



STRENGTHENING IP IN DIGITAL INDIA

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Abstract

With the rapid growth in digital economy, challenges relating to protection of IPR have emerged, there are many cases of piracy reported in world. The issue described in this paper is broadly based on copyright and patent law infringement. Moving on to the new business models like Netflix which provide online content but also increases the risk of copyright infringement and content theft, which have now and then have become the order of the day. Concentrating more on the legal aspect of the IPR India has taken many initiatives toward enhanced protection of IPR like Copyright (Amendment) Act, 2012 and Patent Amendment Act 2005 have added to increased protection to the content creators. Further harsh punishments are to imposed on the possible offenders. These policy initiatives will go a long way ahead in securing better IP Protection. Infringement of website source code, web design /content, linking, framing, **metatagging, cybersquatting** are some of the new challenges in Cyberspace which country presently encounters and measures are needed to tackle these challenges. Recent relationship of IPR and FDI has been a boon to the country since reliable statistics point out that Foreign Direct Investment in India increased to 3509 USD Miln. in May from 2721 USD Mln April 2015. The ecommerce sector in India has grown by 34% (CAGR) since 2009 to touch 16.4 billion USD in 2014. The sector is estimated to be in the range of 22 billion USD in 2015. There are good number of Cases o pertaining to the

jurisdiction regarding Infringement of Intellectual Property rights over Internet and Courts have time and again given directions how to avoid such type of infringements and what needs to be done in order to protect the IPR from infringement and possible identity theft. Courts have dealt with infringement from Wrestling Content from authentic sources to online series and local Tv shows. There are many possible instances of content copying and displaying the same content overtime on the net. leading to more cases and which are pending adjudication. India's IPR laws need to be internationally compliant, for this change to occur it will take a long time and efforts on the part of law makers and law enforcement agencies to meet the international benchmarks et up by WIPO and other renowned IPR Organisations. India needs to boost its Protection on protecting the hard earned Intellectual Property and Software developed by our. genius minds.

The rapid growth of the digital economy, enabled by broadband penetration, and coupled with increases in computing power and storage, creates global markets for content and rights holders. But it also creates a threat that — without adequate controls — piracy will damage the creative industries. The discussion paper on which this article is based, “Intellectual property rights in today’s digital economy”, therefore focuses in particular on the ways that the growing digital economy is impinging on copyright.

Intellectual Property Rights (IPRs) is a legal system of Industrial Property (i.e. Patents for invention, designs for industrial designs and trade marks for marketing a product) together



with copyright in literary India's Intellectual Property Rights

The rights in Intellectual Property are protected by the appropriate legislations. In India, the protection of it is governed by the following legislations.

1. The Patents Act 1970 was amended in 1999 passed by the Indian Parliament on March 10, 1999 to amend the Patents Act of 1970 that provides for establishment of a mail box system to file patents and accords exclusive marketing rights for 5 years. The Patent (second amendment) Bill 1999, further amend the Patent Act 1970 and make it Trade-Related Intellectual Property (TRIP) compliant was introduced in December 1999.
2. Trade Marks Act 1958: The Trade Marks Bill 1999, and replaced the Trade and Merchandise Marks Act, 1958 passed by Indian parliament in December 1999.
3. Industrial Designs Bill 1911: The Industrial Designs Bill 1999, which replaces the Designs Act 1911 (modified in 1970) was passed in 1999.
4. Copyright Act 1957: The Copyright Act 1957 was enforced to protect the IPR in the print publishing era. It was amended in 1983, 1984, 1991, 1992, 1994 to keep pace with the expanding needs due to fast growth of electronic media and information technology. The Above Patents, Trade Marks and Designs Act are under the control and supervision of the Ministry of Industry, Department of Industrial Development, Government of India, whereas Copyright Act is under the control and supervision of the Ministry of Human Resource Development, etc.

Protection of Intellectual Property is Vital as New Business Models Emerge.

New business models of delivery of services in the digital world are changing the world for the better, but they also throw up challenges in terms of managing problems relating to them,.

The range of services and reach digital platforms provide is mind blowing. But they also expose companies, service providers and users to potential misuse of intellectual property rights.

Amazon, Netflix models of delivery of digital content, and said these provide wide access and market equilibrium. .

However, from an enforcement point of view, it throws a number of challenges for companies and service providers from the piracy angle.

Even the content sometimes uploaded on to the digital platform needs to be strictly regulated. But any violation can be tracked and addressed by the right experts,

Citing the example of Ethiopian Fine Coffee, where buyers were making huge money and coffee plantation workers hardly any in the past, she said through branding and protection of IPR, it is a win-win situation for both of them

Now, the Ethiopian Fine Coffee is branded, it gets the right price, gets consumed in Starbucks network, the coffee sellers get right prices and in the end even the workers get their rightful due.

There have been a number of instances where free speech and trade mark related issues come in conflict. But there are ways to address them as per the laws and ensure justice is done.

Recent Legislative/Policy Initiatives to protect IPR in India in recent years

Important legislative & policy initiatives have strengthened India's IP regime. Apart from the passage of Patent (Amendment



)Act,2005, significant changes were brought in other relevant statutes as well. Recent changes introduced in the Indian copyright regime has made our law stronger. The Copyright (Amendment) Act,2012 has introduced new independent rights to lyricists, composers and singers as authors of literary and musical works in films and sound recordings which entitles them to receive royalty and other benefits. The Act aims to protect rights of performers by permitting them to record their work for commercial reasons. The amendment has allowed free import of copyrighted works from other countries. It prescribes stringent penalties on persons that circumvent technologies that are used to protect copyrighted works. According to Section 65A any person who circumvents an effective technological measure applied to protect copyright subject to limited exceptions shall be punishable with imprisonment that may extend to two years and fine . Such exceptions include doing acts necessary to test security of a system or for law enforcement purposes or conducting lawful investigation. Any person who unauthorisedly removes digital rights information is punishable with imprisonment of upto 2 years and fine. Owner of copyright whose right is infringed can also avail remedies of injunction, claim etc.

In India, a recent development in IP protection is grant of patents for computer programs which are otherwise generally only copyrightable as literary . Recently, Google was granted patent for advertising business method wherein it could serve content targeted ads in email newsletter based on publisher unique content identifier in email content. Other statutory changes include enactment of Designs Act,2000 to comply with mandate of TRIPS Agreement.

As a result of these proactive changes in IP legal framework, there have been exponential rise in number of applications filed in India to protect IP by global stakeholders and domestic companies. There is one virtual patent office and 4 physical patent offices in India. Under the Patent Cooperation Treaty, the Indian Patent Office has been recognized as an International Searching Authority and an International Preliminary Examining Authority (ISA/IPEA) by World Intellectual Property Organization in October, 2007, which became operative since 15th October, 2013, wherein only 17 countries hold such recognition. The process of examining applications is dealt with by experts in a digitized mode, records of case are digital and ecommunications flow between department and applicants.

In addition, India is signatory to the following WIPO-administered International Treaties and Conventions that protect IPR and they are :-

- Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure
- Paris Convention for the Protection of Industrial Property and many more.

Initiatives Taken By States

.In 2017, Maharashtra followed it by setting up the Digital Crime Unit and has taken down many sites which carried infringing content. In 2018, Mimzoram became the announced the setting up of a Digital Crime Unit to combat digital fraud and copyright theft.

In 2017, the Patent Rules and the Trademark Rules were revised, to include strict timelines for disposal of cases and to streamline examination. Special discounts for filing and



an expedited examination for start-ups were started. With the hiring of these examiners and these initiatives, the wait-times at the Indian Patent Office declined.

Intellectual Property in the Digital space

In a nutshell, traditional principles of IP law which apply in offline world also apply to the virtual world. Unauthorised use of a interalia, a person's words, trademarks, service marks, literary work , images , inventions, the functionality of the software, music , video , source code constitute infringement of owner's intellectual property rights. It has a huge role to play in branding, advertising, selling a company's goods or services both online and offline. .Majority believed that policy makers and government have a critical role to play in creating the right IP legal framework wherein 29% felt that policy makers are performing their role satisfactorily but 75% of them commented that there is scope for improvement. 67% Members responded India lacks a sound IP policy and over 50% of the respondents, pointed out that the implementation is ineffective. These findings become even more relevant in view of changing technological landscape of the country & growth of e-businesses.

New challenges to IP Protection in Cyberspace

Increased use of Information Technology has introduced different versions of infringement today including hacking of copyrighted software, infringement of website source code, webdesign /content, linking, framing, ***metatagging, cybersquatting*** etc. New gadgets including scanners, digital camera, data mining and other software tools enable easy reproduction and circulation of infringing materials .For the said reason,

Definition of 'Fair use' under copyright law may need to be redefined for refinements with changing technologies. In digital world, technological measures used to prevent access to copyrighted works which could be used for fair use such as publishing essays and papers in paid databases which require subscription for viewing.

New Challenges to IP Protection on Internet

Deeplinking Metatagging, cybersquatting ,Framing Reverse engineering, Software piracy Spreading this awareness through industry conferences along with active anti-counterfeit raids are playing a key role in curbing piracy in India. Every organization is being sensitized to periodically review their IT assets to detect IP infringements or illegal downloading of pirated software. As per KPMG India fraud survey in 2012,53% respondents rated cybercrime and 38% rated IP theft as emerging fraud areas. Thus awareness about effective reporting, investigation, installing adequate compliance control processes, conducting surveillance and anticountrefeit raids are mechanisms been put in place to curb this problem to a large extent. Once infringements are detected, enforcement of IP may also have jurisdictional issues to invoke legal actions.

FDI AND IPR- A Boon to the Country

Strengthening of India's laws protecting Intellectual Property has invited the attention of foreign investors. Coupled with proliferation and growth of IT Sector in India, Digital India is magnetic and ready for the 'Make In India' paradigm .Reliable statistics point out that Foreign Direct Investment in India increased to 3509 USD Miln. in May from 2721 USD Mln April 2015.



As per the PWC report The ecommerce sector in India has grown by 34% (CAGR) since 2009 to touch 16.4 billion USD in 2014. The sector is estimated to be in the range of 22 billion USD in 2015.

India is no longer behind but is proactive in protecting IP rights. For instance, one of the typical concerns about patent regime is evergreening of patents just when they are about expire , however, internal policies are changing.

Aside from the statutory changes in IP sector, the recent amendments to the Information Technology Act,2000 has strengthened IP protection in India

Hacking of data is punishable under Section 66 of IT Act,2000 punishable with upto 3 years of imprisonment and fine upto 5 lakhs.Unauthorised accessing , downloading,copying, extracting or damaging data (including intellectual property) is punishable as per Section 66 of IT Act,2000.

Apart from myriad legal & Policy initiatives, India is aligning its IP regime for a streamlining of security systems.

Judicial approach in Cybersquatting cases-

Indian courts passed several judgements upholding trademark rights of its rightful owners in India Cyberquatting has been prevalent ever since Internet was introduced .This term means where a person registers a well known domain name or trademark with view to hoard it so that he can then sell it at exorbitant rates malafidely to original rightful owner. Indian courts have dealt with catena of such matters wherein clear principles have been laid down by the courts

to decide these cases. A domain name identifies a website as source of origin of goods and services and attracts same level of protection as a brand name. In Satyam Infoway v sifynetsolutions¹the appellant used SIFY as main component of its domain name as

www.sifymall.com,www.sifyrealestate.com and respondent infringed its domain name using deceptively similar domain name sich as www.sifynett.com.The Supreme court held that appellant was entitled to an injunction order restraining respondent from using domain name in dispute and held respondent guilty of passing off .

1.Satyam Infoway v sifynetsolution (2004 PTC (28) 566

Cases of Jurisdiction regarding Infringement of Intellectual Property rights over Internet

In *World Wrestling Entertainment, Inc. vs. M/s. Reshma Collection*² &Ors From the that it “carries on business” in Delhi because, according to it, its programmes are broadcast in Delhi; its merchandise and books are available for sale in Delhi; and its goods and services are sold to customers in Delhi through its website which can be accessed in Delhi over the internet.”.

The High Court of Delhi cleared the position of determining Internet jurisdiction in *World Wrestling Entertainment, Inc. vs. M/s. Reshma Collection &Ors*,where it held that mere accessibility of website in a forum state which ‘solicits’ its business, through which Defendent’s goods and services are sold, is enough to raise cause of action and in determining the personal jurisdiction in Delhi. The same was reiterated in *Choice Hotels International Inc. v. M. Sanjay Kumar and Ors*³by the single judge bench in the



High Court of Delhi. In *Banyan Tree Holding (P) Limited vs A. Murali Krishna Reddy & Anr*⁴

The Delhi High Court, in this case, decided the question of jurisdiction of the Court under Section 20(c) of Code of Civil Procedure, 1908. The Division Bench, in a well thought out judgment, laid down that in cases of passing off or infringement, where the plaintiff is not carrying on his business within the jurisdiction of the court and there is no long-arm statute, the question whether this court has the jurisdiction to entertain the suit would be decided if the plaintiff shows that the defendant has 'Purposefully Availed' the jurisdiction of the forum court to himself. Further, in order to prove this, the plaintiff will have to show real commercial transactions entered into by the Defendant with an internet user residing within the jurisdiction of the forum court. In addition to Section 20(c) CPC, the plaintiff also has an option of approaching the Court under Sections 62(2) and 134(2) of Copyright Act, 1957 and the Trademark Act, 2002 respectively. The Delhi Court referred to the decision of the Supreme Court in *Bhagwandas Goverdhandas Kedia vs M/S. Girdharilal Parshottamdas*⁵ and in *M/S. Dhodha House vs S.K. Maingi*⁶ in deciding the question of jurisdiction in this case. When a customer in Delhi accepts it, it becomes an offer made by the customer in Delhi. Further, when through the software and browser the transaction is confirmed by making the payment to the plaintiff, the plaintiff accepts the offer of the customer at Delhi. Therefore the plaintiff can be considered to be carrying his business in Delhi to some extent because the plaintiff instantaneously communicates his acceptance to the customer through the internet at Delhi. Therefore it was held that

the High Court of Delhi will have jurisdiction to entertain the suit in the same capacity as if the plaintiff is considered to be carrying on business in Delhi for the purposes of suits under Trademark and Copyright Laws.

2..World Wrestling Entertainment, Inc. vs. M/s. Reshma Collection &Ors - 2006 (9) SCC 41.

3.. *Choice Hotels International Inc. v. M. Sanjay Kumar and Ors*-I.A. No.2402/2010 in CS(OS) 332/2010

4. *Banyan Tree Holding (P) Limited vs A. Murali Krishna Reddy & Anr* - CS (OS) No.894/200

5. *Bhagwandas Goverdhandas Kedia vs M/S. Girdharilal Parshottamdas* 1966 AIR 543

6. *M/S. Dhodha House vs S.K. Maingi* {Civil Appeal No.- 6248 of 1997

*Impresario Entertainment & Hospitality Ltd vs. S & D Hospitality*⁷ 2018 (73)PTC275 Del7

In this case, the defendant challenged the jurisdiction of Delhi High Court in the present case as neither he had his registered office at Delhi nor did he carry out any business at Delhi, even the plaintiff's registered office is in Mumbai. In the present case, the plaintiff is a company engaged in providing restaurant services having its registered office at Mumbai. The plaintiff is carrying on a business in Delhi under the Trademark 'SOCIAL', in 2017 it became aware of the defendant having two restaurants in Hyderabad under the name 'SOCIAL MONKEY' and also about serving an identical/similar beverage to that of the plaintiff's beverage. Therefore the plaintiff filed for a permanent injunction against the defendant before the Delhi High Court contending that his principal office for franchising and financing is located in Delhi and it carries on its business in Delhi through



its office in Hauz Khas. Moreover, the defendant has entered into a contract with Zomato in order to promote his business, the office of which is in Delhi and hence this court will enjoy the jurisdiction in the present matter. The Learned Division Bench of the High Court relied on the decision of the Court in *Banyan Tree Holding (P) Ltd.* and held that the plaintiff failed to pass the test laid down in this case because merely registering on Zomato would not conclude a commercial transaction between the defendant and the customers, they would have to avail the services of the defendant at Hyderabad (his principal place of business), even Purposeful Availment could not be proved on the part of defendant. Therefore the Court did not exercise the jurisdiction in this case. In *Millennium & Copthorne International Limited vs. Aryans Plaza Services Private Limited & Ors*⁸

In this case, the Delhi High Court relied on the Impresario case but it also highlighted the faults in the test laid down in the judgment. While dealing with the question regarding reservation and booking from a website, it is a part of carrying on the business even if it does not subsequently materialize.it.

The Division bench relied on the three pronged tests laid down by the Supreme court in *Dhodha House v. S.K. Maingi*, namely:-
“(1) The agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not a general agent who does business for any one

7.Impresario Entertainment & Hospitality Ltd vs. S & D Hospitality 2018 (73)PTC275 Del7

8.Millennium & Copthorne International Limited vs. Aryans Plaza Services Private Limited & Ors- CS(COMM) 774/2016

that pays him. (2) The person acting as agent must be an agent in the strict sense of the term. (3) To constitute “carrying on business” at a certain place, the essential part of the business must take place in that place. 47 To determine whether the plaintiff could be said to “carry on business” in a particular place the SC had interpreted the expression “carries on business” given in Section 134(2)48 and Section 62(2)49of the Trade Marks Act and the Copyright Act respectively. 50 Based on the above reasoning of the Supreme Court, the Delhi High Court opined that plaintiff could be said to carry on his business to an extent in Delhi and therefore, fulfilled the condition “carrying on business” as laid down in the *Dhodha* case. The Court was of the view that “due to advancements in technology and the rapid growth of new models of conducting business over the internet, it is possible for an entity to have a virtual presence in a place which is located at a distance from the place where it has a physical presence

INTERNATIONAL SCENARIO

The Federal District Court of Pennsylvania in the case of *Zippo Manufacturing Co. v. Zippo Dot Com Inc*⁹(952 F. Supp. 1119 (W.D. Pa. 1997))., held that the defendant satisfied the minimum contacts rule criteria as they had entered into agreements with various internet access providers within the state of Pennsylvania, through which they had established minimum contact and also had satisfied the test under the Long-Arm statute of the State of Pennsylvania. 29 This statute includes both general and specific jurisdiction over out-of-state defendants. It



also states that to establish general jurisdiction, a non-resident's contacts with the forum must be continuous and substantial.

The Australian High Court held that the place of publication to be the point of downloading. In *Dow Jones & Co Inc v. Joseph Gutnick*¹⁰ ([2002] HCA 56) the court considered that the focus of defamation is upon the damage which it causes to reputation. A defamation can only cause such harm when 'comprehended by the reader, the listener, or the observer', thus publication of a defamation is a bilateral process which can only be completed once the publisher has made the article in question available and it is available for perusal by a third party. Internet material is not available to the reader in a comprehensible form until it has been downloaded onto the computer of an individual who has acquired it from the server using an Internet browser.

9. *Manufacturing Co. v. Zippo Dot Com Inc* (952 F. Supp. 1119 (W.D. Pa. 1997))

10. In *Dow Jones & Co Inc v. Joseph Gutnick* ([2002] HCA 56)

Need for Revising the Indian laws to be Internationally Compliant.

Major Reforms which are required in IP Sector and its strict implementation to attract Foreign IP Registrations

There has been concession in official fees has been made available for trademarks e-filed through the Trade Marks (Amendment) rules 2017, in line with patents and designs.

1. Reforms and initiatives to ensure Compliance with Foreign IPR laws

International programmes for the Asia Pacific and BRICS countries have been organised. A bilateral meeting was held

between Controller general Patents, Designs and Trademarks and the Japan Patent Office Commissioner. Further MoUs could be signed.

2. Reforms to expedite the process of prosecution

Further, the number of adjournments for hearing has been restricted to two with the provision that each adjournment shall not be for more than thirty days.

3. Reforms for automation and digitalisation

4. Provision for auto-allocation of requests for examination and automation of process for registration and renewal has been made. FIRs and Registration certificates are sent through e-mail. The provision of SMS Alert service to stakeholders regarding examination reports has been made. e-filing facility is available with payment gateway facility and has been made compulsory for patent agents to file their applications online.

5. Reforms for the dissemination of information

- IPO website has been redesigned to improve contents and ease of access.

- IP data on a real-time basis is available in respect of filing and processing of Patents, Designs, Trade Marks and Geographical Indications. A comprehensive online search system with full-text-search capability, which was already in practice, has been updated.

6. Reforms and initiatives for IP training and awareness

- IPR help-desks and online guidance system through e-mail are available at each IPO location.

- The IP office organized and participated in public outreach activities with industrial organizations like (CII), The FCCI and and The ACCI

- Several orientation programmes have been conducted to train examiners, they have been



programmes on IPR- training, and awareness. Some programmes have been launched by the government for strengthening the IPR protection among incubation centres and R&D organisations. The establishment of new *incubation centers* called *Atal Incubation Centres* that would nurture innovative start-up businesses in their pursuit to rise and sustainable enterprises have also been introduced in each state and an IPR wing has been established therein for IP protection and awareness. Cell for IPR Promotion and Management is a professional body under the aegis of the (DIPP) Ministry of Commerce & Industry. Its mandate is to effectively implement National Intellectual Property Rights (IPR) Policy adopted in May 2016 with slogan- "Creative India; Innovative India

The Government is working to provide strong framework in Copyrights, IP cells have been created in the Police departments and officials have been educated to foster the IP rights enforcement in the country. The over-all registration and the prosecution processes must be expedited further. Much more needs to be done to create a strong IPR network in the country.

Conclusion

Online transactions are a rather new concept for our Country right now and consequently, there is a lot of discussion and confusion surrounding it. The Judicial Precedents till now have been time and again criticized the ground that selling products/services online gives an option to the plaintiff of Forum Shopping i.e. the choice of Forum based on his convenience without paying any regard to the difficulty which the defendant might have to face. What is needed is a uniform approach to be followed in all cases of jurisdiction with

respect to Online Transactions with respect to Trademarks. Therefore there is a need for a Statute which should with the question of Jurisdiction so as to enable a fair and speedy trial

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