

IPR Amid Cyber Space: Several Solemn Lacunae

Dr. Nidhi

ABSTRACT

With the unique beginning of computers and the internet and growing popularity of E-commerce, the intellectual property rights have gained great significance. However, there is a snare to this trend of increased dependence upon internet and information and communication technologies, like the difficulty posted in the detection and protection of intellectual property infringements in the virtual space. The intellectual property infringements at greater extent arise in the online medium rather than offline, copied and transferred and the anonymity associated with the cyberspace. Cyber crimes are one of the highest growing crimes in the world. The Information Technology Act, 2000 has been booming in set down the frame work of regulations in cyber space and addresses a few serious concerns of misuse of technology. It has some serious loopholes that have not been discussed, i.e.; Intellectual Property issues. The advancement in e-commerce and e-business are an important concern to the companies and organisations to protect their intellectual property rights online. Cyber crimes not only confine to fraud, cyber bullying, identity thefts but also contravention of copyrights and trademarks of various business and other organisations. Due to advancement and popularity of e-commerce and e-business, it has become important for companies and organizations to protect their intellectual property rights online. In this new era, cyber crimes are not only limited to committing fraud and identity thefts but extend to copyrights and trademarks infringement as well. There are various kinds of cyber crimes relating with IPR that are committed in order to make money or to draw traffic to their sites. Copyright infringement occurs, when one site contains links to copyrighted materials contained in another site against the wishes and knowledge of the copyright owner. Though the person who provides the link may not be making copies themselves, some courts have found the link provider to be partially responsible for copyright infringement.

Keywords: *Intellectual Property Law, Cyber Space, Infringement of Rights, E-commerce.*

INTRODUCTION

This present time is the time of 'automation', where man is shifting his maximum burden on machines to get work done. The computer technology aids the present human civilization to such extent that life without computer seems to be impossible. Now a days, voice files, Song files, photographs, currencies, news items, clips, bio-data's, letters and so forth the capable of being transferred, distributed, circulated and stored in electronic form. So, present generation is greatly depends upon the computer technology for the easy mechanism and effective operations operated in electric from through computers.

Though the computer technology makes the life so speedy, but problems under the threat from the deadliest type of criminality named as, 'cyber crime'. The cyber crime can stop any railway where it is. It may misguide the planes on its flight by misguiding with wrong signals. It may cause any important military data to fall in the hands of foreign countries ad it may end e-media and every system can collapse within a fraction of seconds¹.

The advancement of Information Technology and computers has created a new era in the cyberspace. It gives rise to various legal challenges and at the same time solutions. Intellectual properties e.g. copyrights, trademarks, designs, layout and circuit designs in the current digital environment, are interweave with the electronic technology. The changed environment demands more affirmative protective laws too guard new inventions and creations. It also saves the real owners from economic losses. The protection of digital content against intended and unintended infringements and violations are burning issues today. Many theories like: no fault liability, contributory liability and safe harbour theory are being applied to protect Intellectual Property Rights in the digital media².

Cyber Crime

Cyber crime is particular type of techno- sophisticated criminality. This criminality is the challenge to national legal system. It seems to be difficult to control and combat these crimes within the existing framework of legal system. The

¹ S.B Sinha, *Cyber Pace and the Law*, 2(NALSAR University, Bangalore, 2001)

² Akash Kamal Mishra, *Intellectual Property Rights In Cyberspace*, 1(Cyberlekh Publications, India, 2019).

problem of jurisdiction, identity crises and lack of legal recognition of most of acts make it difficult for legal systems to effectively deal with the crime. The location and trans-national character of these crimes make it too dangerous. Cyber crime may be categorized in two classes. One is where the computer is instrument and second where computer is incidental. The computer is only an instrument and traditional legal system is better to cop up with these problem by recognizing it. It is difficult to deal with the crime where computer is incidental, as computer technology is itself new to the legal system. It cannot be dealt with merely old principles which are territorial sensitive, jurisdictionally responsive and susceptible to paper based culture and identity³.

The extraordinary dawn of computers and the internet and increasing trend of e-commerce, the intellectual property rights have gained tremendous significance. There is slowdown of this trend of increased dependence upon internet and information and communication technologies. The intellectual property infringements to such extent occur, due to this case, data can be accessed, copied and transferred and the anonymity associated with the cyber space. Intellectual Property infringements in cyber space consist of unauthorised or unlicensed use of trademarks, trade names, service marks, image, music or sound or literary matter. The unique matrix of the cyberspace has produced different categories of infringement including: hyper linking, deep hyper linking, framing, Meta tags, spamming and digital copyrights violation etc⁴.

After world-war II the drastic changes in every domain of life has witnessed. It converts all relationships of man with material things after vanishing the lines between living and non living things. The cyber technology has played major role in this transformation. This process lasted long to World War II but took reverse gear. Asian and African countries started to liberate from the iron pawn of continental countries to shape their own laws on domestic requirement. At the same time, neo-globalisation process begins and new types of crime started to emerge challenging the age old nation of sovereign. One out of these crimes, which is new in origin and requires treatment on different grip, is 'cyber crime'. The rapid development of computers, telecommunications and other technologies has led to the evolution of new forms of transnational crime known as, 'cyber crime'. It may be called as any crime with the help of computer and telecommunication technology. It is the deadliest epidemic confronting our plant. A cyber criminal can destroy websites and portals by hacking and planting virus, play online frauds by transfer of funds from one corner of the globe to another and gain access to highly confidential and sensitive information. Cyber crime seems to be the emerging trend of new criminality, which change the entire notion of set traditional map of crime⁵.

Cyber Space

It is just a pattern of electrons skimming a net of computers that describes a location where a collection of activity occurs. But this space could not be understood by us. It is only understood by putting things into it or by carrying into it our own language. We have to take control of this space firstly with our ordinary terms. It is through the practice of analogy that this occupation occurs⁶.

It is domains regarded as the use of electronics and the electromagnetic spectrum to store, modify and exchange data via networked systems and associated physical infrastructures. Cyber space can be thought of as the interconnection of human beings through computers and telecommunication without regard to physical geography.

Cyberspace is virtual world which is technically lives in computer memory. It is interactive and pulsing with life. The advantage in cyberspace is that it can meet and talk to ne people, read, publish research, hear music, watch video, look at art, purchase and sell things, access to the government documents, send emails, download software and receive technical support.

One way cyber space is a living organism enabled to frequent changes to suit the demands of the public. People are so accustomed to the cyberspace that it has become a part of our daily life and more dependent on it, for example; to book a movie ticket, they go online, it is the importance of cyber space⁷.

IPR with Cyber Space

The term intellectual property reflects the idea that this subject matter is the product of the mind or the intellect, that intellectual property rights may be protected at law in the same way as any other form of property. Intellectual property law are territorial such that the enforcement of IPR must be pursued separately in each jurisdiction of interest. Intellectual property laws confer lots of exclusive rights in relation to the particular manner in which ideas are

³ Farooq Ahmed, *Cyber Law in India*, 4 (New Era Law Publication, 2011).

⁴ Georgios Zekos, *Issue of Cyberspace and E-Commerce*, 3 (ICF AI University Press, 2008).

⁵ Adams Paul C and Warf Barney, *Introduction: Cyberspace and Geographical Space*, Vol. 87 the Geographical Review, 143 (1997).

⁶ Benedikt Michael, *Introduction to Cyberspace: First steps*, 13 (Yale Publication, 1991)

⁷ Lawrence Lessig, *The Path of Cyber Law*, Vol. 104 Yale Law Journal, 1743 (1990).

expressed. The 'intellectual property' means the specific legal rights which authors, inventors and other IP holders may hold and exercise⁸.

Intellectual property laws are designed to protect different forms of intangible subject matter. Intellectual property rights can be transferred or licensed to third parties. There are so many tools of protection that come under the term 'intellectual property' like; Patents, trademarks, copyrights, trade design, geographical indications, industrial designs etc. Among these tools, it is copyright and trademark which are of relevant when we discuss intellectual property in cyberspace⁹.

Intellectual property means knowledge in any form which has a commercial value and IPR can be described as a mix of ideas, inventions and creations. These things are creations of human mind. The Information Technology Act, 2000, has addressed the misuse of technology in form of cyber crimes. The Indian trademark act, 1999, Copyright Act, 1957 is also silent on issues arising out of online Trademark and Copyright violation. Computer programmes are protected under the Copyright Act, but it does not provide remedies for online software piracy. Cyber squatting is also not punishable directly under the IT Act, 2000.

In the present era, the internet has become important part of the life of every individual. The modern communication techniques which are available through internet have led business entities to view the whole world as a market. At this time, an entity's trademark gain more importance. It helps to entities to build up its identity over World Wide Web. With the advancement of the internet, a revolutionary change in the field of communications. As the awareness of the internet grows the number of websites grows correspondingly. Such growth of websites has also given rise to new area of disputes¹⁰.

On the internet, there is available lot of literature on almost any topic of human interest. It create more possibility of claims and counter-claims about copyright of an article or deign or words used in a trade mark and an trepidation of infringement of copyright there is another category of literature which can be freely copied by anyone without inviting the wrath of law.

The right of a person to protect the moral and material interest arising from such works has been established as a fundamental right in the Universal Declaration of Human Rights. The grant, protection and enforcement of intellectual property rights in cyber space are governed by various national and international laws and treaties developed specifically for intellectual property.

There are various Indian law relating to IPR which are enacted to lay down the minimum standards for protection of IPR, like; Copy Right Act, 1957, Patent Act, 1970, Trademark Act, 1999, Geographical Indication of Goods Act, 1999, Design Act, 2000, Semi Conductor Integrated Circuit layout Design Act,2000 and Protection of Plant Varieties and Farmers' Rights Act, 2001¹¹.

Software Piracy

Piracy of software involves the unauthorised usage, copying or distribution of software in contravention of the terms o the license. It can be taken in several forms, such as; end user piracy. Software counterfeiting can be occurs when illegal copies of the software are sold in packages. Compilation of pirated software is also made. Internet piracy occurs when software is illegally shared and downloaded over the internet through common internet sites. Any violation of the term of usage of the license will also amount to piracy.

Software piracy is extremely money-spinning. So much investment goes into the development of software. The cost of reproduction and distribution of the software is minimal. The making of the copies of the software is simple and cheap¹².

An overview uncovered the level to which pilfered programming is utilized as a part of nation. Most of the populace utilizing PC are utilizing pilfered programming in a few. Individuals have likewise whined that high cost of the first programming is principle purpose for this. The unapproved replicating, appropriation from the product organization, named as programming theft, consistently in India. Numerous purchasers on the online group said the utilization of pilfered programming in workplaces and homes and referred to simple accessibility.

⁸ Nasirudheen Thandayath, IPR Issues With Special Reference to Copyright in Cyberspace, 297 (University of Calicut, Kerala, 2016).

⁹ Tosaporn Leepuentham, The Protection of Intellectual Property Rights in Outer Space Activities, 56 (Edward Elgar Publishing, UK, 2017).

¹⁰ Akash Kamal Mishra, Intellectual Property Rights in Cyberspace, 91 (Xpress Publishing, Chennai, 2020).

¹¹ Bharat Bhushan, Impact of Digital transformation on Security Policies and Standards, 20 (IGI Global Publisher, India, 2020).

¹² Harish Chander, Cyber Laws and IT Protection, 55 (PHI Learning, Pvt. Ltd., New Delhi, 2012).

In India, the Copyright of PC programming is ensured under the Indian Copyright Act, 1957. Copyright assurance for programming with an individual creator goes on for the term of the creator's life and proceeds with 60 years after the creator's death. The Ministry of Information Technology and the Ministry of Human Resources Development have assumed a dynamic part in supporting the Indian law authorization experts in securing programming copyright holders¹³.

According to Nasscom, 'programming robbery includes the utilization, appropriation without having gotten the communicated authorization of the product creator'. Programming theft has four basic structures;

1. End client robbery. It happens when clients of programming introduce the product on large number of machines.
2. Hard circle stacking. It happens when PC merchants introduce unlawful duplicates of programming onto PC's before their deal.
3. Programming Forging. It includes the unlawful generation and consequent offer of indistinguishable programming.
4. Internet robbery. It happens when people put unapproved duplicates of programming on the internet for download¹⁴.

IPR Violation in Cyber Space

World Intellectual Property Organisation (WIPO) as objective as per the treaty is to promote the protection of intellectual property throughout the World. It works through cooperation among the states and in collaboration with other international organizations. WIPO administer six copyright treaties and aims at 'homogenizing national intellectual property protections with an ultimate eye towards the creation of an amalgamated, interconnected body worldwide international law'.

WIPO is an organization of the United Nations. It has its four kinds of activities: Registration, promotion of inter-governmental cooperation in the administration of intellectual property rights, specialized programme activities and lastly dispute resolution facilities¹⁵.

Copyright and Cyber Law

Copyright may be a legal term explaining the rights which are given to creators for his or her literary and artistic works. The works which are covered by copyrights include; literary work, reference works, newspaper and computer programmes, databases, films, musical compositions and choreography, artistic works and sculpture, architecture and advertisements. Copyrights subsist during a work by virtue of creation. Registering copyrights provides evidence that copyright subsists within the work. Creators often sell the rights to their works to individuals or companies for payment. These economic rights have deadline for all the times of author and sixty years after creator's death¹⁶.

Copyright Issues in cyberspace

The object of the copyrights is to encourage authors, composers, directors to create original works by way of providing them the exclusive right to breed, publish the works for the advantage of the people. After the termination of copyright period, the works belong to the general public domain. Then anyone may reproduce them without permission. Copyrights being property travel from country to country more easily and quickly than other forms of property. Technological progress has made copying of copyright material easy and straightforward¹⁷.

Some examples of Copyright violation:

Catching:

One important copyright issue within internet is maintaining the border between private and public use. The Indian Copyright Act, 1957 makes a difference between reproductions for public use and may be done only with the proper holder's permission. The proper reproduction presents certain fundamental problems over the web. It is due to the essential nature of internet transmission. Temporary copying is known as Caching. It is an important part of the transmission process through internet. In the Indian Law, reproduction has got to be during a material form but includes, 'storing of it in any medium by electronic means' making caching also violative of copyright¹⁸.

¹³ Talat Fatima, *Cyber Law in India 32* (Wolters Kluwer, Netherland, 2017).

¹⁴ *Ibid*, P54.

¹⁵ National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age*, 21 (United States, National Academies Press, 2000).

¹⁶ Subhasis Saha, *Challenges to Intellectual Property Rights in Cyberspace*, 27 (Lap Lambert Academic Publishing GmbH KG, Germany, 2012).

¹⁷ R.Muruga Perumal, *Copyright Infringements in Cyberspace: The need to Nurture International legal principles*, 16 (Springer, University of Macau, Macau, 2010).

¹⁸ Harish Chander, *CYBER LAWS AND IT PROTECTION*, 20 (PHI Learning, India, 2012).

Plagiarism:

Technological progress has made copying of copyright material easy and straightforward. The control of infringement of copyright has very difficult and impossible. Taking content from one site, modifying it or simply reproducing has been made possible by digital technology. This has posed new challenges or the normal interpretation¹⁹.

Protection of Database

The Indian Copyright Act, 1957 protects 'databases' under section 13(1) a of the Act. Copyright shall subsist throughout India in original literary, dramatic, musical and artistic work. Term electronic database has been defined within the Information Technology, Act, 2000 for the primary time.

Trademark law and cyberspace

Trademark is, 'a mark capable of being represented graphically, which is capable of differentiate the goods and services of one person from those of others and may include shape of goods, their packaging and combination of colours'. A trademark serves the purpose of identifying the source of origin of goods. It identifies the product and its origin. It guarantees its quality. It advertises the product and creates and image of the product in the mind of the public²⁰. There are various sorts of infringement of Trademark through cyberspace:

Cyber squatting:

It involves the utilization of a website name by an individual without registration and without any inherent rights to the name. Trademark are exploited by some people that register trademarks of others as domain names and sell those domain names back to the trademarks owners at high profit, it is referred to as 'cyber squatting'. It means some person sitting on the property of another person. The practice of it is abusive. This practice clear the importance of the role played by domain names in establishing online identity. It is typically famous so as to either block the legitimate user registering its most wanted name. Cyber squatting has led the courts to think about relationship between trademarks and domain names²¹.

Hijacking:

It happen when a trademark owner tries to secure a website name by making false cyber squatting claims against a website name's rightful owner through action. Reverse domain name hijacking is most ordinarily done by larger corporations and famous wealthy individuals²².

Meta Tags:

It is component of sites that's also referred as Meta elements. Meta tags provide information about page descriptions, key words and other relevant data. Now a day's people began abusing Meta tags to create false page rankings for web pages that were poorly constructed²³.

Internet Protection in India

The internet challenge for the protection of internet is the protection of intellectual property. Section 79 of the IT Act, 2000 provides for the liability of I.S.P's 'Network Service Providers not to be liable in certain case'. Section 79 of the IT Act exempts ISP's from liability for third party information²⁴.

¹⁹ Intellectual Property on the Internet: A Survey of Issues. Switzerland, World Intellectual Property Organization, 2002, p42.

²⁰ Sally M. Abel, Trademark Issues in Cyberspace, 91(The Brave New Frontier, Mich. Telecom & Tech. L. Rev,1999).

²¹ Retrieved From: <https://www.nolo.com/legal-encyclopedia/cybersquatting-what-what-can-be-29778.htm>, Access on : 21-07-2023

²² Retrieved from: <https://www.nolo.com/legal-encyclopedia/linking-framing-inlining-30090.html>, Access on : 22-07-2023

²³ Retrieved From: <https://cyber.harvard.edu/property00/metatags/main.html>, Access on: 21-07-2023

²⁴ **Section 79 in The Information Technology Act, 2000:** Exemption from liability of intermediary in certain cases. -

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) The intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if-

Indian Cyber Jurisdiction

Though it is in the embryonic stage as of now, jurisprudential development would become essential in the near future, as the internet and e-commerce shall shrink borders and merge geographical and territorial restrictions on jurisdiction. There are two dimensions to deal with it; manner in which foreign courts assume jurisdiction over the internet and relative issues and another is the consequences of decree passed by a foreign court²⁵.

CONCLUSION

There is an immense need for the Indian Society to be made aware about the necessity of copyright protection in all fronts to prevent any unauthorised use and pilferage of the system. To analysis of copyright in cyberspace reveals a mixed result of new opportunities and threat. Such threat often outweighs the opportunities offered by the cyberspace to protect copyrights. Lack of internationally agreed principles relating to copyrights in cyberspace gives ample room for divergent domestic standards. Therefore, these things are to be kept in mind for further strengthening the Indian Cyber Legislations in relation to the Intellectual Property Rights.

Protection of Intellectual property is crucial for the success of e-commerce. The traditional laws for protecting intellectual property have been applied also in cyberspace. Due to inherent nature of the internet, so many issues have emerged, like; the principles to determine jurisdiction, recognising the hybrid varieties of online infringements, resolving conflict of laws issues. The legal enforcement of infringement of intellectual property rights in cyberspace is a very challenging era. It is a challenge of the digital era, which we need to take in the interest of the emerging e-information society.

The Indian Courts are moving the correct way; they have to guarantee the whole motivation behind such request is not abused. In the case of the *Indian performing Right vs. Mr. Badal dhar Choudhary*, Delhi High Court held that, unique directives may not be issued and completely expressed that, 'unclear order can be a manhandle of the procedure of the court and such ambiguous and general order of expectant nature can never be allowed'.

Cyber space is becoming a core area for intellectual property rights infringement. Various practices by the cyber site operators resulted in violation of intellectual property rights and various other rights of other websites operators. It has become crucial that people are aware of the unlawful usage of their websites and WebPages.

With the growth of Cyber space and technology advancements, copyright and trademarks are not limited to the conventional intellectual property alone but has extended to intellectual property rights over the internet.

There are various rules and guidelines provided by international conventions and treaties to protect infringement of IPRs online which are helping e-commerce and e-businesses to expand. The Information technology Act does not provide provisions in respect of jurisdiction issues, cybercrimes related to IPR, cyber stalking, cyber defamation etc.

The Indian Trademark Act, 1999 and Copyright Act, 1957 are also silent on issues on online Trademark and Copyright infringement. Though computer programmes are protected under the Copyright Act, 1957, it does not provide remedies for cyber piracy.

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation. -For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

²⁵ Virendra Kumar, Intellectual Property Rights in India, 14 (LexisNexis, India 2015).