

CHAPTER 6

Protection of Intellectual Property Rights in Cyberspace in India

The Cyberspace

Web-based technology through the Internet has increased our capacity to access it easily with rapid speed which is very useful for e-commerce and having quick electronic business transactions. Information stored in electronic form is cheaper, easy to store, retrieve, and speedier to communicate. The advantages of the Internet have naturally attracted many business people to conduct the business through e-commerce. The present millennium is going to witness a new internet culture which will be a driving force in the days ahead and is bound to change the way the modern business will function through cyberspace and the Internet. Internet originally was confined to military establishments. But Internet has due to its speed, interactivity and flexibility tremendous potential to disseminate information beyond the geographical boundaries. The Diverse activities which at present are possible over the internet might not have been even envisioned by its inventors. The rapid changes in the process have not yet ended and they are still evolving¹. All the facets of business transactions with which we are accustomed in physical environment can be now executed over the internet. These transactions include among others online advertising; online ordering, publishing, banking, investment, auction and also professional services². Internet has made it possible to replace traditional paper-based communications by paperless communication which does not know physical or geographical boundaries, and is possible in any part and from any part of the globe between the parties known or unknown to each other. The efficiency and speed brought by this technology has made it as matchless alternative in electronic commerce.

With its global reach, the Internet provides the intellectual property owners with a seemingly unlimited market for their works. However, the internet offers similarly expended opportunities for those seeking to infringe the rights of others, while making the detection and elimination of such infringement extremely difficult. The challenge that the law has faced in the recent years is how to tackle the development of intellectual property on the internet while preventing its unauthorised exploitation. We find that the advantages of Internet have brought some legal issues which do not find solutions in the existing legal framework which was enacted to suit the needs of physical environment and tangible medium and not the cyberspace which is faceless and borderless. And the most important of the many legal issues raised by the internet is the protection of the copyright. Till recently, Internet, because of the lack of technology, was used sparingly to disseminate only one or two works over which the copyright could be claimed. However, Internet, which is a multimedia, has made it possible through a single medium not only to disseminate all works over which copyright can be claimed but also to create new works which deserve copyright protection but are not covered in the present Copyright Act, 1957.

~~Even before the advent of Internet, the copyright issues cropped up by the introduction of other technologies also. However, none has brought more pressing copyright concerns than digitalisation³. The flexibility of digital technology which makes possible text, sound and images to be transmitted and stored in easily manipulated bits and bytes has been credited with transforming information from simply a means of acquiring and managing other assets into a primary asset itself⁴.~~

~~Intellectual property owners have to make difficult decisions about how to allocate resources to identify and stop infringement. As Internet infringement involved generally in fan-organised websites devoted to popular culture, the intellectual property owners risk alienating their consumers by a possible public relations backlash by too aggressively protecting their intellectual property rights. Moreover, the intellectual property owners must be aware of new forms of possible intellectual property infringement that arise from the unique nature of internet technology. These include linking, framing, the use of metatags, spamming etc.~~

~~Intellectual property means knowledge or information in any form which has a commercial value and intellectual property rights can be defined as a mix of ideas, inventions and creations on which society provides the status of property. And the protection of the intellectual property right systems include a range of laws, institutions and arrangements. Until now the protection of law institutions~~

and arrangements were based on essentially national legislations. However, recently international regimes for the protections of intellectual property have been brought under the umbrella of World Intellectual Property Organisation (WIPO) on the one hand and the World Trade Organisation (WTO) on the other hand. These international regimes, for the protection of intellectual property, attempt to strike a balance between the interest of the intellectual property owner and its interests of the intellectual property users by ensuring the owners of intellectual property adequate return on their investment in knowledge and increasing social benefits from unrestricted access to knowledge to the intellectual property users. This aspect can be clearly pointed out by the agreement on TRIPs in the WTO. The TRIPs agreement imposes minimum standards on patents, copyright, trademarks and the trade secrets. And these standards which are applicable to all WTO members are based almost entirely on intellectual property legislation in the industrialized countries particularly the US.

Deception by Squatting in Cyberspace

The consumers when looking to find the name of the brand on the Internet, the easiest way for them is to type a domain name of the brand or the company. Generally, in India, a domain name has at least two key parts. The second level domain describes like *.Com* or *.Gov* and third level domain contains familiar name that describes product, service or topic that the website addresses. The popularity of Internet in advertising, recruiting and for market place for products and services by the companies on the Internet have the interest and desire to have domain names which are easy to remember and they relate to the product trade names or trademarks such as www.rediff.com. Such kind of identification is essential for any business in order to conduct commerce on the Internet and also advertise and educate the public about the company's product. It helps the consumers realise that they are communicating with the intended source of goods and they are confident of purchasing the genuine goods and are getting from known and reliable source. Internet serves with anonymity and has increased the importance of identity by brand name on the Internet. Trademarks and domain names being similar, have been exploited by some people who register trademarks of others as domain names and sell those domain names back to the trademark owners or third parties at a high profit. This is known as 'cybersquatting' which means some person sitting on the property of another person. Such a trend of cybersquatting has led the courts to consider the relationship between trademarks and domain names in *Intermatic Inc. v. Toeppen*⁵, wherein a US court found that the offer to sell a domain name in the US was 'use in commerce' and therefore it amounts to a trademark's use. And the court held that such an offer to sell a domain name to the owner of an identical or similar trademark was a trademark infringement. The practice of cyber squatting is abusive whereby one entity registers a domain name that includes the name or trademark of another. This practice shows the importance of the role played by domain names in establishing online identity. This practice usually is famous in order to either block the legitimate user registering its most sought after domain name or hoping to sell the names for profit in the market.

The practice of cybersquatting has resulted in litigation in various cases. In *Marks & Spencer Plc v. one in a Million*⁶ case in the UK, the court granted an injunction to prevent cybersquatting on domain names involving well known brands like *Marks and Spencer*. In India, UK, Italy, Germany and the US and

many other countries the authorities concerned with the domain names have ruled that the act of registering a domain name similar to or identical with a famous trademark is an act of unfair competition whereby the domain name registrant takes unfair advantages of the goodwill and fame of the trademark by increasing traffic to the domain or to seize a potential assets of the trademark owner in the hope that the trademark owner will pay the registrant to relinquish the domain name. In cases relating to the infringement of domain name which have been decided in favour of the trademark owners we find that the domain registrant has acted without the intention to make use of the domain name as intended by the domain registration system. The absence of such intention is called *bad faith*. This is generally done for the profits of potential sale of the domain name to the trademark owner.

In this connection the most significant case decided by the Delhi High Court is *Yahoo! Inc. v. Akash Arora & Anr*⁷. In this case the Internet search engine Yahoo! Inc. sued an Internet pirate who had not only copied the domain name *Yahooindia.com* but had also used Yahooindia as a trademark on its website and was offering directory services with information specific to India. And was passing itself off as an extension of Yahoo! Inc. In this case the Delhi High Court granted an injunction restraining him from using Yahoo either as a part of his domain name or as a trademark or from copying any of the contents of the plaintiff's website and thereby infringing Yahoo's copyrights. The court further held that trademark law applies with equal force on the Internet as it does in the physical world⁸. But it may be noted that the principles of trademark law apply on the Internet with a different and with stricter standards. In *tanishq.com*, *Nasscom.org* and *tatasons.com* cases also, the courts have followed the same approach as in the case of Yahoo! Inc⁹.

Eventhough the courts have laid down the principles for violating the infringement of domain name or trademark on the cyberspace, there are still some difficulties in implementing such violations. One of the difficulties is of detecting the wrong or of serving the notice to the defendants. Secondly, there is the risk of the domain name being transferred if you give the cease and desist notice. Thirdly, even if you get an injunction, there is a possibility that the defendant would get registration of alpha-numeric variations as was found in the Tata cases. Such situations make the enforcement an expensive affair.

In this connection it may be pointed out that the Internet Corporation of Assigned Names and Numbers (ICANN) has adopted a policy called Uniform Domain Name Dispute Resolution Policy (UDRP) which offers an expedited administrative proceedings for trademark holders to contest 'abusive registrations of domain names' which provides cancellation, suspension or transfer of a domain name by the registrar. The advantages of the ICANN's dispute system

are its quick resolutions of disputes and relatively low costs. In the ICANN's policy the parties may even conduct the entire proceeding through electronic filings¹⁰.

Protection of Copyright on Cyberspace

The new technology which is multi-functional IT or the Internet poses number of challenges for laws to protect copyrights. Copyright being an intellectual property gives rights to the authors in literary, artistic, dramatic and musical works. As in other intellectual property rights available under the copyright are essentially negative in nature, similarly these are basically the rights to stop others from doing certain things as for example, right to stop piracy, counterfeit, copying or imitations. The copyright even enables the holder to stop even the third parties who might independently reach the same idea from exploiting them without the permission of the copyright owner. It means that the copyright holder has a right to control the activities of others. Therefore, copyright is rightly called as 'bundle of rights' such as right to reproduce work in copies, right to make an adaptation of the copyrighted work, right to perform or display the work in public etc. However, it may be pointed out that copyright does not exist in an idea but is available only when it is in some form or expression. Therefore, no person can have a copyright merely on having idea of story which is only in his

mind. But once a person has written it he will have the copyright on the story which he expressed.

In India 'copyright' means the exclusive right subject to the provisions of the law to do or authorise the doing of act in respect of work or any substantial part of work.

- (a) In the case of literary, dramatic or musical work not being a computer programme to reproduce the work in any material form including the storing of it in any medium by electronic means, to issue copies, to perform the work in the public, to make any cinematograph film, or sound recording, to make any translation or to make any adaptation¹⁴.
- (b) In the case of computer programme to—
 - (i) do any of the acts specified in clause(a); and
 - (ii) sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme.

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental¹⁵.

In relation to computer programmes 'literary work' includes computer programmes, tables and compilations including computer databases¹⁶ and an 'author' means in relation to a literary work or dramatic work the author of the work, in relation to a musical work, the composer, and in relation to any literary, dramatic, musical or artistic work which is computer generated, the person who cause, the work to be created¹⁷.

The above relevant provisions relating to the Copyright Law in India clearly suggest the interpretation that the copyright in computer software would subsist in case the computer software produced entity only if the computer produced entity is 'original' and a copyright subsists only in an original literary work. The copyright Act is not concerned with the originality of ideas but is concerned with the expression of thought, and in the case of a literary work with the expressions of thought in print or writing what is required is that the work must not be copied from another work but must originate from the author. The requirement for the purpose of a copyright is that the work originated from the author though the materials on which it is based might have been used by others earlier also. If may not be either novel, or ingenious, it would be the claimant's original work because it is originated by him, emanated from him and not copied. Copyright subsists in a computer programme provided sufficient effort or skill has been done to give it a new and original character. However, a computer programme which only produces the multiplication tables or the alphabet cannot claim a copyright protection as the skill or effort used is very little¹⁸.

In India, the definition of computer includes any electronic or similar device having information processing capabilities¹⁹. And, a computer programme means a set of instructions expressed in words, codes, schemes or in any other form, including a machine, readable medium, capable of causing a computer to perform a particular task or achieve a particular result²⁰.

“Communication to the Public” 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.

Explanation: For the purposes of this Clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public²¹.

The Indian law about copyright is based on Article 10 of the TRIPs Agreement which deals with computer programmes and stipulates that computer programmes shall be treated as literary works under Berne Convention.

There are various kinds of software based on their availability on the Internet and can be classified as follows:

- Commercial software
- Freeware
- Shareware
- Copy lifting software

Though there are different kinds of software as mentioned above, the law relating to protection of copyright doesn't make any distinction among any of these software's. Under the law in India all kinds of software have been given similar protection for the purposes of copyright.

Computer software that is sold for a price is called commercial software. It may be pointed out that it is only with respect to commercial software a large scale computer piracy is done. This aspect of piracy of commercial software is the basic concern of the copyright law. In the case of computer freeware, the software is fully available on the Internet free of cost. And therefore, the user of such software has not to pay any thing to the author and if the user wishes he may appreciate the work of the author and acknowledge the benefit he derived from the use of the author's work. A shareware is a software that is distributed openly and widely for users to try before they buy that programme. Whereas in copy lifting, the user can use the software for as long as he likes freely. And he is even allowed to change, alter or add to the code and also pass the original work with modifications with or without a fee, which is prohibited in shareware software and freeware.

It may be explained that the software is created or developed by the owner or author either online or offline. Then the owner/author of the software uploads the content on the internet which in turn is transmitted from one website to another website with great speed. From a website, a user can have access to the software through the search engine. The user may download the software from the website and may use it online or offline. Therefore, a Software on the Internet—

- can be created online or offline;
- is made available online; and,
- can be used by the internet user online or offline. The law of copyright is relevant at all the levels of transactions on the Internet. The law confers the exclusive right on the owner/author with respect to the computer software created by him. However, the infringements of his copyright can take place during the transmission of message or with respect to how the software is used.

Infringement of Copyright on Cyberspace

Under the law, copyright in a work shall be deemed to be infringed—

- (a) when any person, without a license granted by the owner of the copyright or the Registrar of Copyrights under this Act, or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act—
 - (i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright;
 - (ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or
- (b) when any person—
 - (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire; or
 - (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright; or
 - (iii) by way of trade exhibits in public; or
 - (iv) Imports into India²⁹. . . .

There is no definition of infringement provided under the Copyright Act 1957. However, Section 2(m) gives the meaning to the words ‘infringing copy’, is in relation to—

- literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;
- a cinematographic film, a copy of the film made on any medium by any means;
- a sound recording, any other recording embodying the same sound recording, made by any means;
- a programme of performance in which such a broadcast, reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance.

If such a reproduced copy of sound recording is made or imported in contravention of the provisions of this Act.

For the purpose of infringement by the defendant: first, there must be sufficient objective similarity between defendant's infringing work and the copyrighted work or a substantial part thereof. And secondly, the copyrighted work must be the source from which the infringement work is derived. In

*Jarrold. v. Houston*³⁰, it was held by the Court that the intention to commit fraud on the part of the defendant for the purpose of saving labour was an important consideration in arriving at the conclusion of occurrence of any infringement. In other words in order to prove infringement an *animus furandi* on the part of the defendant is quite relevant to determine infringement of the copyrighted work.

In India in the case of *R.G. Anand v. Delux Films*³¹, the Supreme Court relied on the 'doctrine of dominant impact' and the court held that if the viewer after seeing the films gets total impression that the film is by and large a copy of the original play, violation of copyright may be said to have been proved³². After careful examination of various authorities the court in the above mentioned case laid down the following test to determine infringement of a copyrighted work:

- (1) There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright if access is confined to the form, manner and arrangement, and expression of the idea by the author of the copyrighted work.
- (2) The Court should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variation here and there it would amount to violation of the copyright. In other words in order to have action against the infringed copy, the copying must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.
- (3) One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer, after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be copy of the original³³.

Linking, Hyper-Linking and Framing

The Internet or the web was initially created for the purposes of enabling hypertext capabilities allowing one side to link or hyperlink and access another sight. In this way, the users could make sense of the great mass of data contained on the Internet. As linking or hyper linking was used for education or research purposes and it was both accepted and encouraged when Internet was a research

network. However, on the commercial Internet the sight owners have contended that before employing a link, the website must seek permission from the website to which it wants to link. Some of the website owners have challenged the practice of linking without first seeking permission. In *Ticketmaster Corp. v. Microsoft Corp.*³⁷ case, Ticketmaster sued Microsoft for linking to its sight without permission. Ticketmaster objected to Microsoft's practice of linking, deep within its site rather than to the home page and claimed *inter alia* that Microsoft unfairly diverted advertising dollars that otherwise would have gone to Ticketmaster. The impetus for the suit was probably primarily economic. But linking deep within the site, Microsoft bypassed Ticketmaster's home page which contains advertising. As a result, no 'hit' to the home page was recorded, potentially decreasing Ticketmaster's revenue. Also Ticketmaster had setup contractual arrangement with other firms in which those companies had agreed to pay to link to the Ticketmaster site. Free linking by Microsoft could devalue those relationships.

On the website, framing is a relatively recent phenomenon as compared to linking. A framing site, by virtue of certain commands in its HTML code, links to another site, displaying that site within a window or frame. The frame itself is comprised of content from the framing site. In comparison to generic hyper linking, in the case of framing, the user remains at the framing site and views content form both sites. The address that the user's browser displays may continue to be that of the framing site. The user may be unaware that the content in the frame comes from another site. The difference between linking and framing may make trademark liability more likely for sites that frame rather than merely hyperlink. Sites are increasingly challenging those who frame them. Probably the most widely publicized challenge was that brought by a group of plaintiffs led by the Washington Post against Total News Inc. The plaintiffs in this case objected to the Total News site's framing of their content. The Total News would surround the content of the plaintiffs' sites with ads that Total News itself had sold. In this case the plaintiffs argued that the Total News had infringed their copyrights and trademarks, diluted their trademarks and engaged in unfair competitions.

It appears that the copyright law is unlikely to be applied in the act of framing although it may be a close question. It can be argued that none of the exclusive copyrights rights is implicated by the frame, as it is simply a method of display. The frame though, might implicate the copyright owner's exclusive right to prepare derivative works. Even if the framing site were considered a derivative work of the framed site, the creator of the framing site may still not be liable for copyright infringement. The user actually does the framing and the user's conduct is likely to be protected under the copyright doctrine of fair use. As in the case of linking, if the user is not a direct infringer, then the site that provides the ability to frame cannot be a contributory infringer. Hyper

linking and framing are just two of the Internet practices, which plaintiffs are challenging. Neither is clearly illegal under existing legal doctrine, nor is it clear that either should be. The uncertainty of the current public law of copyright and trademark may lead parties to seek redress under the law of tort. Further parties may also attempt to order their relationships using the law of contract to set the terms of access and use of a site. And therefore if hyperlinking and framing are able to survive the implication of law under the intellectual property statutes the parties may be able to claim the damages under the law of tort and contract.

The Liabilities of an Internet Services Provider (ISP) in Cyberspace

The liabilities of ISPs may arise in a variety of legal areas, such as criminal law, Torts law, Trade secret law, Copyright law, Trademark law, Unfair Competition law and the like. Many countries have tried to define the liability of ISPs in

disseminating third party content⁴⁰. The function of service providers is to host content, such as web pages of subscriber, over which the service provider exercises no control. And it is impossible practically to monitor or screen the activities of users of network services. Therefore, service providers need legal protection similar to that as given under the law to common carriers, such as telephone companies, for infringements committed by their consumers. Such a view is consistent with the Agreed Statements Concerning the WIPO Copyright Treaty which states that the mere provision of physical facilities for enabling or making a communication does not by itself amount to a communication. As it is impossible to monitor the activities of users of network services, for example, educational institutions, libraries and museums and service providers, they should have no legal obligations to monitor what is transmitted, or seek facts or circumstances indicating illegal activity. The Copyright Forum's recommendation in this regard is based on Article 15(1) of the European Union's Directive on Electronic Commerce. The European Union's approach is preferred over that of the US which is viewed as being too complex⁴¹.

Cyberspace and the Protection of Patents in India

The law of patents is very relevant for the information technology industry as it is in other industries. The owner of a patent is granted certain exclusive rights to a particular invention. The rights of patent owner include the right to make, the right to use, and the right to sell the invention and also the obvious extensions connected with the rights of inventions. One of the objects of the patent granted to the owner is to enable the inventor to make better profits from his efforts. The patent serves to protect the inventor from the unhealthy competition from the copycats. In the computer technology which is fast-paced, being the first to develop and to patent an invention which satisfies the demand in a market can provide significant leverage over competitors. The patent owners can also have an agreement to let others make use of the patented invention. This is generally done by means of a license agreement which specifies what the licensee may do with the invention in exchange for a royalty paid to the licensor patent holder. Patents and other licenses are very common in the computer industry and in fact have influenced the major facets of personal computer market. We can see the effects of Indian Business Machines (IBM's) decision to license the operating system for its personal computer from a company which has become famous like Microsoft.

The term ‘patent’ refers to a grant of some privilege, property or authority made by the government or the sovereign of the country to one or more individuals. The instrument by which such a grant is made by the government is known as patent. A patent is a form of intellectual property rights in, among other things, a new and useful device, design or process. In India, under the law, a patent is a—

- right granted by the government;
- to exclude others;
- from engaging in activities such as making, using, importing, offering to sell or selling an invention.

In India, the law relating to patents came on the Statute Book as The Patents Act, 1970. Patent, under the Act, is granted by the Controller to the inventor for a period of twenty years. It is exclusive right to make use, exercise and vend his invention. The Patents (Amendment Act) 2005, defines: ‘patent means a patent for any invention granted under this Act’⁴². The Patent’s Act grants to the inventor substantive rights and secures to him the valuable monetary right which he can enforce for his own advantage either by using it himself or conveying the privileges to others. He receives something tangible, something which has present existing value, which protects him from some competition, and is the source of gain and profit.

After the expiry of the period for which exclusive right is granted to the inventor, invention can be put to use by any person other than one to whom a patent had been granted. The person to whom a patent is granted is called patentee.