenses to publish the unpublished work

(6) To grant compulsory licenses to produce and publish translation of literary and dramatic works

(7) To grant compulsory licenses to reproduce and publish certain categories of literary, scientific or artistic works for certain purposes

(8) To rectify the Register of copyrights on the application of registrar of copyrights or any aggrieved persons

Other than this, another important function of Copyright Board is carried out by the Registrar of Copyright Board. The Registrar maintains a Register of Copyrights containing the names or titles of works and the names and addresses of authors, publishers and owners of copyright and other particulars as may be prescribed. The Register of Copyright will be kept in six parts as follows:

Part I – Literary works other than computer programs, tables and compilations including computer databases and dramatic works.

Part II – Musical works

Part III – Artistic works

Part IV – Cinematograph films

Part V – Sound recordings

Part VI – Computer programs, tables and compilations including computer databases.

Note: As per **Sec. 50A** of the Act every entry made in the Register of Copyright should be published in the official gazette or in such manner as the registrar may deem fit.

Registration of Copyright: registration of copyright is not compulsory under **sec. 44** of the Act. The registration is neither required for acquiring copyright nor for enforcement. Registration is merely a piece of evidence as to when certain author started claiming copyright in the artistic or other work.

Procedure of Copyright Board

The copyright board has power to regulate its own procedure, including the fixation of places and times of its sittings. This is subject to the Copyright Rules, 1958. Ordinarily it will hear any proceeding instituted before it within the zone in which the person instituting the proceedings actually and voluntarily resides and carries on business or personally works for gain. For this purpose the territory of India has been divided into five zones – The northern, southern, eastern, western and central zone. The Copyright Board functions in five zones. The Board discharges its functions through the Benches constituted by the Chairman, and the Chairman constitutes benches from amongst its members, each bench consisting of not less than three members. If the matter of dispute is of utmost importance, the Chairman of the Board may constitute a bench consisting of five members. If there is any difference of opinion among the members of the Bench, the opinion of majority shall prevail. If there is no such majority, the opinion of Chairman will prevail.

Further, the Chairman may authorize any of its members to exercise any of the powers conferred on it by provision of **Sec. 74** of the Act and any order or act done in the exercise of these powers by the member so authorized will be deemed to the order or act, as the case may be of the Board.

Also, no member of Copyright Board should take part in any proceedings before the Board in respect of a matter in which he has a personal interest.

Appeal (Sec. 71-73 of the Act): An order of the registrar may be appealed within 3 months to the Copyright Board and any decision or order of the Board may be appealed to the High Court within 3 months.

No appeal lies against the order of the Copyright Board for the determination of issue related to the term of the copyright in other countries.

The jurisdiction of High Court in appeal is determined by the place where the appellant actually or voluntarily resides or carries on business or personally works for gain. Further, the word resides, refers only to natural person and not to legal persons like companies or government. This is why the firm or companies whether they carry on business at a particular place is a question of fact.

Civil courts have no jurisdiction to rectify the copyright register. And the Copyright Board has no powers to limit the user of copyright to any particular territorial area.

Further, In ***Mukherjee vs. State*** it was held that while exercising its jurisdiction under section 19A relating to settlement of disputes arising out of assignment of copyright, the Copyright Board has no power to decide whether there was any infringement of copyright.

Hence, registrar functions as single arbitrator. And the appeals against his orders are made to the board. Thus, the mechanism under the Act is – administrative, quasi-judicial and judicial.

5. Explain Related Rights under copyright.

Related rights are the rights that have their special subject matter, which is mainly related to copyright. With regard to the similar subject matter, they are also called the rights related to copyright or simply related rights. With regard to the fact that they are close to copyright they are also called the rights neighboring to copyright. According to the copyright act they include:

I. <u>Rights of broadcasting organization- sec 37</u>

Every broadcasting organization will have a special right known as broadcasting reproduction right in respect of its broadcasts. This right will subsist for 25 years for the year of

broadcasts. During this period if anybody does the following acts without license from the owner of the right he will be deemed to have infringed the broadcast reproduction right:

a) Rebroadcasts the broadcast,

b) Causes the broadcast to be heard or seen by the public on payment of any charges,

c) Makes any sound recording or visual recording of the broadcast,

d) Makes any reproduction of such sound recording or visual recording where such initial recording was done without license or where it was licensed for any purpose not envisaged by such license,

e) Sells or gives on commercial rental or offer for sale or for such rental ant such sound recording or visual recording referred in clause c or d.

II. Performers right sec 38

Performer's rights for the benefit of various kinds of performers like actors, dancers, musicians, jugglers, acrobats and so on are contained in Sec 38. These rights are somewhat analogous to broadcast reproduction rights.

The performer’s rights will subsist for 50 years from the year of performance.

Exclusive right of performers sec 38A

Performer's have the exclusive right to do or authorize the doing of any of the following acts-

a) To make a sound recording or a visual recording of performance, including-

a) Reproduction of it in any material form including the storing of it in any medium by electronic or anyother means,

b) Issuance of copies of it to the public not being copies already in circulation,

c) Communication of it to the public,

d) Selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording,

2) To broadcast or communicate the performance to the public expect where the performance is already broadcast.

Once a performer has consented by written agreement to incorporate his performance in a cinematograph film, in absence of any contract to the contrary, he shall not object to enjoyment by producer of the film of the performers right in the same film.

Moral rights of the performer sec 38B

The performer shall even after assignment of his right, either wholly or partially have the right to-

1) To claim to be identified as the performer of his performance expect where omission is dictated by the manner of the use of the performance
2) To restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

6. Explain Copyright Societies

Copyright Society is a legal body which protects or safeguards the interest of owners of the work in which Copyright subsist. The Copyright Societies gives assurance to the creative authors of the commercial management of their works.

The authors of creative works license a publisher to publish the work on a royalty basic. This also leads to infringement of the work anywhere in India or abroad therefore it is extremely difficult for the owner of the work to prevent from such infringement. To overcome such difficulty owners of Copyright works have formed Societies to license their works for performance or communication to the public or issue copies of the work to the public. 'Copyright Society' means a society registered under Section33 (3).

The Copyright societies are also authorized to watch out for infringement of the Copyright and take appropriate legal action against the infringers.

Functions of a copyright society:

The Copyright Societies discharge the following functions:

1. It grant license of the Copyright in the work for reproduction, performance or communication to public.
2. It locates the infringement of the Copyright and initiates legal proceedings.

To regulate these activities of such Copyright societies Sections 33 to 36A have been enacted under the Copyright Act 1956.

Statutory Provisions:
Section 33(1) provides that no person or association of person allowed to carry on the business of issuing or granting licenses in respect of any work in which Copyright subsists or in respect of any rights conferred by the Act except under a registration.

However the owner of Copyright in his individual capacity will continue to have the right to grant licenses in respect of his own works with his obligation if any as a member of the registered Copyright Society.

An application may be made to the Registrar of Copyright. Every application should satisfy the conditions. And then the Registrar shall forward the application to the Central Government which may, having regard to the interests of the author and other owner of rights under this Act, the interest and convenience of the public and in particular of the group of persons who are most likely to seek licenses in respect of the relevant rights and the ability and professional competence of the applicants, register such association of persons as a Copyright Society subject to conditions as may be prescribed.

Central Government shall not ordinarily register more than one Copyright Society to do business in respect of the same class of works.

Section 33(4) states that the Central Government, if satisfied that the Copyright Society is detrimental to the interest of the owners of rights concerned. Then in this case the Central Government cancel registration of such society after such inquiry as may be prescribed.

Illustration Problems Relating to Unit I

1. ***A public library gets a copy of a book authored by a foreigner author published abroad. Due to high price of the book, the library gets 6 copies of the books made. Is the library guilty of infringement?***

Yes, the library is guilty of infringement.

Sec 52 of the India copyright act lays down certain exceptions to copyright infringement called fair dealing, and sec 52 (o) says, that the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such book is not available for sale in India is fair dealing.

In this above case the library has made 6 copies of the books whereas the act allows only 3 copies and thus the library is guilty of copyright infringement.

2. ***A photographer claims copyright in his photograph of a girl carrying a pitcher pleading that his skill and labour is involved in choosing the exact moment and the setting up of the photograph. Will his claim for a copyright succeed?***

Yes his claim for copyright can succeed as he has put in his skill and labour in taking that photograph. Photographs are protected as artistic work u/s 2(c) of the copyright act. For obtaining copyright protection the photograph must be original and to be original some degree of skill and effort must have been expended on it. A photograph of an existing photograph is not entitled to copyright protection because it is a mere copy.

3. ***A journalist highlighted the flesh trade flourishing in some parts of the country in his article and published it in the newspaper. A producer made a stage play and a movie based on the articles published by the journalist. Can the journalist bring action against producer for infringement?***

No. The journalist cannot bring any action against the producer for infringement. Newspaper is accessible to everyone. There is no copyright for articles published in newspapers. This is as per Sec. 52(1)(m) of the Copyright Act.

Sec. 2(ff) defines “communication to the public”. It means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.
Sec. 13 (3) explains the meaning of publication. Publication means making a work available to the public by issue of copies or by communicating the work to the public.

Sec. 52 (1) reads - The following act shall not constitute an infringement of copyright namely- Sec. 52 (1) (m) the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction.

Sec. 52 (1) (n) The publication in a newspaper, magazine or other periodical of a report of a lecture delivered in public

In the above problem, 'A', the journalist highlighted flesh trade flourishing in some parts of the country in his article and published it in the newspaper.

Thus it is a publication u/s Sec. 13 (3). As per Sec. 52(1)(m), since the journalist has not expressly reserved to himself the right of such reproduction, there is no copyright in the article published in the new paper.

Further as per Sec. 52(1)(n), the publication in a newspaper, magazine or other periodical of a report of a lecture delivered in public, if copied in any manner, is not infringement of copyright. So, any person can copy the contents of the article.

In the given problem, the producer has made a 'stage play and movie' based on the articles published by the said journalist, which is not an infringement of copyright. So the journalist cannot bring action against the producer for infringement.

4. ***Three people take photograph of the 'Taj Mahal' from three different cameras. Is each of them entitled to a separate copyright for his photograph? Give reasons.***

Section 52 speaks about the acts which do not constitute infringements of copy right.

As per Sec. 52(1)(s) of the Indian copy right Act,1957, the making or publishing of a painting, drawing, engraving or photograph of an architectural work of art is not an act of infringement.

Sec. 52(1)(t) of the Act further reads - The making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work falling under sub clause (iii) of clause (c) of Section 2, if such work is permanently situate in a public place or any premises to which the public has access.

Sec 2(c)(iii) reads- Artistic work means any other work of artistic craftsmanship.

In the given problem, three people take the photograph of the Taj Mahal from three different cameras. None of them is entitled to any separate copyright for his photograph, because Taj Mahal being an architectural work of art for which no copy right is available and copying such photograph is not infringement as under Sec 52(1)(s) and Sec. 52(1)(t) of the Act.

5. ***A biology teacher in a college collects the articles written by researchers on cloning and circulates the same amongst his students. Is he guilty of infringement?***

Yes he is guilty of infringement.

To reproduce and to issue copies of the work to the public is an exclusive write of the copyright holder and any person doing this without consent or license from the copyright holder will be guilty of infringement.

In this case the biology teacher cannot plead of fair dealing. A fair dealing of a work is permitted for research, private study, criticism or review of for reporting current events in a newspaper or broadcast or in a cinematograph film or in a photograph. If the teacher makes copies of the work and keeps it for his private study he can plead for fair dealing but here the teacher by making copies of the work and issuing it to the students cannot plead for fair dealing and is thus guilty of infringement.

6. ***The pieces of sculpture outside the National Museum are photographed by an amateur photographer and the same are sent for photograph contest. Can the National Museum bring an action for infringement? Give reasons.***

The National Museum cannot bring an action for infringement of Copyright for the amateur photographer taking photographs of pieces of sculpture outside the National Museum and sending the same for photograph contest.
This is as per Sec. 52 (1) (m) of the Copyright Act, 1957, which reads –
The following act shall not constitute an infringement of copyright namely-
– 'The making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work if such work is permanently situate in a public place or any premises to which the public has access'.
In the above problem, the amateur photographer can very well take photograph of a sculpture outside the National Museum which is permanently situate in a public place and since it is National Museum to which the public has access and it is not infringement of copyright.

UNIT II: BIODIVERSITY

1. **Discuss the establishment of national bio-diversity authority and its functions and powers.**

National biodiversity authority (Sec 8-18)

Establishment and composition - the NBA is established by the central government to regulate, transfer and use biodiversity resource at the national level. The head office of the National Biodiversity Authority shall be at Chennai and the National Biodiversity Authority may, with the previous approval of the Central Government, establish offices at other places in India.

The National Biodiversity Authority shall consist of the following members,

a) a Chairperson, who shall be an eminent person having adequate knowledge and experience in the conservation and sustainable use of biological diversity and in matters relating to equitable sharing of benefits, to be appointed by the Central Government;

b) three ex officio members to be appointed by the Central Government, one representing the Ministry dealing with Tribal Affairs and two representing the Ministry dealing with Environment and Forests of whom one shall be the Additional Director General of Forests or the Director General of Forests;

c) seven ex officio members to be appointed by the Central Government to represent respectively the Ministries of the Central Government dealing with -

- Agricultural Research and Education;
- Biotechnology;
- Ocean Development;
- Agriculture and Cooperation;
- Indian Systems of Medicine and Homoeopathy;
- Science and Technology;
- Scientific and Industrial Research;

d) five non official members to be appointed from amongst specialists and scientists having special knowledge of, or experience in, matters relating to conservation of biological diversity, sustainable use of biological resources and equitable sharing of benefits arising out of the use of biological resources, representatives of industry, conservers, creators and knowledge holders of biological resources.

Removal of members: The Central Government may remove from the National Biodiversity Authority any member who, in its opinion, has-

- been adjudged as an insolvent; or

- been convicted of an offence which involves moral turpitude; or
- become physically or mentally incapable of acting as a member; or
- so abused his position as to render his continuance in office detrimental to the public interest; or
- Acquired such financial or other interest as is likely to affect prejudicially his functions as a member.

Functions and powers of National Biodiversity Authority -

1) NBA is competent to grant permissions to persons who intend to obtain the biological resource occurring in India or knowledge associated thereto for purposes of research or for commercial utilization or for bio-survey and bio-utilization or for transfer of results of any research relating to such biological resources.
2) It is also competent to grant approval to persons making applications for patent connected with biological research in foreign countries.
3) While granting the application for permission or for approval as the case may be the authority may impose such terms and conditions as it may deem fit for payment of royalty, determine and secure equitable sharing benefits arising out of the use of the accessed biological resources, their by-products etc.
4) It shall frame guidelines for access and equitable sharing of benefits.
5) It shall advise the Central Government on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits arising out of the utilization of biological resources.
6) It shall advise the State Governments in the selection of areas of biodiversity importance to be notified under sub-section (1) of section 37 as heritage sites and measures for the management of such heritage sites.
7) The National Biodiversity Authority may, on behalf of the Central Government, take any measures necessary to oppose the grant of intellectual property rights in any country outside India on any biological resource obtained from India or knowledge associated with such biological resource which is derived from India.

2. Highlight the importance of biodiversity and narrate the important features of convention of biological diversity.

In biodiversity, each species, no matter how big or small has an important role to play in ecosystem. Various plant and animal species depend on each other for what each offers and these diverse species ensures natural sustainability for all life forms. For example, green plants remove carbon dioxide and release oxygen into the atmosphere, which helps keep the environment healthy and fit for human life.

Importance of Biodiversity

Biodiversity has a number of functions on the Earth. These are as follows:

- **Maintaining balance of the ecosystem:** Recycling and storage of nutrients, combating pollution, and stabilizing climate, protecting water resources, forming and protecting soil and maintaining eco-balance.
- **Provision of biological resources:** Provision of medicines and pharmaceuticals, food for the human population and animals, ornamental plants, wood products, breeding stock and diversity of species, ecosystems and genes.
- **Social benefits:** Recreation and tourism, cultural value and education and research.

The role of biodiversity in the following areas will help make clear the importance of biodiversity in human life:

- **Biodiversity and food:** 80% of human food supply comes from 20 kinds of plants. But humans use 40,000 species for food, clothing and shelter. Biodiversity provides for variety of foods for the planet.
- **Biodiversity and human health:** The shortage of drinking water is expected to create a major global crisis. Biodiversity also plays an important role in drug discovery and medicinal resources. Medicines from nature account for usage by 80% of the world's population.
- **Biodiversity and industry:** Biological sources provide many industrial materials. These include fibre, oil, dyes, rubber, water, timber, paper and food.
- **Biodiversity and culture:** Biodiversity enhances recreational activities like bird watching, fishing, trekking etc. It inspires musicians and artists.

Features of CBD:

Article1:Objectives

The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.

Article 6 : General Measures for Conservation and Sustainable Use

Each Contracting Party shall, in accordance with its particular conditions and capabilities:

(a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and

(b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Article 7: Identification and Monitoring

Each Contracting Party shall, as far as possible and as appropriate, in particular for the purposes of Articles 8 to 10:

(a) Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex I;

(b) Monitor, through sampling and other techniques, the components of biological diversity identified pursuant to subparagraph (a) above, paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use;

(c) Identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques; and

(d) Maintain and organize, by any mechanism data, derived from identification and monitoring activities pursuant to subparagraphs (a), (b) and (c) above.

Article: 8 In-situ Conservation

Each Contracting Party shall, as far as possible and as appropriate:

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;

(b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;

(c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;

(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;

Article 9: Ex-situ Conservation

Each Contracting Party shall, as far as possible and as appropriate, and predominantly for the purpose of complementing in-situ measures:

(a) Adopt measures for the ex-situ conservation of components of biological diversity, preferably in the country of origin of such components;

(b) Establish and maintain facilities for ex-situ conservation of and research on plants, animals and micro- organisms, preferably in the country of origin of genetic resources;

(c) Adopt measures for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats under appropriate conditions;

(d) Regulate and manage collection of biological resources from natural habitats for ex-situ conservation purposes so as not to threaten ecosystems and in-situ populations of species,

except where special temporary ex-situ measures are required under subparagraph (c) above; and

(e) Cooperate in providing financial and other support for ex-situ conservation outlined in subparagraphs (a) to (d) above and in the establishment and maintenance of ex- situ conservation facilities in developing countries.

Article 10: Sustainable Use of Components of Biological Diversity

Each Contracting Party shall, as far as possible and as appropriate:

(a) Integrate consideration of the conservation and sustainable use of biological resources into national decision-making;

(b) Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity;

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;

(d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and

(e) Encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.

Article 11: Incentive Measures

Each Contracting Party shall, as far as possible and as appropriate, adopt economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.

Article 12: Research and Training

The Contracting Parties, taking into account the special needs of developing countries, shall:

(a) Establish and maintain programmes for scientific and technical education and training in measures for the identification, conservation and sustainable use of biological diversity and its components and provide support for such education and training for the specific needs of developing countries;

(b) Promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, inter alia, in accordance with decisions of the Conference of the Parties taken in consequence of recommendations of the Subsidiary Body on Scientific, Technical and Technological Advice; and

c) In keeping with the provisions of Articles 16, 18 and 20, promote and cooperate in the use of scientific advances in biological diversity research in developing methods for conservation and sustainable use of biological resources.

Public Education and Awareness (Article 13)

The Contracting Parties shall:

(a) Promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes; and

(b) Cooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.

Article 14: Impact Assessment and Minimizing Adverse Impacts

1. Each Contracting Party, as far as possible and as appropriate, shall:

(a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;

(b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account;

(c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate;

(d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; and

(e) Promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.

2. The Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.

Article 15 : Access to Genetic Resources

1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.

3. For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and

Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention.

4. Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.

5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.

6. Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties.

7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.

Article 17: Exchange of Information

1. The Contracting Parties shall facilitate the exchange of information, from all publicly available sources, relevant to the conservation and sustainable use of biological diversity, taking into account the special needs of developing countries.

2. Such exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1. It shall also, where feasible, include repatriation of information.

Article 19: Handling of Biotechnology and Distribution of its Benefits

1. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, to provide for the effective participation in biotechnological research activities by those Contracting Parties, especially developing countries, which provide the genetic resources for such research, and where feasible in such Contracting Parties.

2. Each Contracting Party shall take all practicable measures to promote and advance priority access on a fair and equitable basis by Contracting Parties, especially developing countries, to the results and benefits arising from biotechnologies based upon genetic resources provided by those Contracting Parties. Such access shall be on mutually agreed terms.

3. The Parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity.

4. Each Contracting Party shall, directly or by requiring any natural or legal person under its jurisdiction providing the organisms referred to in paragraph 3 above, provide any available information about the use and safety regulations required by that Contracting Party in handling

such organisms, as well as any available information on the potential adverse impact of the specific organisms concerned to the Contracting Party into which those organisms are to be introduced.

Article 25: Subsidiary Body on Scientific, Technical and Technological Advice

1. A subsidiary body for the provision of scientific, technical and technological advice is hereby established to provide the Conference of the Parties and, as appropriate, its other subsidiary bodies with timely advice relating to the implementation of this Convention. This body shall be open to participation by all Parties and shall be multidisciplinary. It shall comprise government representatives competent in the relevant field of expertise. It shall report regularly to the Conference of the Parties on all aspects of its work.

2. Under the authority of and in accordance with guidelines laid down by the Conference of the Parties, and upon its request, this body shall:

(a) Provide scientific and technical assessments of the status of biological diversity;

(b) Prepare scientific and technical assessments of the effects of types of measures taken in accordance with the provisions of this Convention;

(c) Identify innovative, efficient and state-of-the-art technologies and know-how relating to the conservation and sustainable use of biological diversity and advise on the ways and means of promoting development and/or transferring such technologies;

(d) Provide advice on scientific programmes and international cooperation in research and development related to conservation and sustainable use of biological diversity; and

(e) Respond to scientific, technical, technological and methodological questions that the Conference of the Parties and its subsidiary bodies may put to the body.

3. The functions, terms of reference, organization and operation of this body may be further elaborated by the Conference of the Parties.

3. Traditional Knowledge:

Traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge (TK) is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, cultural values, beliefs, rituals, community laws, local language and agricultural practices including the development of plant species and animal breeds. TK is manly of a practical nature, particularly in such fields as agricultural, fisheries, health, horticulture and forestry.

Its role and value:

Today there is a growing appreciation of the value of TK. This knowledge is available not only to those who depend on it in their daily lives but to modern industry and agriculture as well. Many widely used products such as plant based medicines and cosmetics are derived from TK. TK can also make a significant contribution to sustainable development.

This TK is valuable and is at risk and should be protected. Multinational companies have been commercially exploiting such knowledge and biological resources used by these people openly exploited for generations. Such exploitation naturally affects the interest of these communications who can be called as the custodians of different kinds of TK. The multinational companies have patented such valuable TK leaving the local people unable to use their own local plants and other resources.

Protection of TK under CBD:

The CBD recognizes the close and local communities on biological resources and the need to ensure that these communities share in the benefits arising from the use of their TK and practices relating to conservation and sustainable use of biodiversity. Art 8(j) and associated Art 10©, 17(2) and 18(4) of CBD does have the potential to protect the rights of indigenous people and their rights to TK. The most important among them is Art 8(j) by which each member govt. have undertaken, “Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying

traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices".

Indian being a member of CBD has enacted the Biodiversity Act 2002, which covers conservation, use of biological resources and associated knowledge occurring in India for commercial or research purposes or for the purpose of bio-survey and bio-utilisation.

4. **Discuss the Structure and Functions of Biodiversity Management Committees under Biodiversity Act 2002?**

Biological Diversity Act 2002 mandates all local bodies to setup Biodiversity Management Committees (BMC).

Structure: One Chairperson, Six Members: 1/3rd of nominated should be women, SC/ST reservation as per state demography.

Functions:

1. Preserve and promote local biodiversity- breeds of birds, animals and plants.
2. Prepare People's Biodiversity Register (PBR)- an Electronic database with inputs from locals.
3. Maintain data medicinal plants/resources used by local Vaidhya (traditional healer).
4. Advice State & National Biodiversity Boards on matters related to local biodiversity.
5. Under Nagoya Protocol of Convention on Biodiversity (CBD), they can collect fees for granting access to Biodiversity register to researchers and commercial companies.

Illustration questions on Unit II

I. A foreign citizen undertakes bio-diversity related activities in Western Ghats without S approval of National Bio-Diversity Authority. Decide. Give reasons.

As per Sec. 3 of the Biological Diversity Act, 2002, speaks about persons who cannot undertake Biodiversity related activities without the approval of National Biodiversity Authority.

1. No person referred to in sub-section 3(2) shall, without previous approval of the National Biodiversity Authority, obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilisation or for bio-survey and bio-utilisation.
2. The persons who shall be required to take the approval of the National Biodiversity Authority under sub-section (1) are the following, namely:-

    1. a person who is not a citizen of India;
    2. a citizen of India, who is a non-resident as defined in clause (30) of section 2 of the Income-tax Act, 1961 (43 of 1961);
    3. a body corporate, association or organisation-
    4. not incorporated or registered in India; or
    5. incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management.

In the given problem, a foreign citizen undertakes bio-diversity related activities in Western Ghats without the approval of National Bio-Diversity Authority.

This is violative of Sec 3(2)(a) of the Act and hence he should not undertake bio-diversity related activities in Western Ghats without the approval of the National Bio-Diversity Authority.

UNIT III: PROTECTION OF PLANT VARITIES

1. Explain the conditions required for registration of new plant varieties. When registration can be prohibited?

The TRIPS Agreement states that "Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof." In order to fulfil its obligations under the TRIPS Agreement, India has implemented the Protection of Plant Varieties and Farmers' Rights Act, 2001. This Act has been passed in order to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders, and to encourage the development of new varieties of plants. The Act helps to stimulate investment for research and development to produce new plant varieties. Such protection is also likely to facilitate the growth of the seed industry that will ensure the availability of high quality seeds and planting material to the farmers.

Registration of a plant variety gives protection only in India and confers upon the rights holder, its successor, agent, or licensee the exclusive right to produce, sell, market, distribute, import, or export the variety.

Who can Apply and What can be Registered

The application for protection under the Act can be made by any of the following persons:

- Any person claiming to be the breeder of the variety;
- Any successor of the breeder of the variety;
- Any person being the assignee or the breeder of the variety in respect of the right to make such application;
- Any farmer or group of farmers or community of farmers claiming to be breeder of the variety;
- Any person authorized to apply on behalf of farmers; or
- Any university or publicly funded agricultural institution claiming to be breeder of the variety. (sec 14)

Criteria for registration:

A new variety shall be registered under this Act if it conforms to the following criteria:

- Novelty: A new variety is deemed to be novel if, at the date of filing of the application for registration for protection, the propagating and harvested material of such variety has not been sold or otherwise disposed of by or with the consent of its breeder or his successor for the purposes of exploitation of such variety for a certain period of time before the date of filing of the application. For sale or disposal of a new variety in India, this time period is earlier than one year. Outside of India, in the case of trees and vines, the time period is earlier than six years. In any other case in India, it is earlier than four years.
- Distinctiveness: A new variety is deemed distinct if it is clearly distinguishable by at least one essential characteristic from any other variety whose existence is a matter of common knowledge in any country at the time of filing of the application.
- Uniformity: A new variety is deemed uniform if subject to the variation that may be expected from the particular features of its propagation it is sufficiently uniform in its essential characteristics.
- Stability: A new variety is deemed stable if its essential characteristics remain unchanged after repeated propagation or, in case of a particular cycle of propagation, at the end of each such cycle.

Varieties that cannot be registered

Section 15 (4) of the Act deals with New Varieties which cannot be registered under the Act. This provision is more like Section 3 of the Patent Act which is in the nature of prohibitory provision. Thus any application for New Variety has to withstand the tests laid down under section 15 (4) of the Act in order to be registered, subject to other provisions of the Act and the mandatory test under Section 19 of the Act.

- A New Variety shall not be registered if the denomination given to the variety is not capable of indentifying such variety; or
- A New Variety shall not be registered under the provisions of the Act if the denomination given to such variety is not capable of identifying such variety or consists of solely of figures or is liable to mislead or to cause confusion concerning the characteristic, value identity of such variety or the identity of breeder of such variety; or

- A New Variety shall also not be registered if it is not different from every denomination which designates a variety of the same botanical species or of a closely related species registered under the Act; or
- A New Variety shall also not be registered under the Act if it is likely to deceive the public or cause confusion in the public regarding the identity of such variety; or
- A New Variety is also not entitled to be registered if it is likely to hurt the religious sentiments of any class or section of the citizens of India or is prohibited for use as a name or emblem and names or is comprised solely or partly of geographical names; or
- A New Variety or Extant Variety shall also not be registered if it contains any gene or gene sequence involving any harmful technology including terminator technology which is injurious to the life or health of human beings, animals or plants.
- The Registrar may register a New Variety under the Act, if the denomination given to such variety comprises solely or partly of geographical name, if he considers that the usage of such denomination is an honest use under the circumstances of the Case.
- The Act mandates that every new variety subject to the criteria of Novelty, Distinctiveness, uniformity an stability shall be registered under the Act.

Registration Procedure

Rights holders can apply for the registration of a new variety either directly or through their agents. The Office of the Registrar, Protection of Plant Varieties and Farmers' Rights Authority is the appropriate office for filing of the application in India. The different steps that are involved in the registration process in India are as follows:

2) **Completing the application form and filing**

The Applicant has to file the prescribed form with the requisite fee in the Office of the Registrar. The Applicant can make an application to the Registrar for registration of any variety of such genera and species as specified under sub-section (2) of Section 29 or which is an extant variety or which is a farmer's variety. An agent can complete and sign the application form, provided that the Applicant has issued a signed Power of Attorney appointing them as the agent. The application has to be in respect to a variety and state the denomination assigned to such variety by the Applicant. It has to be accompanied by an affidavit sworn by the Applicant that such variety does not contain any gene or gene

sequence involving terminator technology and also a statement containing brief description of the variety bringing out its characteristics of novelty, distinctiveness, uniformity and stability. The application should also contain a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material has been taken and all such information relating to the contribution, if any, of any farmer, village community, institution, or organization in breeding, evolving, or developing the variety. It should also contain a declaration that the genetic material or parental material acquired for breeding, evolving, or developing the variety has been lawfully acquired.

The Applicant must, along with the application for registration under this Act, also make available to the Registrar such quality of seeds of a variety for registration of which such application is made so that the Registrar can conduct tests to evaluate whether seeds of such variety along with parental material conform to the standards as may be specified by regulations. The Applicant should also deposit the requisite fees for conducting such tests.

3) **Review by the Registrar**

After the application has been filed, the Registrar will accept the application absolutely or subject to certain conditions or limitations, after reviewing the application and making such inquiry as he deems fit. Should the Registrar not be satisfied with the particulars as mentioned in the application, he can either direct the Applicant to amend the application or in the alternative reject the application.

4) **Publication and Opposition**

After the Registrar accepts the application either absolutely or subject to any conditions, it will be advertised in the prescribed manner along with its photographs or drawings. Within three months of the publication of this application, any person may give notice of his opposing the application to the Registrar in the prescribed format. Any person can oppose the application on the following grounds:

- The person opposing the application is entitled to the breeder's right as against the Applicant;

- The variety is not registerable under the Protection of Plant Varieties & Farmers' Rights Act, 2001 Act;
- The registration of this variety will not be in public interest; or
- The variety may have adverse effect on the environment.

After following the prescribed procedure of serving the Notice of Opposition to the Applicant, perusing the evidence as filed by both the parties and hearing both the parties, the Registrar will either allow or reject the opposition.

5) **Registration**

When an application for registration of a variety (other than an essentially derived variety) has been accepted and not opposed or opposed but the opposition has been rejected; the Registrar will issue a certificate of registration to the Applicant. A person aggrieved by the decision of the Protection of Plant Varieties and Farmers' Rights Authority or the Registrar can file an appeal before the Plant Varieties Protection AppellateTribunal.

6) **Term of Registration**

The certificate of registration issued by the Registrar is valid for eighteen years from the date of registration of the variety in the case of vine and trees, fifteen years from the date of notification of that variety (under Section 5 of the Seeds Act, 1966) by the Central Government in the case of extant varieties and for a period of fifteen years from the date of registration of the variety in other cases. However, the certificate of registration is valid for a period of nine years in the case of trees and vines and six years in the case of other crops. The Registrar may review and renew this registration for the remaining term on payment of the prescribed fee.

7) **Revocation**

There are certain circumstances in which the protection that has been granted to a rights holder can be revoked. These circumstances in which the same can be done are enumerated below:

- The grant of the certificate of registration has been based on incorrect information furnished by the rights holder;
- The registered proprietor is not eligible for protection;

- The rights holder has not provided the Registrar with such information and documents as are required under the Act;
- The rights holder has not provided the Registrar with an alternative denomination, which could be used in case the denomination provided by the rights holder is not available;
- The rights holder has not provided the necessary seeds or propagation material to the person to whom a compulsory license has been issued;
- The rights holder has not complied with the provisions of the Actor the accompanying Rules;
- The rights holder has not complied with the directions of the Protection of Plant Varieties and Farmers' Rights Authority; or
- The grant of the certificate is not in public interest.

The Registrar also has the authority to either cancel or rectify the registration on an application made by an aggrieved person.

2. Explain the salient features of the protection of plant varieties and farmer's rights act 2001?

The Protection of Plant Varieties and Farmers' Rights Act was passed by the Indian Government in 2001. After India became signatory to the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs) in 1994, a legislation was required to be formulated. Article 27.3 (b) of this agreement requires the member countries to provide for protection of plant varieties either by a patent or by an effective sui generis system or by any combination thereof. Thus, the member countries had the choice to frame legislations that suit their own system and India exercised this option. The existing Indian Patent Act, 1970 excluded agriculture and horticultural methods of production from patentability. Thus a sui generis system for protection of plant varieties was developed integrating the rights of breeders, farmers and village communities, and taking care of the concerns for equitable sharing of benefits.

Salient features of the Act

Objectives

The objectives of the Act are as follows:

(i) To provide for the establishment of an effective system for protection of plant varieties.
(ii) To provide for the rights of farmers and plant breeders
(iii) To stimulate investment for research and development and to facilitate growth of the seed industry.
(iv) To ensure availability of high quality seeds and planting materials of improved varieties to farmers.

Authority

The Central Government shall establish an Authority to be known as the Protection of Plant Varieties and Farmers' Rights Authority. It shall consist of a chairperson and fifteen members as representatives of different concerned ministries and departments, seed industry, farmer's organizations, tribal communities and State-level women's organization, etc.

Eligibility

For a variety to be eligible for registration, it must conform to the criteria of novelty, distinctiveness, uniformity and stability (NDUS), as described below [Section 15 (1)–(3)].

For the purposes of the Act, a new variety shall be deemed to be:

(a) Novel, if, at the date of filing of the application for registration for protection, the propagating or harvested material of such a variety has not been sold or otherwise disposed of by or with the consent of its breeder or his successor for the purposes of exploitation of such variety

(i) In India, earlier than one year,

(ii) or outside India, in the case of trees or vines earlier than six years, or, in any other case, earlier than four years, before the date of filing such applications. Provided that a trial of a new variety which has not been sold or otherwise disposed off shall not affect the right to protection.

Provided further that the fact that on the date of filing the application for registration, the propagating or harvested material of such variety has become a matter of common knowledge other than through the aforesaid manner shall not affect the criteria of novelty for such variety.

(b) Distinct, if it is clearly distinguishable by at least one essential characteristic from any other variety whose existence is a matter of common knowledge in any country at the time of filing of the application.

(c) Uniform, if subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its essential characteristics.

(d) Stable, if its essential characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle. The variety will be subjected to such distinctiveness, uniformity and stability tests as shall be prescribed.

Application

Every application for registration will have to be accompanied with the following information [Section 18 (a–h)]:

(a) Denomination assigned to such variety by the applicant;

(b) An affidavit sworn by the applicant that such variety does not contain any gene or gene sequence involving terminator technology;

(c) The application should be in such form as may be specified by regulations;

(d) a complete passport data of the parental lines from which the variety has been derived along with the geographical location in India from where the genetic material has been taken and all such information relating to the contribution, if any, of any farmer, village community, institution or organization in breeding, evolving or developing the variety;

(e) A statement containing a brief description of the variety, bringing out its characteristics of novelty, distinctiveness, uniformity and stability as required for registration;

(f) Such fees as may be prescribed;

(g) Contain a declaration that the genetic material or parental material acquired for breeding, evolving or developing the variety has been lawfully acquired; and

(h) Such other particulars as may be prescribed.

The conditions stated above (a–h), shall not apply in respect of application for registration of farmers' varieties.

Period of protection

The certificate of registration issued under section 24 or sub-section 98 of section 23 shall be valid for nine years in the case of trees and vines and six years in the case of other crops, and may be reviewed and renewed for the remaining period on payment of such fees as may be fixed by the rules made on this behalf subject to the conditions that the total period of validity shall not exceed

(i) in the case of trees and vines, eighteen years from the date of registration of the variety;
(ii) in the case of extant varieties, fifteen years from the date of the notification of that variety by the Central Government under Section 5 of the Seed Act, 1996, and
(iii) In the other case, fifteen years from the date of registration of the variety.

Payment of annual fee

The Authority may, with the prior approval of the Central Government, by notification in the Official Gazette, impose a fee to be paid annually, by every breeder of a variety, agent and licensee thereof registered under this Act determined on the basis of benefit or royalty gained by such breeder, agent or licensee, as the case may be, in respect of the variety, for the retention of their registration under this Act [Section 35(1)].

Breeders' rights

The certificate of registration for a variety issued under this Act shall confer an exclusive right on the breeder or his successor or his agent or licensee, to produce, sell, market, distribute, import or export of the variety [Section 28 (1)].

Researchers' right

The researchers have been provided access to protected varieties for bona fide research purposes [Section 30]. This Section states, 'Nothing contained in this Act shall prevent

(a) the use of any variety registered under this Act by any person using such variety for conducting experiments or research; and

(b) the use of a variety by any person as an initial source of a variety for the purpose of creating other varieties provided that the authorization of the breeder of a registered variety is required

where the repeated use of such variety as a parental line is necessary for commercial production of such other newly developed variety'.

Farmers' rights

The farmers' rights of the Act define the privilege of farmers and their right to protect varieties developed or conserved by them [Chapter VI]. Farmers can save, use, sow, resow, exchange, share and sell farm produce of a protected variety except sale under a commercial marketing arrangement (branded seeds) [Section 39 (1), (i)–(iv)]. Further, the farmers have also been provided protection of innocent infringement when, at the time of infringement, a farmer is not aware of the existence of breeder rights [Section 42 (1)]. A farmer who is engaged in the conservation of genetic resources of landraces and wild relatives of economic plants and their improvement through selection and preservation, shall be entitled in the prescribed manner for recognition and reward from the Gene Fund, provided the material so selected and preserved has been used as donor of genes in varieties registrable under the Act. The expected performance of a variety is to be disclosed to the farmers at the time of sale of seed/propagating material. A farmer or a group of farmers or an organization of farmers can claim compensation according to the Act, if a variety or the propagating material fails to give the expected performance under given conditions, as claimed by the breeder of the variety.

Communities' rights

The rights of the communities as defined provide for compensation for the contribution of communities in the evolution of new varieties in quantum's to be determined by the PPVFR Authority [Section 41 (1)].

Registration of essentially derived varieties

The breeder of the essentially derived variety shall have the same rights as the plant breeder of other new varieties, which include production, selling, marketing and distribution, including export and import of the variety. The other eligibility criteria for award of registration are also the same as for new variety registration under the Act [Section 23(1), (6)].

Compulsory license

The authority can grant compulsory license, in case of any complaints about the availability of the seeds of any registered variety to public at a reasonable price. The license can be granted to any person interested to take up such activities after the expiry of a period of

three years from the date of issue of certificate of registration to undertake production, distribution and sale of the seed or other propagating material of the variety [Section 47(1)].

Benefit sharing

Sharing of benefits accruing to a breeder from a variety developed from indigenously derived plant genetic resources has also been provided [Section 26(1)]. The authority may invite claims of benefit sharing of any variety registered under the Act, and shall determine the quantum of such award after ascertaining the extent and nature of the benefit claim, after providing an opportunity to be heard, to both the plant breeder and the claimer.

National Gene Fund

The National Gene Fund to be constituted under the Act shall be credited thereto:

(a) The benefit sharing from the breeder.

(b) The annual fee payable to the authority by way of royalties.

(c) By the compensation provided to the communities as defined under Section 41(1).

(d) Contribution from any national and international organization and other sources. The fund will be applied for disbursing shares to benefit claimers, either individuals or organization, and for compensation to village communities.

The fund will also be used for supporting conservation and sustainable use of genetic resources, including in situ and ex situ collection and for strengthening the capabilities of the panchayat in carrying out such conservation and sustainable use [Section (45)].

Plant Variety Protection Appellate Tribunal

The Tribunal will be established by a gazette notification by the Government to exercise jurisdiction, powers and authority conferred on it under this Act. The Tribunal will consist of Judicial as well as Technical members.

UNIT 4: INDUSTRIAL DESIGN

1. Define design. State the requirements of registration of design.

"A thing of beauty is a joy forever", these golden words have a very great significance in today's materialistic world, where the appearance of an article counts more than its utility or quality. Many people blindly choose an article, which catches their eye by the beauty in its design. The concepts of globalization & liberalization have flooded the Indian markets with large variety of products. The consumers are provided with numerous alternatives for any single product. The producers spend huge capital in developing innovative designs for catching the recognition of consumers by enhancing the appearance of their products. There are professional designers who put great intellectual effort in creating new & attractive designs. Hence it is necessary to protect designs so as to reward the designer's creativity and to encourage future contributions. Design protection will play an important role in the product market, increasing the competitiveness of the manufacturer or vendor of the product, and enhancing quality of societal life.

Design: definition and meaning

"Design," is defined in Section 2 (d) of the Designs Act 2000 (the Designs Act) as follows: Design means only the features of shape, configuration, pattern, ornament or composition of lines or colors applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or the property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957.

The definition is exclusive and only those which satisfy the following conditions can be brought under the purview of design:

1. Design primarily represents features of shapes, configuration, pattern, ornament, color or composition of lines.
2. Such shape, configuration, pattern, ornament, color, or composition of lines should be applied to any article.
3. Such article may be two dimensional or three dimensional or both.
4. Any of these features may be one that is applied by any Industrial process or means which may be manual, mechanical, chemical, separate or combined.
5. And such an application of the aforesaid features in the finished article shall appeal to and judged solely by the eye.

6. It does not include any mode or principle of construction or anything which is in substance a mere mechanical device.
7. It does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or the property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957.

A Design is something which determines the appearance of an article, or some part of an article. Designs are applied to an article with the objective of ornamenting and beautifying the article. If a particular feature is so applied on an article that it does not appeal to the eye at all and is incapable of attracting a prospective consumer in any manner for the purchase thereof, then such feature will not fall within the scope of a design. A visual characterization of an article which influences a person to purchase an article in preference to other articles which are identical in function but differ in appearance, such characterization would also meet the criteria of a design. A design must be applied in the article itself as in the case of a shape or configuration which is three-dimensional, *e.g.,* shape of a bottle or flower vase or the case of design which is two dimensional, *e.g.,* design on a sari, bed sheet, wallpaper which serves the purpose of ornamentation. It should be one which catches the eye of the purchaser.

Who can apply for registration of a design?

As per Section 5 of Design Act, 2000, any person who claims to be the proprietor of any new or original design can apply for the registration of the design. A foreigner can also apply for the registration of the design. However, the convention followed is that if a country does not offer the identical registration right to Indian citizen for their designs in their country, its citizen would not be eligible to apply for registration of design in India. In the *Vredenburgs Registered Designs case* ,it was held that if there are two persons each of whom has produced a similar design and communicated the fact of such authorship to the other, neither of them alone is the proprietor of a new or original design. There is joint authorship of the design.

<u>Requirements for registration of designs</u>

1. Design must be applied to articles.

A Design is something which is applied to an article and not the article itself. A design must be incorporated in the article itself as in the case of a shape or configuration which is three-dimensional, *e.g.,* shape of a bottle or flower vase or the case of design which is two dimensional, *e.g.,* design on a bed sheet, wallpaper which serves the purpose of decoration. An article to which the design is to be applied must be something which is to be delivered to the purchaser as a finished article.

2. Appeal to the eye.

The design must be capable of being applied to an article in such a way that the article to which it is applied will appeal to and judged solely by the eye. The particular shape, configuration, pattern or ornamentation must have a visual appeal. Feature to be registered must "appeal to the eye" and be "judged by the eye. *In Amp v. Utilux*, (1972), it was held that,

(a) to have eye appeal, the features must be externally visible.

(b) The feature must appeal to the customer's eye.

(c) The eye appeal need be neither artistic nor aesthetic, provided that some appeal is created by distinctiveness of shape, pattern, or ornamentation calculated to influence the consumer's choice.

The shape adopted in Amp v. Utilux found no "eye appeal", because the part (electrical connector which was an internal component of a washing machine) although visibly distinctive was entirely functional and would not affect the consumer's choice. A different approach was taken in the case, *Interlego v.Tyco*, (1988), where the toy brick's shape, though functional, did have a visual appeal which would affect the buyer's choice.

3. Novelty or originality.

A design can be registered only when it is new or original and not previously published in India. A design would be registrable if the pattern though already known is applied to new article. For example, the shape of an apple if applied to school bag would be registrable. It was held in *Pilot Pen Co. v. Gujarat Ind. P. Ltd*, that registration could not be deemed to be effective unless the design, which sought to be protected, was new and original and not of a pre-existing common type. Also if it comprises or contains scandalous or obscene matter, shall not be registered under the Act. In *Rotela Auto Components (P) Ltd. and Anr. v. Jaspal Singh*,it was held that, the test for novelty and originality is dependent on determining the type of mental activity involved in conceiving the design in question. If

the design is a mere trade variation of a previous design then the designer could be said to have kept an existing design in view and made some changes. There should be some original mental application involved when conceiving a new design. The novelty or originality of a particular part of the article may be sufficient to import the character of novelty and originality to the whole.A combination of previously known designs can be registered if the visual impact of the combination as a whole is new.

4. No prior publication.

A design can be registered only when it is not previously published in India. In the case of *Wimco Ltd. v. Meena Match Industries,* the Court held that publication means the opposite of being kept secret. The disclosure even to one person is sufficient to constitute publication. The design cannot be registered under Design Act if it is not significantly distinguishable from known designs or combination of known designs. To constitute publication a design must be available to the public and it has been ceased to be a secret. For e.g.:-the display of a design on a saree in a fashion show is a publication of that design.

Procedure for registration sec 5-10

The application under Section 5 shall be accompanied by four copies of representation of the design and the application shall state the class in which the design is to be registered. In India, we follow Locarno Classification for registration of design comprising 32 classes, numbered 1 to 31 and an additional Class 99 to include articles not falling under the aforesaid 31 classes. Briefly the procedure is as follows:

Submission of application

The proprietor of the design shall submit the application for registration in the patent office. The application shall be in the prescribed form and shall be accompanied by the prescribed fees. According to section 5(1), the controller may on application made by any person claiming to be the proprietor of any new or original design not previously published in any country and which is not contrary to public order and morality, register the design under the Act. The application is to be accompanied by the prescribed fee and in prescribed Form and in prescribed manner. The application shall state the class in which the design is to be registered.

Acceptance /Refusal

Before registration the Controller shall refer the application to an examiner appointed under this Act, to determine whether the design is capable of registration under this Act. The Controller shall consider the report of the examiner and if satisfied that the design complies with all requirements for registration under this Act shall register it. The Controller may if he thinks fit refuse to register the design. The aggrieved by such refusal may appeal to the High Court .The Controller may refuse to register a design, the use of which would be contrary to public order or morality.

Objection/Removal of Objection/Appeal to Central Government

If on consideration of the application any objections appear to the Controller, a statement of these objections shall be sent to the applicant or his agent. The applicant has to remove the objection within one month of communication of the objections to him failing which the application shall be deemed to have been withdrawn. He may also apply to the Controller for being heard on the matter. When the Controller refuses the application after the submission, he may directly appeal to the Central Government whose decision is final.

Decision of Central Government

The decision of the Central Government on the registrability of the design is final.

Registration of the design

As soon as the design is registered the Controller shall direct the publication of the particulars of the design and thereafter it becomes open to public inspection. As per section 10, a book called Register of designs shall be kept in the patent office. The register shall contain particulars such as the names and addresses of the proprietors of registered designs, notifications of assignments and other prescribed particulars. On the completion of the above procedure, the Controller shall grant a certificate of registration to the proprietor of the design.

Term of protection:

Section 11 deals with copyright on registration which reads as under: Copyright on registration. (1) When a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during ten years from the date of registration.

(2) If, before the expiration of the said ten years, application for extension of the period of copyright is made to the Controller in the prescribed manner, the Controller shall, on payment of the prescribed fee, extend the period of copyright for a second period of five years from the expiration of the original period of ten years.

2. What is the significance of a design? Discuss the salient features of designs act 2000?

When we go to buy a product, we are attracted by the appearance of a product and do not look at the quality or efficiency of that product. We blindly buy a product which has good appearance.

A product with a particular design may sell better than the one without design. Consumers often take the visual appeal of a product into consideration especially when the market offers a large variety of products with the exact same functions. Thus products with designs have better marketability than the ones without them.

A lot of thought, time and money will be spent to find the correct/desired design which will increase the sales of that product.

The main aim of this designs act 2002 is to see that the creator of a design is not deprived of his reward by others applying it to their own products without his authorization.

Salient features of the designs act 2002

1) Design: definition and meaning :

"Design," is defined in Section 2 (d) of the Designs Act 2000 (the Designs Act) as follows: Design means only the features of shape, configuration, pattern, ornament or composition of lines or colors applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or the property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957.

The definition is exclusive and only those which satisfy the following conditions can be brought under the purview of design:

1. Design primarily represents features of shapes, configuration, pattern, ornament, color or composition of lines.

2. Such shape, configuration, pattern, ornament, color, or composition of lines should be applied to any article.
3. Such article may be two dimensional or three dimensional or both.
4. Any of these features may be one that is applied by any Industrial process or means which may be manual, mechanical, chemical, separate or combined.
5. And such an application of the aforesaid features in the finished article shall appeal to and judged solely by the eye.
6. It does not include any mode or principle of construction or anything which is in substance a mere mechanical device.
7. It does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or the property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957.

2) Requirements for registration of designs

a) Design must be applied to articles-

A Design is something which is applied to an article and not the article itself. A design must be incorporated in the article itself as in the case of a shape or configuration which is three-dimensional, *e.g.,* shape of a bottle or flower vase or the case of design which is two dimensional, *e.g.,* design on a bed sheet, wallpaper which serves the purpose of decoration. An article to which the design is to be applied must be something which is to be delivered to the purchaser as a finished article.

b) Appeal to the eye-

The design must be capable of being applied to an article in such a way that the article to which it is applied will appeal to and judged solely by the eye. The particular shape, configuration, pattern or ornamentation must have a visual appeal. Feature to be registered must "appeal to the eye" and be "judged by the eye. *In Amp v. Utilux*, (1972), it was held that ,
(a) to have eye appeal, the features must be externally visible.
(b) The feature must appeal to the customer's eye.
(c) The eye appeal need be neither artistic nor aesthetic, provided that some appeal is created by distinctiveness of shape, pattern, or ornamentation calculated to influence the consumer's choice.

The shape adopted in Amp v. Utilux found no "eye appeal", because the part (electrical connector which was an internal component of a washing machine) although visibly distinctive was entirely functional and would not affect the consumer's choice. A different approach was taken in the case, *Interlego v.Tyco*, (1988), where the toy brick's shape, though functional, did have a visual appeal which would affect the buyer's choice.

c) Novelty or originality-

A design can be registered only when it is new or original and not previously published in India. A design would be registrable if the pattern though already known is applied to new article. For example, the shape of an apple if applied to school bag would be registrable.It was held in *Pilot Pen Co. v. Gujarat Ind. P. Ltd*, that registration could not be deemed to be effective unless the design, which sought to be protected, was new and original and not of a pre-existing common type. Also if it comprises or contains scandalous or obscene matter, shall not be registered under the Act. In *Rotela Auto Components (P) Ltd. and Anr. v. Jaspal Singh*,it was held that, the test for novelty and originality is dependent on determining the type of mental activity involved in conceiving the design in question. If the design is a mere trade variation of a previous design then the designer could be said to have kept an existing design in view and made some changes. There should be some original mental application involved when conceiving a new design. The novelty or originality of a particular part of the article may be sufficient to import the character of novelty and originality to the whole. A combination of previously known designs can be registered if the visual impact of the combination as a whole is new.

d) No prior publication-

A design can be registered only when it is not previously published in India. In the case of *Wimco Ltd. v. Meena Match Industries,* the Court held that publication means the opposite of being kept secret. The disclosure even to one person is sufficient to constitute publication. The design cannot be registered under Design Act if it is not significantly distinguishable from known designs or combination of known designs. To constitute publication a design must be available to the public and it has been ceased to be a secret. For e.g.:-the display of a design on a saree in a fashion show is a publication of that design.

3) As per Section 5 of Design Act, 2000, any person who claims to be the proprietor of any new or original design can apply for the registration of the design. A foreigner can

also apply for the registration of the design. However, the convention followed is that if a country does not offer the identical registration right to Indian citizen for their designs in their country, its citizen would not be eligible to apply for registration of design in India.

4) PROCEDURE FOR REGISTRATION

The application under Section 5 shall be accompanied by four copies of representation of the design and the application shall state the class in which the design is to be registered. In India, we follow Locarno Classification for registration of design comprising 32 classes, numbered 1 to 31 and an additional Class 99 to include articles not falling under the aforesaid 31 classes. Briefly the procedure is as follows:

i. Submission of application

The proprietor of the design shall submit the application for registration in the patent office. The application shall be in the prescribed form and shall be accompanied by the prescribed fees. According to section 5(1), the controller may on application made by any person claiming to be the proprietor of any new or original design not previously published in any country and which is not contrary to public order and morality, register the design under the Act. The application is to be accompanied by the prescribed fee and in prescribed Form and in prescribed manner. The application shall state the class in which the design is to be registered.

ii. Acceptance /Refusal

Before registration the Controller shall refer the application to an examiner appointed under this Act, to determine whether the design is capable of registration under this Act. The Controller shall consider the report of the examiner and if satisfied that the design complies with all requirements for registration under this Act shall register it. The Controller may if he thinks fit refuse to register the design. The aggrieved by such refusal may appeal to the High Court .The Controller may refuse to register a design, the use of which would be contrary to public order or morality.

iii. Objection/Removal of Objection/Appeal to Central Government

If on consideration of the application any objections appear to the Controller, a statement of these objections shall be sent to the applicant or his agent. The applicant has to

remove the objection within one month of communication of the objections to him failing which the application shall be deemed to have been withdrawn. He may also apply to the Controller for being heard on the matter. When the Controller refuses the application after the submission, he may directly appeal to the Central Government whose decision is final.

iv. **Decision of Central Government**

The decision of the Central Government on the registrability of the design is final.

v. **Registration of the design**

As soon as the design is registered the Controller shall direct the publication of the particulars of the design and thereafter it becomes open to public inspection. As per section 10, a book called Register of designs shall be kept in the patent office. The register shall contain particulars such as the names and addresses of the proprietors of registered designs, notifications of assignments and other prescribed particulars. On the completion of the above procedure, the Controller shall grant a certificate of registration to the proprietor of the design.

3. What do you mean by piracy of copyright in design? What remedies are available against the piracy of copyright in design?

Designs have always played a major role in the global dynamic market. The essential purpose of design law is to promote and protect the design element of industrial production. A design is, in layman's language, the plan or scheme for the appearance of an article (or a part of an article). It primarily concerns with what an article looks like or is intended to look like.

Section 2 (d) of the Designs Act 2000 defines 'design' to mean only the features of shape, configuration, pattern, ornament or composition of lines or colors applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial processes or means, which in the finished article appeal to, and are judged solely by the eye. The registration of a design confers upon the registered proprietor 'Copyright' in the design for the period of registration.

A design qualifies for protection only if-

i. it is new or original.

ii. it has not been previously registered in India.
iii. it has not been previously published in India.
iv. The design must be applied to the articles.
v. Must appeal to the eyes.

The rationale behind the protection of design is the role played by it in promoting and maintaining a competitive market economy. The registered proprietor of a design has the exclusive right to apply a design to any article in any class in which it is registered. This right is called copyright in the design.

Piracy of the Registered Design

The designs act refers only to the piracy of registered design which in substance is the same as infringement of copyright in the design.

To constitute infringement of a registered design, it is necessary that the copy must be fraudulent or obvious imitation. The word "imitation" does not mean exact replica. The court is to see in particular as to whether the essential part of the base of the applicant's claim for novelty in the design form part of the infringing design.

Section 22 of the Designs Act, 2000, lays down that the following acts amount to piracy: -

1. To publish or to have it published or expose for sale any article of the class in question on which either the design or any fraudulent or obvious imitation has been applied.
2. To either apply or cause to apply the design that is registered to any class of goods covered by the registration, the design or any imitation of it.
3. To import for the purpose of sale any article belonging to the class in which the design has been registered and to which the design or a fraudulent or obvious imitation thereof has been applied.

Thus it would not be lawful to apply for a registered design, or a fraudulent or obvious imitation of such, to an article or to import, publish or expose an article to which such a design has been applied in the same class of articles in which the design is registered, without the consent from the registered owner. In the Piracy of registered design, every resemblance doesn't seem to be the action of infringement or imitation. An obvious imitation is, one where immediately strikes

another design as being so similar to the original registered design, to be almost impossible to differentiate. The most common method to identify infringement as stated in *Veeplast v Bonjour, 2011*: the two products need not be placed side by side, but rather examined from the point of view of a customer with average knowledge and imperfect recollection. The main consideration is whether the broad features of shape, configuration and pattern are similar to one another.

Remedies: Sec 22(2)

The civil remedies available against infringement of copyright in a design are:

a) Injunction,
b) Damages or compensation,
c) Delivery up of infringing articles.

Damages may be assessed to compensate plaintiff for the loss of sales suffered by him on account of the sale of the infringing articles by the defendant, or other damage caused to him thereby, e.g. reduction in price. However, the plaintiff cannot recover damages or penalty for infringement if he has failed to mark his articles in the prescribed manner denoting that the design was registered, unless he shows that he took all steps to ensure the marking of the articles.

ILLUSTRATION QUESTIONS ON UNIT 4

I. A textile manufacturer created designs and he displayed them in the showroom. Can the design be registered?

No, the design cannot be registered because a design can be registered only when it is not previously published in India or abroad. Section 3(2) says a design shall be deemed to have been made available to the public if has been exhibited or used in trade or it has otherwise become known. In the case of *Wimco Ltd. v. Meena Match Industries,* the Court held that publication means the opposite of being kept secret. The disclosure even to one person is sufficient to constitute publication.

In this case the textile manufacturer by displaying the design in the showroom has published the design prior to registration and thus cannot be registered.

II. An architect creates a certain design for multi-storied building. Can the contractor who constructs the building claim copyright in designs?

No. The contractor who constructs the building cannot claim copyright in designs.

Sec 2(5) of the Designs Act, 2000 defines Design.

Design means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but **does not include any mode or principle of construction** or anything which is in substance a mere mechanical device, and does not include any trade mark or property mark or any artistic work.

In the given problem, since 'construction' is not covered within the meaning of design, he cannot claim copyright.

III. In a textile designing firm one person created certain design, while another filled that design with colour. Can the two claim copyright over the design individually?

Colour may form an element of a design, but colour or colouring as such does not constitute a design unless the colour creates a new a pattern or ornament. Thus only the person who has created the design can claim copyright over the design. And mere filling of the design does not constitute a new design.

UNIT 5: INTERNATIONAL CONVENTIONS

1. Write a note on "dispute settlement system" of WTO.

To settle disputes between member countries of WTO the dispute settlement body is established under the understanding on rules and procedures governing the settlement of disputes. The DSB shall have the authority to establish panels, adopt panel and appellate body reports, and maintain surveillances of implementation of ruling.

Dispute prevention and settlement has been laid down in Part V of the TRIPS. The dispute settlement process has three main phases: (i) consultations between the parties; (ii) adjudication by panels and, if either party appeals a panel ruling, by the Appellate Body; and (iii) adoption of panel/appellate reports(s) and implementation of the ruling, which includes the possibility of counter measures in the event of failure by the losing party to implement the ruling.

1) **Consultations between the parties-** The procedures begin with a mandatory consultation period in an effort to find a mutually satisfactory solution. Members must enter into consultations in good faith within 30 days of a formal request for consultations, and the consultations must last at least 60 days from the date of receipt of the request, unless the parties agree otherwise or the Member addressed by the request refuses to consult. During this time, the issues in dispute can be clarified and this may help the parties settle the dispute then, without further procedures, as indeed happens in a number of cases. Other Member governments with a substantial trade interest can also request to join the consultations. All requests for consultations are circulated to all Members and made available to the public on the WTO website; they outline the substance of the complaint and identify the provisions that are at issue.
2) **Panel examination**- If the consultations fail to settle a dispute, the complaining Member may request the DSB to establish a "panel" to examine the matter and make such findings as will assist the DSB in making recommendations to secure a positive solution to the dispute. A panel must be established at the latest by the second request to the DSB. Other Member governments with a substantial interest in the matter can join the dispute as third parties. Panels are normally comprised of three persons of appropriate background and experience, who are not citizens of Members party to the dispute or third parties, unless the parties to the dispute agree otherwise. They serve in their individual capacity and not as government representatives. They are never serving WTO Secretariat officials. The parties to the dispute attempt to agree on the composition of the panel on the basis of names proposed by the Secretariat, failing which the Director-General can, upon request, determine its composition in consultation with the parties to the dispute. The names of the panelists are made public on the WTO website. The parties to the dispute make written submissions and oral statements at meetings with the panel. Third parties also have an opportunity to be heard by the panel and make written submissions to it. A panel will normally complete its work within six months, by publishing a report containing findings of fact and law, with

its conclusions. The report is circulated to all Members and made available to the public on the WTO website. If there is no appeal, it can be proposed for adoption by the DSB.

3) **Appellate review-** A party to the dispute may appeal the panel's findings to the Appellate Body, which is a standing body of seven individuals, three of whom serve on any one case. Member governments appoint Appellate Body Members in the DSB for four-year terms. Appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel. The parties make written submissions and oral statements at a meeting with the Appellate Body and third parties may also participate. The Appellate Body completes its work within 90 days, by publishing a report containing its findings on the issues raised in the appeal, which may uphold, modify or reverse the legal findings and conclusions of the panel. The report is circulated to all Members and made available to the public on the WTO website.
4) **Adoption of the Panel/Appellate report(s) and implementation-** The effectiveness of the WTO dispute settlement procedures flows partly from the way in which the reports on particular disputes are "adopted", or acquire legal force. The DSB considers the panel report, together with any modifications to it determined by the Appellate Body in cases of appeal, after it has been circulated to the Members and adopts it unless there is consensus not to do so. This negative consensus rule effectively requires the consent of the Member which prevailed in the report to prevent its adoption. As a result, panel and Appellate Body reports are adopted almost automatically.

   Where a panel or the Appellate Body has concluded that a measure was inconsistent with the TRIPS Agreement or any other WTO agreement covered by the DSU, its report will recommend that the Member concerned bring the measure into conformity with that agreement. The Member is given a reasonable period of time in which to do so. The reasonable period of time is agreed by the parties, failing which it can be determined by arbitration. In TRIPS cases this has generally ranged from six months, where a regulation had to be repealed, to twelve months, where a statute had to be amended by the legislature.

In the great majority of cases, Members comply with the recommendations contained in a report as adopted by the DSB. However, if there is disagreement as to whether a Member has indeed complied, the disagreement can be decided through another proceeding before a panel, wherever possible the same three persons who formed the original panel. This has only occurred in a small number of cases so far, sometimes because there was a disagreement as to whether amendments made to the law to comply with the recommendations were themselves

consistent with the WTO agreements. The panel normally completes its work within 90 days, by publishing another report, which can also be appealed to the Appellate Body, which normally completes its work within a further 90 days.

The DSB monitors implementation of its recommendations. The Member concerned must provide regular status reports on implementation from at least six months after the date on which the reasonable period of time is established until the issue is resolved.

Full implementation of a recommendation to bring a measure into conformity with the WTO agreements is the aim of this part of the procedures. However, pending implementation there is a possibility for the party which prevailed in the dispute to obtain voluntary compensation from the Member concerned, or authorization from the DSB to suspend obligations or withdraw concessions vis-à-vis that Member (in other words to "retaliate"). This possibility is intended to give credibility to the system and ensure prompt compliance within the reasonable period of time. Although findings are normally implemented within this period, in a relatively small number of cases retaliation has been authorized.

Retaliation can be authorized, as a general principle, in the same WTO agreement where WTO inconsistencies have been found. So, for example, import duties can be increased above the bound rates on goods from a Member which has been found in breach of the GATT rules on trade in goods. Where this general principle is not practicable or effective, retaliation can be authorized under another WTO agreement from the one in which the WTO inconsistencies have been found, which is known as "cross-retaliation".

The DSB has authorized countermeasures in 17 cases. Three of them involved "cross-retaliation", namely EC – Bananas III, US – Gambling and US – Upland Cotton. In each of them, countermeasures were authorized inter alia in the area of TRIPS concerning violation in the 9 area of GATT or GATS. For example, the first of them concerned the failure of the European Communities to bring its banana regime into compliance with a panel ruling. In 2000, Ecuador got the authorization to cross-retaliate against the European Communities by denying them protection of related rights, geographical indications and industrial designs. This and other related disputes were finally settled by the Geneva Agreement on Trade in Bananas in December 2009.

2. Explain the salient features of trips with specific reference to protection of various IPR's.

The TRIPS Agreement is an international agreement administered by WTO that sets down minimum standards for many forms of IP regulations. The Agreement, which came into effect on 1st January, 1995 is till date the most comprehensive multilateral agreement on IP. The Agreement covers the following areas of IP:

1) Copyrights and Related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations)
2) Trademarks (including service marks)
3) Geographical Indications (including appellations of origin)
4) Industrial Designs
5) Patents (including the protection of new varieties of plants)
6) Layout-designs of Integrated Circuits
7) Undisclosed Information (including Trade Secrets and Test Data)

The Agreement is the first agreement under WTO under which the member nations are required to establish relatively detailed norms within their national legal systems, as well as to establish enforcement measures and procedures meeting minimum standards. The three important features of the Agreement are:

- Standards
- Enforcement
- Dispute Settlement

First, in respect of each of the areas of IP covered by the Agreement, each of the member nations is obliged to provide a minimum set of standards for protecting the respective IPR. Under each of the areas of IP covered by the Agreement, the main elements of protection are defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. Second, each member nation is obliged to provide domestic procedures and remedies with respect to protection of IPR. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. The Agreement also lays down certain other provisions on civil and administrative procedures and remedies, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights. Third, under the Agreement disputes between WTO member nations regarding the respect of the TRIPS obligations are subject to the WTO's dispute settlement procedures.

Copyright and Related Rights

Copyright protects literary works and other forms of works that constitute expression of ideas, like painting, etc. Under the provision of Article 10, Computer Programs, whether in source or object code, are protected as literary works under the Berne Convention (1971). The term of protection for such kind of works under the Agreement is calculated based on the life of a natural person. Term of protection for copyright is not less than up to 50 years from date of end of calendar year of making of such a work. The related rights regarding protection of performers, producers of phonograms (Sound Recordings) and broadcasting organizations mentioned in Article 14 grants the producers of phonograms the right to authorize or prohibit the direct or indirect reproduction of their phonograms. These rights grant the broadcasting organizations the rights to prohibit the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same.

Trademark

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, is capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, are eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, member nations may make registrability to depend on distinctiveness acquired through use. Member nations may require, as a condition of registration, that signs be visually perceptible. For initial registration, and each renewal of registration of a trademark a term of protection is no less than seven years. The registration of a trademark is renewable indefinitely.

Geographical Indications

As per the Agreement, Geographical Indications are indications which identify certain goods as originating in the territory of a member nation, or a region or locality in that territory. Geographical Indications are used to protect those goods whose quality, reputation or other characteristics are essentially because of their geographical origin. Under the provisions of the Agreement, a member nation can prohibit other member nations from the use of any designation or presentation of any goods that indicates or suggests that those goods originate from a geographical area other than the true place of origin in a manner which misleads the public. The term of protection for Geographical Indication is eternal.

Patents

Article 27 of the Agreement deals with patentable subject matter. The patentable subject matter according to the Agreement constitutes any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. However, the member nations may exclude from patentability, diagnostic, therapeutic and surgical methods for the treatment of humans or animals. Further, plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes may also be excluded from patentability. Under the provisions of the Agreement the member nations have to provide protection for plant varieties either by patents or by an effective sui generis system or by any combination thereof. The term of protection available is usually twenty years counted from the filing date of the patent application.

Under provisions of Article 21 of the Agreement, member nations may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Article 31 of the Agreement has provisions for allowing the grant a compulsory license for pharmaceuticals by the government of a member nation without the consent of the patentee in certain conditions. Compulsory license may be allotted particularly in following conditions:

- Normally the person or company applying for a license has to have tried to negotiate a voluntary license with the patent holder on reasonable commercial terms. Only if that fails can a compulsory license be issued, and
- Even when a compulsory license has been issued, the patent owner has to receive payment; the TRIPS Agreement says “the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization”, but it does not define “adequate remuneration” or “economic value”.

Compulsory licensing must meet certain additional requirements as well. For example, it cannot be given exclusively to licensees (e.g. the patent-holder can continue to produce), and it should be subject to legal review in the country.

Industrial Designs

Member nations have to provide for the protection of independently created industrial designs that are new or original. Member nations may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Member nations may provide that such protection will not extend to designs dictated essentially by technical or functional considerations. The term of protection for industrial designs is 10 years from the creation of the industrial design.

Lay-Out Designs for Integrated Circuits

Under the provisions of the Agreement, member nations are obliged to provide protection to the layout-designs (topographies) of integrated circuits in accordance with the Treaty on Intellectual Property in Respect of Integrated Circuits. The member nations have to provide for protection of not less than 10 years from the date of filing of application for lay-out designs, however, member nations may limit the duration of protection up to fifteen years from the date of creation of the lay-out design.

Protection of Undisclosed Information

Undisclosed information discussed herein is also called Trade Secret. The member nations are obliged to offer protection for trade secrets as per the provisions of the Agreement. The undisclosed information is considered as trade secret, if:

- It is secret in the sense that it is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- It has commercial value because it is secret; and
- It has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Write a note on "international treaty on plant genetic resources 2001".

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) is the first international agreement focusing specifically on the conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA) that is legally binding. It seeks to ensure both the conservation of and access to PGRFA, which are necessary to provide food security in the foreseeable future. The treaty was adopted at the Conference of the Food and

Agriculture Organization of the United Nations (FAO) in November 2001. Following its fortieth ratification, the treaty entered into force on 29th of June, 2004. The ITPGRFA is largely a response to pressing problems in the field of conservation and sustainable use of PGRFA as well as deficiencies of the legal framework existing at the international level before the adoption of the ITPGRFA. This section will shed light on some of the problems and deficiencies in the realm of conservation and sustainable use of PGRFA, which existed prior to the adoption of the ITPGRFA, and in a second step briefly outline in what way the ITPGRFA provides a response to these problems.

The Plant Treaty established international standards for the conservation and exchange of plant genetic material between participating countries. Plant genetic material is a term for plant germplasm, the physical material used by plants to reproduce themselves, and the term connotes seeds, vegetative propagations, and DNA. Plant genetic resources are the collective genetic diversity of plant species in the laboratory, farm, and field. They are described as resources because of their value for food and agricultural purposes.

Significance of PGRFA

PGRFA are of utmost importance to plant breeders and farmers and indeed to all people on the planet. PGRFA are the "raw material" that plant breeders use to improve crops and introduce new traits into them. Thus, PGRFA can and will play an important role in meeting the challenges of local, regional and global food security, as they allow us to optimise crops according to our needs. Drawing on genes from existing varieties of plants, crop breeders are able, using either traditional crop breeding methods or new genetic technologies, to develop new crop varieties that express desirable traits. By incorporating, for example, genes from a drought-tolerant plant species into an existing crop variety, plant breeders could conceivably develop a new variety that grows particularly well in arid conditions.

PGRFA are thus critical for the continued development of new plant varieties and are an integral component in the efforts to:

- meet human needs for food, health and economic security;
- reduce agricultural pressures (chemical inputs, ploughing, etc.) on the environment; and
- adapt to changing weather (drought, salinity) and ever evolving pests and diseases.

The Treaty aims at:

- recognizing the enormous contribution of farmers to the diversity of crops that feed the world;
- establishing a global system to provide farmers, plant breeders and scientists with access to plant genetic materials;
- ensuring that recipients share benefits they derive from the use of these genetic materials with the countries where they have been originated.

Main Provisions:

Multilateral system (Art 12)

The Treaty's truly innovative solution to access and benefit sharing, the Multilateral System, puts 64 of our most important crops – crops that together account for 80 percent of the food we derive from plants – into an easily accessible global pool of genetic resources that is freely available to potential users in the Treaty's ratifying nations for some uses.

Access and benefit sharing (Art 13)

The Treaty facilitates access to the genetic materials of the 64 crops in the Multilateral System for research, breeding and training for food and agriculture. Those who access the materials must be from the Treaty's ratifying nations and they must agree to use the materials totally for research, breeding and training for food and agriculture. The Treaty prevents the recipients of genetic resources from claiming intellectual property rights over those resources in the form in which they received them, and ensures that access to genetic resources already protected by international property rights is consistent with international and national laws.

Those who access genetic materials through the Multilateral System agree to share any benefits from their use through four benefit-sharing mechanisms established by the Treaty.

Farmers rights (Art 9)

Article 9 of the Treaty recognises the enormous contribution that indigenous and local communities and farmers have made to conserving and developing plant genetic resources. Article 9.2 identifies three measures to protect and promote farmers' rights:

i. protection of traditional knowledge relevant to PGRFA;
ii. the right to equitably participate in sharing benefits from the use of PGRFA; and
iii. the right to participate in national decision-making on conservation and sustainable use of PGRFA.

Article 9.3 states that "nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed."

Sustainable use

Most of the world's food comes from four main crops – rice, wheat, maize and potatoes. However, local crops, not among the main four, are a major food source for hundreds of millions of people and have potential to provide nutrition to countless others. The Treaty helps maximize the use and breeding of all crops and promotes development and maintenance of diverse farming systems.

4. Explain features of the Berne convention.

The Berne Convention for the Protection of Literary and Artistic Works (1886)

The Berne Convention deals with the protection of works and the rights of their authors. It is based on three basic principles and 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 three basic principles are the following:

i. Works originating in one of the Contracting States 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").
ii. Protection must not be conditional upon compliance with any formality (principle of "automatic" protection).

iii. 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 origin ceases.

The minimum standards of protection relate to the works and rights to be protected, and to the duration of protection:

As to works, protection must include “every production in the literary, scientific and artistic domain, whatever the mode or form of its expression” (Article 2(1) of the Convention).

Subject to certain allowed reservations, limitations or exceptions, the following are among the rights that must be recognized as exclusive rights of authorization:

- the right to translate,
- the right to make adaptations and arrangements of the work,
- the right to perform in public dramatic, dramatic-musical and musical works,
- the right to recite literary works in public,
- the right to communicate to the public the performance of such works,
- the right to broadcast (with the possibility that a Contracting State may provide for a mere right to equitable remuneration instead of a right of authorization),

the right to make reproductions in any manner or form (with the possibility that a Contracting State may permit, in certain special cases, reproduction without authorization, provided that the reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author; and the possibility that a Contracting State may provide, in the case of sound recordings of musical works, for a right to equitable remuneration),

the right to use the work as a basis for an audiovisual work, and the right to reproduce, distribute, perform in public or communicate to the public that audiovisual work.

The Convention also provides for "moral rights", that is, the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honor or reputation.

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.

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), 10*bis* (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events) and 11*bis*(3) (ephemeral recordings for broadcasting purposes).

The Appendix to the Paris Act of the Convention also permits developing countries to implement non-voluntary licenses for translation and reproduction of works in certain cases, in connection with educational activities. In these cases, the described use is allowed without the authorization of the right holder, subject to the payment of remuneration to be fixed by the law.

The Berne Union has an Assembly and an Executive Committee. Every country that is a member of the Union and has adhered to at least the administrative and final provisions of the Stockholm Act is a member of the Assembly. The members of the Executive Committee are elected from among the members of the Union, except for Switzerland, which is a member *ex officio*.

The establishment of the biennial program and budget of the WIPO Secretariat – as far as the Berne Union is concerned – is the task of its Assembly.

The Berne Convention, concluded in 1886, was revised at Paris in 1896 and at Berlin in 1908, completed at Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971, and was amended in 1979.

5. EXPLAIN “WTO DOHA ROUND OF TRADE NEGOTIATIONS”.

The Doha Round is the latest round of trade negotiations among the WTO membership. Its aim is to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. The work programme covers about 20 areas of trade. The Round was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001. The Doha Ministerial Declaration provided the mandate for the negotiations, including on agriculture, services and an intellectual property topic, which began earlier.

The work programme covers about 20 areas of trade. The round was officially launched at the WTO's 4th ministerial conference in Doha, Qatar in Nov 2001. The Doha ministerial declaration provided the mandate for negotiations which includes agriculture, services & IP topics. The negotiation takes place in the trade negotiation committee & its subsidiaries.

There are 20 subjects listed in the Doha declaration, most of these involve negotiations, others include actions under implementations, analysis and monitoring. All WTO member governments (currently 157) participate.

The two key principles are as follows:

1. **Decisions are by consensus:** which means everyone has to be persuaded before any deal can be struck, and
2. **"Nothing is agreed until everything is agreed"**: it's sometimes called the "single undertaking". Virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. There is no option to pick and choose between different subjects.

IPR under Doha Negotiations:

One group of countries asked for three intellectual property issues to be part of the agenda for the July 2008 meeting, and to link them with agriculture and NAMA modalities. Another group opposes both the linking and the assertion that the subjects are ready for negotiations based on draft texts.

Only one of these subjects is officially part of the Doha round of negotiations and accepted as part of the "single undertaking" in which all Doha round subjects form part of a single package, with "nothing agreed until everything is agreed":

- the negotiation to create a multilateral register for geographical indications for wines and spirits.

The other two subjects are officially "implementation" issues. Members differ over whether these are subjects for negotiation or not:

- "GI extension": a proposal to extend to other products the higher level of geographical indications protection now given to wines and spirits
- "disclosure": requiring that patent applicants disclose the origin of genetic material and traditional knowledge used in their inventions, or alternative proposals. This comes under the "relationship between the TRIPS Agreement and the UN Convention on Biological Diversity (CBD)".

Geographical indications

Geographical indications are place names (in some countries also words associated with a place) used to identify products that come from these places and have specific characteristics (for example, "Champagne", "Tequila" or "Roquefort") U/TRIPS all geographical indications have to be protected at least to avoid misleading the public and to prevent unfair competition (Art.22). Wines and spirits are given a higher or enhanced level of protection (Art.23): subject to a number of exceptions (Art.24), they have to be protected even if misuse would not cause the public to be misled.

1. Negotiation: the multilateral register for wines and spirits: This negotiation takes place in dedicated "special sessions" of the TRIPS Council. It is about creating a multilateral system for notifying and registering geographical indications for wines and spirits, which today benefit from a level of protection that is higher than for other geographical indications. The multilateral register is discussed separately from the question of "extension" — extending the higher level of protection to other products — although some countries consider the two to be related.The work began in 1997 under Art 23.4 of TRIPS. In 2001 it was brought into the Doha Development Agenda

2. Implementation: geographical indications 'extension': The issue here is whether to expand the higher level of protection to other products. A number of countries want to negotiate extending this higher level of protection to other products (i.e., cheeses, ceramics, meat, tea, coffee, etc.). Some others oppose the move, and the debate has included the question of whether the Doha Declaration provides a mandate for negotiations. The subject is an "implementation" issue in the Doha Development Agenda

Patents, biodiversity and 'disclosure': implementation

This debate was originally wide-ranging. It now focuses on how the TRIPS Agreement relates to the Convention on Biological Diversity, and particularly whether the agreement should be amended to require "disclosure". The ideas put forward include:

1. Disclosure as a TRIPS obligation: A group represented by Brazil and India and including Bolivia, Colombia, Cuba, Dominican Republic, Ecuador, Peru, Thailand, and supported by the African group and some other developing countries, wants to amend the TRIPS Agreement so that patent applicants are required to disclose the country of origin of genetic resources and traditional knowledge used in the inventions, evidence that they received "prior informed consent", and evidence of "fair and equitable" benefit sharing.
2. Disclosure through the World Intellectual Property Organization (WIPO): Switzerland has proposed an amendment to the regulations of the WIPO's Patent Cooperation Treaty so that domestic laws may ask inventors to disclose the source of genetic resources and traditional knowledge when they apply for patents. Failure to meet the requirement could hold up a patent being granted or, when done with fraudulent intent, could entail a granted patent being invalidated.
3. Disclosure, but outside patent law: The EU's position includes a proposal to examine a requirement that all patent applicants disclose the source or origin of genetic material, with legal consequences of not meeting this requirement lying outside the scope of patent law.
4. Use of national legislation, including contracts rather than a disclosure obligation: The United States has argued that the Convention on Biological Diversity's objectives on access to genetic resources, and on benefit sharing, could best be achieved through national legislation and contractual arrangements based on the legislation, which could include commitments on disclosing of any commercial application of genetic resources or traditional knowledge.

The Achievements of the Negotiations:

1. **Agreed texts** - the 2001 Doha Declaration set the broad objectives; the 2004 Frameworks narrowed down differences in interpreting the broad objectives and defined the shape of the final agreements, particularly in agriculture and non-

agricultural market access; the 2005 Hong Kong Declaration narrowed the gaps further.

2. **Chairs' drafts** - although these have not been agreed, they drew on members' inputs in numerous meetings, and in many cases contain a considerable amount of detail now described as "stable". This means much of these texts is almost agreed. A small number of issues still need to be resolved, but they are politically difficult, which is why they are still unsettled.