INTELLECTUAL PROPERTY RIGHTS: CHALLENGES OF ENFORCEMENT OF PROTECTION OF COPYRIGHT LAWS IN THE DIGITAL ERA

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Abstract

Creativity has always helped in the development of a civilization. India is a land of rich culture and heritage with the diverse forms of performing art, classical music and intellectual achievements. Protecting anything created by the human intellect has always been a huge responsibility. Policy makers constantly struggle in balancing in making the information accessible to the public and protecting the copyrights of the owners. Digitalization has made it easy to copy and paste files, information, and data. Electronic communication has surely made life easy and material accessible. But the greatest task is of the government to have suitable rules and regulations for the protection of people in the cyberspace.

The development of copyright was marked by passing ‘The Statute of Anne’ in British Parliament. Later, the Berne Convention was established to protect the rights of authors. It included their Literary, scientific and Artistic Works, irrespective of the mode or form of expression, like books, drama, choreographic etc. The convention did not give any specific legal procedure to own the copyright. However, the extent of application shall be a matter of legislation of the countries. India is a member of Berne Convention, Universal Copyright Convention (UCC), Rome Convention of 1961 and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Due to the ongoing technological advancement and digitalisation there has been infringement and unauthorised use of creative work on digital platforms. To address these problems WIPO adopted WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty. These treaties are known as Internet Treaties. Subsequently in 2013, India also enter WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT).

World Intellectual Property Organisation defines copyright as the right of the creator on his/her literary and artistic creations. It covers expressed work, such as, books, paintings, sculptures, music, films, computer programs, maps, sculptures etc. In the landmark Supreme

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Court judgment of RG Anand v. Delux Films that the copyright act protects the creativity in expression and not mere idea. If someone seeks to reproduce, make changes, or to use the work he must take permission from the owner of the work. The use, reproduction or sell of any such work without the authorization of the owners amount to the infringement of the rights of the owner. The owner has the right to seek civil or criminal remedies against the infringer.

In 90s it was difficult to be aware of such infringement. Today, is the digital world it is easy to have access to number of information and compare the works with right facts. There has been a recent trend of naming and shaming the IPR infringers on social media. This method has proved to be useful and quick. The legal procedure to file a case is expensive and slow. It is important to strengthen present policies, give appropriate guidance and make use of latest technologies like blockchain for the protection of copyright in the digital era.
Introduction

Creativity has always helped in the development of a civilization. India is a land of rich culture and heritage with the diverse forms of performing art, classical music and intellectual achievements. The result of globalization of telecommunication and decentralised communication system has made it possible to exchange data, information or files from anywhere on the earth, with the help of personal device and internet.

India is ranked as the second largest online market in the world, only behind China. It has over 560 million internet users and estimated to reach 650 million by 2023. With the increase in the internet use it has made easy to create, share and copy information or creation. The digitalisation has possessed a greater challenge for policy makers to protect the intellectual rights of the creators. It has also made it easy to manipulate the work or product of the creator online. Digitalisation has made it possible to create easy, fast, and cheap copy of a creative work, which can be distributed anywhere with just a click.

Review of Literature

Anything created by the human intellect is called as intellectual property. The rights protecting these creations are called as Intellectual Property Right, copyright is included in it. Policy makers constantly struggle in balancing in making the information accessible to the public and also protecting the copyrights of the owners.

Today, people use pirated data, software, games etc without the knowledge that they are committing a crime. According to a survey 63 percent of people download free music without the awareness that they are violating copyright laws.

History

The development of copyright was marked by passing ‘The Statute of Anne’ in the British Parliament, in April 1710. It was the world’s first copyright statute. The Statute was passed to encourage writers and protect their work from printing, reprinting, and publishing without their consent. It gave the right to copy to the author for a fixed duration.

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4 RONAN DEA ZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE 13 (2006)
Later, the Berne Convention was established on 9 September 1886, to protect the rights of authors. It included their Literary, Scientific and Artistic Works, irrespective of the mode or form of expression, like books, drama, choreographic etc. the convention did not give any specific legal procedure to own the copyright. However, the extent of application shall matter of legislation of the countries.\(^6\) It gave authors right over the use of their work and also gave the allowed them the collect fee. The fees are called as royalty.

The countries which disagreed with the Berne Convention adopted the Universal Copyright Convention (UCC). It was developed in 1952 by the United Nations Educational, Scientific and Cultural Organization (UNESCO). Later it lost its significance.\(^7\) However, India is a member of both conventions. Later India became a member of the Rome Convention of 1961 and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Due to the ongoing technological advancement and digitalisation, there has been infringement and unauthorised use of creative work on digital platforms. To address these problems WIPO adopted the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty. These treaties are known as Internet Treaties. Subsequently, in 2013, India also enters the WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT).\(^8\)

The WIPO treaty included copyright protection of computer programs and it recognised the right of distribution, right of rental and right of communication to the public. Article 11 of the treaty includes provisions for the measures taken in a technological environment. The treaty is designed considering the digital development of the artistic work and the need to protect the rights of the creators.

**The Copyright Act 1957**

Definition: World Intellectual Property Organisation defines copyright as the right of the creator on his/her literary and artistic creations. It covers expressed work, such as books, paintings sculptures, music, films, computer programs, maps, sculptures etc.\(^9\)

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Supreme Court judgment of RG Anand v. Delux Films\textsuperscript{10} that the copyright act protects the creativity in expression and not mere idea.

The material covered in the copyright act is 1. literary work, which includes books, speeches, advertising copy, games, computer, programs; 2. musical composition, which includes musical score, CD, DVD, Cassette, Tape, MP3 files; 3. Dramatic Activities, which includes play, movie, TV shows, news, cast; 4. choreographical works, which includes Gestures & Facial Expressions, Dance Movements; 5. Graphic & sculptural activities, which includes photographs, prints, maps, cartoons, fabric, games, posters, toys; 6. Additional activities, which includes Audio-Visual works, sound recording, architectural work.

If someone seeks to reproduce, make changes or use the work must take permission from the owner of the work. The use, reproduction or sell of any such work without the authorization of the owners amount to the infringement of the rights of the owner. The owner has the right to seek civil or criminal remedies against the infringer. In a criminal suit, the infringer can be held liable for imprisonment for a minimum of 6 months and maximum of 3 years or fine of at least 50 thousand to 2 Lacs.\textsuperscript{11} Distributing copies of software without authorisation is illegal under section 14 of the copyright act. As per section 9 of the act, it is important to establish a copyright office headed by the registrar of copyrights which is currently located in Delhi.\textsuperscript{12}

Copyright (Amendment) Act 2012

The 2012 amendment met with the standards of the Internet Treaties- the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). The aim of the amendment is to enforce the copyright protection in digital era. It amended the section 14 which included exclusive rights of the owner of artistic works, cinematograph films or embodying a sound. It added that storing of any kind of data or work by electronic or other means will be regarded as the copy of the work and will amount to infringement of copyright. It gives measures to protect copyright in digital environment and the liabilities of internet service provider. It introduced licence for cover versions and broadcasting organisations. It also ensured the right of royalty, economic and moral rights of the creator.\textsuperscript{13}

\textsuperscript{10} RG Anand v. Delux Films, A.I.R. 1978 S.C. 1613 (India)
\textsuperscript{11} Supra note 2
\textsuperscript{13} Id. at 4.
People usually commit copyright infringement without knowing the laws. Section 52 of the act gives the fair use of such information or work and will not be considered as the copyright infringement.

**Challenges of copyright law**

Digitalisation has made it easy to access of material and it is easier to make copies of it. In case of Shamoil Ahmad Khan v. Falguni Shah & Ors.\(^\text{14}\) In the case the story of plaintiff was used by the defendant to make a web series of the name ‘Singardaan’, the court observed that the series was illegally available on internet and order to provide the plaintiff with the share of profits or remuneration.

Following are the challenges:

1. **Piracy**: the technological revolution has increased the rate of piracy all over the world. According the estimated data 3 billion people illegally download music each month. Unauthorised downloading and sharing of copyrighted material, recorded music in the form of MP3 files. Frequently the piracy is not committed for monetary gain but the loss due to it is huge.\(^\text{15}\)

2. **Peer-to-peer(P2P) File Sharing System**: peer to peer file sharing system allows two computers share files with each other without central server. Sharing of the content creates it copy in another system. Peer to peer sharing is not an illegal act but when a copyright content is shared without the authorisation that is considered as copyright infringement.

3. **File Hosting and sharing**: Unauthorised distribution of files with the help of file hosting services is infringement of copyrights. In such a situation a person uploads the file to the file hosting service, where other people can download it.

4. **Hot-Linking**: Creating of a link using unauthorised and copied work can be considered and copyright infringement. Hot Link protection can be used to protect files and photos on your website from linking to other websites. This can also be avoided by taking permission from the copyright owner or can use disclaimer. Disclaimers will not guarantee 100 per cent protection but the court can take it in consideration.

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\(^{14}\) Shamoil Ahmad Khan v. Falguni Shah & Ors., COMMERCIAL IP SUIT NO. 1193 OF 2019 (India)

5. Freebooting: the term freebooting was coined by an Australian filmmaker Brady Haran in his podcast ‘Hello Internet’. The term means the action of taking re-uploading someone’s YouTube video on different platform for their own benefits. Later Facebook launched a software which identified copyrighted content posted on it. With the help of YouTube Content ID system, it gave access and power to copyright holder to block, monetize, allow or track the content.\footnote{Will Oreum, Facebook’s Piracy Problem, SLATE(July 08, 2015.11:44 AM), https://slate.com/technology/2015/07/freebooting-stolen-youtube-videos-going-viral-on-facebook.html.}

6. Linking: when the online user of an information links the work of a third party without the permission of the copyright owner is considered as violation of copyrights. a user can be held liable if he encourages the use of links for unauthorised use of copyrighted work. In case of intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.\footnote{Lionel M. Lavenue; Kara A. Specht & Duane L. Carver Jr, Potential Liabilities for Web-Linking to Copyrighted Content, FINNEGAN (May 5, 2017), https://www.finnegan.com/en/insights/articles/potential-liabilities-for-web-linking-to-copyrighted-content.html.}, the defendant published the copyrighted work without authorisation which was later also copied and published by other websites.\footnote{Summary of Intellectual Reserve v. Utah Lighthouse Ministries (LDS Copyright Case) (December 29, 1999), http://www.techlawjournal.com/courts/lds/Default.htm.}

7. Fair dealing in digital environment: Section 52 of the Copyright Act 1957 gives the provisions which can be the considered as the fair use of copyrighted work without the permission of the owner. It includes personal research work, criticism or review of the work and reporting or addressing the current affair. In case of India TV Independent News Services Pvt. Ltd. vs Yashraj Films Pvt. Ltd the court held that fair use of content does not amount to copyright infringement. However, the whole use of work will be considered as infringement. To conclude the fair use of work varies from case to case.\footnote{Uzair Ahmad Khan, Fair Use Law in India under Copyright Act, IPLEADERS (Feb. 15, 2020), http://blog.ipleaders.in/fair-use-law-india-copyright-act/.}

However, the fair use of copyrighted work is different for each country. Article 9(2) of Berne Convention 1883 states that it is the matter of legislators to permit reproduced work with the criterion of fair use without exploiting the copyright owner.\footnote{BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Text 1971), https://www.law.cornell.edu/treaties/berne/9.html.} Article 13 of the TRIPS agreement mentions that limitation and exception to exclusive right should not exploit the interest of the copyright holder.\footnote{Article 13, Limitations and Exceptions, TRIPS, http://www.cptech.org/ip/texts/trips/13.html#:~:text=TRIPS%20Article%2013%20-} Section 52 of the Copyright Act 1957 also gives provisions for fair dealing.
Finding and Suggestions

Copyrights are the intellectual property rights granted mainly for economic benefits. WIPO published a ‘Guide on Surveying the Economic Contribution of the Copyright (2015 revised edition)’ addressed the significant impact of copyrights on national economies. It stated that Copyrights generate employment, wealth, trade, and is source of income in some households. This has driven the economic policy makers and legal practitioner to support and motivate the people in creative sectors. The contribution of GDP is over 10 per cent in USA to under 2 per cent in Brunei. In 3/4th of the nations, copyright industries generate 4-7 per cent of national employment. Mexico and Philippines have maximum people in the copyright industries. Following chart illustrates the distribution and contribution of creative industries to GDP and employment. A statistic value is given by Dr. R K Patro in his research paper ‘Copyright Act in India’ where Indian Governments endures loss of 750 crore in taxes due to the piracy industry.

With the help of digitisation, there has been a recent trend of naming and shaming the IPR infringers on social media. It is said the be inspired from the American web series ‘The Punisher’, which is based on Marvel’s comic character. This trend was lately set by an anonymous Instagram profile named ‘Diet Sabya (DS)’ that calls the infringers from fashion and music industry. This trend is famous in America with Diet Prada, also known as “fashion watchdog”. In 90s it was difficult to be aware of such infringement. Today, is the digital world it is easy to have access to number of information and compare the works with right facts. This method has proved to be useful and quick. The legal procedure to file a case is expensive and slow. Such a shame-culture may be effective, but I think that if not done carefully or not used the right facts can result in the defamation of a popular brand or name. Such a shame culture is of no use to the plaintiff who seeks compensation or damages.

Remedies:

1. Secondary Liability: Due to the digitalisation there is an increase in the illegal use of artistic work, and pirated software, videos or music file. Legal suing each and every

infringer is expensive and slow. The copyright owners prefer to use the direct facilitators like in the case of A & M Records vs. Napster(239 F.3d 100424). Napster is an online service provider to share MP3s music files via internet. The record industry accused them of illegal file sharing which amounts to copyright infringement. The court held that Napster has committed repeated act of infringement and ordered to refrain from free transferring of music.

2. Digital Rights Management: it is the use of technology to protect the creations. It is majorly used to prevent the use of the protected work, track its use or limit the use and control the manipulation and reproduction of data. Its aim is to increase the cost of unauthorised access than the profit from it making it difficult for the user. The virtual container is an example where the user as to agree the term and conditions set by the owner in the form of license or contact.25 In other words, the use of technological mechanism to protect the intellectual asset of the copyright holder which is managed and controlled digitally.

3. Encryption technology system: The system ensures secure transmission of material over the internet from sender to the receiver, with the use of encryption.26 The use of encryption technology converts the data in encrypted digital code which can be accessed with the use of key or a password.

4. Backdrop censorship: if the copyright owner noticed that his work has been used without his permission on social media platform then he can give notice to the infringer asking him/her to take down the copied post.

5. Blockchain Technology: Website which use blockchain technology can store original work like book, document, photographs, art etc. in a decentralized ledger. It will simplify the process of registration and will make access easy and transparent. The owner of the copyright can track the usage of his/her work and have knowledge if someone tries to make an illegal usage.

6. Digital Watermarks: it is the combination of data and part of the protected work which gives access to the owners to track the use of their work.

26 Electronic copyright management system, WIKIA.ORG, https://itlaw.wikia.org/wiki/Electronic_copyright_management_system#:~:text=A%20Electronic%20Copyright%20Management%20System%20%28ECMS%29%20is%20a,of%20making%20it%20%E2%80%9Ceasier%20to%20pay%20for%20copying.%E2%80%9D.
Case laws

UTV Software Communication Ltd v/s 1337x and ors on 10th April 2019-Delhi HC

Eros International Media Ltd v/s Bharat Sanchar Nigam Ltd suit no. 751/2016-Bombay High Court

Department of Electronics and Information Technology v/s Star India Pvt Ltd, FAO (OS) 57/2015, the division bench of Delhi High Court

Conclusions:

Protection of copyrights depends on the effective enforcement of laws. Digitalisation has increased the horizon of severity of crime which takes place in cyberspace. Along with improving the cyber law there is need to have revise punishment for cybercrime in penal code. It is important to have a balance between securing the interest of the copyright owner in receiving the fair price for the efforts and the interest of the users in receiving the information. There is a need for revision of copyright law to adjust with the upcoming digital changes.