

(Published by Rajendra Kumar & Latha R. Nair in the World e-Commerce & IP Report, November 2001, volume 1, Issue 14)

COPYRIGHT PROTECTION IN THE INTERNET: AN INDIAN PERSPECTIVE

By Rajendra Kumar & Latha R

This article is concerned with the issues addressed by the WIPO Internet Treaties of 1996 and seeks to determine whether India's copyright and related legislation meets the requirements set out in these treaties. Towards this end, the article proposes to traverse the following analytical scheme:

- (i) The international copyright treaties prior to 1996: An overview;
- (ii) The WIPO Treaties of 1996: An overview of the issues raised by the Internet and partly addressed by them;
- (iii) Current Indian legal framework;
 - Copyright Act, 1957
 - Information Technology Act, 2000
 - Convergence Bill
- (iv) Case law or other developments

International Copyright Treaties prior to 1996: An overview

The history of copyright protection has followed two separate streams, one relating to the rights of authors of literary and artistic works and the other relating to the contributions of others who add value in the presentation of literary and artistic works to the public: these include performing artists such as actors, dancers, singers and musicians, producers of phonograms including CDs and broadcasting organizations. These contributions are generally referred to as 'related' or 'neighbouring' rights because they are related to or neighbouring upon the main authors' rights.

The two treaties that deal with the authors' rights are the Berne Convention and the Universal Copyright Convention (UCC).

The Berne Convention

Adopted in 1886, with a membership of ten countries, the Convention has today grown to be the most important international copyright convention with a membership of over 140 member countries. The provisions of the Convention (with the exception of those relating to moral rights) are

mandated to be applicable to all WTO members whether signatories to the Berne Convention or not.

The Convention has evolved through a number of revisions at Berlin (1908), Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971). The Paris revision is the text, which is now in force. Under the Convention, copyright protection covers all "literary and artistic works", a term which is defined to encompass diverse forms of creativity such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; cinematographic works, works of the fine arts including drawings and paintings and photographs.

The two fundamental principles on which the Convention is based are:

- (i) National treatment: - An author in a member country can claim in another member country (apart from the country of origin of the work the same protection as the country of claim gives to its own nationals). For instance, an Indian author can claim in the UK the same protection as UK gives to its own nationals.
- (ii) Convention rights: - The Convention provides certain specific rights to authors concerning reproduction, public performance, broadcasting etc., and these rights can be claimed whether or not the country of claim gives these rights to its own nationals.

The Convention requires unanimity of votes cast at a Revision Conference for any substantive amendments.

Universal Copyright Convention (UCC)

The UCC was adopted in 1952 and revised at Paris in 1971. The main inspiration for the adoption of the UCC was the desire to meet the particular features of US Copyright law, which required formalities such as deposit, registration and notice as conditions precedent for protection, and to establish a lower common standard of protection acceptable to the developing countries. The Convention seeks to meet these obstacles by requiring that these formalities shall be regarded as fulfilled, as far as works originating in other countries are concerned, if all legitimately published copies of the work bear the "copyright notice" i.e., the symbol '©', the name of the copyright proprietor and the year of first publication.

Since the level of protection required by UCC is lower than that required by the TRIPS Agreement, it is unlikely to be relevant to the future course of international copyright law and its importance in the development of world copyright primarily lies in building a bridge between the United States, Russia and other developing countries on the one hand and those of the developed world on the other.

The Rome Convention 1961

The Rome Convention was adopted on October 26, 1961 and it set an international standard for related rights belonging to performers, phonogram producers and broadcasters. Currently, there are 67 members of the Convention. India is not a member.

The Phonograms Convention 1971

The Rome Convention deals with the rights of performers, phonogram producers and broadcasters. Unfortunately, the ratification of the Convention requires a complex legislative framework, accommodating the rights of the three interested beneficiaries and their interrelationships. In the meantime, in view of the growing menace of record piracy which assumed serious proportions for the growth of the record industry, it was felt that, given the inherent difficulties of ratification of the Rome Convention, there was a need for adoption of a special convention to combat the menace with simpler rules of ratification.

The Convention was adopted in October 1971 and it covers the right of phonogram producers only. Currently there are around 63 members of the Convention.

The WIPO Treaties of 1996: An overview of the issues raised by the Internet and partly addressed by them.

Since the ratification of the pre-1996 treaties, digital technology, satellite broadcasting and communication through the Internet have enabled the transmission and use of copyright protected materials in digital forms over interactive networks and thereby disrupted the traditional markets for the sale of physical copies of such works. Since the Internet allows one to make an unlimited number of copies, virtually, instantaneously without any perceptible degradation in quality, this poses a serious challenge to the traditional copyright concepts and the manner in which these have been exploited in the analog world.

Taking cognizance of the above challenges to traditional concepts, two new treaties were adopted in December 1996:

- The WIPO Copyright Treaty (WCT);
- The WIPO Performances and Phonograms Treaty (WPPT).

The aforesaid treaties have recognized the tremendous impact of the development and convergence of information and communication technologies on authors of copyright and related rights as well as the subject matter of these rights. The treaties attempt to provide an internationally acceptable framework for resolution of the issues raised by

such technological developments and, sometimes, these treaties are referred to as 'the Internet Treaties'.

In the digital environment in which e-commerce is conducted, the most fundamental issues raised for the fields of copyright and related rights and partly addressed by the WIPO Treaties would be as follows:

(i) Software/ computer programs: - The software running a transaction system needs protection. Such protection may be either as a literary work under copyright law or as a separate right under a *sui generis* legislation.

(ii) Compilations of data and other material: - The information or content on a computer system / network or a web site or server may, by reason of its selection or arrangement, constitute an original creation and needs protection as such. Such protection may be available as a literary work under copyright law.

(iii) Reproduction right: The reproduction right must fully apply in the digital environment, in particular to the use of works in digital forms and must include the storage of a protected work in digital form in an electronic form.

(iv) Communication to the public: This right must apply to the digital environment and must include on-demand availability right whereby, for example, placing a work on an internet web site so that it is available for access by the public is deemed to be part of the general right of communication to the public.

(v) Right of rental: Since computer programs, sound recordings and cinematograph works which form a substantial subject matter of e-commerce, it would be essential to extend the right of rental currently available to physical copies thereof to their electronic forms.

(vi) Issues of licensing and enforcement: For electronic commerce to develop to its full potential, workable systems of on-line licensing must evolve, in which consumers can have confidence. Generally, most online transactions proceed on the basis where the subject matter of the transaction is licensed or sold subject to the terms and conditions displayed on-line and accepted through one click of the "I accept" button. This mode of commerce may be contrary to the traditional principles of copyright licensing / assignment which require a valid contract to be in writing and signed by the respective parties.

(viii) Issues of fair use: In addition to the existing exceptions, the digital environment calls for newer exceptions. One important exception would relate to entities that provide internet access or online services or when technical copies are made 'while browsing a web site'. By definition, when a work is transmitted from one point to another or made available for the

public to access, numerous parties are involved in that transmission. When such service providers participate in transmitting or making available materials provided by another which infringe copyright or related rights, are they liable for the infringement? Such liability could arise in one of two ways: if the service provider itself is found to have engaged in unauthorized acts of reproduction or communication to the public or if it is held responsible for contributing to or making possible the act of infringement by another (e.g., the Napster case). Further, the activities of on-line intermediaries raise issues of copyright infringement in the following contexts:

- **Caching activity**, which generally refers to copying to local servers, frequently requested materials that reside on remote servers. These remote servers might otherwise receive more requests for their contents than they could handle, and transmission networks would be overloaded making the information difficult to access.
- **Hosting activity**, which refers to an on-line intermediary's provision of storage space on web servers to third party users for content such as a web page, which may incorporate many kinds of materials (software, text, graphics, sound). The provision of server space may also be made to such groups as news groups, chat rooms, usenets, bulletin board services etc. The liability of such on-line intermediary may arise in a situation where the content posted on web servers is infringing or violative of copyright or constitutes defamatory material.
- **Search engine facility**, which refers to an on-line intermediary's service of providing an information location tool to users of the internet to locate and display a list of links to web sites where the requested information is located. Issues of copyright infringement may arise through the use of certain types of linking techniques including simple linking, deep linking, framing etc.

(ix) Issues of jurisdiction: E-commerce in the context of copyright and related rights raises important issues of private international law. The digital environment has dissolved national boundaries and placed the traditionally understood territoriality of copyright protection under considerable strain. Online availability, whether authorized or otherwise, of copyrighted materials, and their unauthorized use through various means of access such as linking, framing, posting on bulletin boards etc. pose serious issues of jurisdiction for purposes of enforcement involving the copyright owner, the infringer and in many cases the Internet service provider. In such situations, the situs of publication over digital networks may call for a clear choice to be made between multiple jurisdictions such as the place from where the work is posted on the net or the place where the web site server is located or where the user downloads the work.

Current Indian legal framework

The Copyright Act, 1957

Under the Copyright Act (hereinafter, 'the Act'), copyright exists in the following classes of work:

- Original literary, dramatic, musical and artistic works
- Cinematograph films; and
- Sound recordings

Related rights:

- Rights of broadcasting organizations
- Rights of performers: - The expression 'performer' is defined to include an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.

From the above, it is clear that the rights in sound recordings and cinematograph films, which have traditionally been understood as part of related rights, are classified as 'copyrights'.

(i) Literary work and compilations of data - The definition of "literary work" under the Act includes computer programs, tables and compilations including computer databases.

Computer program is defined to mean "a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result".

The above definition would include computer program in source or object code.

(ii) Reproduction right - The right of reproduction under the Act is broadly defined to include any material form including the storing of it in any medium by any means.

(iii) Communication to the public - This is defined to mean "making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such works regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available".

There is an explanation appended to the definition and it is to the following effect:

“For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public”.

The above provision would cover the making available right and is applicable to all descriptions of copyright and related rights under the Act.

(iv) Right of rental - The owners of copyright in computer programs, cinematograph works and sound recordings enjoy the right to give a work on hire. In particular, in the case of a computer program, the right to give on commercial rental is subject to a proviso which excludes computer programs where the program itself is not the essential object of the rental.

(v) Licensing and assignment of copyright: Under the Copyright Act, a valid license or assignment of copyright and related rights must be in writing and signed by the respective parties or their duly authorised agents. In view of the legal recognition accorded to electronic records under the IT Act, 2000 (as discussed below), an online license/ assignment document would be valid provided it is affixed with digital signatures of the respective parties.

Exemptions from Copyright protection

A. In addition to the traditional fair use exceptions by way of private use, criticism or review applicable to a literary, dramatic, musical or artistic work (not being a computer program), the Copyright Act permits a lawful possessor of a copy of a computer program to make a copy or adaptation of such computer program:

- (i) in order to utilize the computer program for the purpose for which it was supplied: or
- (ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilize the computer program for the purpose for which it was supplied.

B. The Copyright Act does not address the following:

- The activities and liabilities of online intermediaries in so far as these raise issues of copyright infringement;
- Obligations concerning technological measures and rights management information

The Information Technology Act, 2000

The Information Technology Act, 2000 (“the IT Act” for brevity) has been enacted essentially to grant legal recognition to e-commerce. This Act does not directly address any IPR issues but there are provisions therein which

would have impact on the IPR scenario in e-commerce environment. A brief description of the IT Act follows.

A. Objectives of the IT Act

- to grant legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication commonly referred to as “electronic commerce / e-commerce” in place of paper based methods of communication;
- to give legal recognition to digital signatures for authentication of any information or matter which requires authentication under any law;
- to facilitate electronic filing of documents with Government departments;
- to facilitate electronic storage of data;
- to facilitate and give legal sanction to electronic fund transfer between banks and financial institutions; and
- to give legal recognition for keeping books of account by Bankers in electronic form.

B. Areas not addressed by the IT Act

The IT Act is not a comprehensive code covering all possible aspects of e-commerce or the Internet related issues. For example, the Act does not address the following:

- Protection for domain names
- Infringement of copyright or other intellectual property rights
- Privacy related issues
- Protection of consumers from false and untrue advertisements and consumer disputes arising therefrom
- Jurisdiction aspect of e-commerce contract (vis-à-vis jurisdiction of courts and tax authorities)

C. Provisions in the IT Act which have some consequences for copyright / related rights

- Under the IT Act, it would be a criminal offence to tamper with computer source documents, hacking with a computer system and publishing of obscene information in electronic form.
- The IT Act excludes service providers from liability for any third party information or data made available by him if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

- However, the Act is silent about issues concerning caching, linking, framing and search engines.

The Communications Convergence Bill, 2000

Currently, there is the Communications Convergence Bill, 2000 pending before the Indian Parliament which seeks to promote, facilitate and develop in an orderly manner the carriage and content of communications (including broadcasting, telecommunications and multimedia) and for the establishment of a regulatory framework to control and carriage and broadcast of all forms of communication. This Bill also does not directly address issues related to copyright or other IPRs or privacy but its provisions would have a significant impact on distribution of copyrighted material. The focus of the Bill appears to be control of radio frequency spectrum and licensing of users of the radio frequencies.

Case law and other developments

The Indian jurisprudence in the area of Internet related offences is still in its nascent stage and there is not much case law on the subject. However, there are encouraging trends in judicial thinking in India which have sought to interpret and apply the existing provisions of procedural and substantive law in a flexible and pro-active manner to meet the challenges posed by the Internet. The following case is noteworthy:

Himalaya Drug Company v. Sumit (Suit No. 1719 of 2000)

The plaintiff in this action was an Indian company carrying on business in the field of manufacturing and marketing herbal medicinal products. In connection with its business, the plaintiff had compiled a herbal database which was posted on its web site. An Italian infringer illegally copied the herbal database and posted the same on its own web site hosted by a US server. The Indian company sued the Italian infringer through its us server/ISP, claiming:

- That the herbal database compiled by it was an original literary work under the Indian Copyright Act;
- That the Italian infringer had unauthorisedly copied the original database and thereby violated the Plaintiff's rights of distribution and communication to the public;
- That the infringing copies of the defendant's web site were accessible to Internet users in Delhi; and
- That the High Court of Delhi had the jurisdiction to entertain and try the suit in exercise of its personal jurisdiction over the overseas defendant.

Pursuant to the action, the High Court of Delhi granted an *ex parte* injunction against the defendant restraining it from reproducing the

Plaintiff's copyright in its herbal database. Thereafter, the plaintiff served a copy of the order on the US based ISP and requested it to deny access to or disable the infringing web site in accordance with the Digital Millennium Copyright Act which contains notice and take down provisions on fulfillment of certain conditions. Upon receiving the notice, the US ISP/ server removed the impugned web site.

The proactive and imaginative approach of the Indian courts in interpreting and deciding Internet related issues is further exemplified in the context of trademark violations on the Internet. In the trademark context, the Indian courts have applied the traditional principles of passing off action to domain names and restrained the defendants from using the same in any manner.

The first case to deal with this issue was *Yahoo Inc V. Akash Arora* (1999 PTC 201) where the High Court of Delhi restrained the defendant from using the domain name yahooindia.com, as a domain name or otherwise, on the basis that trademark law applies with equal force on the internet. In this case the plaintiff, Yahoo Inc owned the famous Internet domain name *yahoo.com*.

Yet another significant ruling was the *Rediff Communication Ltd. v. Cyberbooth & Anr* (2000 PTC 209) where the defendant, who registered radiff.com as a domain name was enjoined from using the same. The plaintiff's web site being rediff.com, the High Court of Bombay observed that a domain name is more than an Internet address and is entitled to equal protection as a trademark.

The above trend of application of the principles of trademark passing off to domain names has been continued through various orders of ex parte injunction passed by the Indian courts including the High court of Delhi. In one such order, the High Court of Delhi observed that "in matters internet communications having transnational ramifications, the effect of the impugned transaction in India is the decisive factor for determining jurisdiction".

Conclusion

In the recent years, India has come to be known in the international community as an information technology major. Further, India has the largest movie industry in the world. The development and growth of on-line means of transmission of copyrighted works over the Internet has thrown up a plethora of issues of immediate relevance to the Indian business interests and, therefore, there is a compelling need for India to conform to the international framework for resolution of the issues.

There are, however, issues of relevance for which the current legal framework does not provide any statutory remedies such as the liabilities and activities of intermediaries for copyright infringement, the rights

management information, the protection of anti-circumvention devices etc. Hence, barring a few important aspects, India's copyright law meets the challenges posed by the Internet and the Indian jurisprudence has been keeping pace with the fluid world of the Internet in enforcing and protecting intellectual property.

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