



Dr. Babasaheb Ambedkar  
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**PGDCL-202**  
**Intellectual Property Rights**  
**in Cyber Space**



Post Graduate Diploma in  
**Cyber Law**

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# Intellectual Property Rights in Cyber Space

Dr. Babasaheb Ambedkar Open University



# Intellectual Property Rights in Cyber Space

## **Course Writer**

Ms. Shivani Jadhav	Research Associate, Gujarat National Law University
Ms. Ambika Batas	Research Associate, Gujarat National Law University
Ms. Dhanya	Assistant Professor (Research), Gujarat National Law University

## **Content Reviewer**

Mr. Kumar Gaurav	Chanakya National Law University, Patna, Bihar
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## **Content Editor**

Prof. (Dr.) Nilesh K. Modi	Professor & Director, School of Computer Science Dr. Babasaheb Ambedkar Open University, Ahmedabad
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PGDCL-202

## Intellectual Property Rights in Cyber Space

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## **Block-1**

# **INTERFACE OF INTELLECTUAL PROPERTY RIGHTS AND CYBER SPACE**

# Unit 1: INTELLECTUAL PROPERTY RIGHTS VIS-À-VIS CYBER SPACE

1

## Unit Structure

- 1.1 Learning Objectives
- 1.2 Introduction
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- 1.9 Further reading
- 1.10 Check your progress: Possible answers
- 1.11 Activity

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## 1.1 LEARNING OBJECTIVE

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After going through this chapter, you should be able to understand

- Interrelationship between intellectual property rights and cyber law
- The concept of Cybersquatting and its impacts
- Dispute resolution in cyberspace

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## 1.2 INTRODUCTION

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The rapid evolution of cyberspace over the last decade owing to the extensive growth of e-commerce and e-governance on digital platforms has resulted in establishing its unforeseen inter-relationship with a varied range of disciplines, the most significant of them being law. Content which is in the electronic form and can be represented as electronic record are at the epicenter of this Information Technology Ecosystem. With the mass increase in the use of cyber space, availability of content (electronic form) across digital platforms increased by many folds; innovation gave rise to the creation of original and novel content, and intellectual property was disseminated overcoming all geographical boundaries. Cyberspace being a tool of access to data and resources, it expanded human reaches towards global information. As a result, there developed an undeniable relationship between cyberspace and the intellectual property in the content available on the cyberspace.

However, while on one hand, content of various kind including elements of copyright, trademark and patent became easily available to one and all across digital platforms, on the other, there arose instances of violation of intellectual property owing to theft of such content which in turn resulted in complications of piracy and infringement of the rights accruing from such intellectual properties.<sup>1</sup> Consequently, the necessity of protecting digital content was acknowledged, and accordingly, the legal framework of Cyber Law was established to address all concerns of misuse and misappropriation of intellectual property on cyberspace. Apart from the changes in Cyber Law, amendment has been brought in the existing Intellectual Property Laws to make it

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<sup>1</sup>Somu, C.S.. (2006). Intellectual Property Rights In Cyberspace. Paradigm. 10. 62-68. 10.1177/0971890720060110.



compatible to digital platforms as well as digital contents. Nevertheless, the necessity of constantly adopting technological measures towards the protection of content available on digital platforms became all the more significant with the strengthening impact of cyberspace on the society and its growth.

Intellectual property is fundamentally associated with territoriality, while cyberspace cannot be restricted within territorial boundaries. As a result of intellectual property being available on cyberspace, the inherent nature of intellectual property underwent an evolution, thereby giving rise to newer interpretations of both cyberspace and intellectual properties. As it is evident from existing statute on cyberspace considerably lacks due attention A major portion of the concept of cyber law hence needs to be studied in context of its association with intellectual property rights.

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### **1.3 INTERFACE OF CYBER LAW WITH COPYRIGHT LAW**

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Cyberspace provides to copyright law a platform to promote and channelize its objectives and purposes, the most significant of which is to provide to the society access to knowledge for establishing overall societal advancement. The intrinsic philosophy of copyright law is aimed at fostering creativity and innovation which the copyright owner and/or holder may subject to commercial exploitation; and cyberspace served as the perfect medium for fulfilling such purposes.<sup>2</sup>

Notwithstanding the positive impact of the internet on copyright law, there is no denying that owing to the inherent nature of copyright law, it has suffered extensively as a result of exposure to emerging technologies, especially the growth of cyberspace. The very structure of cyberspace and its inherent characteristics has a dual impact on the copyright regime. Both positive impact and negative impact can be easily found the in distribution, reproduction and its exploitation/accessibility of copyright material. While distribution, reproduction and exploitation of copyrighted material have found new direction through cyberspace and content has become easily accessible, it has also adversely affected the copyright holders. Not only does the internet eliminate all distinction between private and public use, but it also creates complications towards the interpretation of use of copyrighted materials

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<sup>2</sup>A. Rahmatian, (2015) 'Cyberspace and intellectual property rights', in: Tsagourias, N. T. and Buchan, R. (eds.) Research Handbook on International Law and Cyberspace (Cheltenham: Edward Elgar), 2015, pp. 72-93 (chapter 4)

thereby diluting the grounds of copyright infringement. The fundamentals of the copyright law state that infringement shall be deemed to have occurred if the exclusive rights of the copyright owner are exercised without express authorization of the owner or right-holder. Since the copyright law validates the use and/or reproduction of copyrighted material for personal/private use, it is essential to understand whether copyrighted content has been subjected to private use or not for determining the occurrence of infringement. However, cyberspace has introduced digital technology that has allowed merging of private and public spheres into one; as a result of which, copyright owners have failed to effectively exercise control over the use of their content and have often failed to prevent unauthorized exploitation of the same. Digital technologies introduced by cyberspace include all forms of copyrightable content that might inter alia include texts, graphics and images, which may be combined in various forms to generate new content.<sup>3</sup>

The reproduction and display of a copyrighted work of another person, in a non-removable or removable storage medium, without his authorization amounts to an infringement of statutory exclusive rights vested in the said copyright owner.

In *Kelly v Arriba Soft Corp.*<sup>4</sup>, the plaintiff, Leslie Kelly, a professional photographer who had copyrighted many of his images of the American West. Some of these images were located on Kelly's website or other websites with which Kelly had license agreement. The defendant, Arriba Soft Corp. operated an Internet search engine that displayed its results in the form of small pictures rather than the more usual form of text. Arriba obtained its database of pictures by copying images from other websites. By clicking on one of these small pictures, called *'thumbnails'*, the user could view a large version of that same picture within the context of the Arriba web page. The circuit court held that *"the creation and the use of the thumbnails in the search engine is a fair use, but the display of the larger image is a violation of Kelly's exclusive right to publicly display his works."*

As opposed to the primitive system of dealing with physical copies of copyrighted content which allowed right-holders to keep track of the use of their copyrighted materials, cyberspace has introduced a system that allows unprecedented replication, spread, reproduction and sale of content within mere seconds without

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<sup>3</sup>Bently, Lionel and Sherman, Brad (2009), Intellectual Property Law, 3rd ed., Oxford: Oxford University Press

<sup>4</sup>280 F. 3d 934 (9<sup>th</sup> Cir 2002)

adversely affecting the quality of such content. As a result, the market for such copyrighted content gets hampered, as does the copyright owners' right to share the revenues accrued from exploitation.

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## **1.4 INTERFACE OF CYBER LAW WITH TRADEMARKS AND DOMAIN NAMES**

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Trademarks, as commonly understood are marks representing goods and/or services or chains thereof graphically or otherwise, thereby allowing consumers to identify goods and services as well as distinguish between goods and services of similar nature and kind. The Trademarks Act, 1999 aims at acknowledging the rights of registered trademark owners and restricting fraudulent exploitation of the goodwill of one chain of goods/services by another similar chain. One of the basic functions of trademark from the perspective of owner is to protect his goodwill in the market and from the customer's/user's perspective it enables them to distinguish goods and services in the market. However, the evolution of cyberspace has given rise to ample scope of misuse of such trademarks by unauthorized parties which in turn has resulted in misleading consumers and violating the rights of the original trademarks.<sup>5</sup> In *Uniply Industries Ltd. V Unicorn Plywood Pvt. Ltd.*<sup>6</sup>, the Supreme Court has laid down test to determine continuous prior use for grant of temporary injunction in trade mark related cases. It has been observed that, *'some courts indicate that even prior small scale of goods with the mark are sufficient to establish priority, the test being to determine continuous prior user and the volume of sale or the degree of familiarity of the public with the mark. Bona fide test of marketing, promotional gifts and experimental sales in small volume may be sufficient to establish a continuous prior use of the mark.*

Domain names have become a kind of 'e-commerce marks' in the online medium. These are digital business addresses – a point of business contact or transaction. Domain names provide a system of easy-to-remember Internet addresses, which can be translated by the Domain Name System (DNS) into the numeric addresses (Internet Protocol (IP) numbers) used by the network.

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<sup>5</sup>Drahos, Peter (1996), A Philosophy of Intellectual Property, Aldershot: Ashgate

<sup>6</sup> (2001) 5 SCC 95.

The inter-relationship between trademarks and cyberspace was developed in exclusive association with the concept of domain names.<sup>7</sup> In simple words, domain names represent the IP address used in surfing the world wide web. It is owing to use of domain names on cyberspace that the strictly territorial nature of trademarks has now broadened to become global. While on one hand such domain names may refer to internet based digital platforms associated with certain goods and/or services and in turn substantiate the commercial prospects of online businesses, on the other, they would be indicative of the identity, goodwill and quality complimenting such goods and/or services. Evidently, misappropriation of domain names could not only cause immense damage to the business of infringed chain of goods/services, they could completely destroy the goodwill associated with such brands which may have taken ages to build.<sup>8</sup> Additionally, domain name registrations being done on a 'first come first served' basis, there are various instances of fraudulent registration of domain names whereby the party registering, in spite of having no legitimate interest in the brand, deliberately infringed the rights of the original trademark owners to acquire registration in an unauthorized manner. Infringement of trademarks through abuse of domain names on cyberspace is hence a very serious concern for flourishing trades and businesses.

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## **1.5CYBERSQUATTING**

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Cybersquatting, which literally means 'sitting on another person's property', may be described as instances of fraudulent use and misappropriation of domain names which involve exploitation of online identities of brands that result in violation of rights of the original right-owners. Cybersquatting often give rise to situations wherein parties who have no legitimate rights in certain trademarks get domain names registered in their names and subsequently sell those to the original owner or other parties at exorbitant prices. It may be done inter alia with the intent of preventing the original owner of brands from having access to such domain names, diverting the traffic off the cyberspace associated with the websites of competing brands, and

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<sup>7</sup>Drahos, Peter (2002), 'Developing Countries and International Intellectual Property Standard-Setting', 5(5) The Journal of World Intellectual Property, 765-789

<sup>8</sup>Easton, Catherine R. (2012), 'ICANN's core principles and the expansion of generic top-level domain names', 20(4) International Journal of Law and Information Technology, 273-290

selling such domain names to earn profits. Evidently, cybersquatting has the potential to cause activities leading to cyber wars.

In India, there is no statutory provision to prevent cybersquatting; however, certain provisions of the Trademarks Act, 1999 are broad enough to address such issues. Cybersquatting can be protected within the legal framework of 'passing off' which emerges from common law principle. Consequently, any person lodging a complaint against cybersquatting necessarily involves the mandate of establishing the following

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- a) Dishonest intention of the fraudulent party
- b) Absence of legitimate rights being held by the fraudulent party
- c) Similarity between the domain name fraudulently registered and the trademark owned by the authentic right-holder

The first Indian case that extensively discussed issues of domain name disputes vis-à-vis cybersquatting was *Yahoo Inc. v Akash Arora (78(1999) DLT 285)*,<sup>9</sup> wherein, the defendant contended having used a common dictionary word and having provided a disclaimer in the website with the intention to avoid confusion being created with the plaintiff's website which was registered in more than 69 countries. However, the court held that despite such disclaimers, there would be necessary associations made with the original website of yahoo which was based in a well-known and distinct trademark. Subsequently, in the case of *Tata Sons Ltd. &Anr.v. ArnoPalmen&Anr.*,<sup>10</sup> the Delhi High Court dealt with a landmark case on domain name disputes and cybersquatting. The plaintiffs sought permanent injunctions against the defendant's use of the domain name 'www.tatainfotech.in' or such domain names deceptively similar to the plaintiff's registered trademark which, they alleged, had been registered only with the intention of earning illegal gains by commercially exploiting the same. The defendant however, argued that 'Tata Infotech' had been their trade name since 1997, and claimed to have earned a goodwill in the trade owing to a flourishing business. The court held that similarity in domain names could indeed result in diversion of traffic across websites, and could even cause economic loss to the registered right-holders of the original trademark

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<sup>9</sup>Yahoo Inc. v Akash Arora (78(1999) DLT 285)

<sup>10</sup>Tata Sons Ltd. &Anr. v. Arno Palmen&Anr 2013(54) PTC 424 ( Del)

owing to the outreach of e-commerce and cyberspace. It was hence held that the impugned website had been registered with mala fide intentions in bad faith with the sole objective of acquiring advantage from exploitation of the plaintiff's registered trademark.

There are also instances called 'Reverse Domain Name Hijacking', wherein, parties come up with false allegations of cybersquatting against rightful owners through legal actions, as a result of which, such rightful owners end up transferring their rights to the fraudulent claimants for the sake of avoiding legal costs. Cases of reverse domain name hijacking hence has been seen to happen majorly against small entities or individual owners of trademark who often lack the financial strength to take up expenses involved in litigation.

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## **1.6DISPUTE RESOLUTION IN CYBER LAW LEARNING OBJECTIVE**

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Resolution of disputes arising from use of cyberspace beings forth some basic problems which are critical to address. Owing to the global outreach of cyberspace, there often arise instances wherein the potential parties involved in a cyber dispute are residents of two different countries. Further complications arise when the dispute occurs in a territory which is different from the country of origin of either of the parties involved in the dispute. Such situations give rise to critical questions of jurisdiction which become difficult to resolve. Additionally, in cases where the disputes concern the technology and/or its rapid advancement, the law often fails to keep pace with such upgradations and succumbs to the gap which takes substantial time to be bridged. For example, by the time a court of law successfully passes a decision on a specific dispute, the technology might have become outdated and irrelevant.<sup>11</sup>

In an attempt to reduce the confusion, several jurisdictions have come up with their own territorial laws to tackle disputes relating to cyberspace wherein specific situations of jurisdictional issues are addressed to address cyber crimes. Additionally, principles of private international law gain relevance in the context of disputes arising from cyberspace, and have served as effective in establishing successfully resolution. Private International law being flexible and laden with doctrines and principles, situations causing cyber disputes are subjected to tests and

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<sup>11</sup> Ethan Katsh and Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace (Jossey-Bass, San Francisco, 2001) at 26 [Katsh and Rifkin].

approaches for analyzing which principle or doctrine would ideally apply. Furthermore, mechanisms of additional dispute resolution such as arbitration, mediation, negotiation, etc. often serves as effective in resolving disputes arising from use and exploitation of cyberspace.

The Judicial dispute resolution under Trademark Dilution Act and Anti Cybersquatting Prevention Act has been primarily performed by the US Courts, whereas non-judicial dispute resolution under UDRP has been done by following ICANN approved dispute-resolution service providers<sup>12</sup>:

- Asian Domain Name Dispute Resolution Centre (ADNDRC)
- CPR Institute for Dispute Resolution
- National Arbitration Forum
- World Intellectual Property Organization

In India, the Information Technology Act, 2000 attempts to address cybercrimes and disputes and provides for quasi-judicial bodies to be established for unencumbered dispute resolution. As per the provisions of the Act, adjudicating officers are to hear disputes of both civil and criminal nature relating to cyberspace and adjudge such cases to ward damages in civil remedies or impose penalties in case of criminal offences being committed. The Act further allows appeals being filed before the Cyber Appellate Tribunal and subsequently before the High Court address disputes involving cyber law.

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## **1.7 CONCLUSION**

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Over the last couple of decades, intellectual property has become assets owned by the right-holders. There is no denying the necessity of protecting intellectual property on or off cyberspace, for it acts as fuel for most modern trades. Owing to the exposure, outreach and enormity of cyberspace, content on the internet especially that including intellectual property requires all-round protection to restrict as well as remedy potential misuse. With the growth in technology, there is ever-increasing scope of new challenges emerging which might need advanced legal measures and stricter regulations for ensuring a balanced platform for all the interested parties

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<sup>12</sup>eResolution [eRes] (approved effective 1 January, 2000; not accepting proceedings commenced after 30 November, 2001).

involved. Cyberspace needs to be bound by specific legal regulations today, more than ever.

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## **1.8LET'S SUM UP**

In this chapter, we have studied about the interface of cyber law with respect to copyright and trademark law along with case laws pertaining to it. In furtherance, we have also seen an overview about cybersquatting and the dispute resolution in cyber law.

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## **1.9FURTHER READING**

- Dr. Farooq Ahmad, Cyber Law in India, New Era Law Publications, Edition 4th, 2011
- RohasNagpal, Intellectual Property Issues and Cyberspace, Asian School of Cyber Law Publication,Pune,2008
- S. K. Varma& Mittal, Legal Dimensions of Cyberspace, Indian Law Institute, New Delhi, 2003
- V.K. Ahuja, Intellectual Property Rights in India, Lexis Nexis Butterworth's Wadhwa, Nagpur, 2009

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## **1.10CHECK YOUR PROGRESS: POSSIBLE ANSWERS**

1. How does copyright law overlap with cyber laws?

Copyright law aims to foster creativity and innovation which the copyright owner and/or holder may subject to commercial exploitation. Cyberspace serves as the perfect medium for fulfilling such purposes. However, copyright law has suffered extensively as a result of exposure to emerging technologies by adversely affecting copyright owners through easy access of content and elimination of the distinction between private and public use so as to result in copyright infringement and the dilution of the grounds thereof. This is how cyberspace and cyber laws overlap share an interface with copyright laws.

2. How are trademarks and domain names related to cyber laws and cyberspace?

Domain names represent the IP address used in surfing the world wide web owing to which, the strictly territorial nature of trademarks has now broadened to become global. In the developing cyberspace, misappropriation of domain names not only cause immense damage to the business of infringed chain of goods/services, but



also destroys the goodwill associated with such brands completely. Cyber laws attempt to address such misappropriation.

### 3. What is cybersquatting?

Cybersquatting refers to the act of registering names of well-known companies and brands as domain names by fraudulent entities with the malafide intention of reselling the same elevated prices for making profits.

### 4. Describe the process of dispute resolution associated with cyber crimes and cyber laws?

Owing to the global outreach of cyberspace, individual jurisdictions have come up with their own territorial laws to tackle disputes relating to cyberspace wherein specific situations of jurisdictional issues are addressed to tackle cyber crimes. Additionally, principles of private international law also become relevant and serve as effective in arriving at successful resolutions. Furthermore, mechanisms of additional dispute resolution such as arbitration, mediation, negotiation etc. often serve to be effective in resolving disputes arising from the use and exploitation of cyberspace.

### 5. How does the Information Technology Act, 2000 address resolution of disputes associated with cyber crimes?

The Information Technology Act, 2000 attempts to address cybercrimes and disputes through quasi-judicial bodies to be established such dispute resolution. As per the provisions of the Act, adjudicating officers are to hear disputes of both civil and criminal nature relating to cyberspace and adjudge such cases to ward damages in civil remedies or impose penalties in case of criminal offences being committed. The Act further allows appeals being filed before the Cyber Appellate Tribunal and subsequently before the High Court address disputes involving cyber law.

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## **1.11 ACTIVITY**

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Elaborate the Intellectual Property issues in cyber law? (1500-2000 words)

# Unit 2: Usage of Internet and the Evolving Challenges of IPR Issues in India

## 2

### Unit Structure

2.1 Learning Objectives

2.2 Introduction

2.3 Present issue of IPR in India in light of Internet usage

2.4 Exploring the idea of liability

2.5 Internet and its impact

2.6 Let's sum up

2.7 Further reading

2.8 Check your progress: Possible Answers

2.9 Activity

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## 2.1 LEARNING OBJECTIVE

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In this chapter, we will learn-

- To review the existing issue on IPR issues in India
- To study the existing IPR issues evolving from the unawareness of cyber laws.
- To evaluate whether increased usage of the internet shall create new IPR issues in India

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## 2.2 INTRODUCTION

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For an intellectual property right controller, the Internet presents two fundamental challenges: what to manage and how to administer. The increased usage of the Internet is expected to pose a greater threat to IPR security than it does now. While the Internet is poised to take off in the world, there are no realistic solutions to the intellectual property rights problems that it raises due to a scarcity of scientific expertise on the subject. There are already problems of intellectual property rights, but they are more theoretical than realistic.

The growing use of the internet carries with it concerns of intellectual property rights (IPR) security, which is critical in the current environment. Currently, the country is unfazed by the vast challenge of infrastructural growth required for Internet availability, and thus this requirement can be met in a matter of years. The internet can be accessed from anywhere in the world. Priority issues include the laying of high-speed national broadband networks and the provision of adequate telephone lines.<sup>13</sup>

To allow Internet services, a large number of nodes have been deployed in over two dozen cities across the world. The government has granted appropriate permission to private firms to make Internet services accessible in order to speed up the process of provision of this sophisticated and fast means of the communication network. India would become a major Internet consumer in the world as a result of the entry of private Internet service providers, much as it did in the cable television service market. The increased usage of the Internet is expected to pose a greater threat to

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<sup>13</sup>Aggrawal, Artee& Trivedi, Jatin& Burman, Sucheta. (2015). Usage of Internet and the Evolving Challenges of IPR Issues in India: A Review. International Journal of Business Quantitative Economics and Applied Management research. 1. 1-10.

IPR security than it does now. While the Internet is poised to take off in the world, there are no realistic solutions to the intellectual property rights problems that it poses due to a lack of scientific expertise on the subject. There are already problems with intellectual property rights, but they are more theoretical than realistic.

The increased usage of the Internet is expected to pose a greater threat to IPR security than it does now. While the Internet is poised to take off in the world, there are no realistic solutions to the intellectual property rights problems that it raises due to a scarcity of scientific expertise on the subject. There are already problems with intellectual property rights, but they are more theoretical than realistic. This paper examines the current problems in the field of intellectual property rights that have arisen as a result of India's increased use of the internet.<sup>14</sup>

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## **2.3 PRESENT ISSUES OF IPR IN INDIA IN LIGHT OF INTERNET USAGE**

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Copyright law is currently the most important tool for dealing with IPR problems on the Internet. The Indian Copyright Act, which was first enacted in 1957. The Act has been amended five times since its enactment i.e., in 1983, 1984, 1992, 1994, 1999 and 2012. The Copyright (Amendment) Act, 2012 is the most substantial and in alignment with digital transformation in general and internet in particular. The Copyright Act is now considered a piece of law, and the general outlook is that the revised Act will be able to withstand copyright problems arising from emerging technology, particularly those arising from the Internet. The Act has adapted to the modern age by dropping some limiting clauses and phrases and extending the meanings of works like cinematograph films (motion pictures) and sound recordings (phonograms) to allow certain works in "any format" within their purview. It does not, however, cover all facets of the digital problems that are now surfacing. Establishing the distinction between proprietary and public use is one of the most significant copyright problems on the Internet. The Indian Copyright Act, like all copyright laws around the world, distinguishes between copying for public and private use.<sup>15</sup>

Reproduction for public use requires the consent of the right holder, while fair dealing for private use, study, critique, or evaluation is permissible by statute. With the

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<sup>14</sup> Barlow, J. P. (1995). Property and speech: Who owns what you say in cyberspace?, Association for Computing Machinery. Communications of the ACM, 3(12), 19.

<sup>15</sup> Maloney, M. C. (1997). Intellectual property in cyberspace. The Business Lawyer, 53(1), 225-249.

potential for an author to upload some copyrightable work to a large number of users concurrently over the Internet from the privacy of his or her house, and users being able to receive a perfect copy of the material sent simultaneously in their homes, this distinction becomes meaningless. Many people assume that a new generation of copyright norms is needed because the fine line between public and private lands is eroding. Another case in point is that of publishing.

Publishers of books and music have made their influence known since the arrival of the industrial revolution and the era of mass manufacturing. The value of their existence has grown to the point that authors cannot picture a future without them. The Internet has evolved into a powerful tool that has eliminated the middleman between a writer and his or her audience. An author's work is published on the Internet, and readers can access it directly. The Internet, by inspiring any writer to be a publisher, has once again served as an alarm bell, if not the death knell, for the publishing industry, which was born with the invention of the printing press.

This fact begs the question of whether making a job available on the Internet qualifies as a "publication." "Publication" for copyright purposes, according to the Indian Act, involves "making a work accessible to the public by issuing copies or communicating the work to the public." Because of its non-restrictive nature, this term can be interpreted as including electronic publishing and, as a result, "publication on the Internet." However, it will take a few years for electronic publication to make a significant impact in India. The fact that communicating over the Internet is "public contact" is still an open question. The Indian Act has a detailed description of the term "public contact." According to the Act, "communication to the public" requires "making any work accessible for public viewing, hearing, or enjoyment directly or through any means of presentation or diffusion other than issuing copies of such work, regardless of whether any member of the public necessarily sees, listens, or otherwise likes the work so made available."<sup>16</sup>

This description is sufficiently descriptive to include Internet-based communication within its framework. In view of this, Internet service providers in India would have a difficult time deciding who holds the rights to the Internet's content. Another issue is the proper distribution. The sales right in Indian law is also terminated after the first

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<sup>16</sup> Tanenbaum, W. A. (1998). The challenge of cyberspace intellectual property. *The Computer Lawyer*, 15(2), 14-18. Features, Design, Photography, Technology, and Publishing Editors. (1998, Apr07).

delivery, as it is in most copyright laws. In the current situation, a student can sell a used textbook, and a library can distribute the books it has bought to its members.

Since no single copy can be circulated without duplication on the Internet, dissemination is limited to reproduction. On the Internet, the question of the right to reproduction raises a number of fundamental issues. This stems from the very essence of Internet transmission. Any stage of transmission requires replication. Temporary copying (also known as caching) is an essential aspect of the Internet communication mechanism through which messages will not be able to pass across the networks to reach their intended destinations. And if a user just needs to browse, transient copying occurs on the user's screen.

Coverage of temporary reproductions was a hotly contested subject at the World Intellectual Property Organization (WIPO) Diplomatic Conference in December 1996, but the outcome has remained ambiguous to this day. Can a reproduction be prohibited where it happens in the context of permitted use of the work and its primary objective is to make the work available, or when the reproduction is of a temporary or incidental nature? According to Indian law, reproduction must take the form of a tangible entity, but it also requires "storing it in any medium through electronic means." Case laws are yet to specify whether reproductions happening in Internet interactions are protected by the law's right of reproduction, and once that occurs, views on temporary and permanent reproduction, as well as the validity of temporary reproduction, can differ.

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## **2.4 EXPLORING THE IDEA OF LIABILITY**

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The problem of responsibility is one of the most critical facets of copyright compliance. There is also the matter of responsibility for actions performed during the delivery of a legitimate (as opposed to an infringed) copy of a work. As previously mentioned, the question is heavily contingent on the judiciary's understanding of different legal rights. When the court decides that in-transit copying, for example, is a breach of a patent, concerns about responsibility emerge. Who should be made accountable? Who is responsible for dispatching the job, receiving it, or the Internet service provider? The solution may not be quick to come by. Another factor is the transmission of a directly infringed copy of work over the Internet. The central argument, in this case, is whether an Internet service provider should be found liable for a subscriber's copyright violation even though he is ignorant of the subscriber's

behaviour. The Indian Copyright Act assumes that the infringement or abetment of the infringement must be done “knowingly” by an individual in order to be deemed a copyright violation. There is a reasonable risk that an Internet service provider, who may not be aware of the subscriber’s copyright violation, may be excluded from prosecution and penalty because of the term “knowingly.”<sup>17</sup>

However, the above factor poses a new concern. Even if the Internet service provider is not found guilty under Indian law, he may be found guilty under the laws of another region. How does one control the internet, which by its very existence, is universal and cannot be limited by national borders? Since the networks are widely distributed around the globe, a message or piece of information may be sent via a variety of countries before reaching its final destination.

The Internet service provider may not be liable in the country of origin or the country of destination, however, he or she may be liable in a transfer country. This is a problem that affects the whole world. The regulation of national IPR legislation bound by federal authorities in the seamless world of the Internet poses challenging problems. As a result, international law cooperation is urgently needed in this area; if this is not achieved, the possibility of litigation in some countries will force the Internet service provider to review the content being distributed for copyright approval, causing a pause in the whole procedure. The challenge is to speed up rather than slow down the flow of information. Any important technical innovation triggers a trend change, and the Internet is no different. Better norms must be established to delegate obligations to the parties involved; an Internet service provider is not always an enabler of copyright infringement.

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## **2.5 INTERNET AND ITS IMPACT**

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Finally, we should state that the Internet as a medium is extremely complex. It is also expected to be widely used in India, with the government announcing ambitious plans to make it available throughout the world. This is a challenge that the private sector providers have taken very seriously. As newer technology present more nuanced problems to a society, the widespread use of the internet will pose a

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<sup>17</sup>Posch,RobertJ.,Jr. (1999). Will intellectual property rights diminish incyberspace? *Direct Marketing*, 61(9), 29-31.

significant danger to the current copyright act. The protection of the rights of service providers, producers of generated content, and customers is a major challenge and mission.

We have a clear understanding that the Indian copyright act, as amended, is capable of dealing with the above issues to a large degree, but there is still room for progress in this field. The IPR administrator faces a unique difficulty in balancing the rights of various Internet actors such as content companies, security providers, access providers, and so on. This must be accomplished without jeopardizing the free exchange of knowledge while still guaranteeing that the legitimate economic rights of intellectual property creators are not jeopardized. The Internet's IPR privileges are reliant on this. The task for the IPR administrator is to determine how to implement the IPRs on the Internet in the most cost-effective way after they have been determined.

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## **2.6 LET'S SUM UP**

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In this chapter, we have learned the scope of IPR in light of internet usage. Besides, we have also analyzed the existing legal framework in the said area along with its interface with international conventions. We have also studied the concepts like-publication, communication etc, as per Indian legislations.

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## **2.7 FURTHER READING**

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- Barlow, J. P. (1995). Property and speech: Who owns what you say in cyberspace? Association for Computing Machinery. Communications of the ACM, 3(12), 19.
- Cohen, J. B. (1996). Dilemma in cyberspace. Editor & Publisher, 129(51), 20-21.
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- Tanenbaum, W. A. (1998). The challenge of cyberspace intellectual property. The Computer Lawyer, 15(2), 14-18. Features, Design, Photography, Technology, and Publishing Editors. (1998, Apr07).



- Cohen, J. E. (1998). Lochner in cyberspace: The new economic orthodoxy of “rights management”. Michigan Law Review, 97(2), 462-563.
- Posch, Robert J., Jr. (1999). Will intellectual property rights diminish in cyberspace? Direct Marketing, 61(9), 29-31.
- Elsmore, M. J. (2000). The implications of intellectual property law for the auditing and protection of national and international brands: Part I. brands in cyberspace. Managerial Auditing Journal, 15(3), 116-132.

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## **2.8 CHECK YOUR PROGRESS: POSSIBLE ANSWERS**

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### **1. What is “publication”?**

“Publication” for copyright purposes, according to the Indian Act, involves “making a work accessible to the public by issuing copies or communicating the work to the public.” Because of its non-restrictive existence, this term can be viewed as including electronic publishing and, as a result, “publication on the Internet.”

### **2. What do you mean by “communication to public”?**

Whether or not any member of the public necessarily sees, receives, or otherwise likes the work so made possible, communication to the public involves making any work available for viewing, hearing, or enjoyment by the public directly or by any way of presentation or diffusion other than issuing copies of such work.”

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## **2.9 ACTIVITY**

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Elaborate upon the concept of liability in light of Intellectual property right and its related issues with internet usage. (Word count- 2000 to 2500)

# Unit3:CYBERSPACE–CONFLICTING JURISDICTIONAL SPHERES OF IPR

## Unit Structure

- 3.1 Learning Objectives
- 3.2 Introduction
- 3.3 What is Internet?
- 3.4 Jurisdiction in International law
- 3.5 Jurisdiction of copyright infringement on internet
- 3.6 Protection of copyright on Internet
- 3.7 Data protection on internet
- 3.8 Recent cases on internet jurisdiction
- 3.9 Let's sum up
- 3.10 Further reading
- 3.11 Check your progress: Possible Answers
- 3.12 Activity

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## 3.1 LEARNING OBJECTIVE

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In this chapter we will learn-

- How the traditional principles of jurisdiction are being adapted to amenability of jurisdiction of cyberspace-origin cases.
- About the existing IPR issues evolving from internet.
- About various provisions of law dealing with cyber related aspects.

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## 3.2 INTRODUCTION

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Cyberspace is a technically amorphous vacuum, and its jurisdiction encompasses many fields of law and policy, including intellectual property rights violations, which is highly nuanced by copyright jurisprudence, and trade-related concerns. In cyberspace, IP security is divided into four categories: copyright, data protection, trademark, service mark, trade name, and trade dress, and domain names. In light of competing arguments that are litigated in a conventional manner without a particular model of jurisprudence suitable for settlement of various jurisdictional problems arising from technical advancement, the jurisdictional sphere of cyberspace assumes prominence. A single transaction in cyberspace can be governed by the laws of at least three jurisdictions: (1) the user's home state/nation, (2) the server hosting the transaction's home state/nation, and (3) the laws of the state/nation that refer to the individual or company with which the transaction is conducted.<sup>18</sup>

Jurisdiction corresponds to judicial, legislative, and administrative independence and is a legitimate component of state sovereignty. Despite the fact that authority is a part of sovereignty, it is not synonymous with it. The rules of a country which have extraterritorial effects, stretching the country's authority beyond its sovereign and temporal boundaries. This is especially concerning because the Internet is a tool that does not specifically recognize sovereignty or national boundaries. There is no universally applicable international jurisdictional rule, and certain issues are usually treated as matters of violation of laws or private international law. For example, a website's content can be legal in one country but illegal in another. Judicial

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<sup>18</sup> Achieving legal and business order in cyberspace: A report on global jurisdiction issues created by the Internet, Business Lawyer, 55 (2000) 1801.

professionals are often faced with a conflict of law in the absence of a uniform jurisdictional code.

In the case of *United States v. Jake Baker*,<sup>19</sup> the defendant faced criminal prosecution for his online conduct, notwithstanding the fact that his case established a precedent for the right to free expression on the Internet. Furthermore, in the near past, a number of developers of peer-to-peer filesharing applications have been subjected to federal litigation for copyright violations. When these suits are international in scope, though, the scheme becomes incompatible. Simply put, what is lawful in one country can be unlawful in another. In reality, in a civil case, even separate requirements for the presumption of evidence will create jurisdictional squabbles. Actually, the authority is determined by the location and operation of online groups, which is based on the minimal touch principle. The vanishing point in copyright jurisprudence is cyberspace. The union between the virtual and physical worlds is a fertile ground for the birth of new theories and vast explorations that span all aspects of living things. The relentless revolution in knowledge flow and communication technology is forcing a worldwide rethinking of the concept of intellectual property legal regime. Infringement of intellectual property rights on the Internet has reached previously unheard-of levels. Standard forms of security such as copyrights, trademarks, licenses, applications, databases, and so on currently prove to be unable to address many of the issues, and no tailor-made alternatives seem to be on the horizon. This artistic illusion has impacted governments, companies, and people all over the world— particularly in a world where virtually every action is a copy, where creativity happens at a breakneck rate, and where knowledge is shared almost instantly and for free. These hydra-headed problems provide the developing world with the challenge of an incoming wave of structurally applied mechanisms, based on property rights and enforced by the world's most wealthy, intellectual property-exporting nations.

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### **3.3WHAT IS INTERNET?**

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The Federal Networking Council (FNC) overwhelmingly passed a resolution describing the word Internet on October 24, 1995. It defines the Internet as a global

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<sup>19</sup> *US v Jake Baker*, 890 F. Supp. 1375, 1381, 1997 Fed App. 0036P (6th Cir)

information system that (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; and (ii) can support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) offers, utilizes, or renders available high-level services layered on the communications and associated infrastructure listed herein, whether publicly or privately.

### ***Origin and Subject Matter of Disputes***

Conflicts in cyberspace may have a variety of causes. One significant and recurrent source is an Internet arrangement. While a website connecting arrangement is an example of an Internet-only agreement, Internet agreements do not often mean Internet-only agreements and also have other elements.<sup>20</sup> A few of the forms, such as the celebrity endorsement deal, have just a shaky Internet connection. Terms of use arrangements, video content licensing agreements, domain name acquisition agreements, website creation agreements, press releases for website milestones or announcements, privacy policy, Internet advertisement agreements, copyright and patent rights notices, website disclaimers, website contracts, and more are among the legal documentation required for websites.

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## **3.4 JURISDICTION IN INTERNATIONAL LAW**

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In international law, there are three forms of jurisdiction that are commonly recognized. There are: (1) the power to prescribe; (2) the power to enforce; and (3) the power to adjudicate. The following are the types of historically recognized bases of authority or doctrines in which a state may assert jurisdiction to prescribe a rule of law over an operation in international law: Subjective territoriality (b) reflective territoriality (c) nationality (d) security principle (d) passive nationality and (e) universality, with the stipulation that authority must be exercised in a fair manner.<sup>21</sup> The territoriality issue in cyberspace can be resolved by pointing to the 'law of the site,' i.e. the server where the website is physically stored. If applied literally,

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<sup>20</sup>Justice S. Muralidhar, Jurisdictional Issues in Cyberspace, THE INDIAN JOURNAL OF LAW AND TECHNOLOGY.

<sup>21</sup>Ms. Prevy Parekh, *Cyberspace And Jurisdiction*, JOURNAL ON CONTEMPORARY ISSUES OF LAW (JCIL) VOL. 2 ISSUE 5.

territorialization of cyberspace through its servers has a number of issues, including the existence of a webpage without its accessibility, constituents of a web page collected from other servers, links to other pages located in other countries, and the randomness and anonymity of cyberspace interactivity. The philosophy of foreign space, which includes outer space and the high seas, is based on nationality rather than territoriality. The relevant definition in outer space is the nationality of the vessel's registration, whether manned or unmanned, while on the high seas, the nationality of the vessel, or the "rules of the flag," is the predominant norm. A conflicting theory compares the high seas to a "floating island," with the jurisdiction falling under federal jurisdiction. Furthermore, the prevailing ideas of *res nullius* (a matter of no one) and *res communis* (a thing of all) confuse definitions of special significance in disagreements over international spaces (a common thing or common heritage of mankind).

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### **3.5 JURISDICTION IN COPYRIGHT INFRINGEMENT ON THE INTERNET**

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The following quote exemplifies how closely copyright and the Internet are linked: 'Since its inception, the Internet has been described as the biggest threat to copyright.' The Internet is awash in material, all of it protected by copyright to varying degrees. News stories, apps, books, screenplays, animations, videos, Usenet posts, and even email are examples of copyrighted works on the Internet. In truth, the frightening reality is that copyright law protects virtually everything on the Internet. That can cause issues for the unfortunate surfer'.<sup>22</sup>

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### **3.6 PROTECTION OF COPYRIGHT ON THE INTERNET**

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Electronic copyright is a modern phenomenon that is emerging, and with it comes a legal shift in the field. Copyright covers the originality, underlying architecture, and contents of a webpage, including links, original text, images, audio, video, html and other markup language sequences, lists of websites assembled by a person or entity, and any other special elements that make up the material's original existence. There are some inherent limits of copyright rights. Only original means of presenting facts and concepts are preserved. Fair usage makes up almost half of the copyright law, which gives you restricted ability to use other people's art without their

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<sup>22</sup> The Copyright website, <http://www.benedict.com> (1 May 2010)

permission. Since terms like “fair” and “rational” are difficult to describe exactly, it is the least clear-cut copyright cap.

Films, tv programs, images, paintings, and artwork, including screenplays, teleplays, and blueprints, are all protected by copyright in the artistic domain. The main issue is combining all of the above without infringing on someone’s copyright with one or more of them. Many jurisdictions have a scheme for licensing internet works, which may or may not cover computer systems and automated databases, which have their own registration laws. Only the copyrightable content of the work identified as the subject of the copyright and deposited with the copyright office with appropriate application forms (US Circular 66) is protected. This includes literary works, visual art works, performing art works, sound recordings, serials and periodicals, and mask works, to name a few.

Apart from that, copyrights exist in software as well. The fundamental concept of English law, for example, is that the author of the code holds the copyright in the script or website. The fact that the individual commissioning the work has paid for it has no bearing on this. This law has two significant exceptions. To begin with, if the work was performed by a business employee, the copyright belongs to the boss. Second, the author has passed possession of the copyright by a signed contract that allows the author to delegate ownership to another person, typically the client.<sup>23</sup>

In spite of legal precedent, *Religious Technology Centre v Netcom*<sup>24</sup> and *Playboy Enterprises v Frena*<sup>25</sup>, two American cases dealing with Internet copyright problems, did not include international jurisdictional issues. Both cases involved American citizens prosecuting other Americans, who were both explicitly subject to American territorial control.

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### **3.7 DATA PROTECTION ON INTERNET**

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Purchasing directories, security cameras, cell phone monitoring, wiretapping, manipulation of medical records, genetic profiling, and other practices have jeopardized anonymity, the most basic civil right. Since servers regularly record information about users’ e-mail and web surfing activities, Internet service providers

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<sup>23</sup> Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 *Mich. Telecomm. & Tech. L. Rev.* 69, 72(1998)

<sup>24</sup> *Religious Technology Center v Netcom*, 907 F. Supp. 1367 (N.D. Cal 1995).

<sup>25</sup> *Playboy Enterprises v Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

can provide a lot of information about them. The European Court of Justice (ECJ) handed down decisions in four cases in November 2004 concerning the interpretation of the EU Directive on the Legal Rights of Databases, which gives the maker of a database a sui generis database privilege (as opposed to copyright) where there has been a substantial investment in either the acquiring, verification or display of the database's contents.

Now GDPR is the new development with respect to data protection. The General Data Protection Regulation (EU) 2016/679 (GDPR) is a regulation in EU law on data protection and privacy in the European Union (EU) and the European Economic Area (EEA). The GDPR's primary aim is to give individuals control over their personal data and to simplify the regulatory environment for international business by unifying the regulation within the EU. Superseding the Data Protection Directive 95/46/EC, the regulation contains provisions and requirements related to the processing of personal data of individuals (formally called data subjects in the GDPR) who are located in the EEA, and applies to any enterprise—regardless of its location and the data subjects' citizenship or residence—that is processing the personal information of individuals inside the EEA.

In India the Personal Data Protection (PDP) Bill, 2019 is the India's first attempt to domestically legislate on the issue of data protection. The Bill derives its inspiration from a previous draft version prepared by a committee headed by retired Justice B N Srikrishna.

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### **3.8 RECENT CASES ON INTERNET JURISDICTION**

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A French court<sup>26</sup> recently took control over Yahoo, an American internet news company, and ordered it to delete web sites containing Nazi memorabilia, which is illegal in France but legal nearly anywhere else. In a separate case<sup>27</sup>, a British court found a British citizen responsible for sharing images on an American web server that were deemed indecent in the UK but not in the US.

In the case of **United States v Galaxy Sports**<sup>28</sup>, an American court found the president of an Antigua-based gaming corporation responsible for soliciting and

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<sup>26</sup> LICRA, French Union of Jewish Students v Yahoo Inc USA, Yahoo France, Tribunal de Grande Instance de Paris, Interim Court Order, November 2000.

<sup>27</sup> R v Waddon [2000] All ER (D) 502.

<sup>28</sup> United States v Galaxy Sports, US Department of Justice, (28 Feb 2000), <http://www.usdoj.gov/criminal/cybercrime/cohen.htm> (8 March 2010).



taking bets from Americans over the Internet, notwithstanding the fact that this principle may be harmful to the principles of comity, sovereignty, and economic ties in the era of free trade. In the lack of a long-term solution to the hydra-headed problems arising from the integration of more and more gadgets into the cyber world, a temporary solution must be sought. The United States District Court for the District of Virginia recently found that it had “In rem Authority” over domain name registrants residing in other countries who were guilty of cyber squatting in Virginia. It was not a contentious situation. Summary judgment was given to the appellant, setting a high bar for the application of the US Anti-Cybersquatting Act and the authority of US courts over international cyber squatters. The claimants in this lawsuit, Atlas Copco AB and Atlas Copco North America LLC<sup>29</sup>, were the owners of a registered trademark in the United States. Atlas Copco filed a complaint against the defendant’s domain names: Atlascopcoiran.com, Atlascaspian.com, Atlascaspian.net, Atlascaspian.org, Atlascaspian.biz, Atlascapianir.com, Atlascaspianiran.com, Atlascap1an.us, Atlascapian.cc, Atlascaspian.tv, and Atlas-caspian.com, alleging that the defendant’s domain names: Atlascopcoiran.com, AtlascaspianThese domain names’ registrants tended to be from Iran, Afghanistan, or India. Nonetheless, the domain name registries were based in Virginia and were subject to the jurisdiction of this Court. Long-arm authority was not activated because the registrants did not have adequate connections with the department. Citing Continental Airlines Inc v ContinentalAirlines.com<sup>30</sup>, the Court reasoned that it had in rem authority over the defendants. The Anti-Cybersquatting Act has now been shown to have the tentacles to capture cyber squatters finding paradise in international jurisdictions, and this concept should be embraced and emulated by other countries as well.

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### **3.9LET’S SUM UP**

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We learned an outline of some terminology and legal issues relating to cyberspace in this chapter, and it then goes on to address the four clusters, including copyright, data security, trademarks, and domain names, with a focus on how conventional jurisdictional rules are being extended to jurisdiction in cyberspace root cases.

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### **3.10FURTHER READING**

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<sup>29</sup> Atlas Copco v AtlasCopcoiran.com, 533 F. Supp. 2d 610 (ED Va. 2008).

<sup>30</sup> Continental Airlines Inc v ContinentalAirlines.com, 390 F. Supp2d, 507 (E.D. Va. 2005).

- CompuServe Inc v Patterson, 89 F.3d 1257, 39 U.S.P.Q.2d (BNA) 1502 (6th Cir 1996).
- Zippo Manufacturing Co v Zippo Dot Com Inc, 952 F. Supp. 1119 (W.D. Pa. 1997).
- LG Berlin 97O193/96 (Nov. 20, 1996), aff'd, KG, 5U659/97 (March 25, 1997).
- Citigroup Inc v City Holding Co, 97 F. Supp. 2d 549 (S.D.N.Y. 2000).
- Mink v AAAA Dev LLC, 190 F.3d 333 (5th Cir. 1999).
- Bensusan Restaurant Corp v King, 937 F. Supp. 295 (S.D.N.Y. 1996).
- Tech Heads Inc v Desktop Serv 105 F. Supp. 2d 1142 (D. Or. 2000)

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### **3.11 CHECK YOUR PROGRESS: POSSIBLE ANSWERS**

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#### **1. What is internet?**

The Internet is a global information system that is logically connected by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) can support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure.

#### **2. What are the categories of jurisdiction in International law?**

In international law, there are three forms of jurisdiction that are commonly recognized. There are: (1) the power to prescribe; (2) the power to enforce; and (3) the power to adjudicate.

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### **3.12 ACTIVITY**

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Provide a detailed account of International jurisdiction under cyber space with respect to Internet. Substantiate it with relevant case laws. (2000 to 2500 words)

# Unit 4: CYBERSECURITY AND THE THEFT OF INTELLECTUAL PROPERTY ONLINE

## 4

### Unit Structure

- 4.1 Learning Objectives
- 4.2 Introduction
- 4.3 Protocols
- 4.4 Key documents
- 4.5 Current issues
- 4.6 Partnership and actions to combat cybercrime
- 4.7 Future outlook
- 4.8 Let's sum up
- 4.9 Further reading
- 4.10 Check your progress: Possible Answers
- 4.11 Activity

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## 4.1 LEARNING OBJECTIVE

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In this chapter we will learn-

- The strategies to ensure cyber security and its related aspects with IPR.
- The relevance of international measures to make safer cyber space.
- The steps needs to be taken in form of policy formation to protect intellectual rights.

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## 4.2 INTRODUCTION

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Digital globalization has exploded in recent years, linking millions of people through information and communication technology (ICTs). Borderless trade options are becoming more prevalent, which is usually a good thing. Increased adoption of ICTs, on the other hand, is linked to higher rates of cybercrime. According to the United Nations Office on Drugs and Crime (UNODC), the number of internet-connected computers will outnumber humans six to one by 2020. This hyper-connectivity would inevitably lead to higher rates of cyber crime, as well as a correlation between traditional crime and the digital world. It is difficult to assign a territorial authority to cybercrime because of the multinational existence of ICTs. In order to adequately counter cybercrime in regards to intellectual property, the international community must collaborate and cooperate.<sup>31</sup>

Intellectual property rights are “legal rights that cover innovations and/or discoveries arising from intellectual activity in the technological, science, literary, or artistic fields,” according to the International Telecommunication Union (ITU). Intellectual property rights encompass a wide range of topics, from sculpture, the Olympic Rings, and research on microorganisms. For a set amount of time, these rights normally grant the artist full use of their work.

Cybercrime is difficult to define since it is so context-dependent. According to the UNODC, the spectrum of computer-related actions of personal, financial, or intellectual advantage or damage is so vast that combining them into a single definite and encompassing word is difficult. Cybercrime can damage any kind of online

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<sup>31</sup>Loza de Siles, Emile. (2015). Cybersecurity and Cybercrime: Intellectual Property and Innovation. American Bar Association / Landslide. 2015. 6. 10.2139/ssrn.2644365.

property, making it a major problem for businesses and governments alike. While it can be difficult to describe cybercrime, its effect is undeniable. Cybersecurity threats have resulted of a trillion-dollar industry in lost intellectual property due to imitation and pirated products. The method of determining the extent of cybercrime is extensive and complex. When attempting to detect, counteract, and defend against cybercrime, scale, motive, meaning, and jurisdiction must all be taken into account. Because despite the exponential advancement in technology, the international community is also grappling with the effects of cybercrime on global businesses and property holders.<sup>32</sup>

Theft of intellectual property costs billions of dollars to copyright holders and legal companies all over the world. Theft of intellectual property further threatens invention and ingenuity by discouraging copyright due to the pervasive existence of this illegal enterprise. It also puts consumers' health and welfare at risk by overwhelming the market with counterfeit pharmaceuticals. By leveraging financial benefits from counterfeit drugs, these activities help finance transnational organized crime networks. Aside from the direct consequences of intellectual property piracy, there are a slew of other problems to consider. These include the theft of personal identity and financial records, the reduction of commercial market advantages, reduced product or service viability, and the failure of a business attributable to counterfeit goods.<sup>33</sup> It also results in significant financial losses for victims after the reality. Intellectual property piracy has a long-term effect on businesses and states, owing to court fines, cybersecurity lawsuits, missed contracts, and public relations expenses. The Special Event on Cybersecurity and Development was organized in 2011 by the Economic and Social Council, in collaboration with the United Nations Department of Economic and Social Affairs and the International Telecommunication Union. This panel discussion aimed to raise awareness of cybercrime at the foreign policy level, recognize best practices for fostering a cybersecurity community, and consider strategies for a global response to cybercrime. Cybercrime is multifaceted, and the cybersecurity panel recognized the value of cooperation among Member States, the

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<sup>32</sup> See, e.g., The Estonia Model: Why a Free and Secure Internet Matters, WOODROW WILSON INT'L CENTER FOR SCHOLARS (Apr. 21, 2015), <http://www.wilsoncenter.org/event/the-estonia-modelwhy-free-and-secure-internet-matters>.

<sup>33</sup> See Improving Critical Infrastructure Cybersecurity, Exec. Order No. 13,636, 78 Fed. Reg. 11,739 (Feb. 19, 2013).

private sector, civil society, and law enforcement to develop a holistic solution to the problem.

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## **4.3 PROTOCOLS**

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Any breakthrough in the world of innovation faces a variety of threats. The web is one such vulnerability that has engulfed the actual commercial centre and transformed it into a virtual one. In order to secure the corporate interest, it is important to establish a powerful property management and insurance instrument, bearing in mind the huge amount of business and commerce that takes place in cyberspace. Today, any company must develop a powerful and widespread IP management system and insurance protocol. The robotic world's constantly approaching threats will, therefore be able to be tested and contained.<sup>34</sup>

There could be important protocols for ensuring cybersecurity, which include the following –

- Creating a Secure Cyber Ecosystem
- Creating an Assurance Framework
- Empowering Open Standards
- Strengthening the Regulatory Framework
- Creating IT Security Mechanisms
- Securing E-administration Services
- Assuring Critical Information Infrastructure

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## **4.4 KEY DOCUMENTS**

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The Copyright Treaty of the World Intellectual Property Organization (WIPO) is the cornerstone text in terms of intellectual property rights (WCT). The first is that writers, musicians, and recording producers shall have the freedom to store their works in digital form. The owner's right to disseminate work digitally to the public through the

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<sup>34</sup> See Cybersecurity: How to Keep You and Your Clients from Becoming Tomorrow's Headlines, A.B.A. (Aug. 1, 2015), [http://www.americanbar.org/news/abanews/aba-newsarchives/2015/08/cybersecurity\\_howt.html](http://www.americanbar.org/news/abanews/aba-newsarchives/2015/08/cybersecurity_howt.html); Matthew Goldstein, Citigroup Report Chides Law Firms for Silence on Hackings, N.Y. TIMES, Mar. 26, 2015, [http://www.nytimes.com/2015/03/27/business/dealbook/citigroup-report-chides-law-firms-for-silence-onhackings.html?\\_r=0](http://www.nytimes.com/2015/03/27/business/dealbook/citigroup-report-chides-law-firms-for-silence-onhackings.html?_r=0) (discussing internal April 2015 report by Citigroup's Cyber Intelligence Center).

internet is the second concept. The third step is to use appropriate legal remedies to shield these multimedia works against unauthorized copying, sharing, or selling. The WIPO's Performances and Phonograms Treaty also acts as an outline of how to compose an intellectual property document for an emerging medium and how to deal with the interests of interactive media beneficiaries.

The UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications (GGE) is a UN-mandated working group that has contributed to the development of the global cybersecurity agenda and adopted the concept of international law applying in digital contexts. Each meeting is followed by the development of a consensus paper, which has been lauded for its diversity of views, advice, and coverage of contentious topics. The group's recommendations for confidence-building interventions, capacity-building efforts, and infrastructure security are included in each study. Although the GGE's membership is comparatively limited, the association has made considerable strides in developing international cybercrime and cyber security norms.

The ITU convened the World Summit on the Information Society (WSIS) to facilitate equal access to the benefits of ICTs, such as e-commerce, e-governance, e-health, education, economic growth, diversity, and environmental conservation. The Geneva Declaration of Principles and Geneva Plan of Action from WSIS' first and second phases, respectively, the Geneva Declaration of Principles and Geneva Plan of Action from 2003 and the Tunis Commitment and Tunis Agenda for the Information Society from 2005, place a strong emphasis on growth, capacity-building, openness, and confidence-building steps to increase access to ICTs and cybersecurity.<sup>35</sup>

The Geneva documents are foundational documents that set out the international community's priorities, challenges, and objectives. The Tunis papers are more actionable in general, as they include detailed strategies for carrying out the obligations outlined in the Geneva Declaration of Principles and Plan of Work. The Council of Europe's Convention on Cybercrime is a valuable regional paper on cybercrime and its prevention. This is the first multinational treaty dealing specifically with cybercrime. It specifically addresses patent theft, computer-related fraud, and network protection breaches. The key goal of this convention is to pursue a universal

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<sup>35</sup> Cyber Crime: Modernizing Our Legal Framework for the Information Age, Hearing Before the Subcomm. on Crime & Terrorism, of the S. Comm. on the Judiciary, 114th Cong. 3 (2015) (statement of David M. Bitkower, Deputy Assistant Att'y Gen., Criminal Div., Dep't of Justice), <http://www.justice.gov/opa/file/627486/download>

crime reduction strategy aimed at preventing cybercrime, especially through the adoption of relevant legislation and the promotion of international cooperation.

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## **4.5 CURRENT ISSUES**

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While the international community has many means to fight cybercrime, there are few manuals and instruments to direct their acts. Currently, the proposed international system for cybercrime in relation to intellectual property legislation is used in the broader definition of cybersecurity. The ITU is a member of the International Multilateral Partnership Against Cyber Threats (IMPACT), which is the world's biggest cybersecurity coalition. It's a networking forum for sharing cybersecurity best practices. IMPACT and the ITU collaborate to bring together the expertise of government, academics, business executives, and individuals to ensure global cybersecurity. The ITU has charged IMPACT with providing Member States with access to cyber threat experience, services, and infrastructure. It also aids UN organisations in safeguarding their information technology resources.

- ***Challenges of promoting cybersecurity***

Because of the complexities of cybersecurity, the international community faces many obstacles in combating cybercrime in relation to intellectual property rights. There are several issues that the international community as a whole must solve, as well as issues that Member States face on an individual basis. When a cybercrime happens, determining the magnitude of the damage is virtually impossible. This is attributed to a scarcity of accurate data and the absence of mechanisms to collect it. The fact that this is a transnational problem adds to the difficulty of solving such crimes. Huge economic inequalities exist between developing and developed nations, making it difficult for them to catch up with their advanced equivalents. Developing countries also lack the resources to fight cybercrime.

Since developed countries have little detection systems, they may become "safe havens" for cyber criminals. The lack of collaboration and collaboration between developed and developing countries exacerbates the problem. The ITU has created a guide for developed countries called *Understanding Cybercrime: A Guide for Developing Countries* in order to assist in tackling the issues that the international community is facing. Legislation, strengthened law enforcement, capacity building,



and preparation are some of the national and multilateral solutions to such problems. Such policies, on the other hand, cannot be implemented without adequate crime prevention and criminal justice programs, as well as the human capacity, financial, and technological tools needed to tackle cybercrime. Member States seeking assistance in areas such as access to ICTs and establishing better cybersecurity are supported by the ITU. - case is treated independently and begins with a review of the country's current ICT situation. The ITU will then include a customized guide to help the Member State achieve its ICT objectives. These roadmaps tailor capacity-building plans and provide guidance on policies that can be used to improve cybersecurity.<sup>36</sup>

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## **4.6 PARTNERSHIPS AND ACTION TO COMBAT CYBERCRIME**

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A lot of work has been done on this subject in the private sector and in academia. In addition, private sector organisations see cybercrime involving intellectual property as a larger concern than Member States. There is now a wide movement within academia to not only consider cybercrime phenomena, but also to create effective technologies to fight them. Non-profit organisations such as the Knowledge Technology-Information Exchange and Analysis Center, which aims to improve cybersecurity for businesses by fostering cooperation, intelligence sharing, and incident management, are now helping to tackle cybercrime.

This not only helps the private sector escape intellectual property piracy, but it also allows various actors to learn and exchange best practices, preventing potential abuse by both parties, public and private. Public-private partnerships are also essential in the development of cybersecurity strategies. These collaborations are critical for fostering cybersecurity and development, particularly in developing countries. Private businesses frequently have the capacity and capabilities to more efficiently fight cybercrime while also fostering benefits in the host country, such as economic growth and human resource development.

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<sup>36</sup> Nakashima, Ellen et. al. "Report: Cybercrime and espionage costs \$445 billion annually." The Washington Post. June 9, 2014. [https://www.washingtonpost.com/world/nationalsecurity/report-cybercrime-and-espionage-costs-445-billionannually/2014/06/08/8995291c-ecce-11e3-9f5c9075d5508f0a\\_story.html?utm\\_term=.2d356b0ec666](https://www.washingtonpost.com/world/nationalsecurity/report-cybercrime-and-espionage-costs-445-billionannually/2014/06/08/8995291c-ecce-11e3-9f5c9075d5508f0a_story.html?utm_term=.2d356b0ec666).

Cybercrime against intellectual property is considered a piracy problem by the International Police Organization (INTERPOL). Counterfeiting, piracy, and smuggling for tax avoidance are all considered illegal merchandise trafficking. As a result, INTERPOL will use all of its anti-trafficking capabilities to track down, interrupt, and shut down these activities. Supporting regional and global activities, capacity development and preparation, raising awareness, and offering legal assistance to Member States on request are INTERPOL's key activities against intellectual property cybercrime.<sup>37</sup>

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## **4.7 FUTURE OUTLOOK**

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On a global scale, there have been several debates about the implementation of an international conference on cybersecurity. In a perfect world, this convention will aim to harmonize national rules on cybercrime, such as copyright theft, hacking, and network security breaches. In order to promote the existence of binding treaties and further guidance, the GGE has also suggested the formation of a successor group.<sup>38</sup> The treaty will also support and reinforce efforts to fight cybercrime more quickly and efficiently than in previous years. Given the complexities of cybercrime and ICTs, however, such a treaty would almost certainly be complicated and take careful thinking and consideration. Professional assistance promotion, facilitation, and funding will further enhance those efforts, meaning that all Member States have the tools they need to mitigate the effect of cybercrime on intellectual property security.

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## **4.8 LET'S SUM UP**

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In this chapter, we have learned the possible steps, which can be taken to manage cyber security. Additionally, we have also analyzed the responsibility of international organisations and governmental institutions in ensuring cyber security and its aspects related to intellectual property rights.

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<sup>37</sup>Passman, Pamela. "How to Protect Intellectual Property: from Fair Trade to Legal Trade." Foreign Affairs. February 27, 2013. <https://www.foreignaffairs.com/articles/2013-02-27/howprotect-intellectual-property>.

<sup>38</sup> "The Information Technology – Information Sharing and Analysis Center." IT-ISAC. July 16, 2017. <https://www.it-isac.org/>.

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## 4.9 FURTHER READING

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- Taubman, A. (2009), 'International Governance and the Internet', in: L. Edwards and Ch. Waelde (eds), Law and the Internet, 3rd ed, Oxford and Portland, Oregon: Hart Publishing, pp. 3-44
- Torremans, Paul (2005), 'Authorship, ownership of right and works created by employees: which law applies?', 27(6) European Intellectual Property Review, 220- 224
- Vivant, Michel and Bruguière, Jean-Michel (2012), Droit d'auteur, 2nd ed., Paris: Dalloz
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- Rahmatian, Andreas (2009), 'Dealing with rights in copyright-protected works: assignments and licences', in: E. Derclaye, Research Handbook on the Future of EU Copyright, Cheltenham: Edward Elgar, pp. 286-316
- Rahmatian, Andreas (2011), Copyright and Creativity. The Making of Property Rights in Creative Works, Cheltenham: Edward Elgar

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## 4.10 CHECK YOUR PROGRESS: POSSIBLE ANSWERS

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### 1. Define Cybercrime

Cybercrime is difficult to define since it is so context-dependent. According to the UNODC, the spectrum of computer-related actions of personal, financial, or intellectual advantage or damage is so vast that combining them into a single definite and encompassing word is difficult. Cybercrime can damage any kind of online property, making it a major problem for businesses and governments alike. While it can be difficult to describe cybercrime, its effect is undeniable.

### 2. What could be possible protocol to ensure cyber security?

There could be important protocols for ensuring cybersecurity, which include the following –

- Creating a Secure Cyber Ecosystem
- Creating an Assurance Framework
- Empowering Open Standards

- Strengthening the Regulatory Framework
- The Creating IT Security Mechanisms
- Securing E-administration Services
- Assuring Critical Information Infrastructure

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## **4.11 ACTIVITY**

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In what ways might cybersecurity attacks on protected IP impact your Member State's social and economic landscape? (Word count- 2000 to 2500)

## **Block-2**

# **COPYRIGHT AND CYBER LAW**

# Unit 1: COPYRIGHT IN CYBERSPACE

## Unit Structure

- 1.1 Learning Objectives
  - 1.2 Introduction
  - 1.3 Copyright and its treatment in cyber space
  - 1.4 Peer to Peer file sharing
  - 1.5 Internet Service Provider Liability
  - 1.6 Let's sum up
  - 1.7 Further reading
  - 1.8 Check your progress: Possible Answers
  - 1.9 Activity
-

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## 1.1 LEARNING OBJECTIVE

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In this chapter, we will learn-

- The relationship between copyright and internet.
- The concepts of downloading, Peer-to-Peer sharing and other related aspects of copyrights on cyber space.
- Various legal provisions governing copyright on internet.

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## 1.2 INTRODUCTION

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Intellectual property rights are critical to the country's socio-economic and cultural growth. The evolution of the internet is humankind's greatest scientific accomplishment. The internet's unique capability to share insights, thoughts, and material in the form of images, graphs, and videos to any corner of the world in the same content in a fraction of a second. Infringement is on the rise as the usage of internet IPR grows. Linking, deep linking, uploading-downloading, copy-paste, and P2P file-sharing applications, which are often found on the internet, all require copyright problems. Protecting copyright in cyberspace is a huge problem for us because our copyright legislation, the Information Technology Act, does not relate to the changing new world because it is impossible to track down criminals in cyberspace due to the internet's extraterritorial authority. India is a signatory to the WIPO Internet Treaty, and the Copyright Act was amended in 2002 and 2012 to address internet concerns in order to satisfy international requirements. This provision, however, was insufficient to address the question of copyright rights in cyberspace. Copyright infringement poses a significant danger to all industrial sectors, including copyright, electronics, music, and the film industry, among others, and has a negative impact not only on owners' rights but also on the nation's economy. As a result, it is vital to fight internet piracy by maintaining effective copyright rights in cyberspace, which would automatically stimulate mankind's innovation. Around the same time, general knowledge and information about copyright are critical.

Patents, trademarks, architectural design, copyright, and proprietary documents all fall under the umbrella of intellectual property, which is a globally recognized

principle. Copyright is a crucial right in all forms of intellectual property protection because it prevents the illegal copying of original work. In the twenty-first century, the invention of new media has brought about fundamental improvements. Because of its attributes such as storing power, speed, intercreativity, interconnection, and operation beyond territorial boundaries, the internet presents many opportunities and challenges for copyright enforcement in cyberspace. It is very possible in cyberspace to take material from one platform and change and replicate it on another without revealing one's identity. Copyright Act, 1957 is revised from time to time for the defence of copyright, the most recent change being in 2012 to satisfy national and international specifications. While the Information Technology Act of 2002 exists, these statutes are unable to preserve copyright in cyberspace.

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### **1.3COPYRIGHT AND ITS TREATMENT IN CYBER SPACE**

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Copyright is similar to other property rights, such as title, in that the landowner owns everything on the land, from the sky to the grass. Copyright works on the same concept but with certain restrictions.<sup>39</sup> Copyright compliance in cyberspace is hampered by the use of computers, the internet, and streaming, copying, copy-cut-paste, deep linking, and peer-to-peer file sharing. The following are the problems posed in defence of copyright in cyberspace:

#### ***Uploading & Downloading***

Copyright infringement occurs when someone uploads proprietary works without permission. The standard of illegally downloaded songs, videos, and video games is bad, and it is punishable under India's Copyright Act. Even if he has not earned any financial benefit, the individual who posted the content is responsible. When an uploader uses his imagination to update, modify, or amend copyrighted content, he assumes responsibility. Illegal downloading is most common in the film, recording, music, gaming, and software industries. Piracy is a major issue in India's media and film industries, with copyright piracy costing the country \$4 billion per year. Only when a user prejudicially distributes, exhibits or lets for selling or employ copyrighted content without sufficient consent commits an offence, according to Justice Gautam Patel of the Bombay High Court.

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<sup>39</sup> <http://nopr.niscair.res.in>(Journal of Intellectual Property Rights, Vol.19, Sep.2014, pp307, Exploring Sovereign Immunity in Copyright Infringement: How India can learn from the Global Experience)



## ***Linking***

The world today is a worldwide web. The website provides a vast volume of material in the form of sentences, images, illustrations, audio, and other media. As a result, the copyright statute covers the website. The site's primary focus is on the electronic publication of this content. Designing or creating a website necessitates a significant amount of talent, labour, time, resources, and mental effort. As a result, preserving the website's intellectual property is important. Linking allows people to easily switch from one place to another and view information in a limited amount of time. It informs people about the life of work by including a clear website address. Linking is a feature that allows you to visit a third-party website by clicking on a location on the linking site without having to enter any location information or using a search engine.<sup>40</sup> Links are normally outlined, underlined, or conspicuous text or images. There are two ways of linking<sup>41</sup>:

1. Surface linking: Surface linking happens when a site's home page is linked.

2. Deep linking: Deep linking is where a connection skips the home page and goes directly to an internal page inside a favourite website. Only in regard to 'Deep connecting' do legal questions emerge, as this technology aids in the distribution of other people's artistic content. Copyright infringement is described as reproducing, issuing, or transmitting work to the public without authorization or consent, according to Sec.14,51. Deep linking sites are not specifically responsible for infringement since the duplication of work is performed by the individual who visits the linked website by the connection, not by the linking site.

Having any job available for the public to view, read, or enjoy directly or by any means of showing is considered contact to the public under Sec.2(ff). The Copyright Act does not expressly prohibit deep linking, but the phrase "by any means of view," as defined in Sec. 2(ff), includes sharing of a web site's contents over the internet. Communication of work without consent is considered copyright infringement under Section 51. It means that deep linking without the owner's consent is a kind of copyright infringement. Contributory Copyright Infringement happens when someone makes a link that is likely to facilitate unauthorized copying of copyrighted content,

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<sup>40</sup>Lw relating to computers Internet & E-commerce,Universla Law Publishing Co.New Delhi-India,AuthorNandan Kamat,pp197

<sup>41</sup> Legal Dimensions of Cyberspace,Edited by S.K.Verma& Raman Mittal,Indian Law Institute,New Delhi,pp-119.

and the person that created the link has cause to know about the unauthorized copying.<sup>42</sup> Some websites, such as Amazon.com, welcome linking or deep linking because it enhances traffic, advertisement prices, and sales.<sup>43</sup>

Linking, also known as deep linking, is a technique for gaining easy access to information. Bixee.com, without the consent of Naukari.com, allowed users to access these jobs directly on its website, bypassing Naukari.com's home page, resulting in financial losses for Naukari.com. On the grounds of copyright violation, an Indian court barred Bixee.com from deep-linking, copying, uploading, and reproducing material from Naukri.com's website. In a nutshell, deep linking without authority entails the electronic publishing of information, copying, and contact to the public without consent, all of which constitute copyright infringement.

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## **1.4 PEER TO PEER (P2P) FILE SHARING**

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In general, file sharing refers to the electronic sharing of multimedia media (music, audio recordings, movies, tv shows, games, and computer applications, for example). Peer-to-peer (P2P) is a means of sharing files without the use of a middleman server. P2P technology was not intended to make copyright piracy simpler, but it is now being used to distribute unlawfully copyrighted content. Some P2P technologies, such as Napster, Gnutella, and Kazaa, are well-known and enable users to share, distribute, and update files across the internet without sacrificing efficiency. MP3 technology entails compressing sound recordings to a tiny size and distributing them over the internet in a limited period of time. The growth of MP3 necessitated the creation of a mechanism for transferring files over the internet, which led to the creation of Napster.<sup>44</sup> Only music files, especially mp3 files, were associated with Napster. Following the installation of the Napster program, you were directly linked to Napster's central server, which only included a list of music files accessible on Napster members' computers.

Simply type the name of an album or an artist to get a list of what's available, and then stream music from another user's machine who is online in a matter of seconds. As a secondary infringer, the court ordered Napster to cease distributing stolen

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<sup>42</sup> <http://smallbusiness.findlaw.com>

<sup>43</sup> Legal Dimensions of Cyberspace, Edited by S.K. Verma & Raman Mittal, Indian Law Institute, New Delhi, pp-119.

<sup>44</sup> IP2P Networks : Online Piracy of Music, Films & Computer Software, Journal of Intellectual Property Rights, Vol 9, Sep. 2004, pp 442, Author-Raman Mittal (Keith Taylor, Piracy in Cyber space: The battle over digital music on internet, <http://guslaw.gus.edu/lawand/papers/fa02/taylor>)

music and close down its website. In India, anybody operating a network similar to Napster is liable under Sections 14 and 51(a)(ii) of the Copyright Act, 1957. It resulted in the collapse of Napster and the rise of stronger peer-to-peer networks. Every individual who permits any location to be used for the transmission of the work to the public where such communication constitutes an infringement is liable for copyright infringement, according to Sec.51(a)(ii). The word “any place” includes both physical and virtual places.<sup>45</sup> Infringement occurs as someone makes copies of a work or communicates the same work to the public, according to Sec.14.

In the case of Napster in India, someone who downloads and installs the program is making copyrighted work accessible to any member of the community who has the software installed on his computer. It suggests that Napster is promoting online contact and that transmitting proprietary content to the public is infringing under Sec. 14. The person who copies a patented work file is reproducing the work without the permission of the copyright owner. As a result, he has committed patent theft. P2P technology, in short, poses a challenge to the copyright industry, which includes the music, sound capture, and software industries, because it allows for the copying and sharing of copyrighted works over the internet.

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## **1.5 INTERNET SERVICE PROVIDER LIABILITY (ISP)**

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When we first began using the internet, the issue of ISP responsibility for copyright infringement emerged. ISPs are businesses or organizations that allow clients to link to the internet. In India, ISPs such as Airtel, Idea, and Telenor offer internet connections and other connectivity services to users. Any concerns have been raised about ISP responsibility for copyright violations, such as whether ISPs are held responsible for criminal acts committed by their users. And to what degree was it found to be infringing? Usually, copyright owners sue ISPs for enforcing their copyright because ISPs are more financially capable of paying fines than actual private users, and that has a deterrent impact on holding ISPs responsible. When a website has several users who are all allowed to upload or download content to and from that website, if you take action against one of them, another user can infringe the following day. However, if you take legal action against the ISP, you can uninstall

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<sup>45</sup> Legal Dimension of Cyberspace, Edited by S.K. Verma & Raman Mittal, Indian Law Institute, New Delhi, pp142

proprietary content from the website and advise their subscribers not to post illegal content. So, since the ISP dominates the network, it is very straightforward to protect copyright piracy by suing him personally.<sup>46</sup>

Different laws apply to ISP liabilities, including penal law, tort law, patent law, trademark law, and unfair competition law. There is no clause of the Copyright Act of 1957 that addresses the question of ISP liability. Sec.51(a)(ii) states that whenever any person permits for profit any place to be used for the transmission of work to the public where such communication constitutes an infringement of copyright unless he was not aware and has no reason to suspect that such communication would constitute an infringement of copyright.

Since computer servers and telecommunication facilities fall under ISP, which is a dimension of cyberspace, the term “every location” includes cyberspace, which contains ISP. So, under Sec. 51(a), ‘any position’ includes ISP (ii). Another phrase is “permits for profit,” which means that ISP profited financially from infringing practices. So, if ISPs bill for their services and others are free, they are indirectly profiting from advertisements. It ensures that by distributing or holding infringing content, the above conditions of “permits for benefit” are met. Another condition is that they should only be held responsible if they have knowledge that the content processed or sent from their repositories is violating. If ISP satisfies all of the aforementioned criteria, it is presumed that he is infringing on someone else’s copyright.

The Information Technology (IT) Act of 2000 contains rules on ISP liability. An intermediary is specified in Sec. 79(a) of the IT Act as any person who receives, stores, or transmits a message on behalf of another person or provides any service related to that message. The Internet Service Provider (ISP) is a form of intermediary. This provision, once again, restricts ISP’s responsibility under some cases. According to this clause, an intermediary, such as a network service company, is not responsible whether he may demonstrate that the crime or contravention was done without his knowledge or that he used any fair attempts to avoid it. Practically, ISPs perform a variety of roles in the delivery of material, and their responsibility varies based on the sort of work they perform; otherwise, they would be kept responsible for information for which they have no control or over which they have never played any part. However, no statutes, including the

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<sup>46</sup> 4 Legal Dimension of Cyberspace, Edited by S.K. Verma & Raman Mittal, Indian Law Institute, New Delhi, pp152.

Copyright Act, have been amended to restrict the liability of ISPs. The IT Act only allows ISPs to be found responsible for copyright violations if they offer filtering services.

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## 1.6 LET'S SUM UP

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In this chapter, we have learned the overview of some terms and legal aspects related to cyberspace and copyright. Besides, we also learned various concepts revolving around internet sharing, downloading, internet service provider liability etc. We have also analyzed various legal provisions governing copyrights.

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## 1.7 FURTHER READING

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- Jonathan Franklin, "Intellectual Property Law," Electronic Resource Guide, American Society of International Law, last updated February 8, 2013, accessed on August 2, 2013, <http://www.asil.org/erg/?page=iip#id.juy3tsp3onkv>.
- Richard L. Hermann, Landing a Federal Legal Job: Finding Success in the U.S. Government Job Market (Chicago: American Bar Association, 2011), 277.
- Berkman Center for Internet and Society at Harvard University, "Overview of Trademark Law," accessed on August 2, 2013, <http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm>.
- Library of Congress, The Congressional Research Service: [www.loc.gov/crsinfo/](http://www.loc.gov/crsinfo/)

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## 1.8 CHECK YOUR PROGRESS: POSSIBLE ANSWERS

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### 1. What is "any place"?

Since computer servers and telecommunication facilities fall under ISP, which is a dimension of cyberspace, the term "every location" includes cyberspace, which contains ISP. So, under Sec. 51(a)(ii) 'any place' includes ISP.

### 2. Explain "permit for profit".

The term “permits for-profit” refers to the fact that ISP profited financially from infringing practices. So, if ISPs bill for their services and others are free, they are indirectly profiting from advertisements. It ensures that by distributing or holding infringing content, the above conditions of “permits for benefit” are met.

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## **1.9ACTIVITY**

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Explain Internet Service Provider Liability with relevant provisions of law. (2000 to 2500 words)

# Unit 2: COPYRIGHT AND INFRINGEMENT IN CYBERSPACE

## Unit Structure

- 2.1 Learning Objectives
  - 2.2. Introduction to Copyright Issues in Cyberspace
  - 2.3. Online Copyright Violation
    - 2.3.1. Caching
    - 2.3.2. Plagiarism
    - 2.3.3. Protection of database
    - 2.3.4. Protection of computer software
  - 2.4. Computer software and copyright law
  - 2.5. Software licenses
    - 2.5.1. Freeware licenses
    - 2.5.2. Open source Licenses
    - 2.5.3. Shareware
    - 2.5.4. Demo ware
  - 2.6. Let's Sum up
  - 2.7. Further Reading
  - 2.8. Check your progress: Possible Answers
  - 2.9. Activity
-

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## 2.1 LEARNING OBJECTIVE

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In this chapter, we shall be learning about-

- Various forms of copyright infringement in cyber space.
- Software protection and copyright laws
- Various forms of licensing.

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## 2.2 INTRODUCTION TO COPYRIGHT ISSUES IN CYBERSPACE

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The copyright's aim is to inspire writers, composers, and directors to create original works by giving them the exclusive right to print and publish them for the public good. When the limited privilege, i.e., the copyright term, expires, the works become public domain, and anybody can copy them without permission. Initial literature, tragic, theatrical, creative, cinematographic video, sound recording, and computer program are all protected by copyright.<sup>47</sup> Today, copyright is used in a wide range of sectors, including the publishing and sale of books, magazines, and newspapers, the manufacture and distribution of dramatic and artistic works for performances, the printing of musical works and cinema, broadcasting, and so on. Copyrights, as Intellectual Property, move more freely and rapidly from country to country than other types of property. Copying copyright content has become much simpler due to technical advances. As a result, copyright piracy has been difficult, if not impossible, to regulate. Books, recorded tapes, video cassettes of videos, and electronic programs can all be easily transported from one country to another, and thousands of copies can be manufactured and distributed. Unauthorized home recordings of radio and television programs have become popular around the world.<sup>48</sup>

Digital media has made it possible to take material from one site, change it, or simply reproduce it on another site, posing new problems for conventional interpretations of individual rights and security. A publisher can be anybody with a PC (Personal Computer) and a modem. It just takes a few mouse clicks to download, import, save, convert, or create a derivative work. Since it includes text, images, and also audio and video, a web page is equivalent to a print, a magazine, or a digital CD-ROM and

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<sup>47</sup>Dr. Farooq Ahmad, Cyber Law in India, New Era Law Publication, New Delhi, 2012, pg.no.28.

<sup>48</sup> Available at [www.wipo.int](http://www.wipo.int) , visited on 15/02/2016.



would be liable for copyright protection. The creator of a copyrighted work has the sole right to permit copying, preparation of derivative works, dissemination, and other activities under copyright law.<sup>49</sup>

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## **2.3 ONLINE COPYRIGHT VIOLATION**

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### **2.3.1 Caching:**

Determining the distinction between private and public use is one of the most fundamental copyright problems on the internet. The Indian Copyright Act, 1957 distinguishes between reproductions for general use and reproductions that can only be achieved with the consent of the right holder. On the internet, the freedom to copy poses a variety of constitutional questions. Because of the fundamental essence of internet transmission, this is the case. Any stage of transmission involves reproduction. Temporary copying (also known as caching) is an essential aspect of the internet communication mechanism through which messages will not be able to pass across the networks to reach their intended destinations. According to Indian law, copying must be in a tangible way, but it also requires “storing it in every format through electronic means,” making caching a copyright violation.

### **2.3.2 Plagiarism:**

Copying copyright content has become much easier, thanks to technological advancements. As a result, copyright piracy has been difficult, if not impossible, to regulate. It entails using someone else’s work without giving them credit, even though it were one’s own original work. It is regarded as an ethical violation that may jeopardize one’s intellectual standing and honesty. Plagiarism is possible without infringing on another’s copyright, and infringing on another’s copyright is possible without plagiarizing. Plagiarism and copyright violations can all occur at the same time. Books, videos, films, and music can all be easily replicated, and thousands of copies can be made and circulated. Digital media has made it possible to copy material from one platform, change it, or literally replicate it. The standard view of human rights and security under the Copyright Act has been thrown into disarray as a result of this.

### **2.3.3 Protection of Database:**

The Indian Copyright Act 1957 protects “Databases” as “Literary Works” under Section 13(1) (a) of the Act, which specifies that copyright in original literary,

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<sup>49</sup>V.K. Ahuja, Intellectual Property Rights in India, Lexis Nexis Butterworth's Wadhwa, Nagpur, 2009, at page nos.15-16

theatrical, musical, and artistic works shall exist in India. For the first time, the word “computer database” was established in the Information Technology Act of 2000. An individual who breaches the copyright and cyberspace norms is liable to pay compensation to the aggrieved party up to one crore rupees under Section 43 of the I.T. Act 2000. In addition, Section 66 of the Income Tax Act of 2000 imposes criminal penalties in certain cases.

#### **2.3.4 Protection of computer software:**

A computer programme is described as a “collection of instructions transmitted in words, codes, schemes, or some other type, including a machine readable media, capable of causing a computer to perform a particular task or achieving a particular result,” according to section 2(ffc) of the Copyright Act. Within the scope of the Copyright Act, computer software is a “computer application.” Computer programs now count for copyright protection, as well as other forms of Intellectual Property Rights protection, under the T.R.I.P.S (Trade-Related Aspects of Intellectual Property Rights). This programming programs are also covered by the Copyright Act’s copyright protection. Under the Copyright Act, computer programs are included in the scope of literary content.

The owner of computer software has a variety of rights, including the ability to issue software licenses. Freeware licenses, open-source licenses, demoware licenses, and other forms of software licenses exist. The owner of a software patent has the freedom to reuse and render as many copies of his work as he wants. Second, he has the possibility of showing his program on the website, which will be called public view. He also has the rights to sell, rent, move, update, and change his proprietary software. Without the owner’s consent, no one can use a copyrighted work for personal gain.

However, copyright infringement happens when someone uses a patented work for a commercial reason or to rob the author of income. Despite the fact that the software copyright owner has certain proprietary rights, they are not absolute and are subject to certain restrictions and exceptions in order to protect and preserve the public interest, including that of software users.

In certain socially desirable circumstances, such as literary, dramatic, musical, or artistic work for private use, including study, criticism, or review, the use of the copyrighted work is allowed even without the author’s permission in order to use the computer program for the purpose for which it was supplied or to make back-up

copies purely as temporary protection against loss, destruction or damage in order only to utilize the computer program for the purpose for which it was supplied.

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## **2.4 COMPUTER SOFTWARE & COPYRIGHT LAW**

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A computer programme is described as a “collection of instructions transmitted in words, codes, schemes, or some other type, including a machine-readable media, capable of causing a computer to perform a particular task or achieving a particular result,” according to section 2(ffc) of the Copyright Act. Within the scope of the Copyright Act, computer software is a “computer application.” These programming programs are also covered by the Copyright Act’s copyright protection. Under the Copyright Act, computer programs are included in the scope of literary content. The owner of computer software has a variety of rights, including the ability to issue software licenses. Software licenses can be of various types.

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## **2.5 SOFTWARE LICENSES**

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### **2.5.1 Freeware licenses:**

Freeware is proprietary computer software that is distributed for download and for an unspecified period of time. Freeware licenses are typically developed and distributed for free by software developers who wish to give back to the community. There are, however, certain restrictions. For instance, if you’re looking for a unique way to express yourself, try A freeware license that is nonexclusive, non-transferable, and has a restricted scope of use. Many freeware licenses stipulate that the applications cannot be used for commercial purposes. The license is non-exclusive, and it does not grant any operator exclusive privileges. Furthermore, the warrant is non-transferable, and the licensee is not permitted to assign any rights to a third party.

### **2.5.2 Open-Source Licenses:**

As the name suggests, this license is available to anyone and has no limits. To be called “open source,” applications must satisfy a variety of criteria. Once an individual has created an open-source licence, the software must be freely distributed and redistributed. The owner of an open-source license cannot prohibit anyone from selling, altering, sharing, or using it for genetic analysis or other

purposes. The most basic interpretation is that open source licenses are legally binding arrangements between a software component's author and its owner, stating that the software can be used in commercial implementations under such circumstances. The license is what makes a piece of code open source. According to the terms and conditions, each open source license specifies what users are allowed to do with the program modules, their rights, and what they are not allowed to do. This may seem to be an easy job, but there are over 200 open source licenses to deal with, so good luck keeping track of them all. Organizations must select which licenses are more consistent with their practices to ensure that they remain legal, and these licenses vary in scope and specifications.

### **2.5.3 Shareware:**

This type of app is also known as "try before you buy." For a limited time, this app normally comes with maximum availability. Users must either purchase the app or delete it from their machines at the end of the trial period. The trial date should be defined in terms of days. Shareware software is distributed at a minimal (or often no) rate, but complete legal use typically necessitates payment and registration. On a trial basis, copies are circulated. You have full freedom to test the app, evaluate if it suits your needs, and assess whether it is a decent deal. In most cases, order forms or ads contained in the program or on the delivery disk will instruct you how to register the program and how much it costs. A written manual, a modified copy of the software, often with added functionality, and the lawful right to use the program in their home or company are usually given to authorized users of shareware systems. The developers of shareware applications receive reimbursement from those who wish to use the programs on a daily basis because it is not free software. It does, though, have the advantage over traditional consumer applications in that you can fully test a program before purchasing it.

Individuals or small businesses typically write shareware, and the content and level of service vary greatly. However, in some circumstances, shareware kits are generally more capable than equivalent commercial applications, and some commercial systems began as shareware.

Companies cannot charge premiums for copies that greatly outweigh their copying and storage expenses, even though shareware may be freely replicated. Shareware software writers hold rights to the contents, and you are not allowed to alter or distribute updated versions.

#### **2.5.4 Demo ware:**

Demo ware is only intended for use in demos. The prototype app has no usable functionality, and its primary purpose is to show the features to future customers. The owner of a software patent has the freedom to reuse and render as many copies of his work as he wants. Second, he might place his program on the internet, which would be called public view. He also has the rights to sell, rent, move, update, and change his proprietary software. Without the owner's consent, no one can use a copyrighted work for personal gain.

However, copyright infringement happens when someone uses a patented work for a commercial reason or to rob the author of income. Despite the fact that the software copyright owner has certain proprietary rights, they are not absolute and are subject to certain restrictions and exceptions in order to protect and preserve the public interest, including that of software users. Under certain socially desirable cases, the use of a copyrighted work is tolerated even without the author's consent.

In India, some acts that do not constitute copyright infringement include fair dealing with a literary, dramatic, musical, or artistic work for the purpose of private use, like study, criticism, or review, or making back-up copies purely as temporary protection against loss, destruction, or damage in order only to utilize the computer program for the purpose for which it was supplied.

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## **2.6LET'S SUM UP**

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In this chapter, we have studied the types of online copyright violation along with a detailed study on its interface with cyberspace. Besides, we understood different provisions on copyright and types of licensing and their relevance in copyright.

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## **2.7FURTHER READING**

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- Tabrez Ahmad, *Cyber Law and E-Commerce*, APH Publishing Corp., New Delhi, 2003
- Taubman, A. (2009), 'International Governance and the Internet', in: L. Edwards and Ch. Waelde (eds), *Law and the Internet*, 3rd ed, Oxford and Portland, Oregon: Hart Publishing, pp. 3-44

- Kolb, Arne (2009), 'Protection of Computer Software', in: L. Edwards and Ch. Waelde (eds), Law and the Internet, 3rd ed, Oxford and Portland, Oregon: Hart Publishing, pp. 335-360
- Kur, Annette, and Dreier Thomas (2013), European Intellectual Property Law, Cheltenham: Edward Elgar.
- Prytherch, R. (Ed.) (2005).Harrod's Librarian's Glossary & Reference Book. England: Ashgate. pp. 173, 543.
- Bailey, J. (2013). The Difference between Copyright Infringement and Plagiarism. Plagiarism Today. Retrieved November 29.

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## **2.8 CHECK YOUR PROGRESS:POSSIBLE ANSWERS**

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### **1. What isOpen-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 an open source license, then there must be free distribution, redistribution of such software.

### **2. What isPlagiarism?**

Technological progress has made copying copyright material easy and simple. Consequently, the control of copyright infringement has very difficult and often impossible. Books, videos, films, music can be copied without any difficulty, and thousands of copies can be made from it and distributed.

### **3. What is the provision for data protection?**

The Indian Copyright Act 1957 protects "Databases" as "Literary Works" under Section 13(1) a. Of the Act, which says, that copyright shall subsist throughout India in original literary, dramatic, musical, and artistic works.

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## **2.9ACTIVITY**

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Provide detailed analysis of software licensing. (Word count- 2000-2500)

# Unit 3: E-COMMERCE & ITS COPYRIGHT ISSUES

## Unit Structure

- 3.1 Learning Objectives
  - 3.2 Introduction
  - 3.3 Legal recognition to e-commerce practices
  - 3.4 Issues of e-commerce
  - 3.5 General issues
  - 3.6 Protection to e-commerce
  - 3.7 International frameworks
  - 3.8 E-commerce protection in India
  - 3.9 Let's sum up
  - 3.10 Further reading
  - 3.11 Check your progress: Possible Answers
  - 3.12 Activity
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## 3.1 LEARNING OBJECTIVE

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In this chapter we will learn-

- The E-Commerce regime and how it is treated under cyberspace.
- Concepts governing e-commerce including B2B, B2C, C2C etc.
- Various treaties and international conventions along with legal provisions.

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## 3.2 INTRODUCTION

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E-Commerce is a revolutionary method of using digital information systems to conduct, manage, and execute company transactions. The Internet is available 24 hours a day, seven days a week, and from any place. The internet is the primary technology that allows all aspects of a commercial transaction (advertising, creation, acquisition, payment, and service delivery) to be done interactively with several people, without regard for time or space, in a multimedia (sound, picture, and text) environment at a low cost. Via the restructuring of conventional business, this allows changes in processes, resulting in considerable cost savings as well as improved productivity and efficiency. As a result, e-commerce is a commercial activity involving the use of hardware, operating applications, or computer networks. The Information Technology Act of 2000 was passed in order to give legal legitimacy to the idea of electronic banking, ecommerce, and electronic transactions, as well as to deter cybercrime and ensure safe practices. However, there are questions about intellectual PRoperty rights on the internet.<sup>50</sup>

### **Defining E-Commerce**

The word "e-commerce" refers to "commerce dependent on bytes." Simply put, e-commerce is the electronic exchange of goods and services for a fee. E-commerce, in general, is a business methodology that meets the demands of enterprises, traders, and customers to cut prices while improving the quality of goods and services and speeding up service delivery. It's also known as the electronic data interchange, electronic fund transfer, and other terms for the paperless sharing of business records. E-commerce encompasses not only data exchanges but also

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<sup>50</sup>Misra, ParthaSarathi, E-Commerce & Its Copyright Issues (April 3, 2011). Available at SSRN: <https://ssrn.com/abstract=1801782> or <http://dx.doi.org/10.2139/ssrn.1801782>



general business activities such as public relations, advertising, agreements, contracts, and fund transfers. The Ministerial Declaration on E-commerce of the World Trade Organization<sup>2</sup> (WTO) describes e-commerce as "the processing, distribution, selling, sales, or delivery of products and services through electronic means."<sup>51</sup>

Telephone, fax, television, electronic payment and money transfer services, EDI (electronic data interchange), and the internet are the six major E-Commerce instruments recognised by the WTO. E-Commerce, according to the European Commission, is more than mere internet browsing. It encompasses a wide range of activities such as shopping, searching the internet for products and services, collecting knowledge on things to buy, and completing purchases. It also includes the distribution and supply of certain goods and services, as well as investigations into order status. It also entails conducting consumer loyalty surveys, collecting information about customers, and managing consumer data bases for marketing campaigns and other similar operations, much as any other long-term commercial endeavor. E-Commerce creation is similar to a roller-coaster train. It's progressing, but it's not without its setbacks. It may be considered a part of the maturation process. The first phase of E-Commerce spawned a modern industry nomenclature focused on different permutations and variations of Business and Customers, such as Business-to-Business (B2B), Business-to-Consumer (B2C), Consumer-to-Business (C2B), and Consumer-to-Consumer (C2C), and Consumer-to-Consumer (C2C) (C2C).

### **Business-to-Business (B2B)**

It is a business platform that involves two separate or even dependent business actors, as the name implies. It serves as a business facilitator, negotiator, and dealmaker for mutually beneficial business units. For eg, Maruti, the vehicle manufacturer, has over 200 ancillary suppliers who finance its car manufacturing operations. It seeks their help (primarily in procurement) in keeping all of its pre- and post-production operations running smoothly.

### **Business-to-consumer (B2C)**

It refers to a business network that links an organization with its customers. It is a retail version of E-Commerce that includes the sale of products or services through

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<sup>51</sup> Ahmad, Tabrez&Misra, Partha. (2011). E-Commerce & Its Copyright Issues. SSRN Electronic Journal. 10.2139/ssrn.1801782.

online retailers. It is based on the idea of 'convenient shopping.' A customer can shop at his leisure, from any location and at any time. It's about a new kind of retail experience, one that involves an electronic version of catalog (mail order) shopping.<sup>52</sup>

### **Consumer-to-business (C2B)**

It's a kind of retail marketing platform in which a company aggressively searches out or rather chases down consumers. It is a proactive version of e-commerce in the sense that it is a consumer chaser, selling consumers exclusive offers, packages, or packets of goods at cheap prices. Furthermore, it negotiates or bids on behalf of clients, including the best possible offers. Airlines and tour operators use it as a popular business model these days.

### **Consumer-to-consumer (C2C)**

It reflects a consumer market network in which one consumer functions as a resource person, selling products to other consumers through an online channel for a fee. Market to consumer auctions are another name for this. This is an advancement on conventional sale or auction systems, which include a business-to-consumer partnership.

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## **3.3LEGAL RECOGNITION TO E-COMMERCE PRACTICES**

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From the original introduction of UNCITRAL's Model Law on Electronic Trade by the United Nations General Assembly, e-commerce activities have come a long way in terms of legal approval. The UNCITRAL model law on electronic communications was created to promote the use of electronic commerce and to provide nations with model laws covering the use of alternatives to paper-based correspondence and data storage. It is built on a practical analogous approach which applies conventional paper-based standards such as printing, signature, and initial to a paperless environment. It recognizes electronic archives and digital signatures as legal documents.<sup>53</sup>

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<sup>52</sup> Jane C. Ginsburg, Copyright Use and Excuse on the Internet, from [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=239747](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=239747)

<sup>53</sup>VikasAsawat, Information Technology (Amendment) Act, 2008: A new vision through a new change, from [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1680152](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680152)

On October 17, 2006, India became the world's twelfth country to adopt the UNCITRAL model legislation on electronic commerce. The model legislation on electronic commerce served as the basis for the Information Technology Act of 2000.

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### **3.4 ISSUES OF E-COMMERCE**

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Individual copies of a work kept in electronic media without the permission of the copyright holder constitute a copyright violation, according to a very simple formulation of how copyright laws in most countries apply to electronic communications. The main issue with this formulation in terms of ISPs and intermediaries is that the TCP/IP protocol that underpins the Internet, as well as the technology that overlay it, depend heavily, if not completely, on the ability to create copies of information.

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### **3.5 GENERAL ISSUES**

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#### ***Contractual Issues***

(a) Online contracts are valid: The Indian Contract Act requires such contracts to be rendered in non-written formats. As a result, while internet contracts can be legitimate because they are assumed to be in these other ways, there are concerns about the legality of contracts that may be written down.

(b) Differences between normal and online contracts: It's important to understand the differences between normal and online contracts, especially when it comes to where and when the contract is signed. In this regard, the paper contrasts the UNCITRAL Model Law and the Information Technology Bill, 1998 to the dispatch and receiving of data messages under Indian law, based on the UNCITRAL Model Law and the Information Technology Bill, 1998.

(c) Evidence: According to the Indian Evidence Act, records must be supported by primary evidence, and the authenticity of data messages as primary evidence is debatable. There's also a question on how to access knowledge contained in machines.<sup>54</sup>

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<sup>54</sup> Jaime Delgado & Isabel Gallego, Negotiation of copyright in e-commerce of multimedia publishing material, from [elpub.scix.net/data/works/att/200129.content.pdf](http://elpub.scix.net/data/works/att/200129.content.pdf) as accessed on 12th march, 2010.

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### **3.6 PROTECTION TO E-COMMERCE**

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As the Internet has increased in importance, copyright security has become increasingly relevant. For the past two decades, the copyright system has been continuously threatened by ever-increasing technologies, and the rule of copyright has emerged as a legal solution to those challenges. Copyright legislation has been modified to cover Internet products in the same way as it has been adapted to protect various other new mediums over the years. It safeguards original work as well as work that has been fixed in a physical form, such as printing, typing, or recording. Technologies like referencing, inlining, and framing, which are often used on the internet, pose a significant challenge to a right holder's copyright rights.<sup>55</sup>

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### **3.7 INTERNATIONAL FRAMEWORKS**

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The Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1995 were the foundations of international copyright law until recently. Since 1974, a separate United Nations body – the World Intellectual Property Organization – has been in charge of the universal copyright instruments (WIPO). WIPO's mission, as stated in its founding treaty, is to foster intellectual property rights around the world through international cooperation and, where applicable, partnership with other international organizations.

WIPO currently has 180 member states and administers six copyright treaties. Its aim is to harmonize national intellectual property rights in the long run, with the goal of creating a single, coherent body of international law.

#### **The Berne Convention**

As previously said, the Berne Convention was the first effort to harmonize copyright law on a global scale, and it was adopted in 1886. The Convention defined a minimum standard of copyright rights for member countries to adhere to, as well as a national care policy (under which a member state must give the same protection to material copyrighted in other member states as it gives to material copyrighted under

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<sup>55</sup>Copinger and Sknoe James on Copyright, Volume 1 - By Kevin Garnett and Gillian Davis and Gwilym Harbottle South Asian Edition 2008, 15th edition.

its own law). The treaty also provided that the International Court of Justice in The Hague (Hague Court) would have jurisdiction over disputes between member countries, but it also granted nations the possibility of claiming immunity from the jurisdiction, as many have done.<sup>56</sup>

Parallel to WIPO, the General Agreement on Tariffs and Commerce (GATT) has discussed copyright concerns. With the rise of the information society, copyright became profoundly important in influencing international commerce, leading the 1994 Uruguay Round of the GATT to create TRIPS – the Consensus on Trade-Related Facets of Intellectual Property Rights. The World Trade Organization was also founded during the same Round (WTO). In enunciating intellectual property rules, the TRIPS Agreement incorporates parts of the Bern, Rome, and Paris Conventions. Members shall conform with Articles 1 through 21 of the Bern Convention (1971) and the Appendix thereto, according to Article 9.1 of the TRIPS Agreement. Members, on the other hand, would have no privileges or responsibilities under this Agreement in relation to the rights conferred under Article 6bis of the Convention or the rights arising from it. As a result, it is clear that the path taken in the TRIPS Agreement's copyright clauses is to follow the Berne Convention's copyright protection regime. According to Article 10.1 of the Bern Convention, "Computer programs, whether in source or object code, shall be protected as literary works." Compilation of data or other material, whether in machine readable or other form, that constitute intellectual creations as a result of the collection or arrangement of their contents shall be protected as such, according to Article 10.2.<sup>57</sup>

### **World Intellectual Property Organization :( WIPO)**

The World Intellectual Property Organisation (WIPO) is a United Nations agency (UN). Before its founding, a number of organizations such as the Assembly of Paris Union, the Executive Committee, and the International Bureau of Bern were created, all of which were later consolidated into the 'Bureau International Reunis Pour La Defense de La Propriete Intellectuelle,' or 'BIRPI.' Registration, fostering of intergovernmental collaboration in the management of intellectual property rights, advanced program operations, and, most recently, dispute resolution facilities are among WIPO's four types of activities. Member countries felt it was appropriate to

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<sup>56</sup> Berne Convention, art 9(1): 'Authors of literary and artistic works.....shall have the exclusive right of authorizing reproduction of these works, in any manner or form'.

<sup>57</sup> Narayanan P., Copyright and Industrial Designs, Eastern Law House, 2010; pp 20 and 30

form a convention in 1996 to deal with the defense of copyright as emerging technologies evolved.

### **WIPO Copyright Treaty, 1996**

On December 20, 1996, the Diplomatic Conference in Geneva accepted it. This treaty comes under Article 2 of the Bern Convention and is a special negotiation. It has everything to do with the Internet and new media. The WIPO copyright treaty is a special arrangement among WIPO member countries that gives authors greater rights than the Bern Convention. According to Article 4 of the Treaty, "According to Article 2 of the Bern Convention, computer programs are protected as literary works. Such safeguards apply to computer systems, regardless of their mode or type of speech." Furthermore, according to Article 5, "Compilations of data or other material, in some manner, that are covered as intellectual creations due to the collection or arrangement of their contents. This defense does not apply to the data or material itself, and it is in addition to any copyright that might exist in the data or material in the collection." The WIPO Copyright Treaty protects all types of programming systems, not just the object code or source code, as was the case in the TRIPS Deal. As a result, including the slight amendments introduced by the WIPO Copyright Treaty, it is not incompatible with the TRIPS Agreement.

### **The Digital Millennium Copyright Act (DMCA)**

The Digital Millennium Copyright Act (DMCA) was passed in October 1998 to carry out the US' treaty obligations under the WCT and WPPT, as well as to bring the country's copyright legislation into the digital age. The DMCA:

1. makes it illegal to circumvent anti-piracy measures built into copyrighted material, thus allowing the cracking of copyright protection devices for encryption research, product interoperability testing, and computer security system testing, and exempting non-profit libraries, archives, and educational institutions from anti-circumvention provisions under some circumstances.
2. Makes it unlawful to make, sell, or distribute code cracking machines that are used to unlawfully copy codes.
3. protects Internet service providers from copyright infringement liability for simply transmitting information, and limits the liability of non-profit institutions of higher education for copyright infringement by faculty members or graduate students while they serve as online service providers and in certain circumstances, thus requiring

service providers to exclude material from their systems that appears to constitute copyright infringement; and

4. Requires webcasters to pay record labels license fees.

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### **3.8E-COMMERCE PROTECTION IN INDIA**

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In India, the Internet infrastructure is rapidly expanding. There are several questions about the internet. One of the most pressing problems surrounding the Internet, though, is the defense of intellectual property, or works of the imagination. Literary books, images, sound recordings, and other artistic works are protected from being reproduced without the consent of the copyright holder under Sections 13 and 63 of the Indian Copyright Act, 1957. It's also uncertain if copyright law would react to these materials when they surface on the site. The Copyright Act of 1957 makes no provision for ISP responsibility. Until now, India's stance on responsibility for copyright-infringing third-party content was unclear.<sup>58</sup>

With the advent of IT (Amendment) Act, 2008 there is a significant clarification regarding the scope of immunities available to intermediaries. Unlike the immunities under the old IT Act, these immunities are not only available with respect to offences under the IT Act, 2000 but even for the liabilities arising under any law. Section 79 of the IT Act exempts ISPs from responsibility for third-party information or data made accessible by them if the ISP has no idea of the violation or has used any reasonable efforts to deter it. Subject to the exceptions, an intermediary is not liable for any third-party records, details, or contact connection made available or hastened by him, according to the amended Section 79. Section 79 of the Information Technology Act of 2008 addresses ISP responsibility as follows:

**The end of the** (1) An intermediary is not liable for any third-party material, details, or contact connection made available or hastened by him, notwithstanding anything contained in any law currently in force, but subject to the provisions of sub-sections (2) and (3).

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

(a) The intermediary's function is limited to providing access to a communication system in which third-party information is distributed, temporarily processed, or hastened; or

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<sup>58</sup> The Digital Millennium Copyright Act - Overview , <http://www.gseis.ucla.edu/iclp/dmca1.htm>.

(b) The intermediary may not: (i) initiate the transmission, (ii) select the recipient of the transmission, or (iii) select or change the information contained in the transmission; and (c) the intermediary exercises due diligence in carrying out his responsibilities under this Act, as well as any other guidance that the Central Government may issue in this regard.

The exception to the above are:

1. The intermediary has conspired or aided in the wrongful act's commission; or
2. Upon actual discovery or warning by the proper Government or its entity that any content, data, or contact connection existing in or linked to a computer resource managed by the intermediary is being used to perform the unlawful act, the intermediary fails to delete or disable access to the material on that resource without tarnishing the proof. In the two scenarios mentioned above, the ISPs will be held accountable. The additions to Section 79 of the IT Act provide a non-obstinate provision, which states that "notwithstanding everything inherent in any statute for the time being in effect," and thereby protects ISPs from liability resulting from such laws.

At the same time, the amended section 81 contains the following proviso: "Provided that nothing in this Act shall prevent any individual from exercising any privilege granted under the Copyright Act, 1957, or the Patents Act, 1970." The aim of this provision, according to the understanding, is to maintain the priority of the Patent Act and the Copyright Act over the Information Technology Act. We can correlate the section 79 and 81 by inferring that other legislation is Copyright Act. Both the section counter each other but a careful and finer study will justify that the section 79 has been amended to give more relaxation to ISPs.

Section 79 of the amended act has been framed in accordance with EU Directives on E- Commerce to determine the extent of responsibility of intermediaries for third party data or content. The objective of the directive is to promote free flow of information between the member states. The EU Directive spells out the intermediaries' responsibilities in great depth, including not only intellectual property rights and related obligations, but also general material responsibility. The EU Directive on Electronic Commerce was created with the aim of developing information society services (ISS), ensuring regulatory certainty and customer trust through the coordination of national legislation, and clarifying legal principles for the



proper functioning of the internal market in order to provide a legal structure that allows ISS to freely travel between Member States.

Under the E-Commerce Directive, an ISP is exempt from liability when it serves as a "mere conduit" (Article 12) or provides "temporary caching" (Article 13) for the sole purpose of making the transmission of content more efficient, is of a mere technical, automatic and passive nature, and where the ISP has neither knowledge nor control over the content being transmitted or stored. The terms under which a hosting company is immune from responsibility, as specified in Article 14(1)(b), serve as the foundation for the development of "alert and take down" procedures by copyright owners to ISPs in order to resolve instances of infringement.

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### **3.9 LET'S SUM UP**

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In this chapter, we have learned the laws on copyright under E-commerce and the international regime governing the same. Besides, along with legal provisions we have understood the terms like B2B, B2C, and C2C etc.

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### **3.10 FURTHER READING**

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- Nimmer on Copyright, Lexis Nexis, Melville B. Winner & David Winner, Indian Print 2010. Copinger and Sknoe James on Copyright, Volume 1 - By Kevin Garnett and Gillian Davis and Gwilym Harbottle South Asian Edition 2008, 15th edition.
- Legal Dimensions of Cyberspace, S.K. Verma & Raman Mittal, Indian Law Institute, 2004.
- Dr. Wadehra B.L., Law Relating to Intellectual Property, Universal Law Publishing Co., 4th Edition

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### **3.11 CHECK YOUR PROGRESS: POSSIBLE ANSWERS**

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#### **1. What is Business-to-consumer (B2C)?**

It refers to a business network that connects a company with its customers. It is a retail version of E-Commerce that includes the sale of products or services through online retailers. It is based on the idea of 'convenient shopping.' A customer can

shop at his leisure, from any location and at any time. It's about a new kind of retail experience, one that involves an electronic version of catalog (mail order) shopping.

## **2. What is Consumer-to-business (C2B)?**

It's a kind of retail marketing platform in which a company aggressively searches out or rather chases down consumers. It is a proactive version of e-commerce in the sense that it is a consumer chaser, selling consumers exclusive offers, packages, or packets of goods at cheap prices. Furthermore, it negotiates or bids on behalf of clients, delivering the best possible offers. Airlines and tour operators use it as a popular business model these days.

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### **3.12 ACTIVITY**

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Elaborate on international conventions and treaties governing E-Commerce. (Word count- 2000 to 2500).

# Unit 4: COPYRIGHT PROTECTION IN CYBERSPACE- A COMPARATIVE STUDY OF USA AND INDIA

4

## Unit Structure

- 4.1 Learning Objectives
  - 4.2 Introduction
  - 4.3 Laws- a comparison
  - 4.4 USA
  - 4.5 India
  - 4.6 Compliance with International regimes
  - 4.7 Liability on infringement
  - 4.8 Let's sum up
  - 4.9 Further reading
  - 4.10 Check your progress: Possible Answers
  - 4.11 Activity
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## 4.1 LEARNING OBJECTIVE

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In this chapter we will learn-

- The comparative analysis of USA and India in light of its copyright provisions.
- The compliance regime in USA and India with respect to copyright infringement.
- Various legal provisions governing copyright in national and international forums.

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## 4.2 INTRODUCTION

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It has aided globalization significantly by promoting the quick sharing of information from one location to another, resulting in increased communications and awareness dissemination.<sup>59</sup> Every year, about 8,50,000 objects, including books, magazines, electronic, and multimedia materials, are published worldwide, according to UNESCO. However, it has also been seen to be dangerous in certain instances. Copyright laws are designed to strike a balance between the author's private rights and the public's overall interests. However, with the emergence of the internet and cyberspace, it is impossible to draw a straight distinction between the public's needs and the author's interests. It has greatly helped in globalization by facilitating easy exchange of information from one place to another thus leading to increase in communications and spread of knowledge. According to UNESCO, approximately 8,50,000 items which include books, journals, electronic and multimedia resources are published worldwide every year.<sup>60</sup> But, it has also proved to be harmful in some ways. Copyright laws are aimed at maintaining a balance between the individual interests of the author and the interests of the public at large.<sup>61</sup> However, with the coming of the internet and the advent of cyberspace, it is difficult to draw a clear line between the interests of the public and the interests of the author. It has led to the commission of certain crimes in a much hassle free manner than executing them in

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<sup>59</sup>R MurugaPerumal, Copyright Infringements in Cyberspace: The Need to Nurture International Legal Principles, 14(3) INTERNATIONAL JOURNAL OF THE COMPUTER, THE INTERNET AND MANAGEMENT 8,8 (2006)

<sup>60</sup> Frank Pasquale, Toward On Ecology of Intellectual Property: Lessons from Environmental Economics for Valuing Copyright Commons, 8 YALE J.L. & TECH 78, 110 (2006)

<sup>61</sup>Muragendra B.T., Copyright and Trademark in Cyberspace, 3 (6) International Journal of Scientific and Engineering Research 1, 2 (2012)

person. Infringement of copyright is one of such wrongful acts. Earlier, the infringer had to do all acts physically so it was easy to locate him, but through a large number of networks in cyberspace, it is not even possible to track the offender or stop such infringement every time it occurs. Therefore, digitalization has a profound effect on creation, reproduction and dissemination of works protected by copyright. Now almost anything or everything can be transmitted on cyberspace. Movies like Star Wars and Spiderman could be downloaded easily before they hit the screens, mainly due to the advent of digital technology. In the light of these situations, almost every country has felt the need for developing and enacting effective laws to prevent loss to the authors due to mass undetectable copyright infringement. The laws have been discussed below in detail.

In the world of digitalization, the problem of copyright infringement in cyberspace has become a big challenge. There are several reasons for this; one such reason is in my opinion, the level of enforcement of copyright laws in the countries. So, to confirm this viewpoint, a detailed study will be made of the legislations that have been enacted in the two countries selected for study- USA and India, one with a strongly developed copyright law and one with a comparatively developing copyright law.

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### **4.3 LAWS- A COMPARISON**

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The comparison of the laws of the two countries USA and India has been made on various aspects of the law as discussed below:  
Jurisdictional Issues The question of jurisdiction of courts in case of copyright infringement in cyberspace is a matter of global debate due to the unique nature of dissemination of information through the internet.

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### **4.4 USA**

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It is relevant to mention that USA is the first country where computer software were developed, so naturally the country had to bear the burden of incidents of intellectual property infringement in cyberspace before any other country. As these incidents were on an increase, the US courts had to exercise their powers to give justice to the victims of copyright infringement. Since 1990s the Courts have developed two tests for determining their jurisdiction to entertain complaints of intellectual property

infringement. The first test referred to as the Zippo test was developed in the case of *Zippo Manufacturing Co v Zippo Dot Com Inc*<sup>62</sup>.

The test based jurisdiction of the US courts on the extent of a website's „interactivity“ in the given jurisdiction. In the opinion of the Court, “a passive website is insufficient to establish personal jurisdiction, but an interactive site through which a defendant conducts business with forum residents, is sufficient to establish personal jurisdiction.” But a major drawback of this test was that it did not provide any guideline as to what amounted to the right level of interactivity in order to constitute jurisdiction, whether a continuous day to day record is required or it is sufficient to show a fairly regular interaction. The second test also referred to as the “effects test” was given in the case of *Calder v Jones*.<sup>63</sup>

The test based jurisdiction on three criteria: (1) an intentional action (2) expressly aimed at the forum state (3) knowledge that the brunt of the injury would be felt in the forum state. Thus, it indicated that if the person being affected by the copyright infringement or the spread of the copyrighted work is widespread in the forum state, it has full jurisdiction over the matter. Although the second test is not much in use today, the first test does have a great significance in determining jurisdiction in recent infringements. A recent case of *United States v Kim Dot Com*<sup>64</sup> that decided the jurisdiction in case of a matter under the DMCA 1998, gave quite a similar view. The Court was of the opinion that „corporations that are foreign in their registration and address but conduct a substantial amount of business in the United States will not be able to dodge the jurisdiction based on formalities“. The courts have however become a bit more flexible in this approach and do not always look for a high amount of business. This is reflected in the case of *Inc v Yandex NV*<sup>65</sup> where a Dutch search engine was held to be subjected to the California Court even though only 6 per cent of the infringements occurred in the United States.

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## 4.5 INDIA

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The Indian law is not very clear in this regard. Section 62(2) of the Indian Copyright Act, 1957 confers an additional jurisdiction to the courts to take cognizance of

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<sup>62</sup> Justice S Muralidhar, *Jurisdictional Issues in Cyberspace*, 6 THE INDIAN JOURNAL OF LAW AND TECHNOLOGY 1,1 (2010)

<sup>63</sup> 952 F. Supp. 1119 (W.D. Pa. 1997) (US District Court)

<sup>64</sup> 465 U.S. 783 (1984) (US Supreme Court)

<sup>65</sup> 2012 WL 517537 (E.D. Va. Feb. 16, 2012) (US District Court for the Eastern District of Virginia)

matters of infringement of copyright over the internet by providing for an extra place of suing other than the grounds provided under Section 20 of the CPC, 1908.<sup>66</sup> Thus, such infringements can be brought within the purview of District Courts under Section 62. This again raises a very crucial question as to the constitutionality of Section 62(2) of the Act as it would mean extraterritorial jurisdiction of the courts which is clearly in conflict with Article 1(2)<sup>67</sup> of the Constitution of India, 1950.

Although the IT Act provides for all cyber laws, it does not particularly the problems of intellectual property rights. So, provisions do not indicate any solution. However, the Indian judiciary has read in jurisdiction of the Indian courts in these provisions. In the case of *Super Cassettes Industries Ltd v Myspace Inc & Anr.*,<sup>68</sup> the use of the words „any place“ for profit under Section 51(a) of the Copyright Act, 1957 have been interpreted to include common public place or library or any other kind of place. It subsumes within it physical place or place at the internet or web space.

A landmark case is that of *Banyan Tree Holdings Ltd v M Murali Krishna Reddy and Anr.*<sup>69</sup> in which the issue of extended jurisdiction was dealt with. The plaintiff here was a resident of Singapore and the defendant was from Hyderabad. The rationale of *Casio India Ltd v Ashita Tele Systems Pvt. Ltd.*<sup>70</sup> was relied upon to conclude that due to the ubiquity, universality and utility of the features of the Internet and the Worldwide Web, any matter associated with it possesses global jurisdiction. The Court also relied on the holding in *Zippo Manufacturing Co v Zippo Dot Com*<sup>71</sup> and some other US decisions and concluded that the Court did have the jurisdiction to deal with the matter.

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## **4.6 COMPLIANCE WITH INTERNATIONAL REGIMES**

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For addressing the problems of intellectual property infringement over the internet, various international regimes were developed. The World Intellectual Property Organization Internet Treaty was one of its kinds. Both USA and India are signatories to WIPO. It is pertinent to check their incorporation of the treaty into their domestic laws.

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<sup>66</sup> 2013 WL 1899851 (N.D. Cal. May 7, 2013) (US District Court)

<sup>67</sup> Section 62, Copyright Act, 1957

<sup>68</sup> (2011) 48 PTC 49 (Delhi High Court)

<sup>69</sup> 280 F.3d 934 (9th Cir. 2002)(US District Court for the District of California)

<sup>70</sup> Abhai Pandey, Inside Views, Development in Indian IP Law: The Copyright (Amendment) Act, 2012, Intellectual Property Watch (January 1, 2013), available at <http://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-2012/>

<sup>71</sup> Berman, CAREER GUIDE TO INDUSTRIES, 2008-09 143 (2008)

## **USA**

In USA the Digital Millennium Copyright Act was enacted in 1998 to bring the Copyright Act in consonance with the provisions of WIPO treaties. Section 1201 of the US Copyright Act, 1976 added by Section 103 of DMCA protection against circumvention of technical measures used by copyright owners to protect their works. Two types of technological measures have been recognized: measures that prevent unauthorized access to a copyrighted work and measures that prevent unauthorized copying of the copyrighted work. The circumvention of the first was prevented but not the second, in order to promote fair use. These changes were made in consonance with Article 11 of WCT and Article 18 of WPPT. In this regard, the US Court has held in the case of *Kelly v Arriba Soft Corp*<sup>72</sup> that providing thumbnail versions of images and automatic indexing of webpages containing images will amount to fair use. Similarly, Section 1202 was added to protect the integrity of copyright management information in consonance with Article 19 of WPPT.

## **INDIA**

In 2012 the Copyright Act of 1957 was amended to bring it in consonance with the World Intellectual Property Organization Internet Treaties- the WCT and WPPT. Along with providing for technical measures to protect copyrighted works in cyberspace, it also provides for special fair use provisions for works in the internet. The word “hire” was included in Section 14 of the Indian Copyright Act, 1957 in compliance with Article 7 of WCT and Article 9 of the WPPT, which provide for “commercial rental” rights for computer programmes and cinematograph films. In Section 14(d) and (e) the term “hire” was replaced by the term „commercial rental” in order to narrow down the scope of hire to only commercial rentals and not non-commercial ones. The definition of the term commercial rental was also introduced under Section 2(fa) of the amended Act. Fair use provisions are now extended to digital works.

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## **4.7 LIABILITY ON INFRINGEMENT**

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In case of copyright infringement over the internet, multiple parties are involved in the act. The parties involved in copyright infringement over the internet are: copyright

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<sup>72</sup> 464 U.S. 417, 435 (1984)(United States Court of Appeals)



owners, internet service providers and the individual involved in uploading the copyrighted material in the server of the Service Provider. ISPs (internet service providers) are organizations that provide their clients or customers with access to the internet. It generally appears that the person uploading the document should be responsible for infringement, but there is a tendency to rather hold the service provider liable for infringement. There are mainly two reasons for this: 1) due to the wider reach of cyberspace it is difficult to locate an individual who actually uploads the copyrighted material, whereas the service provider is an organization having its place of business in a definite place, 2) an individual will not be able to pay the amount on infringement but an organization can pay for making good the losses on infringement. This trend is also visible in the laws of two countries for fixing liability:

### **USA**

In US the liability for copyright infringement in cyberspace has been established with the help of case laws. One of the initial cases is that of Sony Corp v Universal Studios where the Internet Service Providers were held liable by virtue of vicarious liability and contributory infringement. Later, in the case of Religious Technology Center v. Netcom Online Communication Services, Inc. the Federal District Court of Northern California was posed with a similar question of liability of the ISP for a material posted by the clients. The court adjudged on three main issues: firstly, Netcom could not be directly held liable for the material posted directly by its clients. In its opinion, the ISP is the one, which only provided the tool, and the original infringing work was done by the client who uploaded it.

This was a clear dissent from the previous judgements in this regard. Secondly, the link between the infringing activity and Netcom's finances were not sufficient to hold Netcom vicariously liable. Thirdly, though Netcom could not be held liable for direct infringement or even vicariously, it could be definitely made liable for contributory infringement. This however had to be proved, which was left open for trial, and the case was subsequently settled out of the court.

### **INDIA**

The stand in India is completely opposite to that of USA. There is no definite law or decision which provides guidelines for such kinds of infringement. A small provision can be said to have been made in the Information Technology Act, 2000 by virtue of Section 79 of the Act, which exempts the internet service provider from liability in case of third party violations, if due diligence is proved. However, confusion arises as

to the specific position of copyright infringers within the text of this provision. The words „under this Act, rules or regulations made thereunder indicate only a bar under this Act and not that of the Copyright Act. In such a situation, it is important to look at various case laws in this regard in India. The judicial response suggests that the ISPs have been held liable for acts of contributory infringement, not following the provisions of the IT Act, 2000. In one case of Super Cassettes Ltd v Yahoo Inc and Anr, the Delhi High Court had issued a notice to the ISP Yahoo Web Services (India) Pvt. Ltd for infringing copyright of the plaintiff by streaming one of its videos in the portal video.yahoo.com. The Delhi High Court has issued similar notice to other ISPs like Google, Youtube. Some amendments have also been brought about in the Act in Section 52(1) (c) for restricting liabilities. However, there is still no express provision.

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## **4.8LET’S SUM UP**

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In this chapter, we have learned the laws of two countries-USA and India in the light of copyright protection of their works in cyberspace. The main issues revolved around the jurisdiction of domestic courts, compliance with WIPRO, liability on infringement and remedies for the copyright owner. We have also learned various laws and the decisions of the courts.

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## **4.9FURTHER READING**

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- Thomas H Davenport, INFORMATION ECOLOGY: MASTERING THE INFORMATION AND KNOWLEDGE ENVIRONMENT, 3 (1997)
- Tatiani G Rapatzikou, GOTHIC MOTIFS IN THE FICTION OF WILLIAM GIBSON, 100 (Rodopi,2004)
- [3] ChitrarekhaKuffalikar, Redefining IPR in the New Digital Environment: Some Concepts For College Libraries in INTELLECTUAL PROPERTY RIGHTS AND COPYRIGHT, 50, 51 (SP Satarkar ed., 2003)
- JJ Hua, TOWARD A MORE BALANCED APPROACH: RETHINKING AND READJUSTING COPYRIGHT SYSTEMS IN THE DIGITAL NETWORK ERA, 39 (2014)

- Super Cassettes Ltd. v MrPunitGoenka and Anr. 2009 (41) PTC 1(Delhi High Court)
- Frank Pasquale, Toward On Ecology of Intellectual Property: Lessons from Environmental Economics for Valuing Copyright Commons, 8 YALE J.L. & TECH 78, 110 (2006)

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## **4.10 CHECK YOUR PROGRESS: POSSIBLE ANSWERS**

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### **1. What are the reasons to hold the service provider liable for infringement?**

There are mainly two reasons for holding service provider liable.

- 1) due to the wider reach of cyberspace it is difficult to locate an individual who actually uploads the copyrighted material, whereas the service provider is an organization having its place of business in a definite place,
- 2) an individual will not be able to pay the amount on infringement but an organization can pay for making good the losses on infringement.

### **2. State the criteria to determine the jurisdiction.**

There are three criteria: (1) an intentional action (2) expressly aimed at the forum state (3) knowledge that the brunt of the injury would be felt in the forum state. Thus, it indicated that if the person being affected by the copyright infringement or the spread of the copyrighted work is widespread in the forum state, it has full jurisdiction over the matter.

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## **4.11 ACTIVITY**

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Elaborate on the jurisdiction of domestic courts, compliance with WIPRO, liability on infringement and remedies for the copyright owner (Word count- 2000 to 2500)

## **Block-3**

# **TRADEMARK AND CYBER LAW**

# Unit 1: TRADEMARK TRAFFICKING IN CYBERSPACE

## Unit Structure

- 1.1 Learning Objectives
  - 1.2 Introduction
  - 1.3 Cyber spacing
  - 1.4 Fundamental of Trademark
  - 1.5 Rights under Trademark
  - 1.6 Trademark in cyberspace
  - 1.7 Linking and framing
  - 1.8 Let's sum up
  - 1.9 Further reading
  - 1.10 Check your progress: Possible Answers
  - 1.11 Activity
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## 1.1 LEARNING OBJECTIVE

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In this chapter we will learn-

- The traditional notion of trademark law and its shift towards cyberspace.
- Relevant case laws in relation to determination of the jurisdiction of the case.
- Various remedies in case of trademark violation on cyberspace.

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## 1.2 INTRODUCTION

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Unimaginable growth of the Cyberspace raise the various thought in trademark related issues arises in it. Many of the issues are solved by the traditional notion of trademark law, whereas the other present thornier questions requiring greater sensitivity for the effecting marketing in internet. The domain name dispute is the cyberspace trademark issue that continues to attract the most coverage. Is a domain the same as a trademark? When does a domain's use infringe on a trademark's rights? What will a corporation do if someone else registers its name or trademark as a domain name? Beyond domains, there are a slew of trademark problems that are sure to outweigh domain conflicts in the end. Along with the internet, questions about what constitutes patent use and misuse are exploding. Companies must be cautious in minimizing trademark dilution and think carefully before linking to other sites or allowing others to link to the company's site using company trademarks, in addition to standard trademark improvement and policing issues that take on new forms on the Internet. Attempting to enforce trademark rights in cyberspace is a difficult but fascinating job.<sup>73</sup>

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## 1.3 CYBERSPACING

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Cyberspace is a futuristic computing environment and an interactive medium that is used to link computers all over the world. Cyberspace is a global computer network that uses the TCP/IP protocol to allow online networking and data transfer. The term cyberspace was initially introduced by William Gibson in his 1984 books, "Neuromancer". Later on it was Gibson who criticizes the term in late year, calling it

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<sup>73</sup>Meena Amar, lectures on Cyber Laws, 1st ed. (Hyderabad: Asia Law House, 2011), pp.71 to 72.

evocative and essentially meaningless. Cyberspace allows users to share information, conduct business and many other activities. It mostly gained its interest not by its technical execution and implementation but by the social interaction. The Cyberspace does not have any physical foundation that we used in the real world. But that virtual effect in cyberspace takes place in the real world have a real effect. Cyberspace, according to author Bruce Sterling, is "the location where a telephone call seems to take place."<sup>74</sup> It's not in your phone; it's in the plastic unit on your desk. Not in the other person's house, but in a different city – the space between the phones. The indefinite location where the two of you, as human beings, meet and communicate." The growth in the internet brought the problem in the cyberspace because of its ease flow of information and communication led the misuse of the information in the internet. In fact, the investigator has revealed that the incident of 9/11 in the U.S.A and the 26/11 in Mumbai are result of the internet where the carnage communicates to each other through the internet.

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## **1.4 FUNDAMENTALS OF TRADEMARK LAW**

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Trademark law Trademark is the word, symbols, or phrase of the particular manufacturer or seller's product distinguish itself from other product. For example the TM of Nike is different from other brand of the shoes such that in internet is done by Nike.com and under some circumstances the packaging and procedure also include in the trademark. Trademark is very much essential in industry and commercial business to of identify their product. This trademark secures the right of the owner of the manufacturer and avoids the infringement of the product so that no person can allow using that mark with approval of the owner. The trademark is the way by which right of both the consumer and manufacturer owner. The essential function of the trademark is to identify the origin of the consumer source and the product source. It is properly called as indicate source or serves for example, "Pepsi", "coke cola", "McDonalds" etc. Trademark is an essay way to the consumer to identify the product source.<sup>75</sup> Trademark just directly looks in the symbols of the

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<sup>74</sup> R.K. Chaubey, *Cyber Crime and Cyber Law*, 1st ed. (kolkatta: Kamal Law House, 2008), pp712 to 714

<sup>75</sup> See Joe Mullich, *Coffee Break: Some Play Net Domain Game Hoping for Big Gain*, *BUSINESS FIRST*, Aug. 25, 1997, at 18. The results of a 'whois' search on conducted on January 28, 1999, indicate that the domain is still registered to Khoshnood but evidently does not have a server location.

product from which a consumer can easily know the quality of the product. For example if the person has to buy cold drink, he simply sees the symbols of Pepsi and borrows it. Such that in internet the consumer directly look into the domain name example when a person have to buy cell phone he will look into the application of flip kart which assured the safe delivery of the product.

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## **1.5 RIGHT IN TRADEMARK**

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Right of TM owner – the trademark owner has three essential rights: 1. Exclusively right to use that product. 2. To obtain relief from the infringement of the product. 3. Right to assign the TM in consideration to use. The right in the trademark are confer by two ways that is by registering the trademark in registration office i.e. patent and registration office or by being the first one to use that trademark in commerce.<sup>76</sup> The use of marks means the actual sale of the product to public in that area where it gain the reputation for example if owner sale pizza in his local area than he gain the reputation over there and can protect that marks from the late comers who use that marks. But if the mark is used in other geographical area then the mark could not called as infringes. The other way to use mark is by registering that mark in the registration office. It is the bonafide intention to use that mark. After the marks have been registered the right will be confers to sue the party in infringement or could claim the remedy from that person. This right is limited if the mark is been used in geographical area then the registration owner of the trademark can use that mark everywhere except in that area where it has been used earlier.

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## **1.6 TRADEMARK IN CYBERSPACE**

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Traditionally, trademark law was used to shield merchants who had registered trademarks by granting them exclusive rights to do business under the logo and excluding third parties from doing so. However, with the advent of the internet and the paradigm change from the conventional trading method to the online forum, the

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<sup>76</sup> McCarthy J Thomas, Dilution of a trademark: European and United States law compared in Intellectual Property in the New Millennium, 165-166



traditional trading process has become obsolete. Many new problems have arisen in the area of trademark rights.

One of the most prominent places where trademark disputes in cyberspace occur is the domain name. A domain name is essentially the name given to a website; it is similar to an address that people use to access the website. The domain name is very significant in device recognition, and is achieved with the help of an IP address, which is a series of numbers and letters. However, due to the IP address's complicated numeric coding, simpler alternatives that are easily remembered have been created. A domain name is an option that may be a mixture of words, symbols, and numbers. For instance, a domain name may be [www.lawyerswork.com](http://www.lawyerswork.com).<sup>77</sup>

It is vital to register a domain name in order to create a structured marketable position on the internet. As a result, there is no trademark examination of domain names because it will be too much hassle for the registrar. As a result, there are four situations in which a controversy over a domain name versus a trademark occurs.

The first instance is known as cyber-squatting. It applies to the act of registering a domain name for the purpose of conducting trade and commerce. The domain name is the company's trading name, but it is not registered with the company. A third party registers a domain name with the intention of transferring it to the original owner for a fee. The applicant cannot file his trademark as a domain name until the other party has the domain name, and therefore his right to register is infringed. It has been noted that a domain name serves as a company's identifier. It has the same purpose as a company's trademark. A domain name is more than just a way to get to a certain website.

Furthermore, if an entity registers a domain name that is equivalent or close to a trademark of a corporation for which he has no business relationship, an injunction can be issued against the person. There was no legislation pertaining to domain name rights. The United States was the first nation to pass laws on the subject. The Cybersquatting Piracy Act of 1999 was the name of the law.

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<sup>77</sup> Further complications arise with regard to user names and subdomains. Although NSI may assign second level domains, domain holders are free to create any number of subdomains and user names. Thus, the journalist who registered , in part to call attention to the reality that only the affluent have access to the Internet, used the moniker 'Ronald' (ronald@mcdonalds.com). See Joshua Quittner, Billions Registered, Wired Magazine, October 1994 (visited April 22, 1999) . Likewise, there was nothing, other than trademark law, to prevent the registrant of the domain from using a subdomain such as 'microsoft' () even accompanied by the user name 'gates' (gates@microsoft.windows95.com).

The cyber parasite is the second case, in which benefits and profits are gained through the use of the real domain name. The approach entails using a generic or misspelled domain name that is similar to a well-known trademark. These strategies are used to trick customers to pawn off goods as their own. In the case of Rediff Communication Ltd. v. Cybertooth and Others, the defendant had registered a domain name that was confusingly similar to the plaintiff's and was operating a similar company. The defendant intended to carry out his trade and business under the plaintiff's trademark or trade name, resulting in a violation of the plaintiff's privilege, according to the court.

The Cyber twin is the third scenario. This condition happens where all parties to a lawsuit have a legal right to a certain domain name.

Reverse cyber-squatting is the fourth case involving a domain name. This is the antidote to cyber-squatting. It entails trademark owners attempting to take control of a domain name by using tactics such as bogus cybersquatting claims against the domain name's legitimate owner. To avert legal repercussions, the domain name owner is required to pass the domain name to the trademark owner.

Apart from the above obstacles, there are also several other cyberspace challenges posed to a company's trademark. In the cyber space, another field where a trademark dispute can occur is hypertext connections. It basically refers to moving a user from one page of a website to another. There are hyperlinks that are inserted between web pages. For eg, we can see a hyperlink for 'Gucci' on a web page, but when we click the link, we are taken to another web page that may sell similar items but is not associated with the brand Gucci. Trademarks are infringed as a result of these hyperlinks. Furthermore, it is simple to monitor the hyperlinks that exist in cyberspace. As a result, a functional solution in this area has yet to be formulated.

In certain cases, the use of keywords may result in trademark infringement in cyberspace. Often times, web sites use well-known trademarks as keywords in order for their website to appear at the top of the search results. The use of a trademark can mislead an unsuspecting user, resulting in infringement.

The internet was initially created as a tool for communication only for government and industrial purpose but now it becomes the global economic purpose. The easy flow of information and ease of communication increase the ability to access the information which creates the opportunity to misuse and criminal activity. It had tremendous impact in intellectual property. Domain name dispute is the most active

part that involves the accusation of trademark infringement usually by the cyber squatter. Recently there was no law regarding the protection of the domain name but after the legislation made by the United State, which is the first country to make cybersquatting infringement act 1999. In an increasingly global market the brand become important for competitive advantage in the internet. "Brands rely on their symbolic power to draw attention to themselves and build an acknowledged capacity for value creation". Brand can secure its rights by registering the trademark as a domain name. The current internet technology does not limit problem of cybersquatting and other confusion regarding the TM as a domain name.

With the adoption of the Domain Name Dispute Resolution Policy (UDRP) on August 26, 1999, the Internet Corporation for Assigned Names and Numbers (ICANN) created a new regulation. The Internet Organization for Assigned Names and Numbers (ICANN) is in charge of maintaining and organizing the domain name scheme to ensure that each address is unique, including IP addresses and domain names. Via its Digital Agenda, which combines the internet, digital media, and the intellectual property regime, the World Intellectual Property Organisation (WIPO) guarantees that the rights of authors and owners of intellectual property are secured around the world.

Cyberspace is functioning well in order to effective commercial marketing and business but with this the right of consumer and owner of product must be protected. The development of law in the technical field is limited but with little courage the law and technology together will protect the trademark community in cyberspace. The most common aspect of domain name issue issues is that of cyber squatting. Under the U.S Anti-Cyber squatting Consumer Protection Act 1999, cyber squatting is the use of trademark in order to take advantage by that trademark and by registering domain name of the famous company to take undue benefit from it. One of the corollary of the cyber squatting is typo squatting where the users are made to make a typographical errors when entering in the domain name. For example:

1. BSNL.co.in into BSNL.com
2. Sony.com into soni.com
3. Facebook.com into facebok.com

*Yahoo Inc. vs. Akash Arora 19 february1999*The appellant, who is the registered owner of the domain name "yahoo.com," was successful in securing a temporary injunction prohibiting the defendants and their associates from doing business on the

Internet or elsewhere under the domain name "yahooindia.com" or any other trademark/domain name that is confusingly identical to the plaintiff's trademark.

Domain Active Property Ltd Sbicards.com vs. Sbicards.com was requested by the World Intellectual Property Organization (WIPO) to be sold to an Indian company from an Australian firm that had stolen the domain name in the hopes of selling it for a large amount to a State Bank of India affiliate later. SBI Card's claim that the Australian firm was in the business of buying and selling domain names from its website was acknowledged by the panel.<sup>78</sup>

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## 1.7 LINKING AND FRAMING

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Hyperlink is the transportation of the users to another location. Linking create problem with feature like "deep linking" and in the framing helps the site manager to create frames on the page itself and open web page on a single page. It makes vulnerable to intellectual property right violations. Meta tagging is another major problem for the trademark holders. Meta tagging containing the words, keywords and content of the pages due to its meshing of the technology makes its legal issue. It signify the HTML, which forms the basis of the WWW.<sup>79</sup>

- Remedies International level
- Provision of the Anti cyber squatting consumer protection act (1999).
- International arbitration system created by ICANN.
- National level
- National internet exchange of India
- WIPOs and arbitration system
- Suit in ICANN

### ***Jurisdiction and enforcement***

Anti cyber squatting Consumer Protection Act (ACPA) feature is that it enables in rem jurisdiction in domain name dispute which means that the domain name owner does not have to sue personally but can takena action against domain name itself. But it is not easy to sue the cyber squatter as the location of the infringer could not

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<sup>78</sup> Mariela Maidana-Eletti, Market Access and Trademark Protection in the WTO Regime: The Case of Certification Marks, RECHT UND GESUNDHEIT: JUNGE RECHTSWISSENSCHAFT LUZERN 69, 82 (2013), available at <http://ssrn.com/abstract=2602000>.

<sup>79</sup> NEIL WILKOF & DANIEL BURKITT, TRADE MARK LICENSING, 176–78 (Sweet & Maxwell 2d ed. 2005).

be located then the person cannot be sue as in context of the U.S. law. To take advantages of the rem provision the trademark owner must have to satisfy that the location of the infringer could not be found. The plaintiff in rem provision cannot claim damages but the remedies to cancellation or transfer of the domain name in related matter the TM owner prefer the (ICANNs) Uniform Dispute Resolution policy. Thus the above policy cannot provide the damages claim. For such that the plaintiff has to sue the cyber squatter personally for damages. But such policy is silence in the dispute which is outside of their jurisdiction and the internet community has to take more skill technique and effective implementation of law in the cyberspace in order to protect the TM in internet.

Therefore, it can be concluded that the protection of trademark in the cyberspace is very complex subject and it is very difficult to stop the infringement of trademark as the internet is so much vast in nature, involving many grey area which have to be focused in order to protect the right of TM owner. Our existing law doesn't have the effective remedies to plaintiff as the infringer location could not be found and the out of jurisdiction could not be sued. Such failure could amount to destruction in the global market. Legal right of an individual poses the challenge for the court to secure the physical presence of the party who is located outside the jurisdiction of the respective court and enforce it. All the concerned authorities working towards betterment of healthcare facilities should work together and take steps to provide:

- Remedies to the plaintiff
- Implementation of law where it is not possible
- 26Protection of trademark community in cyberspace

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## **1.8 LET'S SUM UP**

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In this chapter, we have learned the laws on trademark and its related aspects of trafficking. We have also covered relevant case laws along with its reference in Indian context. We have also understood the remedies and steps to mitigate the trademark trafficking,

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## **1.9 FURTHER READING**

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- Jonathan Eisenberg, A Guide to the Anti cyber squatting Consumer Protection Act, 2000. [www.gcwf.com/articles/journal/jil-march00-1.html](http://www.gcwf.com/articles/journal/jil-march00-1.html)

- Jonathan Eisenberg, A Guide to the Anti cyber squatting Consumer Protection Act 2000. [www.gcwf.com/articles/journal/jil-march00-1.html](http://www.gcwf.com/articles/journal/jil-march00-1.html)
- Christopher R Perry. Trademarks as Commodities: The 'Famous' Roadblock to Applying Trademark Dilution Law in Cyber space Connecticut Law Review, 2000; 32:1127
- Jack Goldsmith. Cybercrime and Jurisdictions, 2000.
- David Post. Governing Cyberspace This article was to appear in Fall 1997 in Wayne Law Review. F. Gregory Lastowka, Search Engines, HTML, and Trademarks: What's the Meta For? 86 Virginia Law Review, 2000, 835.
- David Streitfeld. Making Bad Names for Themselves; Firms Preempt Critics With Nasty Domains The Washington Post, Friday September 8, 2000, Westlaw 25414864

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## **1.10 CHECK YOUR PROGRESS: POSSIBLE ANSWERS**

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### **1. What is cyber spacing?**

Cyberspace is a futuristic computing environment and an interactive medium that is used to link computers all over the world. Cyberspace is a global computer network that uses the TCP/IP protocol to allow online networking and data transfer.

### **2. What are the rights of trademark owner?**

The trademark owner has three essential rights: 1. exclusively right to use that product. 2. To obtain relief from the infringement of the product. 3. Right to assign the TM in consideration to use. The right in the trademark are confer by two ways that is by registering the trademark in registration office i.e. patent and registration office or by being the first one to use that trademark in commerce.

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## **1.11 ACTIVITY**

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Explain the essentials of trademark in cyber spacing along with detailed account on the infringement and its remedy. (Word count- 2000 to 2500).

# Unit 2: INFRINGEMENT OF TRADEMARK IN CYBER SPACE

## Unit Structure

2.1 Learning Objectives

2.2 Introduction

2.3 What is domain name

2.4 Trademark and Domain name

2.5 Dispute between Trademark and Domain name

2.6 Forms of infringement of trademark in cyberspace

2.6.1. Cyber Squatting

2.6.2. Reverse domain name hacking

2.6.3. Meta tabs

2.7 Let's sum up

2.8 Further reading

2.9 Check your progress: Possible Answers

2.10 Activity

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## 2.1 LEARNING OBJECTIVE

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After going through the chapter, you should be able to understand the-

- Relevant aspects attached to trademark in relation to domain name.
- Significance of domain name under infringement of trademark
- Different types of infringement under trademark.

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## 2.2 INTRODUCTION

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Issues of Trademark Law and Domain Names in Cyberspace “A logo capable of being depicted graphically and capable of separating the products or services of one individual from those of another, and may include the form of goods, their wrapping, and combinations of colours,” according to the definition of a trademark.<sup>80</sup>

A trademark is used to distinguish the origins of a product's origin. The four purposes of a trademark are as follows:

- i. It defines the substance as well as its source.
- ii. It maintains the product's consistency.
- ii. It promotes the commodity.
- iv. It provides a mental picture of the commodity in the public's mind, especially among consumers or potential consumers of such products.<sup>81</sup> Lee, Skoda, Colgate, Pepsi, Brooke Bond, Sony, among other trademarks, are examples.

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## 2.3 WHAT IS A DOMAIN NAME?

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Simply placed, a domain name is a linguistic equivalent to what we refer to as an IP address. Per machine has a unique identifier, which functions similarly to a phone number. If you wish to contact a friend, you must first dial the friend's phone number. Similarly, if he wants to reach a website, he would type in its IP address. However, because it's difficult to recall a long number like 202.162.227.12, a mechanism has emerged in which a name is translated to the relevant phone number or IP address.

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<sup>80</sup> Section 2(1)(zb), The Trademark Act, 1999.

<sup>81</sup> Dr. B.L. Wadhwa, Law relating to Intellectual Property, Universal Law Publishing Company, New Delhi, 2009, at pg. no. 134.



As a result, instead of typing 202.162.227.12, one can now simply type [www.tata.com](http://www.tata.com).

What exactly does a domain name entail? These unmemorable lines by the great poet William Shakespeare were most certainly composed at a period when patents and domain names were unknown. If Shakespeare had known that Shakespeare.com was for sale, he would have thought twice about writing those words. As a result, the importance of domain names should not be overlooked.<sup>82</sup>

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## **2.4 TRADE MARKS AND DOMAIN NAMES**

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Cyberspace does not constitute a substantive change to ordinary trademark infringement. It may be easier to infringe trademarks on the internet, but the actual infringement is not a qualitatively different phenomenon as such. However, there is one important exception: the conflict between trade marks and domain names which is characteristic of the cyberspace. Trade marks are signs capable of being represented graphically and capable of distinguishing goods or services of one undertaking from those of other undertakings. Domain names are a different and more user-friendly expression of internet protocol addresses (unique numbers that identify each computer linked to the internet) that indicate the location of a given website. The question of infringement arises if a domain name is confusingly similar or identical to a trademark. Very often, this is even intended by the registrant of the domain name. He registers (in bad faith) a domain name that is identical to a known trademark or trade name of a company and then offers that company the domain name against payment of a large sum of money – ‘cybersquatting’.

In the UK the principal decision in this regard is *BT (and others) v. One in A Million*: where there is clear evidence of systematic registration by the appellants of well-known trade names for blocking registrations and for extracting money from the owners of the goodwill in the chosen name, that is a threat to exploit the goodwill by trading under that name. The registering of a distinctive name makes a representation to persons who consult the register that the registrant is connected or associated with the name registered and thus the owner of the goodwill in the name.

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<sup>82</sup> S. K. Varma & Mittal, *Legal Dimensions of Cyberspace*, Indian Law Institute, New Delhi, 2003, at pg. no.154.

This amounts to passing off and also to trademark infringement.<sup>83</sup> Usually, conflicts between trademarks and domain names are resolved according to the Uniform Domain Name Dispute Resolution Policy (UDRP), which operates worldwide. The registrant submits to this process on registration of his domain name. Where the registrant's domain name is identical or confusingly similar to the complainant's trademark, the registrant has no legitimate interests in the domain name, and the domain name has been registered and is being used in bad faith, UDRP will cancel, transfer or change the domain name.<sup>84</sup> Although the law on infringement is clear, it is also obvious that in fact, cybersquatting opens up a large field of potential cyberwar activities.

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## **2.5 DISPUTE BETWEEN TRADEMARK AND DOMAIN NAMES**

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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 to violate the rights of the original trademark owner. Actually, domain names are registered on a '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.

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## **2.6 FORMS OF INFRINGEMENT OF TRADEMARK THROUGH CYBERSPACE**

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### **2.6.1 Cybersquatting:**

Various forms of domain name cases are brought to courts around the world. Most of the more extreme forms of lawsuits has been "Cybersquatting," which entails the use

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<sup>83</sup> BT (and others) v. One in A Million and others [1999] 1 WLR 903, at 924-926, CA. Discussion of other cases on cybersquatting in the US and the UK, see Younes (2012: 849-850)

<sup>84</sup> UDRP policy as approved by ICANN (Internet Corporation for Assigned Names and Numbers), <http://www.icann.org/en/help/dndr/udrp/policy> (visited 7 Feb. 2014), paras. 3, 4(a) and (i).

of a domain name by someone who has not claimed the name nor any intrinsic claim to it. Since trademarks and domain names are identical, certain individuals have taken advantage of this by registering trademarks of others as domain names and then selling such domain names to trademark owners or third parties for a fee. This is referred to as “cybersquatting,” which refers to someone sitting in another person’s house. Cybersquatting is an abusive process in which one party registers a domain name that contains the name or trademarks of another. This activity demonstrates the significance of domain names in defining online identities. This method is well-known in order to either prevent a legal customer from registering their most desired domain name or to sell the names for a profit on the open market. As a result of this cybersquatting pattern, courts are looking into the relationship between trademarks and domain names. To file a cybersquatting suit, the plaintiff must show deception, a violation of legal rights and interests, and a domain name that is identical to the trademark.

#### **2.6.2 Reverse domain name hijacking:**

**Reverse cybersquatting** is another term for it. It arises when a trademark owner seeks to secure a domain name by filing bogus cybersquatting charges against the legitimate owner of the domain name in court. In domain name dispute proceedings, reverse domain name hijacking, or RDNH, happens when a copyright owner tries to secure a domain name by wrongly alleging cybersquatting against the domain name owner.

This differs from domain name hijacking, which is commonly synonymous with cybercrime and involves the theft of a domain name via unauthorized access to the domain management account or domain name system (DNS) hijacking, which involves the modification of a domain’s name servers via similar unauthorized access.

In other words, RDNH occurs when a trademark owner uses UDRP litigation to force an actual domain owner to relinquish their domain name rights. This strategy is against the law, which explicitly indicates that the claimant must certify that they are not exploiting the procedure to intimidate a domain holder and that they are behaving in good conscience through fair arguments. Domain name owners are often forced to sell ownership of their domain names to trademark owners in order to escape court litigation and expensive costs, particularly where the domain names belong to smaller businesses or individuals who are unable to afford to contest the lawsuit.

Larger companies and well-known affluent people are the most prominent perpetrators of reverse domain name hijacking.

➤ **What can companies do to avoid attempted RDNH?**

There is an increased chance of the respondent requesting an RDNH decision where the trademark is made up of common terms or where the domain name has no substance. Trademark owners who have ample reasons or who do not act in poor conscience will avoid an RDNH decision.

Recommendation to trademark owners:

- Make sure the trademark or rights predate the last registrant's domain name registration or purchase (in case a domain name has changed hands). It would be impossible to argue "bad faith" if prior rights cannot be confirmed, since the UDRP hinges on registration and usage.
- Document how well the trademark was known at the time the contested domain name was registered; whether the domain name is 20 years old, how well it is known today is meaningless.
- Claims that are backed up with proof. Present no allegations of your favour or try to dismiss the respondent without evidence.
- Be truthful with the jury. If you tried to purchase the domain name from the registrant before filing the UDRP, tell us about it. No tribunal would hold a complainant responsible for attempting to reclaim a domain name more easily or cheaply than via the UDRP, although they would remain unimpressed whether the complainant claims the respondent attempted to market the domain name to them at an unfair price since the complainant initiated the conversation.
- Avoid overt efforts to entrap the respondent or deceive the jury, such as submitting only partial material information, the particulars of which are revealed when the registrant files their answer.
- Finally, think about who and who you'll turn to if you have a disagreement. Without proper analysis of the evidence, a boilerplate solution avoids leaving the trademark owner vulnerable to not only a loss but also the presumption of underhanded tactics.

**2.6.3 Meta tags:**

Meta tags, also known as Meta elements, are a type of web page feature. Meta tags include details such as website titles, keywords, and other pertinent material. Meta tags were originally used in search engines to describe what a website was for a while the internet was in its infancy. Meta tags were also used to help position web sites in the relevant categories. People nowadays use Meta tags to generate fake page rankings for badly designed web pages. Meta tags are classified into three categories: title, definition, and keywords.

Meta tags are divided into two categories: context meta tags and keyword meta tags. The context meta tag, for example, includes a brief summary of the website. The keyword meta tag, on the other hand, is a word or phrase that best defines the website's subject. Other useful meta tags, such as the meta http-equiv tag, the meta reset tag, the meta copyright tag, and the meta author tag, provide additional information to web browsers and search engines.

The use of a third-party trademark in one's meta tags is the key point of controversy when it comes to meta tags. To draw Internet traffic, website owners, for example, add third-party trademarks in meta tag info. This will cause traffic to be diverted away from the trademark owner's website. Misuse of meta tags can enable the website owner to benefit from public attention and sales that are misdirected. Intentional trademark infringement can occur when website operators use third-party trademarks in meta tags, website copy, and code meta tags.

#### **2.6.4 Loopholes under the IT, Trademark**

In India's new or proposed Information Technology Act, there is no clause to jail cyber-squatters; at most, the domain can be taken back. Despite the fact that the IT Act does not provide for civil compensation, To discourage squatters from grabbing more domains, the IN Registry has taken aggressive measures to reward victims. The majority of squatters, on the other hand, go by aliases. The National Internet Exchange of India (NIXI) is a. IN Registry is a self-contained entity that is primarily responsible for the upkeep of the. IN cc-TLD (country code top-level domain), as well as maintaining its organizational continuity, reliability, and security. It will carry out the different aspects of the current strategy outlined by the Indian government's Ministry of Communications and Information Technology's Department of Information Technology. The Information Technology Act is defective in certain areas, such as authority, cybercrimes involving IPR, cyber harassment, cyber slander, and so on.

Similarly, the Indian Trademark Act, 1999, is vague on questions resulting from trademark violations on the internet.

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## **2.7 LET'S SUM UP**

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In this chapter, we have analyzed the concept of cyberspace in light of trademark infringement. In addition to that, we understood the various type of trademark infringement in cyberspace and how domain name id studies in the given context. Besides, we have also learned about the loopholes under trademark legislation.

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## **2.8 FURTHER READING**

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- V.K. Ahuja, Intellectual Property Rights in India, Lexis Nexis Butterworth's Wadhwa, Nagpur, 2009 Vakul Sharma, Information Technology, Universal Law Publishing Company, New Delhi, 2013.

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## **2.9 CHECK YOUR PROGRESS: POSSIBLE ANSWERS**

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### **1. What is a domain name?**

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.

### **2. Define Mega Tags.**

Meta tag is an element of web pages that are also known as Meta elements. Meta tags provide information about page descriptions, keywords and other relevant data.

### **3. Explain the reverse domain name hacking.**

It is also known as reverse cybersquatting. It happens 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.

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## **2.10 ACTIVITY**

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Provide a detailed account of the domain name along with different types of trademark infringement. (word count 2000-2500)

# Unit 3: TRADEMARK LAW IN CYBERSPACE: PROTECTION TO INTERNET ADDRESS

## 3

### Unit Structure

3.1 Learning Objectives

3.2 Introduction

3.3 Disputes relating to Trademark in Internet Domain Name

3.3.1 Cyber Squatting

3.3.2 Reverse Domain Name Hijacking

3.3.3 Typo-Squatting

3.4 Relation of Dispute Resolving between UDRP and the Courts

3.5 Position in India

3.6 Let's sum up

3.7 Further reading

3.8 Check your progress: Possible Answers

3.9 Activity

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## 3.1 LEARNING OBJECTIVE

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In this chapter, we will learn-

- How UDRP (Uniform Dispute Resolution Policy) deals with the same situation at an extra-territorial level.
- The legal position under trademark law for protection of trademark in cyberspace
- Some suggestions as to how Indian Trademark Laws can make the working of UDRP better by working on its own laws.

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## 3.2 INTRODUCTION

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The history of trademark law to the cyberspace can be associated with the creation of the World Wide Web (www) which certainly created a link of trademark law with Internet domain name disputes. It has also sparked interest among consumers as a means of commercializing the Internet medium. Thousands of companies have created online storefronts to distribute publicity materials, provide customer support, and sell merchandise and services. As a result of this commercialization aspect, trademark law and domain name law are being increasingly intertwined. Consequently, the following dynamic growth of the World Wide Web has issued new challenges to the intellectual property consultants concerning trademark infringement.

For trademark owners, internet is a profitable platform, but in certain cases, it turns out to be problematic in their business growth. These trademark owners often have to deal with certain domain name disputes inflicted by the third party like cybersquatting etc but in India, we per say do not have any Domain Name Protection Law so the cases relating to cybersquatting are decided under Trade Mark Act, 1999.<sup>85</sup>

Under the current law, section 29 provides for the protection of registered trademark and the protection for unregistered trademark has been provided in section 32. However, the act is silent on the protection for trademarks infringement in the cyberspace. The bulk of domain name cases appear to include trademarks, as it is said that the conflict stems from the ownership or use of the domain name infringing

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<sup>85</sup> See generally Gary W. Hamilton, Trademarks on the Internet: Confusion, Collusion, or Dilution?, 4 TEX. INTEL. PROP. L.J. 1, 2 (1995); Dan L. Burk, Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks, 1 RICHMOND J.L. & TECH. 1, § 2 (April 10, 1995) .

with some lawfully recognised right, such as a trademark, a common law privilege of handing off, or some other right.

As trademark laws are territorial in nature but internet in the global domain so the dispute involving bad faith registrations are typically resolved using the UDRP (Uniform Domain Name Dispute Resolution Policy) process which is developed by the ICANN. Under UDRP, WIPO happens to be the leading ICANN accredited domain name dispute resolution service provider which was established as a tool for promoting the protection, dissemination, and the use of intellectual property throughout the world. Since TRIPS agreement provides for only minimum standards so, there exists similarity up to some extent in the domestic IP laws and except these principles there are hardly any laws which are uniform, and as a result of which there exist some advantages and disadvantages of nation over other nations IP laws.<sup>86</sup>

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### **3.3 DISPUTES RELATING TO TRADEMARK IN INTERNET DOMAIN NAME**

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Let's start with the question why do domain names need a legal protection? On one hand, domain names provide great economic value to the online business and on the other, these names are exposed to many ways in which it puts domain names at risk. The risk particularly includes;

- 3.3.1 Cyber squatting is described as “the registration of a domain name by someone who does not have a legal right to the name with the intent to
- (i) sell the name,
  - (ii) (ii) block the trademark holder from having rights to the name, or
  - (iii) (iii) divert traffic to a name in the hopes of a trademark owner making a bid for it.”

In the case of ‘Green Products Co. v Independence Corn By-Products Co.’<sup>87</sup> (ICBP), for example, both firms were rivals in the corncob by-product sector. ICBP

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<sup>86</sup> Robert J. Raskopf, Trademarks and the Internet, in INTELLECTUAL PROPERTY LAW INSTITUTE 1047 (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-416, 1995). For a description of how domain names are created and assigned, see infra Part III.

<sup>87</sup>992 F. Supp. 1070

licensed the domain name (greenproducts.com) but has yet to create a website. The court determined that ICBP's goal was to use its confusing domain name to attract new users to the site after it was launched, and that it sought to profit unfairly from the use of Green Product's name. Consumers may not be confused after visiting the site, but they may only purchase the product from the ICBP's site, according to the court. The court ruled that it was violation based on these results.

3.3.2 Reverse Domain Name Hijacking; as people file confusingly identical domain names, they point them to gripe pages that contain some propaganda.

3.3.3 Typo-Squatting; done by people who register the domain names incorporating variations of well-known trademarks terms such as misspellings (micr0soft.com) or adding of prefixes or suffixes to the existing domain name (yahooindia.com) and use them for websites to take advantage of unwary Internet users.

***Yahoo Inc. Corporation v Akash Arora***<sup>88</sup> is the first case in which the Indian Court that discussed the issues revolving services offered through the Internet. The plaintiff, in this case, submitted that they had the registration of the domain name yahoo.com with Network Solutions Inc. and had registrations of the same in more than 69 countries. The defendant contended that he had provided a disclaimer in his website which avoided the confusion, also, that yahoo is a dictionary word and could not be protected but the High Court of Delhi held that the marks were similar and disclaimer does not help as people still would associate it with the original yahoo, administratively or economically. Furthermore the word yahoo was protected as it was a well known trademark used by the Plaintiff and was distinctive.

The main problem regarding this dispute arises with Cyber Twins which occurs when both the domain name holder and the challenger have a legitimate claim to a domain name then they are known as cyber twins. The cases involving cyber twins are the most difficult to be resolved, because, the law of trademark and unfair competition may otherwise allow both parties to enjoy concurrent use of both. Both types of

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<sup>88</sup>1999 Arb. L. R. 620

conflicts may occur on two levels: first, when the same mark is owned and used by different people for different types of goods or services; and second, when the same mark is used and used by different people for different types of goods or services. Second, 'territoriality' occurs where the same symbol is owned and used by different people in different countries in relation to the same products or services.

Both companies have a legal claim to the domain name (dci.com) in ***Data Concepts, Inc. v Digital Consulting Inc.***<sup>89</sup> and both of them had patent rights for DCI. Data Concepts, on the other hand, licensed the domain name dci.com in 1993. It would seem that, in the cases where both have claims then the entity first to register would get it but The Sixth Circuit ruled that there still was possibility of infringement. Since trademark infringement is both a reality and a legal issue, the case must proceed through a full trial before an infringement decision can be made. Owing to a lack of documentation and the fact that Digital was unaware of Data's previous life, the lawsuit was dropped when Data did not show that dci.com was misleading people between the two tags.

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### **3.4 RELATION OF DISPUTE RESOLVING BETWEEN UDRP AND THE COURTS**

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The UDRP applies to second-level domain name registrations in the following 14 generic top-level domains (gTLDs):

.aero, .asia, .biz, .cat, .com, .coop, .info, .jobs, .mobi, .museum, .name, .net, .org, .pro, .tel, and fly. However, some of the above-mentioned gTLDs are only covered by rules and procedures rather than the UDRP. For example, in the .name room, there are two dispute resolution policies that may be applicable to second-level domain name registrations: the UDRP and the Eligibility Requirements Dispute Resolution Policy (ERDRP), both of which are seldom used by Indian registrants. A claimant must define the following three elements to succeed under the UDRP:

- (i) "Because the domain name is identical or confusingly similar to a

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<sup>89</sup>150 F.3d 620

complainant's trademark or service mark;

- (ii) That the registrant has no ownership or legal privileges in the domain name; and
- (iii) That the registrant registered and used the name in bad faith.”

The process of getting redressed under UDRP is conducted online with a single electronic and hard copy document submission of facts and legal arguments which makes the process simple and easily accessible. Service of process can be achieved by email to the address in the registrar's record. Under the rules of UDRP, the panelists take their decisions on whichever law they think as fit in a particular case.

But despite its obvious achievement, lack of oral testimony and rules of evidence in these papers proceeding makes it difficult to evaluate the disputed facts and ascertain the credibility of the evidence produced. Panelists deliver the judgment only on the evidences produced in front of them, so they have to regard that as reliable where there is lack of documentary evidence even in the cases of legitimate interest. So it is not necessary that same or right conclusion is reached in this type of Resolution Policy as the decision in UDRP or courts would differ according to where better evidences are put forth. Moreover the decision of the UDRP is not binding on the courts of land which sometimes turn to be defeating the very initiation of decision by UDRP

and the trademark owners are the victims of such thing. As also seen, in the case of **Referee Enterprises Inc. v Planet Ref. Inc.**,<sup>90</sup> where the dispute was between the magazine publisher and another publisher on online medium, the plaintiff initiate the UDRP proceedings in the basis of his ownership on the term referee as his magazine title, challenging his rivals mark “ereferree” on domain name, the panel negated the complaint on the ground that the word used by the plaintiff is the word which is generic in nature the publisher subsequently filed the case against the inferior alleging him violating the federal trademark law, the court in response granted the preliminary injunction which was broad to the extent that it prohibited the defendant to use all the domain names having the word in dispute court did not

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<sup>90</sup>2001 U.S. Dist. LEXIS 9303

take thenotice of UDRP proceedings and did not mention the decision in its ruling. Furthermore in a case where the applicant brought the subsequent suit in the court after being defeated in the UDRP proceedings, the trademark owner moved to dismiss the action on the grounds that it do not have sufficient grounds to vacate arbitral award of UDRP, the court denied this argument by saying that Federal Arbitration Act do not applies to the UDRPproceedings.

The case ***Maruti.com et al. v. MarutiUdyog Ltd. et al.***,<sup>91</sup> where MarutiUdyog, an Indian company with a well-known name in India, has already registered marutiudyog.com as its domain name in the United States, is one of several cases of the system failing. The domain name "maruti.com" was obtained by the respondent. When the appellant filed a lawsuit with the WIPO, the panel ruled in favor of Udyog. In addition, the respondent has been labeled a cyber squatter by the WIPO panel three times in WIPO arbitration cases brought by Onida, Hero Honda, and Maruti. However, when the matter was brought to the US courts, the WIPO panel's rulings were deemed non-binding. Even the Anti-Cybersquatting Consumer Protection Act of the United States was said not to apply. The court ruled that since Maruti did not make or market cars in the United States, it was not entitled to trademark rights under the Lanham Act of 1946.

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### 3.5 POSITION IN INDIA

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Another question that needs to be resolved is whether or not the country's trademark laws are sufficient to remedy the situation.

The court in the case of ***Satyam Infoway Ltd v. Sifynet Solutions (P) Ltd***,<sup>92</sup> which was decided in 2004, nailed the Indian domain name situation, citing that-

*“As far as India is concerned, there is no law that specifically applies to domain name dispute resolution. While the Trade Marks Act of 1999 is not extraterritorial in nature and does not have appropriate safeguards for domain names, this does not preclude domain names from being lawfully covered to the degree practicable under passing off laws.”*

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<sup>91</sup>447 F. Supp. 2d 494 (D. Md. 2006)

<sup>92</sup>2004(3)AWC 2366 SC

In India, since, there exists no direct law to wrestle the threat of such disputes; hence courts have largely used the principle of passing-off.

Despite the fact that the national court system is not constrained by the WIPO Arbitration Panel's ruling, they have made numerous judgments and judicial decisions based on the ICANN's UDRP Policy, demonstrating that the courts consider the UDRP's policies and decisions to be of sound authority on the subject. One of the examples

demonstrating the same is **Manish Vijv. Indra Chugh**,<sup>93</sup> in this case, With the copyright and domain name "www.kabadibazaar.com," the appellant was selling secondhand goods on the internet. Within a month of plaintiff's launch, defendant launched "www.kabaribazaar.com," claiming a larger media profile than plaintiff. The complainant filed a complaint with the WIPO Uniform Dispute Resolution Policy, 1999, alleging that the defendants registered the domain name "www.kabaribazaar.com" with a malicious intent. The panel held that it was not possible to prove that the registration of the domain name was in a bad faith as "Kabadi- bazaar" is a common term in the hindi language and so the plaintiffs domain name had not acquired a secondary meaning. It also referred to the Rules 4 (a) and 4 (b), found that both parties had operated their websites within a month and while the plaintiff was unable to show the quantum of business carried out, it can't be said that the defendant had not incurred advertisement costs. Therefore, it dismissed the plaintiff's application and vacated the interim injunction order against the defendant.

This, thus, can be said that the national courts can easily shift domain name cases towards ICANN's UDRP mechanism which is an efficient alternate dispute resolution remedy easing the over burdened domestic court system of a country.

It is of no argument that UDRP has been proved to be the simplified and cost friendly way of getting justice over the issue of domain name disputes to tackle the online disputes affecting the landmark owners in an era of online world but a lot is still to be done to make it a better working at the territorial level. The global experience has shown that many other countries have even tried to plug the legal

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<sup>93</sup>AIR 2002 Delhi 243

lacuna by passing separate law for dealing with the problem like US has passed Trademark Cyber Piracy Prevention Act, 1999. Likewise, India also needs a law regarding the same since bringing the passing law principle does not provide for an entire solution to the issue in question. There should be a provision for easier and supplemental method of register for each State under the Indian trademark laws so that the owner who wants a territorial registration only does not have to be tortured with 'n' number of procedural formalities due to which a lot of time can also be saved. The period of non-use of a trademark for five years as a ground for revocation should be reduced to three years under the Indian law so that one does not take advantage of getting a name registered from stopping some other squatter to use the same as they know how tedious and lengthy the process of litigation is. Another suggestion is that there should be a provision regulation of cyber crimes especially cyber squatting, not only under trade mark law but also in Information and Technology law in order to protect the rights of the legitimate claimers at territorial as well as extra-territorial level.

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### **3.6 LET'S SUM UP**

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In this chapter, we have learned legal position under trademark law for protection of trademark in cyberspace. The chapter also discusses the issue of inadequacy of laws for dealing with this matter. It further outlines as to how UDRP (Uniform Dispute Resolution Policy) deals with the same situation at an extra-territorial level according to the mechanism provided by ICANN (The Internet Corporation for Assigned Names and Numbers). Finally, we learned about some suggestions as to how Indian Trademark Laws can make the working of UDRP better by working on its own laws.

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### **3.7 FURTHER READING**

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- WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP); WIPO; Date of Access: 24.10.2019 <<https://www.wipo.int/amc/en/domains/guide/>>
- Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886); WIPO; Date of Access:



- 24.10.2019 < [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html) >
- Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961); WIPO; Date of Access: 24.10.2019 <[https://www.wipo.int/treaties/en/ip/rome/summary\\_rome.html](https://www.wipo.int/treaties/en/ip/rome/summary_rome.html)>
  - [Aurélie Pols](#), [Ewa Bałazińska](#), [Karolina Lubowicka](#): OECD Guidelines: 8 Privacy Principles to Live By; PiwikPro Dated: 21.09.2018; Date of Access: 24.10.2019 < <https://piwik.pro/blog/oecd-guidelines-8-privacy-principles-to-live-by/>>
  - Linking, Framing, Meta Tags, and Caching; Date of Access: 24.10.2019 < <https://cyber.harvard.edu/property00/metatags/main.html>>
  - Linking, Framing, and Inlining by Richard Stim; Nolo; Date of Access: 24.10.2019 < <https://www.nolo.com/legal-encyclopedia/linking-framing-inlining-30090.html>>

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## 3.8 CHECK YOUR PROGRESS: POSSIBLE ANSWERS

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### 1. What are the elements to establish the complaint under UDRP?

A claimant must define the following three elements to succeed under the UDRP:

- (i) “Because the domain name is identical or confusingly similar to a complainant's trademark or service mark;
- (ii) That the registrant has no ownership or legal privileges in the domain name; and
- (iii) That the registrant registered and used the name in bad faith.”

### 2. Provide the provisions for trademark protection.

Under the current law, section 29 provides for the protection of registered trademark and the protection for unregistered trademark has been provided in section 32.

However, the act is silent on the protection for trademarks infringement in the cyberspace.

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### **3.9ACTIVITY**

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Discusses the legal position under trademark law for protection of trademark in cyberspace. (Word count 2000-2500)



# 4

## **Unit 4: DOMAIN NAMES, THE INTERNET, AND TRADEMARKS**

### **Unit Structure**

4.1 Learning Objectives

4.2 Introduction

4.3 Internet domain name and trademark infringement

4.4 Judicial Pronouncements

4.5 Should domain name be protected as trademark

4.6 Special challenges to traditional trademark law post by domain name registration on the internet

4.7 Let's sum up

4.8 Further reading

4.9 Check your progress: Possible Answers

4.10 Activity

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## 4.1 LEARNING OBJECTIVE

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In this chapter, we will learn-

- The unique problems that conventional trademark law faces as applied on the Internet.
- The controversy on trademarks and domain names is addressed by assessing the benefits and limitations of the InterNIC regulation on domain name registration.
- Possible solutions offered on domain names.

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## 4.2 INTRODUCTION

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Law academics have spent the past few years examining how digital data transfer over the Internet - the world's largest computing network - has questioned and tested existing legal principles and doctrines, especially in the field of intellectual property. For those attempting to preserve the goodwill and intrinsic meaning encapsulated in a trademark, the Internet presents special challenges. The alleged violation of established trademark rights by computer users who register allegedly infringing domain names, or computer addresses, will be addressed in this chapter, as will the settlement of conflicts between two would-be users with legal claims to the same domain name.<sup>94</sup>

The Internet is a global network of interconnected data networks that connects

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<sup>94</sup> See generally Gary W. Hamilton, Trademarks on the Internet: Confusion, Collusion, or Dilution?, 4 TEX. INTEL. PROP. L.J. 1, 2 (1995); Dan L. Burk, Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks, 1 RICHMOND J.L. & TECH. 1, § 2 (April 10, 1995) .

millions of users and enables them to exchange and transmit resources and information. There is no single government that controls or regulates the Internet. As a result, "there is no central body to control Internet access, no one to ask for permission to enter the network, and no one to report to when things go wrong" since each machine connecting to the Internet operates autonomously and is only supervised by its own systems administrator. The United States Department of Defense created the Internet to link geographically distributed scholars.

The Internet, on the other hand, now links millions of people around the world, provides a high-speed, reliable, and effective networking network by which people can access, exchange, and distribute a vast array of information and services.

In recent years, commercial use of the Internet has accelerated, converting the network infrastructure from a testing instrument to a digital marketplace capable of serving millions of consumers worldwide. ' As a result, many businesses have positioned themselves to sell their products and services over the Internet in order to tap into a demand of 30 million potential customers. Just 30,000 businesses used the Internet in December 1994, but by February 1996, 175,000 businesses had a kind of online presence. By January 1996, over 300,000 people and businesses had created home pages on the World Wide Web, a branch of the Internet that offers a hypertext-based distributed information system that allows users to build, search, and delete hypertext records.<sup>95</sup> This burst of activity has rapidly transformed the Internet from the "cozy, non-commercial atmosphere" that marked its early years to a platform for commercial retailers to advertise, market goods and services, distribute software and other devices, and provide on-line services.

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## **4.3 INTERNET DOMAIN NAMES AND TRADEMARK INFRINGEMENT**

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### ***A. What is a Domain Name?***

Other users must be able to identify and find each device or user connecting to the Internet. As a result, each user is given an Internet Protocol Address (IP

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<sup>95</sup>Thomas K. Thomas, NIXI To be Registrar for .in Domain Name, October 27, 2004, available at <http://www.thehindubusinessline.com/2004/10/27/stories/2004102701720700.htm>

Address), which is a specific string of numbers separated by intervals that represents various fields, such as 123.101.23.128. A network component of these strings of digits identifies the particular network to which the user is associated, while a local address identifies the user within the network. Unfortunately, IP addresses are unwieldy and difficult to remember. As a result, the IP Address system has been replaced by a more user-friendly domain name system, in which IP Address holders are given a mnemonic designation that is easy to recall. The numeric IP address that corresponds to the designated mnemonic domain name address is automatically looked up by computer programs that link users to the Internet.<sup>96</sup>

To designate fields, domain names are made up of a series of characters divided by intervals. A term that can readily distinguish the holder of the address, such as an individual's or company's name, a brand name or trademark, or a nickname, is often used in domain names, accompanied by a three-letter abbreviation that designates the user's form of organization.

### ***B. Trademark Skirmishes on the Internet***

The commercialization of the Internet has resulted in a series of legal battles between trademark owners and Internet users that have registered domain names that could infringe on the trademark owners' rights. These conflicts clearly demonstrate the conflicting interests at stake and the kinds of controversy that the domain name registry system has sparked.

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## **4.4 JUDICIAL PRONOUNCEMENTS**

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### ***1. MTV v. Adam Curry***<sup>97</sup>

MTV Networks (MTV) sued Adam Curry, one of its former video disc jockeys, in October 1994, claiming copyright infringement in connection with Curry's use of the domain name "mtv.com" to find his Internet portal. To decide who had legal rights to

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<sup>96</sup>Eric Misterovich, Domain Names as Registered Trademarks, available at <https://revisionlegal.com/trademark-attorney/domain-names-as-registered-trademarks/>

<sup>97</sup>867 F. Supp. 202

use the logo, the two sides went to court in the Southern District of New York. Curry said that he was granted permission to use the name when working with the network to create an Internet portal that disseminated regular coverage of film and music industry gossip. Curry registered the domain name "mtv.com" under his own name and paid for it with his own money, and he continued to publish regular updates from the site long after his employment at MTV ended. Curry's website was very popular, with millions of visitors in the first ten months of its existence.

MTV sued Curry for copyright violation and violation of his work contract after many failed demands that he stop using the "mtv.com" brand for his website. Despite Curry's promise to take the case "all the way to the Supreme Court" and his description of the case as the "Roe v. Wade of the Internet and the technology superhighway,"<sup>84</sup> the case was never resolved in district court. Curry relinquished the "mtv.com" domain name to MTV on unspecified terms in March 1995, and the two sides settled their disagreement. Nonetheless, the significance of this case was undeniable; it was one of the first, and most well-known, <sup>85</sup> efforts to resolve the risk of patent infringement in cyberspace.

## **2. *Stanley Kaplan v. Princeton Review*<sup>98</sup>**

Stanley Kaplan and Princeton Review, two competing test-preparation firms, decided to arbitrate the first publicly known instance of "Internet address poaching and speculation," the crime of hoarding lucrative trademarked names for use as Internet addresses and keeping them for ransom, in October 1994. In May 1994, Stanley Kaplan applied to trademark the domain name "kaplan.com" in order to create an Internet portal to promote its services, only to discover that the name had already been taken by its biggest rival, the Princeton Review.

Although the Princeton Review's president argued that the domain "kaplan.com" was registered solely to "mock and harass" Stanley Kaplan, the name poaching had the potential to harm Stanley Kaplan's company. "Electronic materials disparaging the consistency of Kaplan Review's offerings and extolling the competitive benefits of the Princeton Review courses" were presented to users who accessed Princeton Review's "kaplan.com" platform. Furthermore, users were not informed that the platform was operated by Princeton Review rather than Stanley Kaplan, raising the

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<sup>98</sup> <https://crushthegretest.com/kaplan-vs-princeton-review-gre/>

risk of users being misled about the true source of the information shared on the Internet site.

### **3. WIRED v. Wire**

Wired magazine was pitted against WIRE, a computer network that used the domain name wire.net, in a trademark/domain name battle that focused on a related issue: the registration of a domain name that was identical to one already in use. About the fact that the two organizations provided very different content - Wired is a monthly newsletter that discusses information technology-related subjects, and WIRE is a computer network dedicated to women's issues". Wired felt WIRE's domain name, wired.com, was too close to its own. Despite the fact that both parties retained attorneys to handle the dispute, the parties reached an agreement in February 1994 without having to go to court. Wired promised to share the expense of changing WIRE's name to Women's Wire and ran some advertisements for the network, which even updated its Internet address to wwire.net.

Despite the fact that the case was settled amicably, it posed a question not answered in the trademark/domain name dispute: whether the registry of competing domain names created such a risk of misunderstanding that one of the names needed to be modified.

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## **4.5 SHOULD DOMAIN NAMES BE PROTECTED AS TRADEMARKS?**

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As previously stated, some researchers argue that domain names are not the same as trademarks and thus should not be considered infringing on existing trademarks. They contend that domain names are not entitled to immunity since they are similar to emails. Others, on the other hand, have emphasized that domain names serve the same function as trademarks: they designate the source of the product, service, or material being sold over the Internet, and they enable businesses to move their brand identity and goodwill to the computer network medium. "Domain names will seem odd because they appear to be both names and addresses; they both locate and recognize Internet resources," according to the report. If trademark law only recognized a domain name's ability to find an Internet location, "application of

trademark law to domain names... may be problematic." The second essence of domain names, though, must be considered: their ability to convey the source's identity. Domain names should be protected as trademarks and accepted as worthy of infringement on other trademarks when they have such a valuable purpose of identifying the origins of a product or service.<sup>99</sup>

Critics also claim that the new Internet address scheme is rigid and blinkered, since all business entities are clustered together under the "com" top-level domain identifier. "The.com top-level domain has become insufficient to satisfy the demand for domain names from commercial organizations with related or equivalent names as the Internet has become more commercial," says the study.

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## **4.6 SPECIAL CHALLENGES TO TRADITIONAL TRADEMARK LAW POSED BY DOMAIN NAME REGISTRATION ON THE INTERNET**

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This chapter has already discussed how domain names can be licensed under trademark law and how domain names can be considered potentially infringing on existing trademarks. However, there are certain quirks in the way domain names are used on the Internet that should be taken into account when determining how to handle domain names and trademark violations.

### ***A. Geographic Overlap in Cyberspace***

Traditional trademark law states that two firms can use the same trademark as long as their brands or local markets are sufficiently different to guarantee that there is no chance of misunderstanding. As a result, Domino's Pizza and Domino's Sugar will coexist peacefully—and legally—because it's extremely doubtful that a customer would mix up the two brands' origins. Similarly, the Acme hardware store in Lewiston, Maine, and the Acme hardware store in Portland, Oregon, can also legitimately own the name "Acme" because their local markets are sufficiently distinct to eliminate the possibility of confusion. However, since the Internet is simply one vast geographic region, one domain name cannot be given to two individuals or businesses, regardless of how different their goods or markets are.

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<sup>99</sup>Wipo Cyber Squatting Cases Hit record, *available at*[http://www.wipo.int/pressroom/en/articles/2017/article\\_0003.html](http://www.wipo.int/pressroom/en/articles/2017/article_0003.html)



In cyberspace, there are no realistic barriers that cause two businesses of the same name to coexist peacefully and profitably. Moreover, "Usage of domain names that act as popular logos of more than one corporation will become more difficult as businesses continue to use their [Internet] presence to enable consumers to purchase goods," as companies begin to use their [Internet] presence to allow customers to order products. When two entities claim the same trademark under the current rules, "Even though the other side has been using the logo on which it is based for several more years, the first to file may be entitled to keep the domain name. The limitations faced by domain name registrations are obvious in cyberspace, where local markets that are easily distinguishable in "real space" converge and combine.

### ***B. Technological Limitations on the Internet***

Domain name addresses are limited to 26 characters due to Internet technical restrictions. "From a 'user-friendly' standpoint, businesses looking to trademark their domain names have an opportunity - and InterNIC encourages - to make them considerably shorter than 24 characters," says InterNIC. As a result, businesses tend to file acronyms rather than their full names, increasing the likelihood that a given name would be sought by other businesses. Companies who formerly coexisted in the industry under separate names but with the same acronym now face the possibility of any legal owner with the same acronym filing the domain name first.

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## **4.7 LET'S SUM UP**

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In this chapter, we have learned legal position under trademark law for protection of trademark in cyberspace and its relationship with domain name. We also analysed the judicial pronouncements along with relevant legal provisions.

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## **4.8 FURTHER READING**

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- Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER &

- HIGH TECH. L. J. 321 (1997).
- William A. Hodkowski, The Future of Internet Security: How New Technologies will Shape the Internet and Affect the Law, 13 SANTA CLARA COMPUTER & HIGH TECH. L. J. 217 (1997).
  - Jo-Ann M. Adams, Controlling Cyberspace: Applying the Computer Fraud and Abuse Act to the Internet, 12 SANTA CLARA COMPUTER & HIGH TECH. L. J. 403 (1996).
  - Michael P. Roch, Filling the Void of Data Protection in the United States: Following the European Example, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 71 (1996).
  - Joshua D. Blackman, A Proposal for Federal Legislation Protecting Informational Privacy Across the Private Sector, 9 SANTA CLARA COMPUTER & HIGH TECH. L.J. 431 (1993).
  - Halina S. Dziewit et al, The Quest for the Paperless Office Electronic Contracting: State of the Art Possibility but Legal Impossibility?, 5 SANTA CLARA COMPUTER & HIGH TECH. L. J. 75 (1989).

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## **4.9 CHECK YOUR PROGRESS: POSSIBLE ANSWERS**

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### **1. What is a Domain Name?**

Other users must be able to identify and find each device or user connecting to the Internet. As a result, each user is given an Internet Protocol Address (IP Address), which is a specific string of numbers separated by intervals that represents various fields, such as 123.101.23.128. A network component of these strings of digits identifies the particular network to which the user is associated, while a local address identifies the user within the network.

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## **4.10 ACTIVITY**

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Write a detailed note on special challenges to traditional trademark law posed by domain name registration on the internet. (Word count 2000 to 2500)

**Block-4**

**EMERGING ISSUES IN RELATION  
TO IPR AND CYBERSPACE**

# Unit 1: IPR MANAGEMENT: EMERGING CYBERSPACE ISSUES IN KNOWLEDGE SOCIETY: A CRITICAL ANALYSIS

1

## Unit Structure

- 1.1 Learning Objectives
  - 1.2 Introduction
  - 1.3 Rationale for Intellectual Property Rights
  - 1.4 Digital Environment and Copyright
  - 1.5 Internet and Intellectual Property Rights
  - 1.6 Protection of Computer Software: The Existing Regime
  - 1.7 Indian Scenario
  - 1.8 Piracy in the Digital Era
  - 1.9 Let's Sum Up
  - 1.10 Further reading
  - 1.11 Check your progress: Possible Answers
  - 1.12 Activity
-

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## 1.1 LEARNING OBJECTIVE

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In this chapter, we will learn:

- Dangers to financial and commercial transactions
- Global standards on electronic crime

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## 1.2 INTRODUCTION

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Inventions, literary and artistic creations, and marks, titles, pictures, and patterns used in commerce are all examples of intellectual property (IP) rights granted by society to persons or organisations. For a limited time, they grant the developer the freedom to prohibit anyone from allowing illegal use of their land. Industrial Property (commercial innovations) and Artistic and Literary Property are two types of intellectual property (cultural creations). Current technical advancements are blurring this line, resulting in the emergence of hybrid sui generis systems.<sup>100</sup> The industrial revolution carried with it its own collection of rules governing industry and economic practice, as well as post-industrial society government. The industrial revolution impacted many areas of the world, leaving former colonies behind, and the legal institutions of so-called developed countries were unable to meet the challenges of industrialization. Meanwhile, the ICR has swept the globe, shattering economic and political walls and undermining existing rules of the developed world. Most emerging countries must make a quantum leap in legal development in order to build capacities to defend national interests and prevent abuse by those who own technologies whose boundaries are uncertain. The invention of the Internet Information Highway and Cyberspace has created a challenge for the world today.

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## 1.3 RATIONALE FOR INTELLECTUAL PROPERTY RIGHTS

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IPR rationale can be divided into two categories:

- philosophical and
- pragmatic approaches.

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<sup>100</sup> Richard, D, (2004), Intellectual Property Rights and Global Capitalism: The political Economy of the TRIPs Agreement, 27 (New York: M.E. Sharpe, 2004)

There is no adequate theory of legal scholarship that establishes the basis of intellectual property rights (IPRs). In the light of rapid technical advancements and growing rivalry within industries, legal scholars' theories, such as economic opportunity reasoning, may be considered contradictory. The European Court of Justice's latest ruling against Microsoft urges a reconsideration of the fundamental precept governing IPRs.

Philosophical approaches are well known in the tradition of British philosophers John Locke (1632-1704), Thomas Hobbes (1588-1679), and Georg Wilhelm Friedrich Hegel of the 18th century (1770-1831). John Locke is a model property as right theorist. According to Locke, property rights, as all rights, are derived from the fact that God gave the world to all humans in general, so how can any one individual possess an exclusive property right in the worldly subject? Locke's solution is brilliant, and it brings one to the concept of private property rights. Locke accomplishes this demonstration by distinguishing between the Creator's collective property and the individual's acquisition of the property.<sup>101</sup>

Hegel's insistence on land ownership as a symbol of freedom led to a different philosophical attitude to intellectual property. George Wilhelm Friedrich Hegel was a German philosopher. 1770 – 1831 Individuals will create and realize their full human identities thanks to property tradition. It has been widely suggested that intellectual property should be unalienable based on this approach. In the light of natural rights and moral rationales, a fundamental point against IPRs is that scientific innovations are largely a social production of collective, cumulative, and interrelated work to which we all contribute, and thus no single individual or company should be entitled to assert the land.

Jeremy Bentham (1748-1832), Adam Smith (1723-1790), Jean Baptiste Say (1767-1832), John Stuart Mill (1806-1873), and John Bates Clark all advocated a pragmatic approach (1847-1938). The fundamental argument of these classical economists is that IPRs offer "the promise of reward," which promotes innovative and technical progress by increasing motivation to discover, invest in, and create new ideas, and without which the innovation inducement will be undermined. The

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<sup>101</sup>Hegal, G (2006), *The Phenomenology of Mind* (1806), available at <http://www.marxists.org/reference/archieve/hegal/help/hegelbio.htm>

reasoning is that doing research and development and getting an innovation to market can be a long and costly operation with little promise of success at the end of the tunnel.<sup>102</sup>

Patents have been seen to have a positive effect on the economy in a number of surveys. Patent acquisition has been shown to improve the pace of innovation in sectors that depend on patents for intellectual property rights, such as pharmaceuticals and chemicals. Simon Rose discovered a strong statistical association between patents filed and GDP, as well as a similar correlation between patents adjudicated and patents adjudicated. It has been found that after a period of animosity, the number of patent applications in technical innovation declined, having a negative effect on the economy. When appellate courts supported patents, however, the number of patent applications rose, which had a favorable effect on the economy.

IPR-induced incentives to innovate reasoning for the IPR scheme is based on two assumptions:

- Without effective incentives, not enough discoveries can be made. In other words, neither innovation nor manipulation of inventors can occur because capitalists expect that they can generate wealth, making it worthwhile for them to invest their time and resources.
- IPRs are the quickest and most powerful way for society to have both rewards.

According to Robert Merges and Richard Nelson, patents encourage innovation by offering benefits, but once they are liberally approved, other companies are discouraged from engaging in the broad range of follow-on innovative work that enhances or modifies an original invention. They showed how discoveries occur along multi-product trajectories that are cumulative, direction dependent, and dynamic in the sense that each discovery in the pathway is based on one's own or others' current or previous ideas. While there are numerous reasons against patents as a motivator to discover, use, and distribute money more effectively, the traditional

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<sup>102</sup> Anderson B (2003), Rational for Intellectual property rights in the Electronic Age, New Economy Handbook (Elsevier Science, 2003).

wisdom by economists, attorneys, and many government officials is strongly skewed in favor of the proposition that protections promote economic development.<sup>103</sup>

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## **1.4 Digital Environment and Copyright**

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Because of their speed and accessibility, digital technologies have become essential resources for generating and preserving information. Digital intelligence now plays an astoundingly important part in financial markets and in all aspects of everyday life. Copyright law's approach of digital information has been important. The internet, a prominent feature of our day, can better be described as a multimedia way of disseminating information and promoting free speech on a scale never before conceivable. Users interested in gathering resources on a certain topic no longer need to access or preserve physical copies; instead, they may make these records accessible on the Internet (without the author's knowledge) by creating a web document with pointers (hypertext links) to the specified references. The open nature of modern Internet technologies distinguishes it from other traditional forms of communication, allowing users to post to a large audience previously inaccessible due to the limited nature of traditional publication.<sup>104</sup>

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## **1.5 INTERNET AND INTELLECTUAL PROPERTY RIGHTS**

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Intellectual property rights apply on the Internet, but enforcing them is complicated. The cost of reproducing works in digital format is low, and the accuracy of the copies is nearly flawless. Publishers and other copyright holders claim that the Internet harms their intellectual property rights by radically altering the structure and means of publication, leaving their works highly vulnerable to Internet piracy. Because of the Internet's decentralized management, any person can freely disseminate a work on the electronic network known as Cyberspace via any number of networks. A consumer can easily send a job to newsgroups via e-mail or on their personal website.

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<sup>103</sup> N.S. Gopalakrishnan, Principles of Intellectual Property, EBC, Lucknow, 2014.

<sup>104</sup> Paul Torremans, Holyoak&Torremans Intellectual Property Law, Oxford Univ.Press, 2010



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## 1.6 PROTECTION OF COMPUTER SOFTWARE:THE EXISTING REGIME

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Since the demand for computer programmers and communications applications is rising in size and economic importance, the type of security offered is becoming increasingly relevant. Software is easily replicable and inexpensive to duplicate. It's easy to convert from one programming language to the next. The cost of copying program package for most systems is low in the absence of devices that prevent copying. Even if direct emulation is impossible, resourceful programmers and engineers will often reverse engineer programs.

The law governing intellectual property rights has caused issues with emerging technology, such as computer programmers. The law presumes that everything is either a written work protected by copyright or a computer protected by a patent, but not both at the same time. Data engineers, on the other hand, have both authorship and creativity. As a result of these issues, we are forced to doubt the law's applicability. *Sui Generis* is seen as an alternative to the intellectual property model, allowing security to be tailored. Legislative intervention or treaty negotiations are needed. Their doctrinal evolution is still taking a long time.

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## 1.7 INDIAN SCENARIO

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While the Indian Copyright Act complied with international treaties, the country's new copyright legislation lags well behind that of the West. There is no similar law in India to the US DMCA or EU guideline applying the WIPO Internet Treaties since India did not sign the "WIPO Internet Treaties." The current Indian Copyright Act makes no provision for "technological security mechanisms" or "electronic rights management information" protection. The Indian Penal Code, 1860 (IPC), could be sufficient to offer legal safeguards for technical interventions.<sup>105</sup> 'Wrongful benefit or harm' is specified in Section 23 of the IPC. In the event of unlawful entry to the 'safe jobs,' this section can be invoked. Section 28, which deals with 'counterfeiting,' will be used to stop people from stealing safe works.

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<sup>105</sup>Bently and Sherman, *Intellectual Property Law*, Oxford University Press, U.K., 200

India is one of the top 20 countries in terms of Internet use. Despite its low Internet penetration rate, India has emerged as the world's software development hub and a popular destination in this sector. With the increased use of the Internet, copyright infringement issues relating to multimedia transmission have worsened. This is a perplexing case. If India offers greater legal safeguards for technical protection policies with few fair use exceptions, the public domain will be depleted, and the public interest concept of copyright will be harmed. If legal security for technical measures is not provided, the Internet can cause havoc with copyright compliance.

The Information Technology Act (IT Act) of 2000 was passed in India to resolve issues posed by 'cyberspace' in the conduct of electronic commerce. The IT Act does not have a clear mechanism for dealing with individual Internet copyright infringement. There are clauses that may be seen as attempting to fix certain facets of copyrights, as shown by Section 43, which deals with penalties for machine and machine abuse.

Non-profit organisations such as NASSCOM (National Association of Software and Service Companies) have been actively participating in the formulation of IT policies and regulations in India as partners with the Government of India and state governments. Its efforts are commendable, as it developed the country's first "anti-piracy" hotline, as well as India's first toll-free anti-piracy hotline. Special police cells are being developed by state governments to combat copyright infringement.

The worries of copyright owners regarding the risks faced by the digital transition are valid. The use of technical defense mechanisms has tipped the scales in favour of right holders at the expense of the public domain. It established a new and effective "Access right" that is used to prohibit unauthorized copying, which is allowed under existing copyright exceptions. Under fair dealing standards, technical safety schemes can be used to avoid infringing replication, reproduction allowed for educational and archival purposes, and reproduction required for science. In India, additional provisions will be added to existing copyright legislation to include legal safeguards for "technological protection initiatives" and "internet rights management." Conciliating private and public interests is difficult; India cannot disregard the public interest principle that underpins copyright laws. It could follow

the lead of Japan, which treats 'non-commercial' use as fair use.<sup>106</sup>

Fair use should be used as a counterweight to ensure the proper balance between public and private interests in the digital world; there is no optimal approach to the issue of defending copyrighted content in the digital environment. The problem of computer software theft isn't fresh in and of itself. This chapter seeks to discuss problems that exist as a result of providing digital applications on the internet, the way in which piracy happens, the privileges and responsibilities of different parties, and the actions that can be taken to prevent it. The term "computer programmer" is described in section 52(1)(ad) of the Indian copyright Act, 1957, as "a collection of instructions transmitted in terms, codes, schemes, or any other type, including a machine readable medium, capable of causing a computer to perform a specific task or achieving a specific result."

The above is based on the World Intellectual Property Organization's definition; Draft Models Provision for Copyright Legislation. Under the 1977 Model Provisions for the Protection of Computer Software, the concept consists of three parts:

- Computer programmers;
- programmers' descriptions; and
- supplementary information

The speech of the owners of the copyright, not the concept, is protected by copyright law. In India, computer software is shielded by copyright law, which means that only the speech of the software's concept can be covered.<sup>107</sup>

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## 1.8 PIRACY IN DIGITALERA

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In India, the film industry is struggling to keep up with rapidly changing emerging and if technology that are challenging current intellectual property laws and market models. Individual consumers can now easily capture, copy, and share films or music in digital form without losing content as technology continues to advance

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<sup>106</sup> AnanthPadmanabhan, Intellectual Property Rights: Infringement and Remedies, LexisNexis, Nagpur, 2012.

<sup>107</sup> Harish Chander, Cyber Laws and IT Protection, PHI learning Private Ltd. Publication, New Delhi, 2012, at page no. 14.

globally.<sup>108</sup> Crime in artistic works by collective gangs, which is spawned by such advancements, is a universal concern. Consumers have been pitted against creators of films, music, and television programs, and rights activists are concerned that corporate lobbying is contributing to excessive copyright enforcement that favors producers.

There is agreement on the need for fair copyright rights, but disagreements have arisen about the extent of protection. While these debates continue, file-sharing on the Internet using the peer-to-peer (P2P) paradigm has created a new field of conflict between music and film fans, as well as the respective industries. Using a specific P2P program allows for unrestricted sharing among users.

The challenge of illicit copyrighted content distribution has prompted creators around the world to seek technical solutions. New market models for music distribution have arisen in Western countries with strict copyright laws which are plagued by piracy over broadband Internet. Apple Computer's iTunes pioneered one of these for a la carte music streaming, which was soon joined by related offerings from other major names in the industry. This contrasts with many copyright owners in India's virtual reluctance to accept the advent of digital creativity, which allows for the compression of a vast number of songs for download or sale on compact discs while still integrating tools to protect the content.

While India's piracy issues are true, the entertainment industry has not made a significant attempt to address them with a market-based approach. According to a study conducted by the UK Trade and Industry Department two years ago, piracy cannibalizes 60% of India's film industry revenues. Some states are attempting to combat copyright piracy by enacting tough regulations that allow police to arrest convicted pirates without charge, while the entertainment industry has argued that state governments can assist in re-engaging moviegoers by tax breaks.<sup>109</sup>

Whatever the consequences of these steps, it is apparent that the film and music industry, which is one of the world's biggest, is stuck in a time warp. Unlike in more industrialized countries, the entertainment industry in the country is impacted not so much by P2P providers using the Internet, but by organized gangs using technology

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<sup>108</sup>Dr. Gupta & Agarwal, *Cyber Laws*, Premier Publishing Company, Allahabad, 2010, at pg.no.324.

<sup>109</sup>Dr. Farooq Ahmad, *Cyber Law in India*, New Era Law Publication, New Delhi, 2012, pg.no.28.

to make large profits by illicit CD replication and selling.<sup>110</sup> The entrainment industry will have to suffer more profit loss as a result of technical improvements in television and radio brought on by digitization, along with broader internet access. The legislation alone could be sufficient to ensure progress in the modern age.

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## 1.9 LET'S SUM UP

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We heard in this chapter that the Information and Communication Revolution (ICR), which is currently sweeping the globe, is undermining existing systems and traditions in a way that is difficult to comprehend. Governments are being forced to pass legislation pertaining to the management of information in society due to unprecedented developments in socio-economic organization and democratic governance. The Indian Copyright Act, 1957, is the current intellectual property regime in India that deals with the protection of electronic software. There are no parts of the Act that deal with electronic software theft over the Internet.

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## 1.10 FURTHER READING

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- Richard, D, (2004), *Intellectual Property Rights and Global Capitalism: The political Economy of the TRIPs Agreement*, 27 (New York: M.E. Sharpe,2004).
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- CarrierMA(2002),*UnravelingthePatent-AntitrustParadox*,150U.Pa.L.Rev.761(Jan2002).
- Roe, S A (1999) *Patent 'Monopolyphobia: A Means of Extinguishing the Fountainhead?* 49 *Case W Res. L.Rev.* 509 (1998-1999) at 514; Mark Grdy and Alexander, *Patent Law and Rent Dissipation*, 78 *VA. Rev.* 305 (1992) at307;

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<sup>110</sup>Tabrez Ahmad, *Cyber Law and E-Commerce*, APH Publishing Corp., New Delhi, 2003, at Page no.25.

- David M Gould and William C Grubben, (1996) *The Role of Intellectual Property Rights in Economic Growth*, 48 J. Dev. Econ. 323 (1996) at 333.

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## **1.11 CHECK YOUR PROGRESS: POSSIBLE ANSWERS**

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### **1. Is IPR applicable on Internet. If Yes, then why is not enforceable?**

The cost of reproducing works in digital format is low, and the accuracy of the copies is nearly flawless. Publishers and other copyright holders claim that the Internet harms their intellectual property rights by radically altering the structure and means of publication, leaving their works highly vulnerable to Internet piracy. Because of the Internet's decentralized management, any person can freely disseminate a work on the electronic network known as Cyberspace via any number of networks. A consumer can easily send a job to newsgroups via e-mail or on their personal website.

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## **1.12ACTIVITY**

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Write a detailed note on need to bring more legislations like the Information Technology Act, 2000 in today's time. (Word count 2000 to 2500)

# Unit 2: CHALLENGES TO COPYRIGHTABLE WORK IN CYBERSPACE

## 2

### Unit Structure

2.1 Learning Objectives

2.2 The page and Introduction

2.3 Internet and India

2.4 Why is copyright ill equipped to deal with the internet?

2.5 Basic challenges for Intellectual Property Rights

2.6 Basic Copyright Problems in regards to Internet

2.6.1 Determination of Public and Private Use  
The-and then she went home  
and will you be a lack of time that the

2.6.2 Problem of Distribution and Reproduction Rights

2.6.3 Enforcement of Li on the homepage on, maintaining and they should  
have the time, and ability

2.6.4 Problems which have no solutions

2.7 Copyright in the Age of Napster and Beyond

2.7.1 What the evolving napster case stands for

2.7.2 MGM v. Grokster

2.7.3 Cyber Jurisdiction – the Indian View

2.8 The Future of Copyright

2.9 Let's sum up

2.10 Further reading

2.11 Check your progress: Possible Answers

2.12 Activity

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## 2.1 LEARNING OBJECTIVE

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In this chapter, we will learn:

- the meaning of cyberspace and the state of Internet-related issues in India,
- fundamental intellectual property issues,
- why copyright is ill-equipped to deal with the Internet,
- copyright's essential problems in relation to the Internet, including determining public and private usage and enforcing liability,
- The Indian scene in terms of cyberspace control, and
- the future of copyright.

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## 2.2 INTRODUCTION

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Cyberspace is a futuristic universe that, while logically only existing in computer memory, is immersive and alive. One can meet and speak to new people in cyberspace, read, write, learn, listen to music, watch videos, look at art, buy and sell items, view government records, submit e-mail, download apps, and get technical help. As more content is uploaded and accessed, and as more people enter the founders of this brave new age, cyberspace is a breathing organism that is continuously evolving. Our legal framework is yet to catch up. This isn't always a negative thing; the legislation always lags behind societal movements before resolving itself. While this modern frontier may never stop emerging, we might also be too early in its development to figure out how to control it. However, as it becomes more embedded (and integral) into our everyday lives, many people are confused with what constitutes appropriate behavior in this modern setting.<sup>111</sup>

The defense of intellectual property — works of the imagination — is one of the most pressing concerns surrounding the Internet. Literary books, images, sound recordings, and other artistic works are protected from being reproduced without the consent of the copyright holder under Sections 13 and 63 of the Indian

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<sup>111</sup>Saha, Subhasais&Keshri, Sourav. (2008). Challenges to Copyrightable Work in Cyberspace. 13.



Copyright Act, 1957. It's also uncertain if copyright law would apply to these materials when they surface on the web.<sup>112</sup>

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## 2.3 INTERNET AND INDIA

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In India, the Internet infrastructure is rapidly expanding. On August 15, 1995, Videsh Sanchar Nigam Limited (VSNL), a public sector undertaking responsible for all international telecommunication services from India to other countries, launched commercial Internet services. Prior to that, only a few groups had access to the Internet, and the overall number of subscribers was under 10,000. In India, the number of Internet users has surpassed 150,000 and is increasing on a regular basis. People's imaginations have also been captured by the Internet.

According to a survey conducted by the National Association of Software Companies of India (NASSCOM), the demand for Internet connectivity in India is projected to be as seen in Table 1.<sup>113</sup>

While India's Internet users make up a small percentage of Indian the global total, as the Executive Director of NASSCOM put it in a recent post, "if the western world is riding high on the information superhighway, India has begun its effort to be on the Net, by at least building its own information super footpath."

Issues of intellectual property rights (IPR) security are expected to become more prominent as the Internet grows. Currently, the country is focusing on infrastructural growth in order to meet the need for Internet access within a few years.

Table 1 — The demand for Internet connections in India

Year	No. of Connections
1998	4,50,000
1999	8,00,000
2000	1,500,000
2001	3,500,000
2002	8,000,000

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<sup>112</sup>Akdeniz, Y., Walker, C. and Wall, D. (2000) *The Internet: Law and Society*, London: Pearsons Longman p.45

<sup>113</sup>David Bainbridge, *Introduction to Computer Law*, Fourth Edition 2000, Pitman Publishing, Edinburgh Gate, England .p 15

The internet has reached every corner of the world. Prioritize the creation of a high-speed national telecommunications backbone and the availability of sufficient telephone lines. To make Internet services more available, nodes have been built in over a dozen cities across the world. The government has agreed to allow private firms to offer Internet services in order to increase access to this advanced and fast means of communication network. With the arrival of private Internet service providers, India could quickly overtake the United States as the world's largest Internet customer, as it did with cable television. The expanded use of the Internet would make IPR security more difficult than it is now. Although the Internet is primed for a quantum leap in the world, it would be premature to propose realistic solutions to the Internet's intellectual property rights concerns, given the lack of experience with such issues. Intellectual property rights (IPR) problems exist now, but they are more theoretical than practical.<sup>114</sup>

The Copyright Act is currently the most powerful tool for dealing with IPR problems on the Internet. The Indian Copyright Act, which was first enacted in 1957, was overhauled in 1994. It has become a forward-looking piece of law as a result of these changes, and the general consensus is that the revised Act is worthy of dealing with copyright problems posed by emerging technology, especially those of the Internet. The Act has adapted to the modern age by dropping some limiting clauses and phrases and extending the meanings of works like cinematograph films (motion pictures) and sound recordings (phonograms) to incorporate certain works in 'any format' within their purview. It depends, though, on how case laws evolve as Internet IPR disputes are brought to court.

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## **2.4 WHY IS COPYRIGHT ILL EQUIPPED TO DEAL WITH THE INTERNET?**

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Copyright dates back to the printing press period. Printing presses were operated by a small number of individuals. There was a good benefit as people wanted to steal books, but the pirated books could be traced and were a good indicator of infringement. A typical person could not make a copy of a book and distribute it to friends or sell it on the market. Overall, the device seemed to perform very well. But then came the twentieth century, with its marvelous new inventions. Many of these

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<sup>114</sup> David Bainbridge , Intellectual Property (3rd Ed.1996 ) p 19

advancements, such as photocopiers, tape decks, and VCRs, have altered the relationship between copyright owners and future copier. Although access to computers used to be a deterrent to public copying, modern technologies allowed the ordinary citizen to photocopy papers, tape albums, and archive their favorite television shows.<sup>115</sup> What does one know? The film companies remain as dominant as ever, and copyright is still alive and well.

Copyright is now facing the toughest test ever on the Internet. The first is the simplicity with which it can be replicated. If one wishes to save this file, he would have an exact replica of the original. Furthermore, he could make as many copies as he wanted. The benefit of modern media is that it does not degrade with repeated copies. For others, this is both a blessing and a curse. When faced with a similar situation with the introduction of digital audio tapes (DAT), which allowed for flawless copying of audio recordings, the industry decided to stifle its invention by not allowing second-generation recordings to be made from its tapes (despite intense opposition from the music industry). In addition, the DAT producers charged the record labels a royalty for any tape deck sold, ostensibly to compensate for missed revenue.

Another important factor regarding digital media is the ease of transmission and multiple uses. Another critical aspect of modern media is the speed of dissemination and versatility. For instance, if someone has a copy of this paper on their computer and wishes to give it to one of their mates. He will send it to you via email. Similarly, if he owns a book, he may lend it to him; copyright laws do not prevent this. Once he has the book, he will do whatever he wants about it — this is known as the "first sale" doctrine. He's also allowed to resell it without violating the copyright. While e-mailing this paper to him could seem to be a straightforward analogy to loaning it to him, there is one significant difference: he may give it to him without ever relinquishing custody of it. In other words, he already has a copy on his hard disk, and the other guy now does as well. Where there was once just one, there are now two. This dilemma is exacerbated as you consider the fact that he enjoys the paper and wants everyone to read it. He uploads it to a network rather than sending it to individuals via e-mail. Many people will now read it, copy it, and so on. Who knows

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<sup>115</sup>BerntHugenholtz ,Institute for information law ,Faculty of Law ,University of Amsterdam Why the Copyright Directive is Unimportant, and Possibly Invalid.Published in [2000] EIPR 11, p. 501-502 at<http://www.ivir.nl/publications/hugenholtz/opinion-EIPR.html>

how many copies are still out there?

The equivalence of works in print medium is another feature of digital media. Both computer works are nothing more than little bits of data that a computer can interpret. Under the copyright statutes, protectible works of authorship are classified as very particular types of works, with differing regulations and exemptions based on the quality of the piece. Though there are some fuzziness in the distinctions between subjects, it is usually not difficult to differentiate between them. While software programs are called literary works in the case of modern media, the actual effects of such lines of source code may be viewed as a variety of traditional subject matter.

CD-ROM devices, for example, are in the forefront of widely distributed technologies, combining audio and video into immersive games. Virtual Reality is now open to the general population, although in its infancy, and it's only getting better — for both entertainment and science purposes. The World Wide Web, like Gibson's cyberspace prophecy, is a showcase for what these little pieces of knowledge will do on the Internet. Not only could this paper be read by hundreds of thousands of people, but the text is only the beginning.<sup>116</sup>

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## **2.5 BASIC CHALLENGES FOR INTELLECTUAL PROPERTY RIGHTS**

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The Internet presents IPR administrators with two fundamental challenges: what to manage and how to administer. Only when a consensus on IPR topics in the Internet can be reached can the first challenge be faced. The IPR administrator faces a unique difficulty of balancing the rights of various actors on the Internet, such as content providers, distribution providers, and access providers. This must be accomplished without jeopardizing the free exchange of knowledge while still guaranteeing that the legitimate economic rights of intellectual property creators are not jeopardized. The Internet's intellectual property rights are reliant on it. If the IPRs on the Internet have been determined, the task for the IPR administrator is to determine the most cost-effective way to implement them.

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<sup>116</sup> Niels Ferguson ,Censorship in action:why I don't publish my HDCP results August 15, 2001at <http://www.macfergus.com/niels/dmca/cia.html>

Although there are no two minds on the importance of securing IPR on the Internet in the interests of authors, the implementation of such rights over this medium is likely to be difficult due to the technical device's sophistication. The compliance mechanisms would almost certainly necessitate the use of costly and sophisticated electronic equipment. After all, "the machine's response is the machine," and each new machine appears to be more expensive than the previous one. Will the costs of the interventions become so high that developed nations are forced to abandon the Internet? Would the protection of intellectual property rights on the Internet result in the planet being divided between those who have access to technology and those who do not? When it comes to the IPR problems of the Internet, these are the sorts of issues that must be answered.

In India, the Internet is still in its infancy. The majority of the questions posed in this paper are hypothetical and have not been encountered in reality. However, in order to accelerate the development of the Information Superhighway without jeopardizing the rights of copyright owners, it is important to investigate them thoroughly and find solutions. The golden mean between the general interest and the interests of the authors and disseminators of copyright works should be sought.<sup>117</sup> Around the same time, the latest IPR standards would not result in a widening of the gap between developed and emerging countries.

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## **2.6 BASIC COPYRIGHT PROBLEMS IN REGARD TO INTERNET**

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### **2.6.1 Determination of Public and Private Use:**

Determining the line between private and public use is one of the most fundamental copyright problems on the Internet. The Indian Copyright Act, like all copyright laws around the world, distinguishes between copying for public and private use. Reproduction for public use requires the consent of the right owners, while the statute permits equal dealing for private use, study, critique, or analysis.<sup>118</sup> This distinction is undermined by an individual's freedom to distribute some copyrightable

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<sup>117</sup> John Naughton ,A conspiracy against the public Online commentary Sunday March 16, 2003 at <http://media.guardian.co.uk/newmedia/comment/0,7496,915043,00.html>

<sup>118</sup> Charles Clark, General Counsel, International Publishers Copyright Council Copyright Representative, Federation of European Publishers, The copyright environment for the publisher in the digital world <http://users.ox.ac.uk/~icsuinfo/clark.htm>

work to a large number of users simultaneously over the Internet from the privacy of his or her house, and users' ability to receive a perfect copy of the material distributed simultaneously in their homes. Many believe that the disappearance of the fine line between public and private lands necessitates a new generation of copyright norms.

Any common ideas have been turned on their heads as a result of the Internet. The publishing industry is a good example. Publishers of books and music had entered the market with the start of the industrial revolution and the era of mass manufacturing. They've been so ubiquitous that authors can't imagine a future without them. The Internet, unlike books, is a tool that eliminates the intermediary between a writer and his or her reader. The author may publish his or her work on the Internet, which the reader can see directly. If the printing press gave birth to the publishing industry, the Internet has sounded an alarm bell, if not the death knell, for that industry by encouraging every writer to be his or her own publisher. This begs the issue of whether or not making a work available on the Internet qualifies as "publication." For the purposes of copyright, the Indian Act defines 'publication' as 'making a work accessible to the public by issuing copies or communicating the work to the public.' Because of its non-restrictive nature, this term can be interpreted as including electronic publishing and, as a result, 'publication' on the Internet. However, it will take a few years for electronic publication to make a significant impact in India.

The question of whether communicating over the Internet qualifies as "public contact" remains unresolved. The Indian Copyright Act has a detailed description of "public correspondence." According to the Act, "communication to the public" requires "making any work accessible for the public to view, hear, or otherwise appreciate directly or by any means of exhibition or diffusion other than issuing copies of that work, regardless of whether any member of the public currently sees, listens, or otherwise enjoys the work so made available." This term is considered broad enough to include Internet networking within its scope. If the courts take this opinion, Internet service providers in India would have a difficult time determining who owns the rights to the Internet's content.

### **2.6.2 Problem of Distribution and Reproduction Rights:**

The distributing right in Indian law, like most copyright laws, is exhausted with the first transaction. Currently, a student may freely sell a used textbook, and a library may freely distribute the books it has bought among its representatives. Since no copy can be transmitted without replication on the Internet, dissemination becomes entangled with reproduction.

On the Internet, the freedom to reproduce raises a number of serious issues. This is due to the fundamental essence of Internet transmission. Any stage of transmission involves reproduction. Temporary copying (also known as caching)<sup>119</sup> is an essential aspect of the Internet communication mechanism through which messages will not be able to pass across the networks to reach their intended destinations. And if a user just needs to browse, transient copying occurs on the user's screen. Coverage of temporary reproductions was a contentious topic at the December 1996 World Intellectual Property Organization (WIPO) Diplomatic Conference, which ended in a deadlock. Can a reproduction be prohibited where it occurs in the form of permitted use of the work and its primary objective is to make the work visible, or when the reproduction is of a temporary or incidental nature? Reproduction in India is required to be in a physical way, but it also requires "storing it in any medium through electronic means." Case rules are yet to specify whether reproductions occurring in Internet correspondence are covered by the law's right of reproduction, but views on temporary and permanent reproduction, as well as the validity of temporary reproduction, will continue to differ.<sup>120</sup> It would be curious to see how the courts add the idea of economic relevance to a reproduction in order to get it under the Copyright Act's right to reproduction.

### **2.6.3 Enforcement of Liability:**

The problem of responsibility is perhaps the most important one in terms of copyright law. For one thing, there's the question of responsibility for actions committed during

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<sup>119</sup> Justice Laddio, "Copyright, Over-strength, Overregulated, Over-rated", (1996)5 EIPR 253.

<sup>120</sup> Prof. J.E. Cohen (1998), Some Reflections on Copyright Management Systems and Laws Designed to Protect Them, 12 Berkeley Tech L.J. 161 at 169

the delivery of a legitimate (as opposed to an infringed) copy of a work. As previously mentioned, the question is highly dependent on the judiciary's view of different legal rights. If the courts decide that in-transit copying, for example, is a breach of a patent, so concerns about damages will emerge. Who should be made accountable? Who sends the job out, who gets it, and who is the Internet service provider (ISP)? The solution may not be simple to come by. The other thing is the transmission of a specifically infringed copy of a job over the Internet. The question here is whether an ISP should be found responsible for a subscriber's copyright violation even though he is unaware of the subscriber's behavior.

According to Section 79 of the Information Technology Act of 2000, where the subscriber may show that the crime or contravention was done without his knowledge or that he used any reasonable efforts to avoid the offence or contravention, he would not be found responsible under the Act. The Indian Copyright Act stipulates that the violation or abetment of the infringement must be done "knowingly" by an individual while defining copyright offenses. It is likely that, because of the word "knowingly," an ISP, which might or might not be aware of the subscriber's copyright violation, may be exempt from prosecution and penalty. This, though, poses a new problem. Even if the ISP is not criminally liable under Indian law, he can be held liable under the laws of another region. How will we control this, given that the Internet is completely universal and does not respect national borders? The networks are scattered around the globe, and a message or piece of information may pass through many countries before arriving at its final destination. The ISP may not be liable in the country of origin or the country of destination, but it may be liable in a transit country. Second responsibility arguments of contributory or vicarious violation make ISPs and software developers legally responsible for copyright infringement. A contributory infringer is described as "one who, knowing of the infringing behavior, induces, triggers, or materially contributes to another's infringing actions." In order for the provider to be found liable, there must have been an actual violation, and the provider must have committed some contributory or vicarious copyright infringement.<sup>121</sup>

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<sup>121</sup>ThiliniKahandawaarachchi, Liability of ISP for third party online copyrights infringement: A study of the US and Indian Laws, journal of intellectual property rights, Vol 12, pp 553- 561, Nov 2009



The regulation of national IPR rules, which are bound by federal jurisdictions, raises difficult challenges in the seamless world of the Internet. This is an environment where international harmonization of laws is critical; otherwise, the possibility of litigation in some countries which force the Internet service provider to examine the content being distributed for copyright approval, causing the whole procedure to be delayed. This could turn the Internet into a "World Wide Wait." The aim should not be to stifle knowledge flow, but rather to accelerate it.<sup>122</sup> A paradigm change occurs with any significant technical advancement, and the Internet is no different. New norms will be required to assign liability to the appropriate parties; an Internet service provider is not always an enabler of copyright infringement.

The variety of challenges that the Internet presents for IPR protection makes us wonder if copyright legislation would be adequate to face the burden, or whether we should pursue a unique IPR protection scheme. In reality, to face the current technical demands, there is a widespread movement to think in terms of unique ways of defense. Designer rules for intellectual rights of manufacturing designs, plant types, and integrated circuits have thus been enacted. Sui generis security is being considered for databases and folklore. Although copyright laws have become more flexible over time to accommodate modern ways of production, they do have a lot of rigidity.<sup>123</sup> Copyright does not cover inventions, processes, or technical features because of the idea-expression dichotomy, which is fundamental to the copyright doctrine. A sui generis type would, by definition, have much more versatility in terms of its reach, level, and duration of security. But it also requires a desire to try new things, as well as a willingness to let the legislation change by trial and error.

#### **2.6.4 Problems which have no Solutions:**

Differences in cultural perspective can have an effect on the appropriateness of content communicated over the Internet in some cases. Many literary, musical, and cinematic expressions that are permissible in western cultures may not be

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<sup>122</sup> Raman Mittal, online copyright infringement liability of internet service providers, journal of the indian law institute [vol. 46 : 2]

<sup>123</sup> R. MurugaPerumal, Copyright Infringements in Cyberspace: The Need to Nurture International Legal Principles, International Journal of The Computer, the Internet and Management Vol. 14.No.3 (September-December, 2006) pp 8-31

acceptable in more conservative societies such as India. A national government may exert some restrictions on books, music, literary works, and cinematographic films; this is also possible to a large degree for broadcasts and telecasts. How can we do this in the case of Internet communication? It is impossible to provide police at national borders on the Internet. Controlling and filtering content that spreads across the Internet presents a number of functional challenges. It is possible to intercept content that is indecent in nature (prurient or lascivious) under Section 69 of the IT Act, which currently provides the ability to ban websites. Such action may also be taken against pornographic websites, which is why there isn't any pornography hosted in India. And so, the Internet is also much too big and amorphous to be controlled.<sup>124</sup> When an infringing site is blocked, a hundred more can appear in different locations. The amount of knowledge available on the Internet is enormous, and it is spread out across the world, not just in one region. Any government will be unable to censor it. When media sources are small, censorship is a possibility. There is a significant distinction between traditional broadcast channels such as television and radio and the Internet. There is one broadcaster and many viewers or listeners in the former, while an overwhelming number of 'netizens' are concurrently inputting and viewing information in the latter. What kind of technological devices are capable of regulating the Internet's dynamic matrix, in which any consumer point is also a production point?

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## **2.7 COPYRIGHT IN THE AGE OF NAPSTER AND BEYOND**

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### **2.7.1 What the Evolving Napster Case Stands for:**

The Napster case, including Judge Patel's well-researched decision granting the record label and music distributor plaintiffs a preliminary injunction, and the 9th Circuit's further review of the fair use factors posed as an affirmative defense by Napster,<sup>125</sup> illustrate the extraordinary way the patchwork copyright legislation responds to the current complexities of the Internet. Although Napster may be extending the metaphor to make it sound rational and reasonable, the definition and

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<sup>124</sup> Aakanksha Kumar, Internet Intermediary (ISP) Liability for Contributory Copyright Infringement in USA and India: Lack of Uniformity as a Trade Barrier, *Journal of Intellectual Property Rights* Vol 19, July 2014, pp 272-281

<sup>125</sup> <https://core.ac.uk/download/pdf/205213553.pdf>

enforcement of "compulsory" music licensing is one of the most complicated (and misunderstood) facets of copyright law, and should not, in the authors' view, be loosely applied to other aspects of the music marketplace. It's also worth noting that compulsory licensing rules are incredibly strict, requiring, among other items, advance warning before sale. Failure to provide adequate notice effectively eliminates the chance of a compulsory license and makes producing and distributing illegal. And now, Napster is pressing Congress to enforce a sort of "compulsory" license on record labels for digital downloading, similar to the compulsory licensing clauses of the copyright legislation that exist to prohibit monopolies of mechanical licensing of musical works, of digital downloads of sound recordings.

Against this backdrop, in January 2002, for the first time since Napster was shut down in the summer of 2001 under Judge Patel's preliminary injunction order, as affirmed by the 9th Circuit, Napster has introduced a demonstration of a commercial file-swapping technology, using tracks licensed from independent record labels. Judge Patel's Napster decision followed a conventional approach to copyright law and preliminary injunctions, and it was arguably distinct from most copyright and technology cases. The plaintiffs copyrighted the bulk of the songs and records made available for free downloading on Napster, and it was apparent that Napster never requested or received licenses. In internal records and on the record, the Court consistently emphasized Napster's expertise, purpose, willfulness, and lack of honesty, as well as the "vast scope" of the violation affecting "millions" of consumers and the "usurping" impact on record companies' online music markets.

'The majority of VCR purchasers in Sony did not distribute recorded television programs, but merely enjoyed them at home,' the Court noted in separating Napster from the Sony case. A Napster user who downloads a copy of a song to his hard drive, on the other hand, can make the song available to millions of other people, even though he later decides to buy the CD. So-called sampling on Napster can exponentially encourage illegal distribution,' and that "Napster users may retain the music they download." In ruling that Napster use does not represent "family or home use in the usual context," the Court also pointed to the "global size" of Napster use. Napster's reasons for extending "time-shifting" to "space-shifting" and adding "the Ninth Circuit's claim, in a case concerning an inapplicable law, that space-shifting

constitutes non-commercial personal use" were all dismissed by the Court.

### **2.7.2 MGMvGrokster<sup>126</sup>:**

In this case, the Court opted to apply the standard test for contributory infringement and vicarious liability rather than the Sony rule. In this situation, the technology is somewhat different from Sony's. The Court holds that a product seller will be held responsible for copyright infringement by a third party if they "distribute a gadget with the object of encouraging its use to infringe copyright, as shown by plain speech or other affirmative measures taken to promote infringement, going beyond mere delivery with knowledge of third-party action," as shown by "clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action." According to the Court, it would be "impossible to enforce rights in the covered job efficiently against all direct infringers," so the only practical solution is to pursue secondary responsibility against the device's distributor. Since there was "no proof that Sony had desired to bring about taping in breach of copyright or taken aggressive action to maximize its revenues from illegal taping," the Court differs from its previous decision in Sony. When deciding whether or not the individual was facilitating infringement, the Court looks at motive. Grokster sought to encourage copyright infringement by soliciting business from former Napster users, not attempting to restrict infringement by consumers using their apps, and profiting financially from the selling of advertising, according to the evidence.

### **2.7.3 Cyber Jurisdiction — the Indian View:**

Until 1999, India's cyber authority was almost non-existent. For starters, interstate conflicts never reach the threshold of private international law in India as a result of the country's highly unitary government model. As a result, India has seen little production of private foreign positions. Furthermore, there have been few cases in Indian courts requiring Indian courts to have authority over a foreign matter. However, when the Internet and e-commerce shrink boundaries and merge regional and tribal limits on authority, such a jurisprudential growth will become critical in the near future. There are two situations that need to be considered:

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<sup>126</sup>545 U.S. 913

- (a) The manner in which international courts assume control over Internet-related matters, and
- (b) The implications of a foreign court's decree.

The laws to remember when using electronic data interchange (EDI), e-commerce, electronic fund transfers, electronic currency, copyright, intellectual property rights, digital signatures, and so on.<sup>127</sup> While the Information Technology Act has protections for digital signatures, the Evidence Act also needs to be amended to recognise them. To accept new innovations, changes are also expected in the Indian Penal Code, 1860, the Evidence Act, 1872, and the Indian Patents Act. Any court with exclusive authority over the matter is granted jurisdiction under Section 62 of the Indian Copyright Act, 1957. It also moves on to clarify the courts' jurisdictional boundaries. The Information Technology Act, once again, allows for extraterritorial control in cases of cybercrime. Section 74 of the Indian Penal Code states that any offense involving a machine or computer resource in India can be prosecuted under Indian law.

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## **2.8 THE FUTURE OF COPYRIGHT**

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Since the existence of the Internet is still too unclear, there is no correct response to the issue of copyright's security. Obviously, the decisions we make today will have an impact on the path it will go. Copyright isn't intended to give its owners complete ownership of their works; rather, it's a very specific set of rights intended to encourage innovation in the public interest.<sup>128</sup> A more appealing option would be to view fair use widely to prevent misuse by noncommercial, nonharmful uses. Whatever the outcome of copyright disputes, it is clear that other forms of creator compensation will coexist on the Internet. VSNL, for example, offers "live" performances in which celebrities enter chat rooms and engage with customers. Professional assistance is provided by software providers. On the Internet, there are a plethora of free intellectual works available, all of which clearly state the terms by

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<sup>127</sup>Priyambada Mishra and Angshuman Dutta, Striking a Balance between Liability of Internet Service Providers and Protection of Copyright over the Internet: A Need of the Hour, *Journal of Intellectual Property Rights* Vol 14, July 2009, pp 321-329

<sup>128</sup>FarnazSaadat, Mohammed soltanifar, The role of ISP in encouraging customers to use their internet services in Iran, *International journal of business and social science*, Vol 5 no 3 march 2014.

which they can be reproduced or used. This article, for example, can be written in any format as long as it is correctly attributed and not distributed for profit. New forms of compensation can eventually dethrone copyright. Maybe, in the end, public views of copyright on the Internet would be more important than stringent legislation. Laws, it is said, are intended to represent rather than regulate public sentiment. People adhere to laws that they consider to be fair. 'A societal over-reliance on barricades rather than conscience would inevitably wither the latter by making burglary and stealing into a competition, rather than a crime,' wrote John Perry Barlow in reference to cryptography. The future of copyright in cyberspace can be better determined by people's common concepts of what is equal and equal.

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## 2.9 LET'S SUM UP

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We learned in this chapter that copyright has a direct relationship with cyberspace. Copyright security on the Internet is fraught with issues. These issues and concerns must be addressed with caution and patience, taking into account the current situation in the post-Napster period and beyond.

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## 2.10 FURTHER READING

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- Barlow J P, The economy of ideas
- *A & M Records v General Audio Video Cassettes Inc*, 948 F Supp 1449, 1456 (C D Cal1996).
- James T C, The Internet as a challenge for intellectual property protection: An Indian perspective, *World Intellectual Property Organization Seminar for Asia and the Pacific Region on the Internet and the Protection of Intellectual Property Rights*

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## 2.11 CHECK YOUR PROGRESS: POSSIBLE ANSWERS

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1. What does "Communication to the Public" means and where is it defined?

Home and Communication over the Internet is considered "public communication," and it is still a controversial subject. The Indian Copyright Act has a detailed description of "public correspondence." According to the Act, "communication to the public" requires "making any work accessible for the public to view, hear, or otherwise appreciate directly or by any means of exhibition or diffusion other than issuing copies of that work, regardless of whether any member of the public currently sees, listens, or otherwise enjoys the work so made available."

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## **2.12 ACTIVITY**

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Write a detailed note on how copyright has a direct relation to the sphere of cyber space. (Word count 2000 to 2500)

# Unit 3: PRIVATE INTERNATIONAL LAW AND INTELLECTUAL PROPERTY RIGHTS ON THE INTERNET

3

## Unit Structure

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- 3.1 Learning Objectives
  - 3.2 Introduction
  - 3.3 Bilateral rules
  - 3.4 Neutrality of Contract
  - 3.5 Contract on the Internet
  - 3.6 Contractual relationships
  - 3.7 Copyright on off-shore locations
  - 3.8 Meritless intellectual property right holders
  - 3.9 Extra-contractual liability
  - 3.10 IPR, Internet and legal system
  - 3.11 Let's sum up
  - 3.12 Further reading
  - 3.13 Check your progress: Possible Answers
  - 3.14 Activity
-



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## 3.1 LEARNING OBJECTIVES

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In this chapter, we will learn-

- The relationship between IPR, Internet, and its related aspects in cyber governance.
- International treaties and conventions with respect to Private international law
- Various provisions of treaties and conventions governing the Internet laws.

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## 3.2 INTRODUCTION

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### *The Tools of Private International Law*

1) Points of Contact with Any Kind of Contract or Right The status doctrine was the beginning of private international law. When traders began to migrate to international markets, the issue of their legal status emerged. Many problems were regulated by one's personal status. Friedrich Karl von Savigny later introduced a scheme of contacts, according to which the law of a given country that is the center of gravity of the is regulated by the law of the State whose policies will be most legitimate relationship is deemed applicable for each and every significant type of rights or contracts. Only the United States continues to fail to use this tool. Finally, national or regional codification of private international law tends to be the final move, with more than 60 Acts regulating conflicts of law in countries outside Europe and at least 17 Codes on conflicts.<sup>129</sup>

The fusion of Savigny's approach and the codification movement yields a detailed plan for intellectual property protection on the internet, which will be discussed at the conclusion of this post. These ideas are a practical implementation of the concept of the closest possible connection between a given right or contract and national legislation. The closest relation is not to a state, but to a series of laws that can be traced back to a specific legislature.<sup>130</sup>

The nearest link triggers a series of checks. The first and most important measure refers to the legal rules controlling the characteristic results, the second to the legal rules that apply when any harm is currently felt, and the third to the collection of legal

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<sup>129</sup>EDWARD I SYKES & MICHAEL C PRYLES, AUSTRALIAN PRIVATE INTERNATIONAL LAW 1 (3<sup>rd</sup> ed. 1991).

<sup>130</sup>PB Carter (1990) 6 BYIL 400, 402.

rules that typically apply to the respondent's activities. As can be seen below, those laws have a simple subsidiarity, but they are all subject to different exceptions.

**2) Points of Contact Exceptions by Category** The governing principle of the nearest link, as well as other significant laws, result in at least three exceptions:

a) Where the facts of the case prove that the matter is reasonably beyond the scope of another legislature, courts may apply a law other than the one deemed valid by the particular clause.

b) A third country's direct implementation laws can be used where public or private interests warrant it. Antitrust laws and other long-arm regulations, for example, can take precedence over the rules that would otherwise apply.<sup>131</sup>

c) There are two types of renvoi: remission and propagation. When the *lex fori* designates the rule of another state as the relevant law, but the designated law deems the *lex fori* to be applicable, there is a remission. When the *lex fori* declares another law to be applicable and that law declares the law of a third State to be applicable, there is a transfer. While the Rome Conventions I and (draft) II prohibit renvoi, we believe that where certain texts or related ones are not valid, remission or dissemination can be used intelligently in situations concerning the right to advertising, libel, and *droit moral obligatoire* resulting from the Internet.

Consider the example of a well-known actress's name (Isabelle Adjani) being misappropriated as a domain name. If the argument were to be heard in Switzerland, the French actress would be able to choose between the law of her place of residence (Switzerland) if the wrongdoer should have foreseen that the injury would occur there, and the law of the wrongdoer's ordinary place of residence or place of business if the wrongdoer could have foreseen that the injury would occur there. There would be remission if the wrongdoer's country's private foreign law had referred the case to Swiss law. There would have been transmission if the matter had been transferred to the statute of the wounded actress's nationality (in our case, French law). There would be no renvoi if the court decided that both the affected party's law and the wrongdoer's law pointed to the same practical remedy, as the WIPO Panel did in the case of Mrs. Adjani, so there would be no clash of laws.

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<sup>131</sup> Book length studies include: JAMES J FAWCETT & PAUL TORREMANS, *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW* (1998); C WADLOW, *ENFORCEMENT OF INTELLECTUAL PROPERTY IN EUROPEAN AND INTERNATIONAL LAW* (1998).

If the forum is a country where internet litigation is rare, the renvoi could result in a law that is more developed on internet issues than the lexfori. If, on the other hand, the forum's case law is already well-developed, as it happens to be in the United States, remission provides a clear means to apply the case to well-established requirements rather than a blank international law. Any approach that favors the enforcement of an established body of law is conducive to global judicial harmonization in and of itself.

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### **3.3 BILATERAL RULES**

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A general observation on the procedures of contemporary private international law should highlight the bilateralism of dispute resolution rules: regardless of whether country A or country B is the forum's country, the same test is used to decide whether the law of country A or country B is relevant. The forum's legislation is not favored by bilateralism.

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### **3.4 NEUTRALITY OF CONTACTS**

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The rules of conflicts must remain neutral. They should not systematically lead to the law affording a higher level of protection for intellectual property rights. However, in the long run, the current scheme, which is based on the rule of characteristic efficiency, may lead to a widespread implementation of developing country rules, since they are the primary producers of protected intangibles, at least as long as traditional medicine and folklore are not highly protected.<sup>132</sup> This may or may not be interpreted as implying that a high degree of intellectual property rights boosts a region's innovation. Is the higher expenditure cost, though, due to the regulatory system governing intellectual property rights, or is it due to other factors? The internet may help developing countries assert their own creativity on the internet, or, as has been seen with the movie industry, globalization may lead to concentration of power. Macro-economics provide no clear answer. It is therefore important that the rules on conflicts of law remain neutral.

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<sup>132</sup> DAVID GODDARD, CONFLICT OF LAWS: JURISDICTION AND FOREIGN JUDGMENTS 4 (1999).

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### 3.5 CONTACT ON THE INTERNET

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Let us take an example. A producer established in country A commissions a poster from an artist who resides in country B. Since this poster is part of a larger promotional campaign of 200 other posters, he retains the freedom to change it to suit the others. However, a computer programmer in country C steals the completed poster from the artist's computer and posts it on his webpage, which is hosted by a server in country D, in a revamped format. From there, the poster is downloaded for a fee in 100 countries (E1 to E100). The criminal law of countries B and C applies to the electronic theft, but private international law will govern the conflicts concerning the artist's *droit moral*, the interpretation of the commissioning contract, and the producer's rights vis-à-vis third parties who have downloaded the poster. This example illustrates how a simple international case can require examination of three types of relationships.<sup>133</sup>

- 1) contractual;
- 2) extra-contractual (arising out of the infringement of intellectual property rights); and
- 3) quasi-contractual (for the accounting of profits, if any).

There is no doubt that contractual relationships are the key element in the application of technical measures to safeguard copyrighted contents on the internet. The seamless coordination of business operations on the internet is enabled by a network of interconnected contractual arrangements, allowing other companies or users to completely profit from the e-facilities. Liability for tortious conduct and the ensuing accounting for profits are nonetheless necessary. These three aspects shall now be considered from conflicts of law perspective.

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### 3.6 CONTRACTUAL RELATIONSHIPS

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#### **1) General Rule**

The legislation applicable to a deal entered into on the internet or for the use of an intellectual property right on the internet, according to Article 4, paragraph 2 of the

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<sup>133</sup> See further Graeme W Austin, *Social Policy Choices And Choice Of Law For Copyright In Cyberspace*, \_\_Oregon Law Rev. \_\_ (2001) (forthcoming).

Rome Convention of 1980, is the law of the country where the supplier of the characteristic performance has his domicile or establishment. This rule applies to all licensing or transfer of intellectual property rights. The practice tends to mention "transfer of rights" where the word "licensing" would be more technically correct.<sup>134</sup>

Therefore, in determining the applicable law, no distinction should be made between an outright transfer and a sheer license. Furthermore, the so-called "license" allowing the use of software or any intangible embodied in a CDROM or other physical copy is often ancillary to the selling of the copy and, as such, should be subject to the same laws as the sale.

In the absence of a separate option of law by the parties, both the selling and the license of intangibles will be subject to the licensor's or seller's regulation. Consumer rights legislation has been set aside. There are still several other drawbacks to consider.

## **2) *Transnational Law***

There is no conflict of laws where the laws potentially applied in a particular situation do not differ on the points in question. This is most often the case where a higher authority has mandated some level of harmonization, as is the case in Europe. Non-interference of State law with practice, on the other hand, will result in harmonization.

- Licence Law

This second situation arises on the internet in the absence of applicable State law. Furthermore, as merchants usually resort to arbitration rather than to State courts, it is possible for a transnational law to emerge. The basis of this law is hotly disputed between supporters of the *lexmercatoria* and sovereignists. Whatever the merits of the *lexmercatoria*, licensing practices are identical worldwide and most municipal laws are silent on details. Thus, the ideal conditions are met for a transnational body of law to come into existence. Here are two examples:

- 1) Although still uncertain two decades ago, the right of an exclusive licensee to sue for infringement is now recognized in most jurisdictions. Canada also

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<sup>134</sup> See generally, J FAWCETT (ed.), DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW: REPORTS TO THE XVITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW: ATHENS, AUGUST 1994, (1995).

permits the holder of a non-exclusive license to sue the infringer, but this continues to be a pioneering step that has yet to catch on.

2) The truly exclusive licensee's privileged status is linked to his duty to use the product, patent, concept, model, or patented art. As a result, the licensor who promises not to use the technology will almost certainly be compensated. However, in the case of "sole licensees" (who must consider competition from the licensor but no other licensee) or "semi-exclusive licensees," transnational legislation is less simple (who enjoy the status of an exclusive licensee in some countries or for some applications of intellectual property rights, and the status of a sole licensee in other areas). French, German, and Swiss law, in our opinion, have all agreed on the universally recognized doctrine for genuinely exclusive licensees. However, while French law acknowledges the need to use intellectual property rights even for non-exclusive licenses, this remedy cannot be considered part of the transnational licensing law. On the internet, no conflict of law exists because alternatives are transnational.

- Competition Law

The internet is also subject to similar or identical solutions in the field of competition law. When the time came to develop a world-wide system for the assignment of domain names, a common understanding between the U.S. and European authorities on antitrust issues helped persuade the U.S. to surrender its monopoly in this regard (as well as the initiation of proceedings by the E.U. competition authorities, which were later summarily dismissed). The next reform of the European block exemption regulations can also take into account the current state of antitrust and licensing law in the United States.<sup>135</sup>

- Consumer Protection

In the United States, Professor Raymond Nimmer's efforts to compile the licensing law in Article 2B of the Uniform Commercial Code finally led to a Model Act to

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<sup>135</sup> Andrew F. Christie, 'Private International Law Issues in Online Intellectual Property Infringement Disputes with Cross-Border Elements: An Analysis of National Approaches' (World Intellectual Property Organization, 2015)

Protect Consumers (Uniform Computer Information Transactions Act, hereafter UCITA). Its adoption is pending before several State legislatures. As the sole restatement of modern licensing law, the UCITA will be an inspirational model in many countries.

The UCITA regulations on conflicts of law are symptomatic in that they defend customers, but with a caveat: the parties should select the relevant law. However, their choice will not be enforced in consumer contracts if it modifies mandatory provisions of the applicable law under the UCITA. To a certain extent, European laws also purport to help consumers by having the mandatory provisions of their own laws apply. It's odd because the consumer's home country's law is assumed to be more favorable than the seller's home country's law – which, logically, cannot be valid in both situations when sellers and vendors are more or less involved in the same developing countries. Nonetheless, the rationale for applying the consumer's law is to help avoid any surprise to him or her. As a result, it is preferable to allow the consumer's country's law to prevail in order to promote the advancement of e-commerce, especially in those European countries where there is a reluctance to engage in large-scale e-commerce.<sup>136</sup>

The legal condition is similar to ordinary distance trading where an order is made on the internet but the items are shipped later by courier or postal. When downloading intangibles, however, it is important to differentiate between material that is not covered by intellectual property rights and content that is. The buyer can be shielded by his or her own statute where no intellectual property rights are involved. Where copyright, architecture or model legislation, or a sui generis privilege on data extraction applies, the licensor's law should apply rather than the consumer's law, since the clauses of the law relating to licensing deals are a *lexspecialis* in terms of consumer protection laws, which are best suited to licensing transactions. The text of Article 5 (1) of the Rome Convention may also be used to make a more formal argument: permits are not arrangements for the supply of goods or services.

Finally, licensing necessitates a balancing act since the greater a country's legal security is, the more relevant it becomes to still extend the exceptions offered by that country's rule. For example, Anglo-American copyright law provides a low threshold for originality but has a broad exemption from protection for what is known as "fair

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<sup>136</sup> Graeme B. Dinwoodie, 'Developing a Private International Intellectual Property Law: The Demise of Territoriality?' (2009). Oxford Legal Studies Research Paper No. 52/2009.

use" in the United States or "fair dealing" in the United Kingdom. If the licensor is located in the United States, a European user forum can apply the fair use exception even if his or her national legislation does not permit it, and even if the fair use exclusion is more of a substantive copyright law provision than a contract law provision.

- Exceptional Application of the Licensee's Law

But for consumer rights or antitrust law purposes, the proposition mentioned above applies to the licensor's law being relevant. It is important to remember that other extraordinary situations can necessitate the implementation of the licensee's country's rule. In this respect, three examples are worth noting.

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### **3.7 COPYRIGHT IN OFF-SHORE LOCATIONS**

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When a supplier of intangibles on the internet is an efirm with no particular relationship to the jurisdiction of any State, the general provision for diverging connections or the inspection of the nearest communication could contribute to the implementation of the licensee's statute. Any businesses in Panama or the Netherlands Antilles, for example, may be considered to be in this group. It is suspected that such companies would unlawfully misuse the intellectual property of serious right holders and distribute it around the internet. Their motivation may be direct remuneration from internet users, payments from advertisement sales, or income provided from the sheer accumulation of checked e-mail addresses.<sup>137</sup> In and such a case, the courts will break from the fundamental tenet that the relevant statute is determined by the licensor's characteristic results. In the 160 member states of the Paris Union, the 147 member states of the Berne Union, and the 134 countries that have signed the TRIPS Agreement, intellectual property theft is prohibited. It is fair to conclude that a deal allowing for the sale of such pirated intangibles would be declared null and invalid in these countries, and *contra bonos mores* in the remaining countries. As a result, an illegal or unethical duty cannot be a characteristic obligation under the Rome Convention.

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<sup>137</sup> ICT Development Index (2017)



If the implementation of the nearest relation test may not be accepted for this first explanation, a second reason could seem to be more in line with legal and economic thought.

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### **3.8 MERITLESS INTELLECTUAL PROPERTY RIGHT HOLDERS**

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If the licensor does not obtain the intellectual property right through its own purchases, actions, or ingenuity, or at a fair price, or through inheritance or acquisition, the licensor has achieved nothing characteristic until the licensing agreement is established. Intellectual property regulations aim to safeguard intellectual assets. Piracy is not regarded as an expenditure worthy of security. Furthermore, an e-business that thrives on the illicit manipulation of others' intangibles is unlikely to have funds that could be seized to pay its creditors in the event of a default. The underlying reason for the theory of characteristic performance is the connection between the country of the principal place of operation and the country in which bankruptcy proceedings or disciplinary actions will be instituted if the debtor of the characteristic performance may not discharge himself or herself of his or her obligations.

The foundation of the structure is the consistency of the law governing contract efficiency and the law governing compliance procedures. When the efirm, on the other hand, has no tangible properties, the off-shore climate would be ignored in favour of the licensee's legal environment.

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### **3.9 EXTRA-CONTRACTUAL LIABILITY**

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#### ***1) Scope of the Extra-Contractual Liability***

Intellectual property rights abuses occur often where there is no valid contractual arrangement between the parties. It's possible where the parties claim to have signed a deal, but the contract isn't binding unless a form condition isn't fulfilled, for example. Then, under Article 8 of the Rome Convention, the rule that would have

held if the contract had been legitimate is declared applicable. However, we will only discuss violating acts and unfair competition in the following sections.<sup>138</sup>

In the one side, there is a difference to be made between patent law and copyright, trade name, and trademark law. Since patent law is so closely tied to national economic policy, it is far more territorial. As a result, a list of contacts with each of the major intellectual property groups would be proposed. However, writers have previously gone into more detail on copyright and legal disputes. As a result, we'll begin our investigation with copyright and neighboring rights.

## **2) Copyright and Neighboring Rights**

### **a) Characterization of the country of "origin"**

The definition of "country of birth" is central to the Berne Convention. This point of touch is responsible for determining whether a job is covered in other Member States (alternatively the nationality of the author). It also aids in the distinction between "domestic" and "international" works, which are works of the same origin as the forum and do not benefit from the Berne minimum requirements of security.

Finally, it is important for the reciprocity provision that remains in the Convention, such as the period of defense and works of applied arts (but not for a "droit de suite"). The "country of origin," in our opinion, is a convention-specific term that cannot be twisted into a new and distinct concept for the Berne Convention's purposes. When it comes to conflicts of law, on the other hand, the criteria may be voluntarily selected or construed by States because the The ordinary residence or domicile of a citizen is a more important touch than his or her nationality, according to modern codifications of private international law. It's just reasonable that the author's address is the primary point of touch regarding copyright issues, as well as perhaps deciding whether or not there is a protectible subject matter.

### **b) Place of acting**

Infringement of intellectual property rights faces the same challenges in establishing a conflict of law contact as more conventional tortious behaviors. When the breach and the resultant destruction happen on the same piece of land, the rule of that state will apply. In the internet, though, it is more likely that the breach will occur in one place but the harm will occur elsewhere. As a result, some scholars designate the State in which the most recent infringement occurred as their primary touch. This

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<sup>138</sup> Lilian Edwards, 'The Role of Internet Intermediaries in Advancing Public Policy Objectives Forging Partnerships for Advancing Policy Objectives for the Internet Economy, Part II' (OECD, 2011)

confrontation law is widely agreed for tortious actions to some degree. Most European regulation, on the other hand, leaves the option of the rule of the state where the harm occurs free. In this case, the Swiss private international law codification is a stronger model. Article 110 (2) of the Swiss Federal Law on Private International Law (“PIL”) retains the concept of territoriality in the context of intellectual property, with the caveat that the parties can opt for the *lex fori ex post facto*.

However, we have found that the territoriality principle is not useless on the internet. As a result, we can turn to the plethora of rules governing personality defense, unfair competition, and wrongful behavior in general, particularly because transboundary data flows are governed by Art.

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### 3.10 IPR, INTERNET AND LEGAL SYSTEM

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In this regard, the points of contact that we propose for intellectual property rights on the internet lead to one legal system being applicable under three different viewpoints:

**(1) Time:** the person or legal entity entitled to use the intellectual property rights profits from their use but at the same time, incurs contractual or legal liability for its products or services (such as the strict liability standards of U.S. laws or the liability for risks of Article 1382 of the French Civil Code).<sup>139</sup>

**(2) Geographical:** The location where a dynamic act of wrongdoing causes financial damage is the victim's financial centre of gravity, or its principal business institution. This is also where the company's intellectual property rights are registered. Since intellectual property rights, unlike chattels, are not found in different jurisdictions, the loss cannot be located anywhere.

**(3) Civil actions:** A single regulatory scheme will extend to all damages claims (the success of which is often questionable due to the difficulties of proving missed profits) and benefit accounting under our plan (which an audit may more easily prove).

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<sup>139</sup> WIPO, ‘Overview of WIPO Panel Views on Selected UDRP Questions. WIPO Jurisprudential Overview 3.0’ (3rd edn, 2017), para. 4.2

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### 3.11 LET'S SUM UP

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In this chapter, we have learned how various international treaties and conventions are regulating Private international law. Additionally, we have understood various related concepts like extra contractual liability, neighbouring right etc.

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### 3.12 FURTHER READING

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- STROWEL & J.P. TRIAILLE, LE DROIT D'AUTEUR, DU LOGICIEL AU MULTIMÉDIA 386 (Brussels 1997); Lucas, supra note 23 at n° 96-97; Dutoit, supra note at 151-152.
- FRANÇOIS DESSEMONTET, INTERNET, LA PROPRIÉTÉ INTELLECTUELLE ET LE DROIT INTERNATIONAL PRIVÉ, Internet - Which Court Decides? Which Law Applies? 47-64 (1998)
- LUCAS & H.J. LUCAS, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE n° 976-980 (1994).
- François Dessemontet, L'enrichissement illégitime dans la propriété intellectuelle, in RECHT UND WIRTSCHAFT HEUTE, FESTGABE FÜR PROFESSOR D. MAX KUMMER 191-214 (1980).

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### 3.13 CHECK YOUR PROGRESS: POSSIBLE ANSWERS

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#### 1. Define "country of origin".

The definition of "country of origin" is central to the Berne Convention. This point of touch is responsible for determining whether a job is covered in other Member States (alternatively the nationality of the author). It also aids in the distinction between "domestic" and "international" works, which are works of the same origin as the forum and do not benefit from the Berne minimum requirements of security.

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### 3.14 ACTIVITY

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Explain Extra-contract liability in light of Private International law and Internet. (Word count 2000-2500)

# Unit 4: INTELLECTUAL PROPERTY, CYBERSPACE AND INTERNATIONAL LAW

## 4

### Unit Structure

- 4.1 Learning Objectives
  - 4.2 Introduction
  - 4.3 International conventions and territoriality
  - 4.4 Territoriality on Intellectual property Right
  - 4.5 Territoriality and National policy
  - 4.6 Concluding remark
  - 4.7 Let's sum up
  - 4.8 Further reading
  - 4.9 Check your progress: Possible Answers
  - 4.10 Activity
-

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## 4.1 LEARNING OBJECTIVE

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In this chapter, we will learn-

- The relationship between IPR, cyberspace, and its related aspects in cyber governance under International treaties.
- International treaties and conventions with respect to IPR.
- Various provisions of treaties and conventions governing the Internet laws and IPR.

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## 4.2 INTRODUCTION

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The conflict of laws regulations was designed to resolve disagreements within territorial laws, also known as municipal laws. Since there are no independent national jurisdictions in cyberspace, territoriality is still present in the judicial system (with a few exceptions, such as the Panels adjudicating domain name disputes under the Internet Corporation for Assigned Names and Numbers ("ICANN") Policy or the World Trade Organization ("WTO") Dispute Resolution Body). As a result, conflict of authority remains a major concern in most fields of intellectual property. This has spurred calls for the establishment of a single European patent court. Beyond jurisdictional issues, however, harmonization of intellectual property law is not currently being pursued. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) represents just a sliver of agreement, and the World Intellectual Property Organization (WIPO) Treaties of 1996 only include copyright and adjacent rights. Many geographical differences also exist in trademark and trade name law, design law, copyright law, licensing law, unfair market law, and trade secrets law, as well as in the fields of broadcasting and publicity rights, to name only a few of the most important areas on the internet.<sup>140</sup>

As a result, we believe it is beyond time for a restatement of the dispute principles in intellectual property law. The Convention on the Law Applicable to Extracontractual Obligations may have accelerated the codification process in Europe, but it was squandered. As a result, another permanent body, such as the Hague Conference on Private International Law, will have to take on the responsibility. Since, as will be

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<sup>140</sup> [John M. Mersich, Meeka Jun, "Terms You Need to Know: Search Engines."](#) Description of how search engines work; terms used; and distinction among search engines, search directories, and search managers.

discussed further below, the current network of international conventions does not include a full collection of tools for settling such disputes, harmonization of conflict of laws rules is needed. The second section of this essay focuses on the internet's private international law in the area of intellectual property.

Cyberspace cannot be spoken of as a set of national jurisdictions. However, the inherently territorial existence of intellectual property rights precludes this. This chapter does not explore international laws that control cyberspace around the world since it focuses on intellectual property (for example, the domain name regulation system, the allocation system for internet protocol addresses). It also doesn't take into account how national and foreign legislation work in regards to cyberspace.<sup>141</sup>

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## **4.3 INTERNATIONAL CONVENTIONS AND TERRITORIALITY**

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### ***A. Scope of International Conventions on Intellectual Property***

#### **1) Areas Regulated by International Conventions**

Patents, trademarks and geographic designations, trade names, designs and models, semi-conductor chips, copyright, neighbouring rights, plant variety, and trade secrets are all covered by existing treaties. Furthermore, Member States are required to ensure effective protection against unfair competition under the Paris Convention for the Protection of Industrial Property.

#### **2) Minimum Rights**

The multilateral Conventions provide intellectual property right holders with a minimum level of protection. Regardless of national legislation, all Member States can claim this minimum level of protection.

#### **3) National Treatment**

Discrimination against nationals of other Member States, as well as expatriates and refugees, is prohibited. As a result, any intellectual property right holder who is eligible to benefit from the Convention will be afforded the same level of protection in all Member States as a national of those countries. Most legal conflicts are

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<sup>141</sup>[Mark Sableman, Link Law: The Emerging Law of Internet Hyperlinks](#). The most recent and thorough examination of legal implications of hyperlink use on the Internet. A long but comprehensive look at the many legal arguments that can be made for and against users of hyperlinks.

suppressed by the equal protection of nationals and foreigners, combined with the minimum rights. When a national law differs from international standards, however, private international law issues arise. Although this deviation is justiciable before the WTO Dispute Resolution Body under the TRIPS Agreement, no other international mechanisms exist to ensure that Member States' legislation adheres to the international instruments' minimum rights. National governments have reacted in a variety of ways to the rapid advancement in technology. Conflicts of laws are becoming more common, owing to the fact that the major conventions have not been updated in the last three decades. In view of the Berne Convention, the issue of whether the framework of international treaties contains a set of guidelines for settling legal disputes will be discussed.

The other major intellectual property treaties, on the other hand, have the same effect on international law. Article 5 (2) of the Berne Convention guarantees the independence of the privileges granted to writers by national legislation. On first glance, this clause may cause one to conclude that the Convention establishes a dispute law. However, a thorough examination shows that Article 5(2) only prohibits discrimination against immigrants based on technicalities in their home country's rule. National copyright rules are "alone," which ensures that no deprivation of intellectual property rights under domestic legislation can be recognised by other Member States. That also ensures that no centralized infringement on the authenticity of copyrights for a certain work or subject matter is possible. Furthermore, contrary to popular belief in the nineteenth century, no reciprocity obligations can be enforced on immigrants requesting immunity from local courts. Even the Berne Convention, however, was unable to abolish all statutory reciprocity provisions in some contentious regions, such as copyright length, the "droit de suite" (right to an interest in resales), and the defense of applied arts.

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## **4.4 TERRITORIALITY OF INTELLECTUAL PROPERTY LAWS**

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### ***First Sale Doctrine between Nations***

Global obstacles to the importation of brand papers, proprietary books, and licensed materials are likely to be removed by the internet. International exhaustion is the e-commerce norm on the internet; anything accessed from a device is only subject to international exhaustion laws. However, for goods purchased on the internet and



sent by courier or postal, protection of local intellectual property rights is limited. We are seeing de facto international exhaustion in motion. National courts, we believe, would be unable to implement a national exhaustion scheme for rights in conventional delivery systems in the long term, while e-commerce is focused on international exhaustion.<sup>142</sup>

Japan, Switzerland (except for patents), and the United States (at least for reimportation) are among the first countries to recognize international exhaustion. The territorial solution to conflicts of law is inadequate in this case since the forum would define the first marketing abroad: was it rendered legally and with the consent of the intellectual property right holder? As a result, there is a strong extraterritorial bearing on the forum's legislation in operation (*lex fori*). The *lex fori* rarely has anything to do with the reality of the first marketing, with the exception of a few reimportation events. As a result, the court would often look at the copyright law (*lex contractus*) that enabled the first merchant to bring the goods on the market to decide if the first sale was legal and done with the consent of the intellectual property right holder. Surprisingly, the legislation of the selling nation would be disregarded if it does not have enough protection for the issues at hand, such as drug patents. This approach is also possible outside of the TRIPS Agreement's signatories, since it is a matter of critical interest for national health programs. The "territoriality" of intellectual property rights does not tend to be the guiding concept in any case (*application of contractus*).

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## 4.5 TERRITORIALITY AND NATIONAL POLICIES

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The jurisdiction of Member States over their public health, economic growth, and cultural policies which cause national courts to exclusively extend the *lex fori* to intellectual property rights that are considered to play an important role in such policies, notwithstanding the fact that the international Conventions do not enforce absolute territoriality. It's worth noting that the Swiss Federal Tribunal would not recognize international exhaustion in the field of patent law.<sup>143</sup> The reason for this is the economic consideration that while international exhaustion prevails, a fair return on

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<sup>142</sup>Lundstedt, L. (2016). Territoriality in Intellectual Property Law A comparative study of the interpretation and operation of the territoriality principle in the resolution of transborder intellectual property infringement disputes with respect to international civil jurisdiction, applicable law and the territorial scope of application of substantive intellectual property law in the European Union and United States (PhD dissertation, Department of Law, Stockholm University). Retrieved from <http://urn.kb.se/resolve?urn=urn:nbn:se:su:diva-133470>

<sup>143</sup>[https://www.espon.eu/sites/default/files/attachments/ESPON\\_Policy\\_Brief\\_Territorial\\_dimension\\_of\\_future\\_policies.pdf](https://www.espon.eu/sites/default/files/attachments/ESPON_Policy_Brief_Territorial_dimension_of_future_policies.pdf)

investment for patent holders is not assured because certain countries would not enable patent owners to set reasonably high prices.

In the United States, Professor William Patry has argued that, under Article I (8) of the United States Constitution, any work must meet the Copyright Act's originality requirements. Judge Kaplan of the Southern District of New York, on the other hand, and has responded that the acknowledgment of works covered under the lexoriginis stems from the United States Congress' Treaty Power. In addition, the United States Congress has ratified copyright conventions that provide for any connection to the country of origin.

There is one other point to remember that has yet to be discussed in the United States. The United States Congress has since adopted international human rights declarations, most specifically the International Covenant on Economic, Social, and Cultural Rights, in compliance with its Treaty Power. Intellectual property is protected under Article 15 paragraph 1 of this international treaty. The United States and other treaty partners cannot use their local rules to exclude themselves from their diplomatic obligations to uphold the treaty. Despite not being entitled to the value of the Berne Convention, the French courts correctly interpreted the Universal Declaration of Human Rights to allow Charlie Chaplin to seek immunity in France for his cinematographic works. A federal solution to intellectual property rights is ruled out by the prevalence of international commitments under the universal human rights doctrine. These rights are no longer the driving force behind national economic and cultural agendas. As a result, they are no longer subject to the whims of state governments. This also makes the United States' method of settling legal disputes by choosing the rule of the nation whose legislation seems to be the most relevant obsolete. Furthermore, as we can see, this approach is incompatible with the most current doctrine on conflict of laws.<sup>144</sup>

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## **4.6 CONCLUDING REMARK**

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The real issue for intellectual property rights holders in cyberspace is the protection of their rights. Although intellectual property rights are still territorial in nature, cyberspace must exist globally, and intellectual property security has been standardised by international treaties, especially the TRIPS Agreement. The

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<sup>144</sup>ESPON. 2017a. "European Territorial Review: Territorial Cooperation for the Future of Europe." <https://www.espon.eu/european-territorial-review>.

territoriality theory that defines intellectual property rights has also been loosened as a result of this standardization. The issue of territoriality of intellectual property rights will have to be addressed as part of any international cyberspace legislation. Any effort to regulate cyberspace and its relationship with intellectual property rights on an international level will pose the same legal and political challenges as any other international convention, as well as the need to create an international organization to track and police such a convention. However, in such a situation, international law may be used to control cyber threats and cyber war.

Outlining legal recommendations for internet infringements on intellectual property rights is just the first step. In certain cases, a straightforward test would not yield accurate results. When two or more experiments are used in parallel, the nearest relation is always discovered.

The reader should look back at previous publications and figure out why our series of tests was chosen. These assessments, according to some scholars, are not strictly dependent on the interpretation of the law of the receiving country. The policy is to favor a workable offer for goods and services under private law, as well as the use of intellectual property rights that can be monitored.

The enforcement of the legislation of the country of reception in a subsidiary capacity is not entirely ruled out. It can be used where a separate communication designates the same rule, for example, because the harm is obviously felt there and only there, or when it is a country shared by all sides. Where there is no worldwide distribution over a "Napster"-type relay, or uploading over a cell phone or other mobile devices in a different region, the legislation of the uploading country can also provide a very subsidiary examination. Finally, in extreme cases, the defendant's rule can be applied as the law of last resort.

In either test, the forum's public policy, such as any overreaching international policies, such as in antitrust zones, must be maintained. In the years to come, freedom of access, freedom of study, and freedom of speech, as well as *droit moral* and the security of intangible business properties, would generate enough tensions for dispute resolution laws to flourish.

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## **4.7 LET'S SUM UP**

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In this chapter, we have learned how various international treaties and conventions

are regulating International law on IPR and cyberspace. Additionally, we have understood various related concepts like minimum right, National treatment etc. Besides, we have also analysed the territorial and extraterritorial policy formation along with its implication on cyberspace and in protection of rights under IPR.

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## 4.8 FURTHER READING

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## 4.9 CHECK YOUR PROGRESS:POSSIBLE ANSWERS

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### **1. What is minimum right?**

The multilateral Conventions provide intellectual property right holders with a basic standard of security. Regardless of national law, all Member States will invoke this basic level of security.

### **2. What are the areas Regulated by International Conventions?**

Patents, trademarks and geographic designations, brand names, designs and models, semi-conductor chips, copyright, neighbouring rights, plant diversity, and trade secrets are all covered under current treaties. Furthermore, Member States are expected to maintain adequate safeguards against unfair competition under the Paris Convention for the Protection of Industrial Property.

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## **4.10 ACTIVITY**

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Explain Territoriality and National Policieslight of Private International law and cyber space. (Word count 2000-2500)

## યુનિવર્સિટી ગીત

સ્વાધ્યાય: પરમં તપ:

સ્વાધ્યાય: પરમં તપ:

સ્વાધ્યાય: પરમં તપ:

શિક્ષણ, સંસ્કૃતિ, સદ્ભાવ, દિવ્યબોધનું ધામ  
ડૉ. બાબાસાહેબ આંબેડકર ઓપન યુનિવર્સિટી નામ;  
સૌને સૌની પાંખ મળે, ને સૌને સૌનું આભ,  
દશે દિશામાં સ્મિત વહે હો દશે દિશે શુભ-લાભ.

અભણ રહી અજ્ઞાનના શાને, અંધકારને પીવો ?  
કહે બુદ્ધ આંબેડકર કહે, તું થા તારો દીવો;  
શારદીય અજવાળા પહોંચ્યાં ગુર્જર ગામે ગામ  
ધ્રુવ તારકની જેમ ઝળહળે એકલવ્યની શાન.

સરસ્વતીના મયૂર તમારે ફળિયે આવી ગહેકે  
અંધકારને હડસેલીને ઉજાસના ફૂલ મહેકે;  
બંધન નહીં કો સ્થાન સમયના જવું ન ઘરથી દૂર  
ઘર આવી મા હરે શારદા દૈન્ય તિમિરના પૂર.

સંસ્કારોની સુગંધ મહેકે, મન મંદિરને ધામે  
સુખની ટપાલ પહોંચે સૌને પોતાને સરનામે;  
સમાજ કેરે દરિયે હાંકી શિક્ષણ કેરું વહાણ,  
આવો કરીયે આપણ સૌ  
ભવ્ય રાષ્ટ્ર નિર્માણ...  
દિવ્ય રાષ્ટ્ર નિર્માણ...  
ભવ્ય રાષ્ટ્ર નિર્માણ

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**DR. BABASAHEB AMBEDKAR OPEN UNIVERSITY**

(Established by Government of Gujarat)

'Jyotirmay' Parisar,

Sarkhej-Gandhinagar Highway, Chharodi, Ahmedabad-382 481

Website : [www.baou.edu.in](http://www.baou.edu.in)