



INTRODUCTION

Copyright has a direct relation to the sphere of cyber space. The Internet poses a large number of problems in the area of copyright protection. These challenges and the problems posed before us have to be tackled with due care and diligence, taking into consideration the situation prevailing in the world. Cyberspace is a virtual world, which technically exists only in computer memory, but it is interactive and pulsing with life. In cyberspace, one can meet and talk to new people, read, publish, research, hear music, see video, look at art, purchase and sell things, access government documents, send e-mail, download software, and receive technical support. Cyberspace is a living organism, constantly changing, as more information is uploaded, downloaded, as more people join the pioneers of this brave new world. Our laws have yet to catch up with it. This is not necessarily a bad thing; the law tends to lag behind social changes, and then resolve itself accordingly. While this new frontier will never stop evolving, perhaps it is still too much in its infancy for us to determine how to regulate it. But as it becomes more integrated into (and integral to) our daily lives, many are becoming concerned with defining acceptable behaviour in this new landscape. One of the biggest issues concerning Internet is protection of intellectual property — works of the mind. As per Section 13 and 63 of Indian Copyright Act, 1957, literary works, pictures, sound recordings and other creative works are protected from being copied without the permission of the copyright holder. It is yet unclear how copyright law governs or will govern these materials as they appear on the Internet, is a major issue regarding internet as The Internet system is spreading fast in India. Videsh Sanchar Nigam Limited (VSNL), a public sector undertaking responsible for providing all international telecommunication services from India to other countries, introduced Internet services on a commercial scale on 15 August 1995. Before then, specific groups had the privilege of accessing Internet, but the total number of users was under 10,000. Today, the number of Internet users in India is close to 150,000 and is growing daily. The Internet has already caught the imagination of people. The demand for Internet connections in India, as per a survey conducted by the National Association of Software Companies of India (NASSCOM), is estimated. The present number of Internet users in India may be a small fraction of the total Internet users in the world, but, as put by the Executive Director of NASSCOM in a recent article, ‘if the western world is riding high on the information superhighway, India has begun its attempt to be on the Net, by at least creating its own information super footpath.’ With the growth of Internet, issues of intellectual property rights (IPR) protection are also likely to come to the fore. As of now, the country is busy with infrastructural development for the spread of Internet so that the demand is met, and, within a few years, Internet reaches every nook and corner of the country. Development of high-speed national telecommunications backbone and provision of adequate telephone lines are priority issues. Nodes have been erected in over two-dozen cities in different parts of the country to facilitate Internet services. With a view to enhancing access to this sophisticated and fast medium of cable television service. The increased use of Internet would mean a greater challenge to IPR protection than at present. While Internet is poised for a quantum leap in the country, it will be premature to suggest practical solutions to the intellectual property right problems of Internet, as experiential knowledge of such problems is very limited. Intellectual property rights (IPR) issues are already there but they are more in the realm of theory than of praxis. The Copyright law is the most potent instrument presently available for tackling IPR issues on the Internet. The Indian Copyright Act, originally enacted in 1957, was comprehensively amended in 1994. With these amendments, it has become a forward-looking piece of legislation and the general opinion is that the amended Act is capable of facing copyright challenges of digital technologies including those of



Internet. By removing certain restrictive clauses and phrases, and by expanding the definitions of works like cinematograph films (motion pictures¹) and sound recordings (phonograms) to include such works in 'any medium' within their purview, the Act has adapted itself to the digital era. It however, depends on how case laws develop when IPR issues of Internet are taken to the court.

INTERNET AS THE BASIC ISSUE OF COPYRIGHT

Copyright originated in the era of printing press. Not very many people owned printing presses. When people chose to pirate books, there was a good profit, but the pirated books could be traced and were a good measure of infringement. The average person could not copy a book and give it out to friends or sell it on the street. All in all, the system seemed to work pretty well. But then came the advent of wonderful new technologies in the twentieth century. Photocopiers, Tape decks, and VCRs, all of these advances have changed the relationship between copyright owner and potential copiers. While originally access to technology served as a barrier to copying by the public, with new technologies, the average person was suddenly photocopying articles, taping albums, recording their favourite television shows. And what do one knows? Copyright is still alive and kicking, and the entertainment industries are as powerful as ever. Now, on the Internet, copyright faces its greatest challenge yet. First, there is the ease of replication. If one chooses to save this paper, he can have a perfect copy of it as that of original. Moreover, he could make as many copies of it as he wants. The beauty of digital media is that there is no degradation in successive copying. For some, this is also its curse. When faced with a similar position with the advent of digital audio tapes (DAT), which allowed the possibility of perfect copying of audio recordings, the industry chose (facing extreme pressure from the recording industry) to hobble its technology by not allowing second-generation recordings to be made from its tapes. Also, the DAT manufacturers paid a royalty to the record companies from every tape deck sold, presumably to compensate for lost sales. Another important factor regarding digital media is the ease of transmission and multiple uses. For example, if anyone has a copy of this paper on his hard drive and he wants to send it to one of his friends. He can e-mail it right over. Similarly, if he has a book, he could let him borrow it; the copyright statute does not prohibit this. Once the book is his, he can do what he wants with that copy of it -- this is what is known as the 'first sale' doctrine. He can even resell it without infringing on the copyright. It might seem that e-mailing this paper is a clear analog to loaning it to him, however, there is one very important difference: he can send it to him without ever relinquishing control of it himself. In other words, he still has a copy of it on his hard drive and now so do the other person. There are two copies where once there was one. This problem is compounded when considering the possibility that he might also like the paper and want other people to read it. Rather than sending it to individuals over email, he chooses to upload it to a network. Now, many people can read it, copy it, etc. Who knows how many copies exist now? Another aspect of digital media is the equivalence of works in digital form. All digital works are nothing more than little bit of information that are read by a machine. Protectable works of authorship are categorized under the copyright statutes as very specific kinds of works, with different rules and exemptions applicable depending on the nature of the work. While there are some fuzzy lines drawn between different subject matter, it is generally not too difficult to distinguish between categories. In the case of digital media, however, although software programs are considered literary works, the actual results of those lines of source code can be perceived as many different types of conventional subject matter. CD-ROM games, for example, are at the cutting edge of popularly available technology, incorporating audio and video into interactive games. Virtual Reality, albeit in its embryonic form, is available to the public at large, and it is only getting better -- for both entertainment and scientific uses. The World Wide Web, like the prophesy of Gibson's cyberspace, is a showcase for what these little bits of information can do over the Internet. Not only

¹ Section 2(f) of indian copyright act,1957



could this paper potentially be accessed by hundreds of thousands of people, but also text is only the beginning.

CHALLENGES FOR COPYRIGHT

The Internet poses two basic challenges for IPR administrator: What to administer and how to administer. The first challenge will be met only when a consensus is achieved over the IPR issues in the Internet. The IPR administrator's special challenge is how to balance the rights of different players on the Internet like content providers, service providers, access providers and so on. This has to be done without jeopardizing the free flow of information and at the same time ensuring that the genuine economic interests of the creators of intellectual property are not adversely affected. The IPR on the Internet are dependent on this. Once the IPRs on the Internet are decided, then the challenge for the IPR administrator is how to enforce them in the most cost-effective manner. While there are no two opinions about protecting IPR on Internet in the interests of creators, the enforcement of the rights over this medium is likely to be quite cumbersome given the highly sophisticated nature of the technological device. The enforcement measures are also likely to necessitate expensive and advanced electronic devices. After all, 'the answer to the machine is the machine' and every new machine tends to be costlier than the previous one. So, will the cost of the measures become so prohibitive that developing countries will get pushed out of the Internet? Will the IPR enforcement on the Internet lead to a division of the world into the information rich and the information poor? These kinds of questions will have to be addressed when one considers the IPR challenges of Internet. The Internet is still in a nascent stage in India. Most of the issues raised in this paper are possibilities and have not come up in practice. It is however, necessary to look into them in depth and find solutions in the interest of faster growth of the Information Superhighway without adversely affecting the interests of copyright owners. What is to be looked for is the golden mean between the public interest and interest of the creators and disseminators of copyright works. At the same time, the new IPR norms will not lead to a widening of the chasm between the developed and the developing countries.

How Copyright Works

Copyright protects expression, not ideas or facts. For instance, information in a telephone book or a weather summary can be freely used. On the other hand, the expression used in an essay on telephones or a creative explanation of weather systems is protected by copyright even though the underlying data and ideas aren't.

Copyright law doesn't mean that you can never quote something interesting that you find online. The "fair use" rule allows you to use a small portion of an expression to comment on it or for an educational purpose. But if you want to use the expression for commercial gain, the fair use exception probably won't apply unless the portion you use is extremely small in relation to the entire expression.

It's extremely difficult to apply the fair use rule to new forms of expression such as the discussions that take place in "cyberspace" -- for example, on Internet "newsgroups" or the conferences on online services such as America Online and CompuServe. A hundred people may each contribute a few lines to a discussion. If you want to use a big chunk of the conversation, must you get every contributor's permission? Theoretically yes, because each contributor owns the copyright to his or her words. However, since none of the contributions has any significant commercial value by itself, it's hard to see where the copyright owners would be harmed if the entire conversation were used without their individual permissions. Nevertheless, people whose words are used without their permission may be angry about it. It is always better to ask.



Digital Millennium Copyright Act of 1998

This federal statute, signed by the President on Oct. 28, 1998, addresses a number of copyright issues created by the increasing use of the Internet for commerce in materials protected by copyright. Because the act is so new, it is sure to undergo much interpretation by the courts and by copyright experts in the coming years.

The act outlaws attempts to get around devices used by software publishers to keep their programs from being copied, but makes a number of exceptions. Most of these exceptions involve non-profit uses, legitimate personal privacy concerns, and law enforcement activities. The act also:

- prohibits the falsification of identifying information that often accompanies copyrighted works, such as the familiar copyright notice, and the distribution of works that contain such falsified information
- takes Internet service providers off the hook for infringement for transient transmissions automatically passing through their computers
- allows Internet and other online service providers to escape liability for infringement regarding more permanent materials if they promptly remove infringing materials upon request, and
- allows a copy of a computer program to be made for the purpose of repairing or maintaining a computer.

If a court finds that a violation of the act has occurred, it can award the copyright owner money damages for any loss suffered from the violation or, in the alternative, statutory damages (damages to be assessed by the court on the basis of how intentional the violation was). The court can also:

- order the violator to cease its violation
- impose triple the amount of actual damages on repeat offenders, and
- order the violator imprisoned for up to 10 years if the violation was for personal or financial gain.

One last thing Copyright is not the only law to be concerned about when launching words onto the information highway. You should also avoid:

- invading a person's privacy
- falsely accusing someone of committing an immoral or illegal act, and
- using a trademark or service mark that is already being used by someone else.

PROMBLEMS OF COPYRIGHT WITH INTERNET

One of the basic copyright issues in Internet is determining the border between private use and public use. Like all copyright laws of the world, the Indian Copyright Act also makes a distinction between reproduction for public use and private use. Reproduction for public use can be done only with the right holder's permission, whereas the law allows a fair dealing for the purpose of private use, research, criticism or review. This distinction is eroded with the ability of an individual to transmit over the Internet any copyrightable work to myriads of users simultaneously from the privacy of his/her home and users being able to download simultaneously a perfect copy of the material transmitted, in their homes. Fading away of the thin line that divides the public and private territories, many feel, calls for a new set of norms in copyright. The Internet has put on their heads some of the traditional concepts. A case in point is that of publishing. With the advent of the industrial revolution and the age of mass production, publishers of books and music had made their entry. They have become such a presence that writers could not think of a world without them. The Internet is a medium, which as distinct from books removed the middleman between a writer and his/her reader. The author can put his/her work on the Internet and the reader can access it directly. If printing press had given birth to publishing industry, the Internet, by empowering every writer to be his/her publisher has sounded a warning bell, if not the death knell, of that industry. This raises the question whether making a work available on Internet is 'publication' or not. According to the Indian



Act, 'publication' for purpose of copyright means, 'making a work available to the public by issue of copies or by communicating the work to the public.' This definition, by virtue of its non-restrictiveness, can be construed as covering electronic publishing and, thereby, 'publication' on the Internet. It may, however, take a few years before electronic publishing in India really makes a big mark. Whether communication over the Internet is 'communication to the public' is still an unsettled issue. The Indian Copyright Act has an exhaustive definition of 'communication to the public.' The Act says, 'communication to the public' means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.' This definition is considered broad enough to encompass communication over the Internet within its fold. If the courts adopt this view, the Internet service providers in India will have a hard time sorting out copyright over the content of the Internet. Like in most copyright laws, in the Indian law, the distribution right also gets exhausted with the first sale. As of now, a student can freely sell a second hand textbook or a library can circulate among its members' books it purchased. In the Internet, distribution gets entangled with reproduction since no copy can be distributed without reproduction. The right of reproduction presents certain fundamental problems over the Internet. This arises out of the basic nature of Internet transmission. Reproduction takes place at every stage of transmission. Temporary copying (known as caching) is an essential part of the transmission process through Internet without which messages cannot travel through the networks and reach their destinations. Even when a user only wants to browse through, temporary copying takes place on the user's computer. Coverage of the temporary reproductions was a hotly debated issue in the World Intellectual Property Organization (WIPO) Diplomatic Conference of December 1996 and still remained inconclusive. When a reproduction takes place in the course of authorized use of the work and whose purpose is solely to make the work perceptible or where the reproduction is of a transient or incidental nature, should it be restricted? In the Indian law, reproduction has to be in a material form but includes 'storing of it in any medium by electronic means.' Case laws are yet to clarify whether reproductions taking place in Internet communications come under the purview of the right of reproduction given by the law and until that is done, opinions will vary on temporary reproduction and permanent reproduction and on the legality of the temporary reproduction. It will be interesting to see whether the courts will introduce the concept of economic relevance of a reproduction to bring it within the purview of the right of reproduction granted by the Copyright Act. Perhaps the most significant issue from the angle of copyright enforcement is that of liability. For one, there is the issue of liability for acts that take place in the course of transmission of a legal (as distinct from an infringed) copy of a work. As already mentioned, the issue depends a lot on the interpretation that the judiciary takes of various rights given by the law. In case the judiciary takes the view that reproduction, etc., that occurs in transit is violation of a copyright, then questions will arise as to fixation of liability. Who is to be held responsible? The party who dispatches the work or the party who receives it or the Internet service provider (ISP)? The answer will not be easy to find out. The other issue is of communication over the Internet of a clearly infringed copy of a work. The moot point in this issue is whether an ISP be held liable for the copyright infringement made by a subscriber even though he is not aware of the subscriber's action. Section 79 of the Information Technology Act, 2000, states that if the subscriber proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention then he won't be held liable under the said Act. While describing copyright offence, the Indian Copyright Act makes the stipulation that the infringement or abetment of the infringement has to be made 'knowingly' by a person. It is possible that by virtue of the expression 'knowingly' an ISP, who may not have any awareness about the copyright



Infringement by the subscriber may be absolved from liability and escape punishment. This, however, raises another question. Even if the ISP is not punishable under the Indian law, he may incur liability under the national law of another country. Since Internet is truly global and is no observer of national boundaries, how are we going to regulate this? The networks are spread all over the world and a message or information travels through any number of countries before it reaches its final destination. The ISP may not have any liability in the country of origin and in the country of destination but may have liability in some country in transit. ISPs and Software Developers are potentially liable for copyright infringement based on the secondary liability theories of contributory or vicarious infringement. A contributory infringer is 'one who, with knowledge of the infringing activity, induces causes or materially contributes to the infringing conduct of another.' In order for the provider to be held liable, some direct infringement must have occurred and the provider must meet the requirement of either contributory copyright infringement or vicarious copyright infringement. In the seamless world of Internet, the enforcement of national IPR laws, which are bound by territorial jurisdictions, throws up issues not easy to solve. This is an area where there is an urgency for international harmonization of laws; otherwise the threat of liability in certain countries may compel the Internet service provider to scrutinize the material being transmitted for copyright clearance, and, thereby, delaying the whole process. This could make the World Wide Web a 'World Wide Wait'. The attempt should not be to hamper the flow of information but to speed it up. Each major technological development means a paradigm shift and the Internet is no exception. New norms may have to be evolved to fix liabilities on the right persons; a facilitator of Internet service may not necessarily be an abettor of copyright infringement. The range of issues that Internet poses for IPR protection makes one wonder whether copyright laws would be sufficient to meet the challenge or whether we should go for a sui generis system of IPR protection. In fact, there is a universal trend to think in terms of sui generis forms of protection to meet the new technological challenges. Thus, there have been designer laws for intellectual property in industrial designs, plant varieties and in integrated circuits. Databases and folklore are in line for getting sui generis protection. While the copyright laws have, over the decades, shown much flexibility in accommodating new forms of creation, there still is much rigidity in them. The idea-expression dichotomy is central to the copyright doctrine and, hence, copyright does not protect the ideas, methods and functional characteristics. A sui generis form will naturally have a lot more flexibility in its scope, level and term of protection. But then it presupposes a willingness to experiment, a willingness to let the law evolve through a process of trial and error. There are areas where differences in cultural perspective may have a bearing on the appropriateness of the material being transmitted over the Internet. Many literary, artistic and cinematographic expressions, which are accepted in the western society, may not be acceptable in more traditional societies like the Indian society. In the case of books, music, artistic pieces and cinematographic films, a national government can exercise certain controls over them; even in the case of broadcasts and telecasts this is possible to a great extent. In the case of Internet communication, how are we going to do this? It is not possible on the Net to have policing at the national boundaries. Controlling and filtering information that flows through the Internet has many practical difficulties. Under Section 69 the IT Act, it is possible to intercept material that is obscene in nature (prurient or lascivious) and this currently includes the power to block sites. Also, such action can be taken against pornographic websites, which is why one won't really find any porn being hosted in India. Still the Internet is too large and amorphous for any regulation. When one seals off an infringing site, a hundred such sites may crop up in different places. The amount of information on the Internet is huge and located not in one country but all over the globe. It is not feasible for any government to censor it. Censoring is possible when sources of information are limited. There is a major difference between the mass electronic media like television and radio, and the Internet. In the former, there is one broadcaster and several viewers or listeners,



whereas in the latter, an enormous number of ‘netizens’ are inputting information and accessing it simultaneously. What kind of technical devices can regulate the complex matrix of Internet whose every user point is also a production point?

CYBER JURISDICTION –AN INDIAN VIEW

Government prevalent in India, interstate disputes never assume the level of private international law. Hence, there has been little by way of development of private international roles in India. In addition, there have been few cases in the Indian courts where the need for Indian court’s jurisdiction over a foreign subject has arisen. However, such a 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 situations, which need consideration: (a) Manner in which foreign courts assume jurisdiction over the Internet-related issues, (b) The consequences of a decree passed by a foreign Court. The laws to take into consideration about the use of electronic data interchange (EDI), e-commerce, electronic fund transfer, electronic cash, copyright, IPR, digital signatures, etc. Although there are provisions in the Information Technology Act,²⁸ there is still need to change the Evidence Act to recognize digital signatures. Changes are also required in Indian Penal Code, 1860, Evidence Act, 1872, Indian Patents Act so as to recognize emerging technologies towards. Section 62 of the Indian Copyright Act, 1957 do provides for jurisdiction to any court having a direct jurisdiction over the matter. It further goes on to explain the limits of jurisdiction of the courts.²⁹ Again, the Information Technology Act, provides for extra-territorial jurisdiction in cyber-crime cases. Section 74 provides that where any offence involves a computer or computer resource in India, it can be taken note of under Indian laws.

CASES OF COPYRIGHT

NAPSTER CASE

The Napster case, including Judge Patel’s well researched opinion, granting a preliminary injunction to the record company and music publisher plaintiffs, and the 9th Circuit’s further analysis of the fair use factors raised as an affirmative defence by Napster, demonstrate the remarkable way the cobbled together copyright law applies to the new challenges of Internet. And now, things are coming full circle, with Napster lobbying Congress to impose some kind of ‘compulsory’ licensing on record companies for digital downloads, and reaching to get Congress to extend something like the compulsory licensing provisions of the copyright law that apply to prevent monopolies of mechanical licensing of musical compositions, to digital downloads of sound recordings. While Napster may be stretching to make the comparison seem fair and logical, the whole concept and regulation of ‘compulsory’ licensing of music is one of the more complex (and misunderstood) aspects of the copyright law, and should not, in authors’ opinion, be lightly expanded to other aspects of the music marketplace. It should also be noted that the provisions for compulsory licensing are extremely restricted and require, among other things, notice prior to distribution. Failure to provide proper notice ‘forecloses’ the possibility of a compulsory license and renders making and distribution actionable as acts of infringement. Against this background, in January 2002, for the first time since Napster was shut down in the summer of 2001 under Judge Patel’s preliminary injunction ruling, as upheld by the 9th Circuit, Napster has launched a test of a commercial file-swapping technology, using tracks licensed from independent record labels. Judge Patel’s Napster ruling took a rather traditional approach to copyright law and preliminary injunctions, and arguably similar copyright and technology cases were distinguished. In Napster, majority of the music and recordings made available for free copying were copyrighted by the plaintiffs, and it was clear that Napster never sought or obtained licenses. The Court repeatedly stressed Napster’s knowledge, intent, wilfulness, and lack of sincerity in internal documents and on the record, and especially, the ‘vast scale’ of the infringement



to ‘millions’ of users, and the ‘usurping’ effect on the record companies’ markets for online music. Indeed, in distinguishing Napster from the Sony case, the Court stated, ‘the majority of VCR purchasers in Sony did not distribute taped television broadcasts, but merely enjoyed them at home. In contrast, a Napster user who downloads a copy of a song to his hard drive may make that song available to millions of other individuals, even if he eventually chooses to purchase the CD. So-called sampling on Napster may quickly facilitate unauthorized distribution at an exponential rate,’ and that ‘Napster users can keep the music they download.’ The Court also referred to the ‘global scale’ of Napster usage, in deciding that Napster use does not constitute ‘personal or home use in the traditional sense.’ The Court rejected Napster’s arguments as to stretching ‘time-shifting’ to ‘space-shifting’ and as to applying ‘the Ninth Circuit’s assertion, in a case involving an inapplicable statute, that space-shifting constitutes non-commercial personal use.

MGM v Grokster the Court chose to apply the traditional test for contributory infringement and vicarious liability. The Court held that a product distributor can be held liable for copyright infringement by a third party when they ‘distribute a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action.’ The Court states that it would be ‘impossible to enforce rights in the protected work effectively against all direct infringers, so that the only practical alternative is to go against the device’s distributor for secondary liability.’ The Court distinguishes its earlier decision in Sony because there was ‘no evidence that Sony had desired to bring about taping in violation of copyright or taken active steps to increase its profits from unlawful taping.’ The Court considers intent when determining if the entity was promoting infringement or not. The record in this case clearly established that Grokster intended to induce copyright infringement by soliciting business from former Napster users, by not trying to limit infringement by customers using their software.

THE FUTURE OF COPYRIGHT

There is no right answer to the question of future of copyright because future of Internet is still so uncertain. Obviously, the choices we make now will affect the course it will follow. Copyright is not meant to grant to its holders exclusive control of their works; rather, it is a very specific bundle of rights designed to foster creativity for the public interest. A more palatable alternative would be to interpret fair use broadly to preclude infringement by un harmful, non-commercial uses. Regardless of how copyright issues are resolved, it is clear that other systems of compensation to authors can co-exist on the Internet. Service Providers such as VSNL offer ‘live’ performances, where well-known people visit chat rooms and interact with the customers. Software companies provide technical support. Free intellectual works abound on the Internet, with express indications of the conditions under which they can be copied or used. For example, this paper can be published in any form if properly credited and not sold for profit. Eventually, new forms of compensation might dethrone copyright. Perhaps in the end, the future of copyright on the Internet may depend more on popular perceptions than it will on restrictive regulations. Laws are presumably meant to reflect public opinion, not control it. People follow rules that they believe are reasonable. As John Perry Barlow noted in reference to encryption, ‘a social over-reliance on protection by barricades rather than conscience will eventually wither the latter by turning intrusion and theft into a sport, rather than a crime.’³⁰ People’s basic concept of what is fair and equitable might best determine the future of copyright in cyberspace.

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