

CYBER LAW AND IPR ISSUES: THE INDIAN PERSPECTIVE

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Abstract

The Information Technology Act 2000 is an outcome of the resolution dated 30th January 1997 of the General Assembly of the United Nations (UNCITRAL), which adopted the Model Law on Electronic Commerce on International Trade Law. Cyber Crimes are one of the fastest growing crimes in the world. While the Act has been successful in setting down the frame work of regulations in Cyber Space and addresses a few pressing concerns of misuse of technology, it suffers from a few serious lacunae that have not been discussed, i.e. Intellectual Property issues. Intellectual property means knowledge or information in any form which has a commercial value and Intellectual property rights can be defined as a mix of ideas, inventions and creations i.e. Copyright, Patent, Trademark, Design are some of the types of Intellectual Properties. These things are creations of the human mind and hence called Intellectual Property. Information Technology Act 2000 does not mention a single word about Intellectual Property protection while Infringement of IPR is one of the most challenging area in cyberspace. As well as Copyright and Domain names violations do occur on the internet but Copy Right Act 1957 & Trade Mark Act 1999 are silent on that which specifically deals with the issue. Therefore we have no enforcement machinery to ensure the protection of domain names on net. Time has come where we must enact special legislation for the protection of Intellectual property in cyberspace.

Keywords - Cyber law, Copyright infringement, Domain names, Cyber squatting, IPR issues & challenges involved.

Introduction

The utility of computers and the internet is well understood and in fact embedded in the modern business and commerce as well as in the society in general. The advantages of the use of the computers and internet are immense in the modern business and our society can't function smoothly without computers and information technology. But the use of internet and computers has brought along many unavoidable misuses of computer and

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the internet. This has been possible more so because, in the use of the computers, there is no any territorial limit and can be used from any jurisdiction. E-commerce nowadays have become very popular especially in the corporate sector. The advantages and scope of publicity of business through e-commerce or business on the World Wide Web can reach the surfers very fast in any part of the world. But this has paved the way for the emergence of the cyber-crime¹.

Cyber-crime means and includes where computer is used as a means of committing crime or as a target of crime. To deal with the cyber-crimes, the parliament of India has enacted the Information Technology Act, which provides legal recognition to digital signatures and electronic records. The Act is a legal framework to facilitate and safeguard electronic transactions in the electronic medium. It is based on UNCITRAL (United Nations Commission on International Trade Law) which adopted model law on e-commerce advocating a shift from paper based environment to a computer based environment².

But the IT Act, 2000 lack somewhere to deal with the issues of Intellectual property. Intellectual property refers to creations of mind i.e. Copyright, Trademark, Patent, Geographical Indications and Integrated Circuits etc. etc. The Author in this paper has highlighted some important issues including online copyright infringement, domains names issues and suggestion thereof.

Highlights of the Information Technology Act, 2000

The Act comprises of 94 sections divided in 13 chapters. The chapters cover digital signature, electronic governance, attribution, acknowledgment and dispatch of electronic records, security of electronic records and digital signatures, regulation of certifying authorities, duties of subscribes to digital signature certificate, cyber regulation appellate tribunal, offences and liabilities of network service providers. The act has four schedules that lay down the relative amendments to be made in The Indian Penal Code, Indian Evidence Act, Bankers' Books Evidence Act and Reserve bank of India Act.³

¹ Harish Chander, *Cyber Laws and IT Protection*, PHI learning Private Ltd. Publication, New Delhi, 2012, at page no. 14.

² Vakul Sharma, *Information Technology*, Universal Law Publishing Company, New Delhi, 2013 at pg.no. 15.

³ Dr. Gupta & Agarwal, *Cyber Laws*, Premier Publishing Company, Allahabad, 2010, at pg.no.324.

This Act has three objects, those are

- i. To respond and to give effect to the united nations call to all states to give favourable consideration to model law when they enact or revise their laws so as to facilitate harmonization of the laws governing alternatives to paper based methods of communications and storage of information.
- ii. To provide legal recognition to transactions carried out by means of electronic data interchange and other means of electronic communication, commonly called as e-commerce which involve the use of alternatives to paper based methods of communication and storage of information.
- iii. To facilitate e-filing of documents with the government agencies so as to promote efficient delivery of government service by means of reliable electronic records.⁴

Unfortunately this IT Act does not deal with cyber squatting i.e. stealing of domain names from its legal owner, controlling the conduct of cyber cafes; net pornography hosted by websites of foreign origin; taxation of e-commerce transactions; spamming or the practice of sending unsolicited commercial e-mails that amounts to breach of individual's right to privacy on the net; crimes committed by websites of foreign origin; lack of enforceability of the provisions relating to e-governance, jurisdiction in the cyberspace; stamp duty of e-contracts, cyber stalking, credit card frauds, cyber defamation etc.

Meaning and Types of Intellectual Property Rights

The concept of Intellectual property can be traced back to the Byzantine Empire where monopolies were granted. For instance in Greece a one year monopoly was given to cooks to exploit their recipes. A statutory legislation in the Senate of Venice provided exclusive privileges to people who invented any machine or process to speed up silk making. Thus, from Intellectual property being totally alien to the nomadic community came an era where every new idea was given protection under the category of Intellectual Property Rights. Copyright is known as one of the types of Intellectual properties. Before going into details of the copyright and related issues in cyberspace, we need to know the concept of Intellectual property and its importance. To go home is to enter a place built & filled with human creativity & invention. From a carpet to a sofa, from the washing machine, the

⁴ Dr. Farooq Ahmad, *Cyber Law in India*, New Era Law Publication, New Delhi, 2012, pg.no.28.

refrigerator and the telephone, to the music, the books, the paintings, family photographs, everything which we live is a product of human creativity. These things are creations of the human mind and hence called Intellectual property. Today the internet is not only used for educational purposes but also for business.

Intellectual property can be categorized into two categories i.e. Industrial property and Copyright. Industrial property deals with patents, trademarks, geographical indications, designs and semiconductors layout design. On the other hand Copyright covers literary, dramatic, artistic, musical, cinematographic films and sound recording etc. etc. The primary legislations regulating Intellectual property in India are: The Patents Act 1970, The Trade Marks Act 1999, The Geographical Indications of goods (Registration and Protection) Act 1999, The Design Act 2000, The Semiconductor Integrated Circuits Layout-Design Act 2000 and the Copyright Act 1957.

Copyright Issues in Cyberspace

The object of the copyright is to encourage authors, composers, directors to create original works by way of providing them the exclusive right to reproduce, publish the works for the benefit of the people. When the limited right i.e. term of copyright is over, the works belong to the public domain and anyone may reproduce them without permission. The copyright subsists in original literary, dramatic, musical, artistic, cinematographic film, sound recording and computer programme as well.⁵

Today, copyright serves a variety of industries including production and distribution of books, magazines and newspaper, media of entertainment that is dramatic and musical works for performances, publication of musical works and cinema, broadcasting etc. etc. copyrights being Intellectual Property travel from country to country more easily and quickly than other kinds of property. Technological progress has made copying of copyright material easy and simple. Consequently, the control of copyright infringement has very difficult and often impossible. Books, recorded tapes or video cassettes of films or computer programmes can be taken from one country to another without any difficulty and thousands of copies can be made from it and

⁵ Available at www.wipo.int , visited on 15/02/2016.

distributed. Unauthorised home taping of radio and television programmes has become rampant all over the world.⁶

Infringement of Copyright in Cyberspace

Taking content from one site, modifying it or just reproducing it on another site has been made possible by digital technology and this has posed new challenges for the traditional interpretation of individual rights and protection. Any person with a PC (Personal Computers) and a modem can become a publisher. Downloading, uploading saving transforming or crating a derivative work is just a mouse click away. A web page is not much different than a book or a magazine or a multimedia CD-ROM and will be eligible for copyright protection, as it contains text graphics and even audio and videos. Copyright law grants the owner exclusive right to authorize reproduction of the copy righted works preparation of derivative works, distribution etc.⁷

Copyright in a work shall be deemed to be infringed

- a) when any person, without a license granted by the owner of the copyright or the Registrar of copyrights under this Act, or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act-
 - i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright;
 - ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright or
- b) when any person
 - i) makes or sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire or
 - ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright; or
 - iii) by way of trade exhibits in public; or
 - iv) imports into India

⁶ Dr. Gupta & Agarwal, *Cyber Laws*, Premier Publishing Company, Allahabad, 2010, at pg.no.148.

⁷ Tabrez Ahmad, *Cyber Law and E-Commerce*, APH Publishing Corp., New Delhi, 2003, at Page no.25.

In all above mentioned cases copyrighted work shall be considered as infringed. The software copyright owner will have to prove the deceptive similarity, prima facie case & irreparable loss to claim the damages from infringer.⁸

Computer Software & Copyright Law

According to section 2(ffc) of the Copyright Act, a computer programme is a "set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular results". Computer software is "computer programme" within the meaning of the Copyright Act.

These computer software are also subject matter of copyright protection under the Copyright Act. Computer programmes are included in the definition of literary work under the Copyright Act. Owner of the computer software possesses with various right including the right to grant software licenses. Software licenses can be of various types.

Software Licenses

Freeware licenses: Freeware is a computer software that is copyrighted, available for use free of charge, available for an unlimited time. Freeware licenses are generally created and distributed free of cost by software developers who want to contribute something to the society. However there are some limitations as well. For eg. A freeware license is personal, non-exclusive, non-transferable and with limited use. Many freeware licenses restrict the use of the software for commercial purposes. The license is non-exclusive as it does not confer any exclusive rights on a particular user. Moreover, the license is non-transferable and does not permit the licensee to transfer any rights to a third person.

Open Source Licenses: As the word itself indicates, this license is open for all without any limitations. To qualify as "open source" particular software must comply with several conditions. Once any person has developed such open source license, then there must be free distribution, redistribution of such software. Owner of the Open source license cannot restrict any person from selling, modifying, distributing or using such license for genetic research etc.

⁸ Section 51 of the Copyright Act, 1957.

Shareware: This is also known as "try before you buy" software. This software usually come with full functionality for a limited period. After this trial period users must either buy the software or uninstall it from their computers. The trial period could be in terms of number of days.

Demo ware: Demo ware is meant only for demonstrations. The demo ware does not have any functional features, it only serves to demonstrate the features to potential users.

Software copyright owner has the right to reproduce and make any number of copies of his work as he likes. Secondly, he may display his software on the internet which would amount to display to the public. He is also vested with the rights of selling, renting, transferring, updating, modifying his software copyrighted work. No person can use such copyrighted work for his own benefit without prior permission of the owner. Nevertheless if any person exploits the copyrighted work for any commercial purpose or to cause any monetary loss to the owner, then it will amount to infringement of copyright.

Even though the software copyright owner enjoys many exclusive rights yet they are not absolute and are subject to certain limitations and exceptions in order to protect and safeguard the public interest particularly of the users of the software. In certain circumstances, the use of the copyrighted work is allowed even without the permission of its author in some socially desirable circumstances. In India, some of the acts which do not constitute the infringement of copyright would be fair dealing with a literary, dramatic, musical or artistic work for the purpose of private use, including research, criticism or review, in order to utilise the computer program for the purpose for which it was supplied or to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilize the computer program for the purpose for which it was supplied.⁹

Trademark Law & Domain Names Issues in Cyberspace

Definition of Trademark- “a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours”.¹⁰

⁹ V.K. Ahuja, *Intellectual Property Rights in India*, Lexis Nexis Butterworth's Wadhwa, Nagpur, 2009, at page nos.15-16.

¹⁰ Section 2(1)(zb), The Trademark Act, 1999.

Functions of a Trademark

A trademark serves the purpose of identifying the source of origin of goods. Trademark perform the following four functions

- i. It identifies the product and its origin.
- ii. It guarantees its quality.
- iii. It advertises the product
- iv. It creates an image of the product in the minds of the public, particularly consumers or the prospective consumers of such goods.¹¹

Examples of trademark- Lee, Skoda, Colgate, Pepsi, Brooke Bond, Sony etc.

What is a domain name?

Very simply put, a domain name is the linguistic counterpart of what we call an Internet Protocol address. Every computer has an address, which is akin to a telephone number. If one wants to call up a friend, he needs to dial the friend's number. In much the same way, if he needs to access a website has to type out its IP number. But since it is very difficult for one to remember a complete number such as 202.162.227.12 a system evolved under which a name is mapped to the concerned number or IP address. Thus, today, instead of typing 202.162.227.12, one has merely to type in www.tata.com.

What is there in a domain name? These unmemorable lines by the great poet, William Shakespeare, were no doubt written in an era when neither trademarks, nor domain names were ever heard of. If only Shakespeare knew that Shakespeare.com had been available for sale, he would have thought twice before penning those lines. Thus value of domain names can't be underestimated.¹²

Dispute between Trademark and Domain Names

The Trademark Act, 1999 has been enacted with an object to amend and consolidate the law relating to trademarks for goods and services and for the prevention of the use of fraudulent marks. However, trademark owners desirous of using their marks as domain names have found that such domain names have been recognized by unauthorized parties, often as a deliberate attempt

¹¹ Dr. B.L. Wadhera, *Law relating to Intellectual Property*, Universal Law Publishing Company, New Delhi, 2009, at pg. no. 134.

¹² S. K. Varma& Mittal, *Legal Dimensions of Cyberspace*, Indian Law Institute, New Delhi, 2003, at pg. no.154.

to violate the rights of the original trademark owner. Actually, domain names are registered on 'first come first serve basis' which leads many a time to what are commonly referred to as 'abusive registrations' i.e. registration by a person of a domain name containing a trademark, in which such person/entity has no legitimate right or interest.

Various Forms of Infringement of Trademark through Cyberspace

A. Cybersquatting

Various types of domain names disputes come for consideration before the courts all over world. One of the most serious kinds of disputes has been about 'Cybersquatting' which involves the use of a domain name by a person with neither registration nor any inherent rights to the name. Trademarks and domain names being similar, have been exploited by some people who register trademarks of others as domain names and sell those domain names back to the trademarks owners or third parties at a high profit. This is known as 'cybersquatting' which means some person sitting on the property of another person. The practice of 'cybersquatting' is abusive whereby one entity registers a domain name that includes the name or the trademarks of another. This practice shows the importance of the role played by domain names in establishing online identity. This practice is usually famous in order to either block the legitimate user registering its most sought after domain name or hoping to sell the names for profit in the market. Such a trend of cybersquatting has led the courts to consider the relationship between trademarks and domain names. To file a complaint to prevent cybersquatting, the complainant will have to prove the dishonest intention, lack of legitimate rights and interests and similarity of domain name with the trademark.¹³

B. Reverse domain name hijacking

It is also known as reverse cybersquatting. It happen when a trademark owner tries to secure a domain name by making false cybersquatting claims against a domain name's rightful owner through legal action. Sometimes, domain names owner has to transfer ownership of the domain name to the trademark owners to avoid legal

¹³ Harish Chander, *Cyber Laws and IT Protection*, PHI learning Private Ltd. Publication, New Delhi, 2012, at page no. 35.

action and costly expenses, particularly when the domain names belong to the smaller organisations or individual who are not economically sound to fight the case. Reverse domain name hijacking is most commonly done by larger corporations and famous wealthy individuals.

C. Meta tags

Meta tag is an element of web pages that is also known as Meta elements. Meta tags provide information about page descriptions, key words and other relevant data. Originally, Meta tags were used in search engines to define what the page was about when the internet was in the early stages, Meta tags were used to help the place web pages in the correct categories. Nowadays, people began abusing Meta tags to build false page rankings for web pages that were poorly constructed. Meta tags can be categorised into title, description and keywords.

Landmark Judgments on Trademark and Domain Names Issues

1) Yahoo! Inc. v. Akash Arora and another, 1999 Arb. L. R. 620 (Delhi High Court)

The first case in India with regard to cyber squatting was *Yahoo Inc. v. Aakash Arora & Anr.*, where the defendant launched a website nearly identical to the plaintiff's renowned website and also provided similar services. Here the court ruled in favour of trademark rights of U.S. based Yahoo. Inc (the Plaintiff) and against the defendant, that had registered itself as YahooIndia.com. The Court observed, "It was an effort to trade on the fame of yahoo's trademark. A domain name registrant does not obtain any legal right to use that particular domain name simply because he has registered the domain name, he could still be liable for trademark infringement."

2) Tata Sons Ltd & Anr. v. Arno Palmen & Anr 563/2005, (Delhi High Court)

The Delhi High Court, in its recent judgment dealt with trademark protection for domain names. The suit was instituted by the plaintiffs against the defendants seeking permanent injunction against the defendants from using the trademark/domain name "WWW.TATAINFOTECH.IN" or any other mark/domain name which is identical with or deceptively similar to the plaintiffs' trademarks – "TATA" and "TATA INFOTECH".¹⁴

¹⁴ Available at <http://www.Indiankanoon.org/search/>, visited on 14/02/2016.

Brief facts of the case

The suit was filed by Tata Sons Ltd (plaintiff no.1) and its subsidiary, Tata Infotech Ltd (plaintiff no. 2). It was submitted that the mark “TATA” is derived from the surname of its founder Mr. Jamsetji Nusserwanji Tata. It was submitted that “the mark “TATA” has consistently been associated with and exclusively denotes the conglomeration of companies forming the Tata group, which is known for high quality of products manufactured and/or services rendered by it under the trademark/name TATA”.

It was also submitted that the House of Tata’s comprises over 50 companies which use “TATA” as a key and essential part of their corporate name. Further, plaintiff no. 1 is the registered proprietor of the trademarks pertaining to and/or comprising the word “TATA” in relation to various goods falling across various classes of the Fourth Schedule of the Trade Mark Rules, 2002. It was, therefore, contended that plaintiff no. 1 has the exclusive right in the said trademark. The plaintiff no. 2 submitted that it is a pioneer in the field of information technology and has been using the trade name and service mark “TATA INFOTECH” since the year 1997. It was also submitted that the company enjoys high reputation in the market.

The plaintiffs contended that they came to know about the registration of the domain name www.tatainfotech.in by the defendant on 21 February 2005 when the said defendant sent an email to the plaintiff no. 2 informing them about the registration he held over the impugned domain name. It was also contended that the defendant in the said email had claimed that he had supposedly received an offer for purchase of this domain name for a “large sum of money” and that he wanted to inform the plaintiff about this. The plaintiffs contended that “this clearly showed that the defendant no. 1 had registered the impugned domain name only with a view to make illegal gains out of selling this domain name either to the plaintiffs or to any third party who wished to acquire it to use it in an illegitimate and mala fide manner. And that this also showed that the defendant no. 1 was very well aware of the plaintiff’s rights over the trade name and service mark TATA INFOTECH.”

The impugned mark is identical in parts and deceptively similar as a whole to the plaintiffs’ reputed marks. Further, “if the defendant no. 1 or its transferee starts to use this domain name by resolving it to another website, the chances of a genuine customer of the plaintiffs reaching the defendant’s web page are

highly likely, more so because the impugned domain name is identical to the plaintiff's domain name i.e. www.tatainfotech.com. It is thus contended that anyone using the plaintiff's marks on the internet can cause tremendous loss and damage to the business of the plaintiff by way of passing off and loss of the prestige and business attached to the mark/name TATA and TATA INFOTECH".

Judgment

The Court relied upon the Supreme Court judgment in *Satyam Infoway Ltd. v. Sifynet Solutions Pvt. Ltd.*, (AIR 2004 SC 3540). In the instant case, the apex Court examined whether internet domain names are subject to the legal norms applicable to other intellectual properties such as trademarks and be regarded as trade names which are capable of distinguishing the subject of trade or service made available to potential users of the internet.

The Supreme Court held as follows: "The use of the same or similar domain name may lead to a diversion of users which could result from such users' mistakenly accessing one domain name instead of another. This may occur in e-commerce with its rapid progress and instant accessibility to users and potential customers and particularly so in areas of specific overlap. It is apparent therefore, that a domain name may have all the characteristics of a trademark and could find an action for passing off."

The Court noted that the domain name www.tatainfotech.in was created in favour of the defendant on 19 February 2005. However, the plaintiff was the prior user of the mark since 1997-98. The email correspondence between the contesting parties conclusively demonstrated that the defendant no. 1 knew about the plaintiff no. 2 being the legitimate owner and user of the trademark "TATA INFOTECH". The impugned domain name was registered deliberately in bad faith with the objective of selling the domain name to the plaintiffs or taking unfair advantage of the distinctive character and repute of the plaintiff's trademark.

The Court restrained the defendant, its employees, agents, assigns and all others acting on behalf of the defendant from conducting any business or dealing in any manner including using domain name www.tatainfotech.in or the word "TATA" or any name comprising of the same or deceptively/confusingly similar to it regarding any goods, services or domain. The defendant no. 2, Key-Systems GMBH, was directed to cancel the

registration of the impugned domain name in favour of the defendant.¹⁵

Loopholes under the IT, Trademark and Copyright Act

There is no provision in the current or proposed Information Technology Act in India to punish cyber-squatters, at best, the domain can be taken back. Though there is no legal compensation under the IT Act, .IN registry has taken proactive steps to grant compensation to victim companies to deter squatters from further stealing domains. Most squatters however operate under guise of obscure names. Under NIXI (National Internet Exchange of India), the .IN Registry functions as an autonomous body with primary responsibility for maintaining the .IN cc-TLD (country code top-level domain) and ensuring its operational stability, reliability, and security. It will implement the various elements of the new policy set out by the Government of India and its Ministry of Communications and Information Technology, Department of Information Technology.

The Information technology Act lack somewhere in respect of jurisdiction issues, cybercrimes related to IPR, cyber stalking, cyber defamation etc. etc. Likewise, the Indian Trademark Act, 1999 and Copyright Act, 1957 are also silent on issues arising out of online Trademark and Copyright infringement. Though computer programmes are protected under the Copyright Act but it does not provide remedies for online software piracy.

Conclusion and Recommendations

As Intellectual property is one of the valuable assets of any person, it should be protected at any cost since a person puts his skills and labour for creation of Intellectual Property. On the other hand, there is an urgent need for the strict laws in this field, so that these crimes related to IPR could be avoided in future. The new domain name dispute law should be intended to give trademark and service mark owners legal remedies against defendants who obtain domain names “in bad faith” that are identical or confusingly similar to a trademark. It should act as an important weapon for trademark holders in protecting their intellectual property in the online world. In United States, they have special legislation for prevention of cybersquatting i.e. “U.S. Anti-Cybersquatting Consumer Protection Act, 1999” which protects the interest of owners of both registered and unregistered trademarks against use of their marks within domain names and

¹⁵ Supra note 14.

also safeguards living persons against use of their personal name under certain circumstances. So it's a high time for India to enact such a suitable legislation which will protect the rights of copyright, trademark owners.

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