

“Copyright and Trademark in Cyberspace”

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ABSTRACT - The ability of computer to share data with other computers with the help of networking has led to a major telecommunication revolution. Networking has led to a concept of cyberspace. With the advent of the Internet, some new problems in the field of intellectual property law have been appeared. Copyright and Trademark are the key issues of intellectual property. Infringement of these rights over the internet is common now a day and these includes Linking and Framing, Uploading of copyright material, Downloading of copyright material, Domain Name disputes like Cyber squatter, Cyber parasite, Cyber twins and Reverse domain name hijacking.

KEY WORDS – Cyberspace, Copyright, Trademark, Linking, Framing, Cyber squatter, Cyber parasite, Cyber twins and Reverse domain name hijacking



1. Introduction

The ability of computer to share data with other computers with the help of networking has led to a major telecommunication revolution. Networking has led to a concept of cyberspace.¹ The word cyber has evolved to denote a virtual space or memory, it denotes the medium in which certain activities take place, like the way thoughts work in human memory. Activities take place in the back end of a computer and the results are displayed in the monitor. The data stored in the electronic form as soft copier, which could be retrieved at any point of time and visualized in the monitor. The present day data transmission is far superior in terms of speed, quality, visuals, utility, impact and convenience. Internet is global in nature. It is a fact that the growth and spread of internet has become an important yardstick for measuring the growth and strength of any economy.

With the advent of the Internet, some new problems in the field of intellectual property law have been appeared. The infringement of intellectual property rights over the Internet is one of them. The purpose of my paper is to try to find those problems of Intellectual property rights infringement over the Internet with reference to Indian Scenario.

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¹ The word 'cyberspace' was coined by William Gibson in his Science fiction novel Neuromancer published in 1984.

2. Copyright and Internet

The English East India Company extended the English Copyright Act of 1942 into India and thus the copyright law came into existence in India. The Act was modified in 1911 and later in 1914 a new Copyright Act was enacted. The main provisions of the Act were as under: (i) the authors' right was born immediately when the work was created; (ii) protection was meant for the material which was original and not to ideas; (iii) the term of the right extended up to 25 years after the death of author. By virtue of the provisions of Article 372(1) of the Constitution of India, it remained applicable even after the India attained independence in 1947. With a view to consolidating and amending the old law, the Copyright Act was re-enacted in 1957. The Copyright Act, 1957 has been amended from time to time by the Amendment Acts of 1983, 1984, 1992 and 1999.²

The relationship between the Internet and Copyright law is complicated. The internet is an international system for the transmission and reproduction of material, much of which is protected by Copyright. It therefore presents previously unimaginable possibilities for copyright infringement and may challenges for copyright law.

The following features of the internet pose particular difficulties for copyright law:

² P. Narayan, Law of Copyright and Industrial Designs, 4th ed. (Kolkatta: Eastern Law House, 2007), p.6

- i) Information may be easily reproduced and distributed.

Once the information is in digital form on a computer connected uploaded downloaded and distributed.

- ii) Internet users expect free access to copyright material.

Much of copyright material published on the internet has been made available free of charge. This has created resistance among users to pay for the Internet material.

- iii) Internet users may act anonymously.

It is difficult to identify an industrial Internet user. Users may therefore infringe copyright with little risk of detection, especially if the infringements are relatively small-scale and non-persistent.

Taken together above features of the Internet have raised new kinds of internet cases.

- a) Linking and framing
- b) Uploading of copyright material
- c) Downloading of copyright material.³

2.1 Linking and Framing:

The websites contains enormous amount of information much of it with varying degree of copyright protection. Almost everything on the web is protected by copyright law. Websites are compositions of materials often consisting of words, graphics, audio and video that are expressed to the consumer as information content.⁴

The owners and websites developers carefully select the content to sell the company's product or service. The subject matter expressed in the site is an electronic publication of this content. Since designing, producing and maintaining a sophisticated web-site is very expensive. So protecting the content from infringement is extremely important.

At present it is easy to violate a copyright owner's exclusive right to copy the material. Everyone with a computer and on internet connections creates his own web pages and thus becomes a publisher.

³ Available at:
http://etheses.nottingham.ac.uk/1197/1/initial_submission_2.pdf (last visited on 20th March 2012)

⁴ *Ibid.*

2.1.1 Linking:

Linking comes into two forms hypertext linking and inline linking. 'Linking' is the practice of allowing a user, to move from one web site to another by clicking on a "link".⁵

Hypertext linking:

A hypertext reference link appears on screen as a highlighted citation or phrase that is differentiated from regular text by a special colour or format such as underlining. When an Internet user activities the link by clicking on the highlighted text, the web browser software retrieves the corresponding document from external site and creates a copy, which is then displayed on screen.⁶

Inline Linking:

An inline link allows a web site designer to inline a graphical image from an external site and incorporates it as part of the local on screen display. For e.g. If an external site contains a photograph it can be inclined into local website and shown as part of the current display. In contrast to a hypertext link where there is an immediate termination with the local site after connecting to the external site, the local site remains current when the inline image is displayed. The URL does not change and the user may not realize that the linked image actually comes from somewhere other than linked site.⁷

2.1.2 Framing

Framing is another type of dynamic connection that is similar to inline linking. It allows the web-designer to incorporate or pull in an entire external site or portions thereof and surround it with frames of his own creation. The effect as with inline is that the external site appears to be part of the local site and the URL remains unchanged.⁸

One of the first cases over hypertext linking in the U.K. is that of *Shetland times Ltd. v. Wills*⁹. The claimant owned and published a newspaper called the Shetland times (the Times) and made editions of newspaper available on the Internet. The second defendant provided a news reporting service under the name of the Shetland News (the News). The first defendant was the managing director of the news. The defendants established a web site and included among the headlines on their front page a number of headlines appearing in issues of the Times. These headlines were verbatim

⁵ *Ibid.*

⁶ Available at:
http://www.fenwick.com/docstore/publications/ip/ip_rights_on_the_internet.pdf (last visited on 20th March 2012)

⁷ *Ibid.*

⁸ *Ibid.*

⁹ (1997) F.S.R. 604

reproductions of the claimants headlines, by clicking on one of these headlines the Internet user could again access to the relative text in the Times. By passing the front page the Times.

In *LFG, LCC v. Zapata Corp.*¹⁰ the defendant registered domain name zapte.com for carrying on business over the internet. The plaintiff is providing financial service under the service mark Zap futures. The defendant's web site is having three hyperlinks, which could connect users to other financial service website including that of plaintiff and his competitors. The plaintiff objected this hyperlink on the ground that wrong impression is created in the minds of the public because they may associate him with his competitors.

In *Washington Post Co. v. Total News Inc. Total news*¹¹ operated a website providing links to web-sites of many news purveyors including the Washington Post, Time Cable News Network (CNN), times Mirror, Dow Jones and Reuters. By clicking on the links, the web-sites of these news purveyors were displayed in the frame of Total News. The frame contained the 'Total News' logo Total News URL and advertisements managed by Total News. The claimants brought an action against the defendant alleging copyright infringement and they got succeeded.

2.2 Uploading Of Copyright Material

As it is easy and common for copyright material to be transmitted over the Internet, many Internet users assume that the fact that a material is available electronically entitles them to upload it to their own web-sites.¹²

2.3 Downloading Of Copyright Material

Once the unauthorized copyright material has been uploaded and made available, the next possible thing is that Internet users will download it from the internet. There is little doubt that users are liable for downloading such material without the authority of the copyright owners. However copyright owners are reluctant to bring actions against millions of individual infringers. Much of the attention has been paid to the possibility of holding liable those parties who provide the equipment or facilities used for infringing activities.¹³

In *A&M Record Inc. v. Napster Inc.*¹⁴ Napster facilitated the transmission of MP3 files between and among its users. The company distributed its file sharing software for free via its web site through the process called 'peer to peer' (P2P) file sharing. Its users could search and share MP3 music

files that were catalogued on Napster's central server. These files could be downloaded directly from user's hard drivers over the Internet. A&M records and other record companies brought copyright infringement action against Napster in U.S. District Court and Court decided in favour of plaintiff.

2.4 Position under Indian Law

A hyperlink used by a web site does not directly cause copying of any substantive content by anyone, but instead merely provides a pointer to another site. A surface link to a home page does not require permission. This position is based on the theory that going online creates an implied licence for anyone with a computer to view the web-site.¹⁵

Computer Program:

A computer program or software program or program is a sequence of instructions written to perform a specified task for a computer. A computer requires programs to function typically executing the programs instructions in a central processor.¹⁶

A computer program consists of many instructions that tell a computer what to do. Everything done on a computer is done by using a computer program.

Computer program is stored as a file on the user's hard drive when the user runs the program, the file is read by the computer and the processor reads that data in the life as a list of commands or instructions. The computer then does what the programs tells it to do.¹⁷

Programming languages- C, C++, Pascal, BASIC, FORTRAN, COBAL and LISP. Every program must be translated into a machine language that the computer can understand.¹⁸

2.5 Indian Copyright Act, 1957

Sec. 2(ffb) – Computer

“Computer” includes any electronic or similar device having information processing capabilities.

Sec. 2(ffc) – “Computer Programme”

“Computer Programme” means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a

¹⁰ 78 FS. Supp. 2d.731, 733

¹¹ No. 97 Civil 1190 (PKL).

¹² Supra note, 3

¹³ *Ibid.*

¹⁴ 239 F. 3d. 1004 (9th Cir. 2001)

¹⁵ R.K. Chaubey, *Cyber Crime and Cyber Law*, 1st ed. (kolkatta: Kamal Law House, 2008), pp712 to 714.

¹⁶ Available at : <http://www.modula2org./tutor/chapterI.pht> (last visited on 20th March 2012)

¹⁷ *Ibid.*

¹⁸ *Ibid.*

computer to perform a particular task or achieve a particular result.

2.6 Software Piracy

The illegal use or distribution of software is protected under intellectual property laws. Software piracy includes

- End user piracy- It is illegal to copy or possess software without licensing for each copy. Individual users and companies alike must acquire enough licenses to cover their software installations. Volume licensing applies only to windows Desktop upgrades not to the full windows operating system.
- Manufacturer piracy- It is illegal for a computer manufacturer to copy software and preinstall it without permission on more than one computer.
- Internet piracy- It is illegal to offer unauthorized copies of software for download over the Internet. If software is available on the internet, make sure the software publisher has authorized this distribution.
- Counterfeiting- It is illegal to manufacture unauthorized copies of software and distribute those copies in packaging that reproduces or resembles that of manufacturer. Counterfeit registration cards with unauthorized serial numbers are often included in these packages.
- Online auction- It is illegal to resell software in violation of the original terms of sale, to resell software marked not for resale.¹⁹

In *Microsoft Corporation v. Yogesh Popat*:²⁰ The defendants were engaged in the business of assembly and sale of computers since 1996 and were selling computers loaded with pirated versions of Microsoft Software. Microsoft placed a trap order with the defendants through a Microsoft employee and the defendants sold to this employee a computer preloaded with Microsofts pirated software. Thereafter, Microsoft filed a suit against the defendants for permanent injunction and also damages. Defendants did not appear at all and the court granted the damages of Rs. 2 Crore and injunction.

3. Trademark and Internet

In India chief legislation which deals with the concept of trademark is Trade Marks Act, 1940 this Act was brought on the statute book laying down specific law on the subject which was repealed by the Trade and Merchandise marks Act, 1958 that served its purpose for four decades. However the act of 1958 did not contain any provision for registration of

trademark service and definition of the term “registration”. Besides this in view of developments in trading and commercial practices, increasing globalization of trade and industry, the need to encourage investment flows and transfer of technology need for simplification and harmonization of trade and to fulfill obligations of GATT and TRIPS.

Trademarks are names and symbols that a company uses to identify its product or service in the market place. Trademarks are the laws recognition of the psychological function of symbols. Trademarks rights consists of a particular logo, a company name, a unique packaging style etc. Trademarks serve several useful functions.

The development of Internet has brought a new set of challenges of the trademark law of most importance is the interface between trademarks and domain names.

Domain name very simple is the address of a particular site on the internet not much different from a telephone number. On the web to communicate with or access a simple specific site, each site must have an address. Internet protocol address act as such address.²¹

Machines communicating over the Internet however do not actually ‘talk’ in terms of domain names. Instead domain name is a proxy for the I.P. address, which is like a telephone number, although there is no logical correspondence between the IP number and the domain name.²²

Classification of domain names:²³

A specific domain name can be divided into

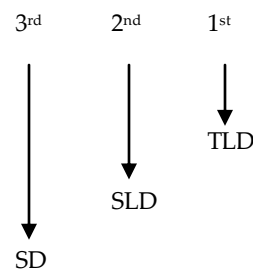
Top-level domain [TLD]

Second-level domain [SLD]

Sub-domain [SD]

Using law.Harvard.edu as an example

Www. Law. Harvard.edu



¹⁹ Meena Amar, lectures on Cyber Laws, 1st ed. (Hyderabad: Asia Law House, 2011), pp.71 to 72.

²⁰ CS (OS) no. 103 of 2003

²¹ Supra note 15 at pp. 727- 729

²² Ibid.

²³ Ibid.

Again top-level domains can be classified into generic and country code TLD

- 'com' → by a commercial enterprise
- 'org' → by a non-profit organization
- 'net' → network and internet related organizations
- 'edu' → for colleges and universities
- 'gov' → for government entities
- 'ac' → academics
- 'res' → research institutes

In addition to these generic domain names, a top level domain name corresponding to a two letter country code has been assigned to every country.

- e.g. - 'in' - India
- 'uk' - United Kingdom

3.1 Domain Name Disputes

Domain name disputes tend to fall into four categories.

- i) Cyber squatter
- ii) Cyber parasite
- iii) Cyber twins
- iv) Reverse domain name hijacking.²⁴

3.1.1 Cyber Squatter

The term, cyber squatter, refers to someone who has speculatively registered or has acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the mark or service mark. Sometimes parties register names expecting to auction them off to the highest bidder.²⁵

As long as a cyber squatter owns the domain name, the trademark owner cannot register his own trademark as a domain name. Thereby, a cyber squatter breaches the right of the trademark owner to utilize his own trademark. It is

relevant to note that there is nothing wrong with the practice of reserving a domain name. Often, cyber squatters register words or phrases they hope will someday be sought after by new companies or new business.²⁶

In *Card Service International Inc. v. McGee*²⁷ American Court held that the domain name serves to the same function as a trademark and is not merely to be constructed as an address as it identifies an internet site to those who reach it, much like a person name identifies a particular person.

In *Mark & Spencer v. One-in-a-million*²⁸ the defendants had registered as domain names, a number of well-known trade names, associated with large corporations with which they had no connection. Then they offered them to the companies associated with each name for an amount. The Court held that when a person deliberately registers a domain name an account of its similarity to the name brand name or trademark of an unconnected commercial organization he must expect to find himself at the receiving end of injunction to restrain the threat of passing off.

3.1.2 Cyber Parasite

Like cyber squatters, cyber parasites also expect to gain financially, however, unlike squatters such gain is expected through the use of the domain name.²⁹

In some cases a famous name will be registered by another, in other cases, a mark that is similar to or a commonly mistyped version of a famous name will be used. The dispute might arise between direct competitors between those in similar lines of business or between those who simply wish to indulge in 'passing off' of the names fame.

In *Yahoo! Inc. v. Akash Arora & Another*³⁰ In this case the Delhi High Court for the first time successfully protected domain name in India involving passing off remedy. In this case the plaintiff is the owner of the trademark, "yahoo" and the domain name "yahoo.com". The defendant adopted the domain name "yahooinda.com" for similar service. The plaintiff filed passing off action.

In *Rediff Communication Ltd. v. Cybertooth and Another*³¹ the plaintiff had filed a case of passing off against the defendant, who had adopted the domain name rediff.com as part of their trading style, which was alleged to be deceptively similar to the domain name of the plaintiff, reddiff.com. The court findings in favour of the plaintiff held that since both the

²⁶ *Ibid.*

²⁷ 950 F. supp. 737

²⁸ 1999 FSR 1.

²⁹ *Supra* note, 24

³⁰ I.A. No. 10115/1998 in suit No. 2469/1998

³¹ AIR 2000 Bom. 27

²⁴ Journal of Intellectual Property Rights, Vol. 9, September 2009, pp. 424- 439

²⁵ *Ibid.*

plaintiff and defendant had a common filed of activity, both operated on the net and both provided a information of a similar nature, and both offered a chat line therefore. There is very possibility of an Internet domain name belong to one common man and connection through the two belongs to different persons. The court was satisfied that the defendants have adopted the domain name radiff.com with the intention to trade on the plaintiff's reputation and accordingly the defendant was prohibited from using the said domain name.

3.1.3 Cyber Twins

When both the domain name holder and the challenger have a legitimate claim to the domain name then they are known as parties.

In *Indian Farmers Fertilizer Corporation Ltd. v. International Foodstuffs Co.*³² the dispute was relating to the domain name iffco.com. The defendants had registered the domain name iffco.com and had been using it with good faith. The complainant had domain names related to iffco.com and had a legitimate interest in the domain name. The complainant had alleged the defendant of diverting the net surfaces to its own web sites. However, the Arbitration center dismissed the case, as both the parties had legitimate interest in the domain name and the complainant had failed to prove "bad faith" on the part of the defendant.

3.1.4 Reverse Domain Name Hijacking

It is also known as reserve cyber squatting. Where a trademark owner attempts to secure a domain name by making false cyber squatting claim against a domain names rightful owner. This often intimidates domain names owners into transferring ownership of their own domain names to trademark owners to avoid legal action, particularly when the domain name belongs to smaller organizations or individuals. It is preferred by larger corporations and famous individuals.³³

4. Conclusion

From the foregoing discussions it can be concluded that the advent of the Internet is a serious concern in the field of intellectual property rights. The infringement of IP rights over internet is common now a day. The present Indian Legislation on cyber Law does not have sufficient provision to tackle with problems relating to IPR and cyberspace. So there is a need of specific provisions which regulate IP rights in Cyberspace.

³² WIPO case no. D2011-110

³³ Supra note no. 24