

UNIT-III

Law relating to electronic records and intellectual property rights in India: Legal aspects of Electronic records / Digital signatures, Cyber laws, the roles and regulations of Certifying Authorities in India, Protection of Intellectual Property Rights in Cyberspace in India.

TEXT BOOK:

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Chapter 4: Legal aspects of Electronic records / Digital signatures

Recognition of Electronic Records

Under Indian law, information can be in writing or type written form or printed form or electronic form.

Section 4, IT Act, 2000 provides legal recognition to electronic records and accepted in an electronic form.

This is based on Article-5 of UNCITRAL(United Nations Commission on International Trade Law), which states that any information cannot be denied if it in the data message form.

Even in the US, the Uniform Electronic Transaction Act, Section 201 states the same.

UNCITRAL Model law

Article 6 states the basic standards to be met by a data message.

In many jurisdictions, writing, original and signature overlap, but model law approaches them as three separate and different concepts.

But they share common structure and should be read together.

The legal recognition of Electronic/Digital signatures

In Indian Law – Any information shall be authenticated by affixing the signature or signed(hand written) document or electronic signature.

- In Article 7 of UNCITRAL Model law – signature is used to
 - Method used to identify the person and indicate person's approval
 - Data message is reliable for communication and also includes relevant agreement.
 - The person is associated with that content and endorse authorship of the text
 - The person was in the given place at that time.

➤The Position in the US

In US Law, Electronic signature means signature in electronic form and it is logically associated with an electronic record.

- In US law, signature means any symbol, sound, process or encryption or a record in whole or in part adopted by a person with an intent
 - identify the party
 - adopt or accept a term or record
 - information integrity
 - authenticity/validity

➤ The position in Australia

In Court view, signature does not necessarily be handwritten. In some cases initial is sufficient.

- printed name only sent by telex was considered
- Ordinary means personally signed it, or mark by a pen or by a stamp.

Person sign means

- Method used to identify the person and indicate person's approval
- The person is associated with that content, content may be written by someone else.
- The person was in the given place at that time.

Electronic Records and Electronic Signatures/Digital Signatures and their use by the government and its agencies in India

In India, Where any law provides –

- (a) The filing of any form, application or any document by any office, authority, body or agency owned or controlled by the appropriate govt.
- (b) The issue or grant of any license, permit, sanction or approval of whatever name called in a particular manner
- (c) The receipt or payment of money(fees or charges) in a particular manner, by means of electronic form as prescribed by the appropriate government. (Section 6, IT Act, 2000)

For the efficient service to the public through electronic means authorise any service provider setup, maintain and upgrade the computerised facilities.

Due to increase in the growth of commerce and business, the govt. should increase function with the help of electronic records and electronic signatures.

The provisions like filing the form, application or other documents, creation, retention or preservation of records, issue or grant of any license or permit or receipt or payment in govt. offices, need to be done in electronic form in order to give more efficiency to the functioning of the govt. and its agencies.

➤ **Retention of electronic records in India**

- Information remains accessible and usable for a subsequent reference.
- The way in which it is generated or received format, same can be retrieved
- Details like origin, destination, date and time facilitate to identify electronic record.

Note: This clause does not apply for any information which is automatically generated

(Section 7, IT Act, 2000)

➤UNCITRAL Model law relating to retention of data messages

Article 10 of UNCITRAL Model law provides

- Information remains accessible and usable for a subsequent reference.
- The data message is retained in the format in which it was generated or received or sent.
- Details like origin, destination, date and time facilitate to identify electronic record.

Note: storage of transmitted information often done by someone else rather than originator, such as intermediary (third party/database). If the person does not retain the required information, then it is intended as bad practice or willful misconduct.

➤Position in the US

Under the Uniform Electronic Transactions Act, section 205 deals with provisions for retention of electronic record. Requirements under law -

- Information remains accessible and usable for a subsequent reference.
- The data message is retained in the format in which it was generated or received or sent.
- Details like origin, destination, date and time facilitate to identify electronic record.

Note: Information may become unavailable because of storage and become incapable of reproducing the information. This is considered as technology obsolescence.

➤ The Central Government's Power to make Rules in India

The rules central govt. may frame w.r.to electronic/digital signatures are

- The type of signature
- The manner and format in which it shall be affixed
- The manner or procedure which facilitates the identification of the person
- Control procedures to ensure adequate integrity, security and confidentiality of electronic records and payments.

The central govt. framed rules in the year 2004.

Rule 3 is about filing the form, application or document by the appropriate person using the specified software.

The following things are taken into account w.r.to electronic records:

- Lifetime
- Preservability
- Accessibility
- Readability
- Comprehensibility in respect of linked information
- Authentication and integrity
- And any license, permit, sanction or approval

➤ **Electronic Records: Attribution Acknowledgement and Dispatch in India**

Based on Article 13 of UNCITRAL Model law

- if electronic record was sent by the originator himself
- by a person who had the authority to act on behalf of originator
- Automatically generated (system programmed)

➤ **Acknowledgement of receipt of electronic record in India**

Under Article 14 of UNCITRAL Model law provides

- system generated mails (do not reply)
- Stimulate time reply (otherwise treat that mail was not received)
- Return receipt requested (postal systems)

➤The Time and place of dispatch and receipt of electronic records in India

Under Article 15 of UNCITRAL Model law provides

otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely –

(a) if the addressee has designated a computer resource for the purpose of receiving electronic records

(i) receipt occurs at the time when the electronic record enters the designated computer resource; or

(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

For the purposes of this section –

- (a) if the originator or the addressee has more than one place of business, the principal place of business shall be the place of business;
- (b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;
- (c) “Usual Place of Residence”, in relation to a body corporate, means the place where it is registered.

Chapter 5: The roles and regulations of Certifying Authorities in India

Due to increased use of electronic communications, misuse of the electronic records and digital signatures also increased, because there is no direct face-to-face interaction in the electronic transaction, the problems concerning identity, authenticity and integrity arise from the point of view of law and lawyers.

-Digital signature is used by the business community for securing electronic records.

In the process of cryptography, a public key infrastructure consisting of certification authorities as trusted third parties, for sharing public keys in an authenticated and reliable manner.

The Role of Certifying Authority (CA)

The Certifying Authority (CA) acts as a trusted third party in the public key infrastructure.

-CA plays important role – is to certify the public key associated with the given individual.

The general characteristics are as follows:

- The authenticity of the subject participating in the commercial communication.
- The integrity of the message communicated or the communication. The authenticity, integrity and confidentiality can be ensured by the independent third party, that is the role of CA under the law.
- The certifying authority can be public authority or private authority. Present the state govt. agencies act as top level CAs who in turn certify the second tier of private sector CAs.

Problems:

- The CAs operations are automatic and may be exposed to many computer based risks.
- System failures – loss of keys
- If CA's private key is compromised, then corresponding public key can be revoked, then all the certificates issued would be invalid.

So, CA must also make its own public key available to the parties who want to verify the certificates of consumers or users and if CA fails to perform its duties , results significant loss to large number of innocent parties.

- Appointment of controller and his functions
- Obtaining license to issue Electronic/Digital signature certificates in India
- Renewal and suspension of license of the certifying authority
- Procedure for the grant or rejection of license to the certifying authority
- Some procedures and security guidelines for certifying authorities
- Procedure and prior requirements for surrender of license, and cessation as certifying authority
- Duties of certifying authorities for disclosure of information
- Electronic Signature certificate to be issued by certifying authorities
- Suspension of electronic/digital signature certificate
- Archiving electronic/digital signature certificates
- Revocation of electronic/digital signature certificates
- Rules of compromise and revocation of electronic/digital signature certificates
- The rules of confidential Information and access to confidential information
- Duties of subscribers under the law – Generating key pair
- The concept of acceptance of electronic/digital certificate by the subscriber
- The importance of the control of private key by the subscriber

Chapter 6: Protection of Intellectual Property Rights in Cyberspace in India

➤ The Cyberspace

- Internet has made it possible to replace traditional paper based communications by paperless communication which does not know physical or geographical boundaries, and is available to any part of globe between the parties known or unknown to each other.
- 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 challenges that the law has faced in the recent years is how to tackle the development of intellectual property on the internet while preventing its unauthorized exploitation.
- New works need copy right protection, not covered under copyright Act, 1957.
- For protecting intellectual property, by the rule of govt., World Intellectual Property Organization (WIPO) and World Trade Organization (WTO) are brought under one umbrella.

- An attempt is made to balance the interest of the intellectual property owner and interest of intellectual property users by ensuring the adequate returns on their invested knowledge to the intellectual property owners and to increase social benefits from unrestricted access to knowledge by the intellectual property users.
- These aspects are clearly mentioned in the agreement on TRIPs(Trade Related aspects of Intellectual Property Rights).
- TRIPs agreement impose minimum standards on patents, copyright, trademarks and the trade secrets.

➤The Relevance of Domain Names in Intellectual Property Rights

-Before starting any online business activity, a company must be easily traceable on the internet. For this company must have a address in the cyberspace.

- Company must have a registration under a particular domain name and a website of its own.
- The Domain Name System (DNS) has made it possible, which enables a company to conduct online transactions and make it easily traceable by the customers, suppliers and other users.
- It is difficult to remember all numeric IP addresses and therefore domain name has a major role.
- The representation of the company's name and address on the internet can serve as a typical trademark function for showing company's recognition and goodwill in the market place.
- The type of attack possible w.r.to is “Cybersquatting”

➤ Deception by squatting in cyberspace

The term **cybersquatting** refers to the unauthorized registration and use of Internet domain names that are identical or similar to trademarks, service marks, company names, or personal names. Cybersquatting registrants obtain and use the domain name with the bad faith intent to profit from the goodwill of the actual trademark owner.

They use special software applications to monitor the expiry of some specific domain names. After registering the expired domain names, cyber squatters duplicate the original websites and thus misleading the genuine visitors of such websites

-The consumer 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 address.

-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 registration 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 resolution of disputes and relatively low costs. In the ICANN’s policy the parties may even conduct the entire proceeding through electronic filings.

➤Bad Faith in Relation to Domain Name Infringement

In order to establish “bad faith” in the proceeding for infringement of a domain name a complainant has to establish the following points in order to obtain relief:

- Respondent’s domain name is identical or confusingly similar to a trademark or service mark in which the complainant has right.
- Respondent has no right or legitimate interest in respect of the domain name.
- Respondent’s domain name has been registered and is being used in bad faith.

In order to file administrative proceedings successfully the complaint must prove that each of the above three elements are present for the purpose of proof of bad faith on the part of the defendant.

It has also to be shown that the complainant had its registered domain name and the defendant is using it in bad faith.

- Registering the domain name with the primary aim of subsequently selling it at a profit.
- Registering the domain name primarily for disrupting the business of the competitor.
- Registering the domain name in order to prevent the owner of the trade mark from reflecting the mark in a corresponding domain name.
- Using the domain name to attract internet users to one’s website by creating a likelihood of confusion with the complainant’s trademark.

➤Some Leading Cases Involving Complaints From India before WIPO

- Before World Intellectual Property Organization (WIPO), the number of complaints have been filed in Indian corporate houses or media companies.
- In most of the cases the Indian complaints involving domain names before WIPO have been decided in favor of the complaints.
- We may cite two cases.
- In Tata Sons Ltd. V. The advanced information Technology Association, it was decided by the WIPO Administrative panel, Instructing Network Solutions Inc. to transfer the impugned domain name tata.org to the complainant Tata Sons Ltd.
- The administrative panel list relied on the decisions that had been earlier given in favour of Tata Sons Ltd. By the Indian courts providing protection to the Tata trademark from abusive registrations.
- Similarly in tridenthotels.com case the complainant was Oberoi hotels which owned trade marks ‘Trident’ and ‘Trident Hotels’ in India. In this case the panel held that the use of the word ‘Trident’ in combination with the word hotels has a certain distinctive character as it indicates a chain hotels such as the complainants group.
- The domain name tridenthotels.com signifies that the domain name was intended to be used for a chain of hotels.

➤ 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 right to the authors in literacy, artistic, dramatic and musical works.

As in other intellectual property rights available under the copyright are essential negative in nature, similarly these are basically the rights to stop others from doing certain things as for example, right to stop privacy, counterfeit, copying or imitation.

➤ Rights of Software Copyright Owners

We have briefly pointed out the rights of the copyright owner as provided for under Section 14 of the Copyright Act, 1957. Here we will explain to understand the copyrights particularly of the software copyright owners.

- First the author of the s/w has the right to reproduce and make any number of copies of his work as he likes.
- Secondly the s/w copyright owner may display his software on the internet which would amount to display to the public which right is provided.
- The owner of the copyright s/w 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 the right to publication.
- Similarly, the owner of the S/W copyright has the right to adaptation of his work by updating, changing and modifying his s/w copyright.

➤ Cyber Space, the Internet, Websites and the Nature of the Copyright

On the internet, the digital nature perspective of intellectual property laws is the most important characteristics as compared to the traditional ‘analog’ methods of recording of works of intellectual property-on paper, film, or on magnetic tape whereas digitisation converts all words, images, sounds, graphics and films into binary numbers, either ones or zeros.

A website creator must ensure that he owns the copyright in all the aspects involved in the creation of website for its functioning.

While downloading from the internet the defendant makes the permanent copies of the copyrighted work on the hard disc of the computer and this amounts to a reproduction of the copyright work.

➤ **Linking, Hyper-Linking and Framing**

The internet or the web was initially created for the purpose of enabling hypertext capabilities allowing one side to link or hyperlink and access another sight.

In this way the user could make sense of the great mass data contained on the internet.

As linking or hyperlinking was used for education or research purpose, it was both accepted and encouraged when internet was a research network.

On the commercial internet the sight owner have contended that before employing a link, the website must seek permission from the website to which it want to link.

Framing is a relatively recent phenomenon as compared to linking.

By using a specific command in its HTML code, a framing site links to another site and displays that site within a window or frame.

The frame itself is comprised of content from the framing site.

➤ 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 have three types of remedies laws available.

- (i) Civil remedies
- (ii) Administrative remedies
- (iii) Criminal remedies

Civil remedies may include two categories

- a) Preventive civil remedies
- b) Compensatory remedies

Preventive civil remedies

Under the copyright Act, 1957 preventive civil remedies may include interlocutory injunction and the final injunction in the suite for infringement of copyright.

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.

Compensatory remedies

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 of copyright.

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

The liabilities of ISPs may arises in a verity of legal areas, such as criminal law, Torts law, Trade secret law, Copyright law, Trademark law, Unfair Competition law.

Many countries have tried to define the liability of ISOs in disseminating third party contents.

The function of service provides is to host content, such as web pages of subscriber, over which the service provider exercises no control.

It is impossible practically to monitor or screen 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 circumstance indicating illegal activity.

➤ Cyberspace and the protection of patent 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 right 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.
- 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.
- We can see the effects of IBM's (Indian Business Machines) 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 country to one or more individuals.

The person to whom a patent is granted is called patentee.

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

➤ Patent as a form of Intellectual Property

Patent came on the status book as the Patents Act, 1970.

The Indian laws have provided judicial as well as administrative protection in order to protect intellectual property.

There are two kinds of remedies or protection for infringements of IPRs.

Civil remedies- to pay for damages and to apologise to the owner of IPRs.

Criminal – fine or imprisonment

For determining infringement of design patent

The court will first decide whether the two products are of the same kind. If not, there can be no comparison.

When two products are of the same kind, then the court will further compare whether the accused product is the same as the patent product.

If both are same, then infringement of the patent is established.