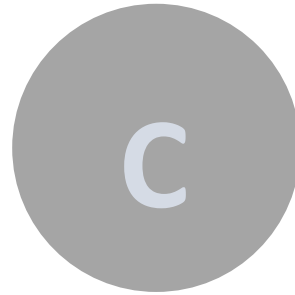


Module 4 - Cyber law

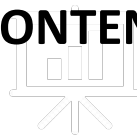
Course Introduction



SYLLABUS



CONTENT



**EXPECTED
QUESTIONS**



Syllabus

Cyber law - Need for cyber laws - Historical perspective - cyberspace - deception by squatting in cyberspace - protection of copyright on cyberspace - infringement of copyright on cyberspace - linking, hyperlinking and framing - ISP in cyberspace - cyberspace and protection of patents in India.

- Cyber law is any law that applies to the internet and internet-related technologies.
- Cyber law got introduced internationally when United Nations Commission on International Trade Law adopted the Model Law on Electronic Commerce in 1996.
- This is because internet technology develops at such a rapid pace.
- Cyber law provides legal protections to people using the internet.
- This includes both businesses and everyday citizens.
- Understanding cyber law is of the utmost importance to anyone who uses the internet.
- Cyber Law has also been referred to as the "law of the internet."

Cyber Law Trends

- Cyber law is increasing in importance every single year. This is because cybercrime is increasing. To fight these crimes, there have been recent trends in cyber law. These trends include the following:
 - ✓ New and more stringent regulations.
 - ✓ Reinforcing current laws.
 - ✓ Increased awareness of privacy issues.
 - ✓ Cloud computing.
 - ✓ How virtual currency might be vulnerable to crime.
 - ✓ Usage of data analytics.
- Creating awareness of these issues will be a primary focus of governments and cyber law agencies in the very near future. India, for instance, funded cyber trend research projects in both 2013 and 2014.
- In addition, India holds an international conference related to cyber law

Cyber Law and Intellectual Property

- Intellectual property can include areas like inventions, literature, music, and businesses.
- It now includes digital items that are offered over the internet. IP rights related to cyber law generally fall into the following categories:
- Copyright: This is the main form of IP cyber law. Copyrights provide protection to almost any piece of IP you can transmit over the internet. This can include books, music, movies, blogs, and much more.
- Patents: Patents are generally used to protect an invention. These are used on the internet for two main reasons. The first is for new software. The second is for new online business methods.
- Trademarks/Service Marks: Trademarks and service marks are used the same online as they are in the real world. Trademarks will be used for websites. Service marks are used for websites that provide services.

- Trade Secrets: Trade secret laws are used to protect multiple forms of IP.
 - This includes formulas, patterns, and processes.
 - Online businesses can use trade secret protections for many reasons. However, it does not prevent reverse engineering.
- Domain Dispute: This is related to trademarks. Specifically, domain disputes are about who owns a web address.
 - Eg: the person who runs a website may not be the person who owns it. Additionally, because domains are cheap, some people buy multiple domains hoping for a big payday.
- Contracts: contracts can be applied to online contents too.
 - Eg: when you register for a website, you usually have to agree to terms of service. This is a contract.

- Privacy: Online businesses are required to protect their customer's privacy.
 - The specific law for privacy protection become more important as more and more information is transmitted over the internet.
- Employment: Employee contract terms are linked to cyber law.
 - This is especially true with non-disclosure and non-compete clauses.
 - These two clauses are now often written to include the internet. It can also include how employees use their company email or other digital resources.
- Defamation: Slander and libel law has also needed updating because of the internet.
 - Proving defamation was not altered substantially, but it now includes the internet.

- Data Retention: Handling data is a primary concern in the internet age.
 - An area where this has become a big issue is in terms of litigation.
 - In lawsuits, it is now common to request electronic records and physical records. However, there are no current laws that require keeping electronic records forever. This is not true for physical records.
- Jurisdiction: Jurisdiction is a key part of court cases.
 - Cybercrime has complicated this issue. If a cybercriminal is located in Minnesota and their victim is located in North Carolina, which state has jurisdiction?
 - Different states have different rules about this issue. Also, it can depend on in what court, federal or state, a case was filed.
- Protecting IP can be difficult over the internet. Eg: pirated movies and music.

Each business that relies on the internet needs to develop strategies for protecting their IP. Governments can also take part in this process. In 1999, India did just this by updating their IP laws.

Recap

- Cyber law encompasses aspects of intellectual property, contract, jurisdiction, data protection laws, privacy, and freedom of expression.
- It directs the digital circulation of software, information, online security, and e-commerce.
- The area of Cyber Law provides legal recognition to e-documents.
- It also creates a structure for e-commerce transactions and e-filing.
 - Hence, to simply understand the Cyber law's meaning, it is a legal infrastructure to deal with Cybercrimes.
 - An increase in the usage of E-commerce has made it pivotal that there are proper regulatory practices set up to ensure no malpractices take place.
- The laws implemented for cybersecurity largely vary from country to country and their respective jurisdiction.
- The punishments for the same also vary from fine to imprisonment based on the crime committed.
- It is very important for citizens to know the cyber laws of their respective countries to make sure they are well aware of all information regarding cybersecurity.
- The first cyber law to ever exist was the Computer Fraud and Abuse Act in 1986 that prohibited unauthorized access to computers and illegal usage

- Cyber law consists of rules that dictate how people and companies should use the internet and computers. While other rules protect people from getting trapped in Cybercrime run by malicious people on the internet. Although it is close to impossible to curb 100% of all cybercrimes, laws are implemented all around the world .

The importance of Cyber law:

- It dictates all actions and reactions in Cyberspace.
- All online transactions are ensured to be safe and protected
- All online activities are under watch by the Cyber law officials.
- Security for all data and property of individuals, organizations, and Government
- Helps curb illegal cyber activities with due diligence
- All actions and reactions implemented on any cyberspace has some legal angle associated with it
- Keeps track of all electronic records
- Helps to establish electronic governance

Why do we need Cyber Law?

- As of early 2021, the number of people that use the internet is over 4.66 Billion.
- With that number increasing by 7% annually, means every day can account for almost 8,75,000 new users.
- Given this swift increase in the use of Cyberspace, implementation and the usage of strict cyber rules helps establish a safe and secure environment for the users.
- Living in a rapidly progressing world, the one thing to keep pace with it is the Internet. Although it initially started off as an information tool, today it helps with communication and commerce.
- Being highly sophisticated and developing every single day, the usage of cyberspaces has become common, hence the increase in cybercrimes

General Categories of cybercrime

- Individual- Cybercrimes against individuals involve crimes like online harassment, distribution and trafficking of child pornography, manipulation of personal information, use of obscene data, and identity theft for personal benefit.
- Property- Usage, and transmission of harmful programs, theft of information and data from financial institutions, trespassing cyberspace, computer vandalism, and unauthorized possession of information digitally are some of the crimes under the property.
- Government- The crimes that come under this are cyber terrorism, manipulation, threats, and misuse of power against the Government and citizens. Groups or Individuals terrorizing Government websites is when this form of cyber terrorism occurs.

- Due to the rapid progress in the technology sector, the usage of cyberspace has become a common practice. With this increase, it has a large number of pros but also a higher number of cons. Hence during the 21st century, the IT Act 2000 was introduced. This was implemented to ensure all online records and activities are brought under the spectrum of legal governance. India has been ranked to be in the top 5 amongst other nations for cyber threats. But it has only one strong law in place to face and fight any cybercrimes that are the IT ACT of 2000 and its amendments.
- The Cyber Law IT act 2000 came into consideration on 17th October 2000 to deal with e-commerce and Cybercrime in India. Cyber law came into existence after the making of the Indian Constitution. So, it is a residuary subject handled by the Central Government and is not included in the three lists namely, Union, State, and Concurrent.

According to the act following are the list of features of Cyber Law:

- All the electronic contracts made via secure electronic channels are valid legally.
- There are security measures in place for e-records and digital signatures.
- The Cyber law act defines a process for the appointment of an adjudicating officer for carrying out inquiries.
- The IT law act provides recognition for digital signatures legally. Also, the digital signatures are obligated to use an asymmetric cryptosystem and a hash function.
- The senior police officials and other officials are authorized to search any public case without a warrant.
- There is a provision in the act to establish a Cyber Regulation Appellate Tribunal. This tribunal handles appeals made against the final order of the Adjudicating Officer or the Controller. But an appeal against the tribunal's order can only be made in the High Court.

- There is also a provision in the act to form a Cyber Regulations Advisory Committee that will advise the Central Government and the Controller.
- The nature of the Cyber law act even applies to online crimes or offenses that are committed outside India.
- There is also a provision to form the Controller of Certifying Authorities which licenses and regulates the working of the Certifying Authorities. All the digital signatures are stored by the Controller in such a case.

Areas where the cyber act is non-applicable

- Transactions and documents initiated by the Central Government
- Financial and legal acts done by someone who is legally claimed as the Power of attorney
- Contract for sale or transfer of immovable property.

ADD-ONS TO THE CYBER LAW IN INDIA AS OF 2021

- With social media being the new-found forum for everyone to communicate and express their views, the Government of India has established new rules to regulate social media and OTT (over-the-top) platforms. It was duly established to curb the usage and propagation of hate speech. Another crucial reason is to address grievances people have faced. They will also track inappropriate messages and tweets to the first originator. This will be done by the Government or a court order directed to that particular platform.
The Government also made it ascertain that they will not encourage anything that could be a possible threat to National Security.
- The need for Social Media and OTT directives
- Defamation and hate speech- Due to the sudden rise of visibility on social media, it is imperative to curb hate speech and defamation as it can have severe implications on the public.
- Misuse of content and misinformation- Another major issue is the misuse of personal content and even obscene content on the same platforms.
- Online Protection- Need for protecting women and men from sexual offenses that occur on these platforms.
- There were no previously effective rules that ensured the content-driven on

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 efficiency and speed brought by this technology has made it as matchless alternative in electronic commerce
 - 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 & 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.

- However, recently international regimes for the protections of intellectual property have been brought under the umbrella of World Intellectual Property Organization (WIPO) on the one hand and the World Trade Organization (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 is 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.

The Relevance of Domain Names in Intellectual Property Rights

- In the new e-commerce economy it is important that before doing any sort of business activity a company must be easily traceable on the Internet.
 - This means that the company must have an address in the cyberspace.
 - This requires the company must have registration under a particular domain name and a website of its own.
- The **Domain Name System (DNS)** has made it possible for the registration of a company which enables a company to conduct online transactions and make it easily traceable by the customers, suppliers and other users.
- Domain name corresponds to various IP (Internet Protocol) numbers which connect various computers and enable direct network routing system to direct data requests to the correct addressee.
 - As it is difficult to remember all-numeric addresses which each computer, public server has its own unique all-numeric IP addresses and therefore domain name has a major role to play in the development of the DNS and the emergence of domain names as important corporate assets.

- The growth of e-business organizations or companies have to cater to new markets for which the Internet is to play an important role.
- As a consequence, it is important for a company to secure an appropriate domain name.
- For this, the domain name and the protection of the company's right to use it are the aspects which every organization or company has to face.
- The domain names serve a number of useful purposes and will rapidly grow to form the fulcrum of a company's visibility and marketing operations.
- Once there is domain name of the company it will soon be remembered only through its web address rather than its geographical or telephonic addresses and numbers.
- The representation of the company's both name and address on

- Various types of domain name disputes have come for consideration before the serious kinds of disputes has been the courts all over the world.
- Internet domain name is a combination of typographic characters used to describe the location of a specific location online. Also known as the Uniform Resource Locator(URL).
- It is considered the identity of a Web site. The Internet domain name is very important for the small businesses who want to establish their name on internet. The two organizations cannot have same domain names.

Eg: www.google.com; www.yahoo.com, etc.

- 'WWW' means that site is linked to World Wide Web.
- 'google' is the name you choose to your site, and ideally is readily identifiable with your organization name or core business.
- '.com' is known as top-level domain name and it indicates that your organization name or core business.
- Sometimes '.in' is being used in place of '.com' that means that company is registered in
- India (For eg – ebay.in, olx.in, airtel.in, etc)

TYPES OF DOMAIN NAME

- Top-Level Domains(TLDs) – They appear in domain names as the string of letters following the last (rightmost) ".", such as "net" in "www.example.net". Most commonly used TLDs are .com, .net, .edu, .jp, .de, etc. Further, TLDs are classified into two broad categories: generic top-level domains (gTLDs) and country-code top-level domains (ccTLDs).
 - Generic Top-Level Domain (gTLDs)– It is a generic top-level domain name that identifies the domain class it is associated with (.com, .org, .edu, etc).
 - Country Code Top-Level Domain (ccTLD)– It is a two-letter domain extension, such as .uk or .fr, assigned to a country, geographic location or territory.
- nTLDs– It refers to new top-level domain names that are geared towards brands organizations and services, as they're more customized, flexible and relevant. Some of the Examples of nTLDs include ".voyage", ".app", ".ninja", ".cool", etc.

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.

- Cybersquatting is the practice of registering an Internet domain name that is likely to be wanted by another person, business, or organization in the hope that it can be sold to them for a profit.
 - It involves the registration of trademarks and trade names as domain names by third parties, who do not possess rights in such names.
 - Thus, cyber squatters register trade-marks, trade names, business names and so on, belonging to third parties with the common motive of trading on the reputation and goodwill of such third parties by either confusing customers or potential customers, and at times, to even sell the domain name to the rightful owner at a profit.

Eg: Satyam Vs. Siffy is the most widely known case.

Bharti Cellular Ltd. filed a case in the Delhi High Court that some cyber squatters had registered domain names such as barticellular.com and bhartimobile.com with Network solutions under different fictitious names.

Yahoo had sued one Akash Arora for use of the domain name 'Yahooindia.Com' deceptively similar to its 'Yahoo.com'.

- Every resource on the Internet, such as a web page or a file of information has its own address known as Uniform Resource Locator URL.
- A domain name is part of this address which is assigned to each computer or service on the Internet.
- The Internet Corporation of Assigned Names and Numbers (ICANN) is responsible for the administration of top level domain names.
- In assigning a domain, NSI uses a multi level system, including a top level domain (TLD) such as .com and .net which are considered worldwide generic.
- First step to acquire a domain name is to contact the administrator of the TLD and if the identical requested domain name is not already assigned, the name will be then approved by the administrator.
- That allocation of IP addresses and domain names worldwide is done centrally.

- Dispute involving bad faith registrations are typically resolved using the Uniform Domain Name Dispute Resolution Policy (UDRP) process developed by the ICANN.
- Under UDRP, WIPO is the leading ICANN accredited domain name dispute resolution service provider and was established as a vehicle for promoting the protection, dissemination, and the use of intellectual property throughout the world.
- India is one of the 171 states of the world which are members of WIPO.
- A person may complain before the administration dispute resolution service providers listed by ICANN under Rule 4 (a) that:
 - (i) A domain name is "identical or confusingly similar to a trade mark or service mark" in which the complainant has rights; and
 - (ii) The domain name owner/registrar has no right or legitimate interest in respect of the domain name; and
 - (iii) A domain name has been registered and is being used in bad faith.

- Rule 4 (b) has listed, by way of illustration, the following four circumstances as evidence of registration and the use of a domain name in bad faith:

- (i) Circumstances indicating that the domain name owner/registrant has registered or acquired the domainname primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trade mark or service mark; or to a competitor of that complainant for valuable consideration in excess of its documented out of pocket costs, directly related to the domain name; or
- (ii) The domain name owner/registrant has registered the domain name in order to preventthe owner of the trade mark or service mark from reflecting the mark in a corresponding domain name, provided that it has engaged in a pattern of such conduct; or
- (iii)The domain name owner/registrant has registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- (iv) By using the domain name, the domain name owner/registrant has intentionally attempted to attract, for commercial gain internet users to its web siteor other online location by creating a likely hood of confusion with the complainants mark as to the source, sponsorship, affiliation or endorsement of the domain name.

- India has also established its own registry by the name INRegistry under the authority of National Internet Exchange of India (NIXI), wherein the dispute related to the domain name are resolved under the .IN Dispute Resolution Policy (INDRP).
- The Policy has been formulated in line with internationally accepted guidelines, and with the relevant provisions of the Indian Information Technology Act 2000.
- Under INRegistry, disputes are resolved under .IN Domain Name Dispute Resolution Policy (INDRP) and INDRP Rules of Procedure.
- These rules describe how to file a complaint, fees, communications and the procedure involved.

Role of Judiciary

- Though domain names are not defined under any Indian law or are covered under any special enactment, the Courts in India has applied Trade Marks Act, 1999 to such cases.
- Like in other cases under Trademarks Act, 1999 two kind of reliefs are available:

1. Remedy of infringement

2. Remedy of passing off

Eg:

The first case that came up before the Indian Courts was
Yahoo! Inc. v. Akash Arora

Tata Sons Limited and vs The Advanced Information
Technology Association (2005)

Protection of Copyright on Cyberspace

- Copyright is the key issue in the intellectual property rights in digital era.
- Under the T.R.I.P.S (Trade Related aspects of Intellectual Property Rights) agreement, computer programs now qualify for copyright protection just as any other literary work as well as other forms of Intellectual Property Rights protection.
- The first attempt to harmonise copyright law at a global level dates back to adoption of the Berne Convention in 1886.
- As per Sec.13 and 63 of the Indian Copyright Act, 1957; literary works, pictures, sound recordings and other creative works are protected from being copied without the permission of the copyright holder.
- The characteristic of the internet has outperformed of the law; thus the question arises whether copyright is shaken by the advancement of technology and that it is significant in the digital era.

Discussion on:

- <https://copyright.gov.in/Documents/handbook.htm>

1

Rights of software copyright owners As per section 14 of the Copyright Act, 1957.

- First, the author of the software has the right to reproduce and make any number of copies of his work as he likes.
- Secondly he may display his software on the Internet which

would amount to display to the public with right provided under Section 14(d) of the Copyright Act

- and if a defendant by making available copyrighted product online will be liable, for violation of the right of public display and distribution of the copyrighted work in violation of author's copyright
- Eg: The first case in this category was Playboy Enterprises, Inc v Frena.
- In this case, the defendant operated a subscription BBS that allowed the subscribers to view, upload, and download material. The court held that Frena had violated Playboy's exclusive distribution right and their exclusive display right. Because Frena supplied a product containing unauthorized copies of copyrighted work, he has violated the distribution right. Moreover, because Frena publicly displayed Playboy's copyrighted photographs to subscribers, he violated the display right. The court concluded that Frena was liable for direct infringement though Frena

- The owner of the copyright software enjoys an exclusive right to distribute copies of the work to the public by sale or by transfer of ownership or by rental.
 - This right to distribute in India flows from Section 14 of the Copyright Act, 1957, which provides right to publication.
 - The software author's right of commercial rental to the public is recognised by TRIPs Agreement in Article 11 and Article 14(4) and by Article 7 of the WIPO Copyright Treaty.
- The owner of the software copyright has the right to adaptation of his work by updating, changing and modifying software copyright. No other person than the owner of the copyright software has the right to modify or change his work whether a work is created or not.

- The general principle is that no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has borrowed and has subjected it to such revision and alteration as to produce an original result.
- The ultimate test is "has there been a reproduction of the plaintiff's work in a substantial form?"
- The elements need to be present to make an act an "infringement' within the meaning of the Act are:
 1. Substantial copying
 2. Direct evidence of copying from the source in which copyright subsists.

- In India, some of the acts which do not constitute the infringement of copyright are as follows:

(a) a fair dealing with a literary, dramatic, musical or artistic work (not being a computer programme) for the purpose of

- private use, including in research,
- criticism or review.

✓ The making of the copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme from such copy:

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

- ✓ The observation, study or test of functioning of the computer program in order to determine the ideas and principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer program was supplied.
- ✓ The making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use.
 - Reproduction of publication which is translation by another person of a matter published in the official Gazette does not constitute an infringement of copyright.
- ✓ If infringement is justifiable under certain conditions as provided under Section 52 of the Copyright Act, 1957 then the infringer of a copy may use such conditions to justify his infringement act.
- ✓ However, it may be pointed out that the object of the intellectual property including the copyright protection is to protect the interest of the author of the software from the point of view of its owner.

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 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 India....

- 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,

- 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.
- 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, 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 proved.
- 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 original.

Cyberspace, the Internet, Websites and the Nature of the Copyright

- The digitally stored works do not transfer fixed expression of works as we would buy a book or license of a video but the digital representation of those works.
- Such a change needs different set-up of laws in order to protect copyrights on the Internet.
- The copyright on the website the underlying source code or computer programme is protectable as a literary work.
- In *Two Pesos v Taco Cabana* case, a US court held that the layout of the web page or rather the 'look and feel' of the website, if distinctive, is amenable to protection as a trade dress.
 - In this case it was held that the décor of a restaurant could be protected as trade-dress.

- A website creator must ensure that he owns the copyrights in all the aspects involved in the creation of website for its functioning.
- In law it is presumed that anything created by an employee during the course of employment belongs to the employer.
- However, it is better that one must stipulate in an employment contract that the copyright in all materials including software programs, website designs created or developed by the employee would vest in the employer.
- In the case of consultant of the software programs unless the contracts between the website owner and the consultant vest the copyrights in any materials so created in the owner the said copyright would vest with the consultant or the software programmer.

- While downloading from the Internet the defendant makes the permanent copies of the copyrighted and this amounts to a reproduction of the copyrighted work.
- For the users who want to download a file or software programme it is important to read instructions and the copyright notices attached with the files.
- The author may permit the user to download but may not permit distribution for posting on the internet through some other website.
- For the owner of a website to have effective control over his material on the website, it is important that he expressly prohibits any downloading of such materials, because in downloading the materials from the website there is always a threat of it being used for various commercial purposes like transmitting and Sale of such material to other users.

Linking, Hyper-Linking and Framing

- A link (or hyperlink) is any component of a Web page that connects to another Web page or another portion of the same Web page.
- Clicking on highlighted text or a graphic image activates most links.

Eg: click on the words Coca-Cola or an image of a Coke bottle to be transported to the Coca-Cola Company's home page.

- A deep link is a hyperlink that bypasses a website's home page and takes the user directly to an internal page.

Eg: instead of linking to the home page of a newspaper, a deep link might take the user directly to a newspaper article within the site.

- Framing or inlining can also connect objects.
- Framing is the process of allowing a user to view the contents of one website while it is framed by information from another site, similar to the "picture-in-picture" feature offered on some televisions.

Eg: a search engine may view the contents of an online store that is framed by the search engine's text and logos.

- Inlining is the process of displaying a graphic file on one website that originates at another.

Eg: a user at site A can, without leaving site A, view a “cartoon of the day” featured on site B.

- On the commercial aspect, the website owners have contended that before employing a link, the website must seek permission from the website to which it wants to link.
- Some website owners have challenged practice of linking without first seeking permission.
- In Ticketmaster Corp v. Microsoft Corp case, Ticketmaster sued Microsoft for linking to its site 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 a website, framing is another phenomenon as compared to linking.
- Framing may trigger a dispute under copyright and trademark law theories because a framed site arguably alters the appearance of the content and creates the impression that its owner endorses or voluntarily chooses to associate with the framer.
- In a 1997 lawsuit, TotalNEWS framed news content from media outlets such as CNN, USA Today and Time.

- For example, the content of a CNN Web page appeared within a frame packed with advertising and information about TotalNEWS. The lawsuit settled and TotalNEWS agreed to stop framing and to only use text-only links.

Limiting Liability With Disclaimers

- If a website owner is concerned about liability for links but is unable or unwilling to seek permission from the linkee, a prominently placed disclaimer may reduce the likelihood of legal problems.
- A disclaimer is a statement denying an endorsement or waiving liability for a potentially unauthorized activity.
 - A disclaimer is rarely a cure-all for legal claims, but if a disclaimer is prominently displayed and clearly written, a court may take it into consideration as a factor limiting damages.
- In some cases, such as trademark disputes, it may help prevent any liability.

Eg: a case involving a dispute between two websites for restaurants named Blue Note, one factor that helped the lesser-known restaurant avoid liability was a prominently displayed disclaimer stating that it was not affiliated with the more famous restaurant.
- To minimize liability for any activities that occur when a visitor is taken to a linked website, a webmaster may want to include a linking disclaimer on its home page or on any pages with otherwise troublesome link

Sample linking disclaimer:

- By providing links to other sites,[name of your website] does not guarantee, approve or endorse the information or products available at these sites, nor does a link indicate any association with or endorsement by the linked site to [name of your website].

Getting Permission

- The simplest method of avoiding linking problems is to seek permission. As a general rule, permission is never required for a hyperlink that uses highlighted text (a text link).
 - Eg: highlighting the word “Yahoo!” as a link to the Yahoo! home page does not require authorization and will not cause a dispute.
- But since the following types of links may cause disputes, it makes sense to ask for permission:
 - ✓ deep links that bypass a linked site’s home page
 - ✓ links that result in framing
 - ✓ IMG links that pull only certain elements from a site (such as an image) and

Remedies for Infringement of Copyright on Cyberspace

- Under the Copyright Act, 1957, for the infringement of the copyrighted works without a license granted by the owner of the copyright or the Registrar we find that there are three types of remedies available to the owner of the Copyrighted work viz.,
 - (i) Civil remedies
 - preventive civil remedies
 - compensatory remedies
 - (ii) Administrative remedies
 - (iii) Criminal remedies under the law.
- Civil remedy: According to Section 55 of The Copyright Act, 1957, where copyright in any work has been infringed upon, the owner of the copyright shall be entitled to all such remedies by way of injunction, damages, & accounts.

- Criminal remedy: According to Section 63 of The Copyright Act, 1957, the copyright holder can take criminal proceedings against the infringer, in which there is a provision of at least six-month imprisonment, which may be extended to 3 years and with a fine of Rs. 50,000, which may extend to 2 lakhs.
 - Provided that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy for the whole or part of the profits made by the defendant by the sale of the infringing copies as the court may in the circumstances deem reasonable.
- **Injunction** is the most important remedy against the infringement of copyright under the law.
- Injunction means a judicial process by which one who is threatening to invade or has invaded the legal or equitable rights of another is restrained from commencing or continuing such act, or is commanded to restore matters to the position in which they stood previous to the action.
- Injunction may be interlocutory granted before trial of a suite or permanently granted after the trial.

- Under the Copyright Act, 1957 preventive civil remedies may include interlocutory injunction and the final injunction in the suite for infringement of copyright.
- The owner of a copyright prefers speedy and effective relief to prevent further infringements of his copyright and consequent damage to his business and therefore the owner does not want to wait for some years until full trial is completed.
- Therefore, the law provides an interim relief to the plaintiff owner of the copyright by way of interim injunction.
- In this way the owner of the copyright has tremendous advantage because the defendant is stopped in his tracks, though the interim injunction is the discretion of the trial court which is judicial order under the law and not arbitrary, vague and fanciful.
- Such interim injunction is granted to plaintiff where there is likelihood of success on the merits of the case and irreparable harm will be caused to the plaintiff if interim injunction is not granted.
- If the plaintiff succeeds at the trial of the case by establishing infringement of his copyright then he will be entitled to a permanent

- Where there is possibility of the defendant destroying or disposing of the incriminating material the court may also make an order for the inspection of the premises of the defendant.
- This allows the plaintiff's advocate to take possession of the infringing copies, documents and other materials relating to the copyrighted work.
- A compensatory remedy is also available to the plaintiff which includes damages, account of profit and delivery of infringing copies.
- Damages are granted to a owner of the copyright for the loss or damage caused to him by the infringement act.
 - However, the plaintiff is only entitled to claim the profits on account of infringement made by defendant or the plaintiff may claim damages for infringement of copyright.
 - The copyright owner is entitled to opt either for damages or for account of profit.

- Administrative remedy to the copyright owner provides an effective and speedy under Section 53 of the Act.
- Section 53(1) of the act provides the registrar of copyright to make an order prohibiting the importation into India such copies on the application of the owner of copyright in any work or his authorized agent after making such enquiry as the registrar deems fit.
- The remedy under the Section 53 of the Act is quasi-judicial in nature and an appeal can be made to the Copyright Board against the order of the registrar.

- Sections 63 to 70 of the Copyright Act provide for the offences relating to copyrights.
- In Section 63, is given the infringement of copyright in a work or any other right conferred by the Act except the resale share right in original copies as provided under Section 53A which is punishable with imprisonment for a term, which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakhs rupees.
- But the Court has discretion to reduce the minimum term of imprisonment and the minimum fine for adequate and special reasons which have to be recorded in the judgement.

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.
- *Should ISPs be held responsible for illegal activities committed by their users?*
- *To what extent are ISPs responsible for third party material put on the Internet by users of their facilities?*
- ISP is an entity that connects people to the Internet and provides other allied services such as Web site building and hosting.
- An ISP has the equipment and the telecommunication line

The two main services provided by ISPs are:

- *Web site building and hosting; done by an entity that provides space and management for individual or business Web sites*
- *Access providing; done by an entity that arranges for an individual or an organization to have access to the Internet.*
- Worldwide many countries have tried to define the liability of ISPs in disseminating third party content.
- Many of these national laws relate to criminal law, information technology law or copyright law.
- These statutes have tried to solve the problem by adopting either of the two approaches;

1. horizontal approach

2. non-horizontal approach

- The **horizontal approach** covers not only copyright infringement but also all other potential areas of law where liability of ISPs might arise.
 - It fixes the liability regardless of the grounds for illegality of the transmitted material.
- Whereas, under **non-horizontal** approach the potential liability of ISPs is determined under each law where it might arise.
- In this case various statutes would determine ISP liability
 - for example, adopting non-horizontal approach the copyright statute would address ISP liability that might arise only in relation to copyright violations.

Horizontal Approach

- In this manner the liability of ISPs is determined at one place in a single statute.
 - There are laws now in force in Germany, Sweden, Japan, etc. which approach the issue from a horizontal perspective.
- Horizontal approach functions through the filtering mechanism i.e. first; the ISPs are made liable according to the general provisions of law related to the conduct of the ISP in question.
- That means if the ISP is accused of defamation then he shall be tried according to the defamation laws and if the ISP is accused of copyright violation then his liability will be determined as per the provisions of the copyright law.
- Further, in case an ISP is held guilty say under copyright law then his liability is screened or 'filtered' through the exemptions granted to the ISPs under the specific provisions created under a particular statute.

Non-horizontal Approach

- Under non-horizontal approach the potential liability of ISPs is determined under each law where it might arise.
- In this case various statutes would determine ISP liability; for example, adopting non-horizontal approach the copyright statute would address ISP liability that might arise only in relation to copyright violations.
- The alternative approach of implementing copyright-specific laws to determine online ISP liability, has been adopted by some countries such as Hungary, Ireland, Singapore and the United States of America.
 - United States of America amended its Copyright Act in October 1998 by enacting the Digital Millennium Copyright Act (DMCA) which adds a new section 512 to chapter 5 of the US Copyright Act.
 - It establishes 'safe harbours' to shelter ISPs from liability for copyright infringement in certain circumstances.

- The DMCA does not define when an ISP is liable for copyright infringement and, in this respect the existing principles of the US copyright law would apply.
- But the DMCA sets down guidelines with respect to copyright infringement online and specifically states 4 circumstances where ISPs are exempt from liability for damages.
 - (1) Transitory digital network communications;
 - (2) System caching;
 - (3) Storing information on systems or networks at direction of users;
 - (4) Information location tools.

ISP Liability under the Information Technology Act, 2000

- In India the provisions relating to the ISPs are specifically legislated in the IT Act, 2000 where an Internet Service Provider is referred to as Network service provider and Explanation (a) to s. 79 defines it as:
- “Network service provider” means an intermediary.
- Intermediary again has been defined under section 2(w) as:
- “Intermediary” with respect to any particular electronic message means any person who on behalf of another person receives stores or transmits that message or provides any service with respect to that message.
- Further the Act contains in section 79 a clause which limits the liability of ISPs under certain circumstances.

Network service providers not to be liable in certain cases.

- *For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made there under for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention .*

How can an ISP Qualify for Exemption from Liability for Copyright Infringement?

- Section 79 of the IT Act also provides two circumstances under which an ISP can qualify for exemption from liability:
 1. Lack of knowledge
 2. Exercise of due diligence

Lack of Knowledge

- Knowledge of the illegal contents on part of the ISP is a prerequisite for holding him liable under section 79 of the IT Act, 2000.
- The ISP can escape liability if it could be proved that he was unaware of all that was stored and passing through his servers.
- But if he is put under a notice that some infringing material is either stored or passing through his servers, he has to take proper action for removing or disabling that material otherwise he could be said to have knowledge of the infringing material and held liable.

Due diligence

- For an ISP to escape liability, section 79 prescribes “due diligence” to be exercised by him.
 - The provision requires actual knowledge or breach of the duty of care.
 - What should be the extent of the “due diligence” requirement?
 - Should the ISPs be required to monitor and judge legality of millions of files that are present or passing through their servers?
 - Considering the gigabyte that are stored or passing through their servers this seems to be an impossible task.
 - But, if we say that the ISPs should not be under an obligation for “due diligence”, it might encourage them to consciously ‘look away’ and evade all liability.
- It can be safely concluded that ISPs are not liable for the (infringing) gigabytes that are stored and passing through their servers unless they are put on notice.
- If an ISP encounters particularly suspicious circumstances, he may be subject to “due diligence” i.e. a duty of care to investigate further whether material he hosts or refers to is unlawful and, where found to be so, to block access.

Cyberspace and the Protection of Patents in India

- 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 patent

- Any kinds of practical application in the computer device is known to be patentable. Not all softwares are patentable but devices like pacemakers are very much patentable.
- A particular computer program is authorized for patenting only when it contributes to an art.
- If this program enhances the speed and the efficiency of the existing program, it has the eligibility to get a patent for the same program.
- A few software patents are as follows:
 - Program algorithms
 - Program language translations
 - Menu arrangements
 - OS functions
 - Editing functions and interface features
 - Display presentations
- The United States of America has recognized the patents for businesses

- There is no specific provision pertaining to the protection of software in the Indian Patent Law.
- The Indian Patent Office does not follow any guidelines with regards to the computer software.
- As the computer coding programmes and languages are not patentable, depending on the functioning of the particular programme, it may be granted the patent.

Patent misuse:

- It is an illegal behaviour committed by the owner of the patent rights.
- It is an affirmative defence which recognizes the fact that it is possible that the owner of the patent to abuse the exclusive patent right granted to him.

Patent misuse in the technology industry:

- It is extremely easy for technological products to overlap with another similar product which basically constitutes a technological patent infringement or misuse.
- Following are a few famous cases:
- The Amazon company made an attempt in adopting the one-click patent.
- Microsoft and Google resolved a patent issue for over five years regarding the X-Box gaming console as well as the smartphones of the brand name – Motorola.

Apple V. Samsung:

- A very famous case in the field of patent infringement is the case of Apple V. Samsung that went on for about 7 years.
- The dispute revolved around allegations made by Apple that Samsung has copied the phone design, similar features like tapping on the screen to zoom as well as the similarities in the layout of the home screen.
- The dispute was resolved in the Court of Law in the United States of America.
- More than 50 patent dispute cases had been filed by the two parties in various countries across the globe such as Italy, Japan, England, France, etc.

- In 2010, Apple had sent a notice to Samsung to be aware of copying and creating a similar software and filed a suit in 2011.
- Samsung denied the accusations by saying that Apple copied the patents of Samsung, but the jury has favoured Apple by asking them to pay a sum of around 1 billion dollars.
- In the revision trial when the Jury finally said that there has been a mutual patent infringement that has been constituted by both the parties, the companies came into a mutual agreement to drop all the patent infringement cases that had been filed.
- 16 smartphones that were in the dispute of patent infringement were not available in the market during the trials of the suit.
- Finally, in 2018, the Supreme Court rejected the plea saying that the patent infringement has occurred but not of the entire device but only a part of it.
- Samsung was ordered to pay around 540 billion dollars to Apple as

Assignment

- Discuss, the already trashed but still exercised “open-ended and unconstitutionally vague” Section 66A of the Information Technology Act, 2000.
- Discuss, the case of R G Anand v. Delux Films filed and ‘doctrine of dominant impact’.
- Discuss, Two Pesos v Taco Cabana case filed in US Supreme court and the importance of Trade Dress.
- Discuss, Warner Bros. Entertainment Inc. vs Mr. Santosh V.G. case on 13 April, 2009
- What are the amendments that have been proposed in section 79 of the IT Act, 2000 vis-à-vis the liability of ISPs? Do you think they are desirable and beneficial in the overall regulation of the Internet? Give reasons.
- Additional reading: <https://legaldesire.com/liability-of-internet->

- Discuss, a case filed at Delhi High Court that involves ISPs.

X vs Union Of India and ors. on 20 April, 2021

- Discuss, Google India Private Ltd vs M/S. Visakha Industries on 10 December, 2019, filed in Supreme Court of India.
- Discuss, Google vs Microsoft Patent War over Motorola and X-Box gaming console.