

Implications of Online Copyright Violation: Balancing the Enigmas of Technology with Copyright in the Internet Age

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Abstract:

Internet has played a major role in the development of communication system and provided us an easy and quick access to innumerable references and sources. Easy accessibility has resulted in several unauthorized use and copying of information available online which is copyrighted and for which author shall be credited. Internet has literally become a large copy machine, constantly used to transform and download the digital material for reference & research. Copyright is one of the most crucial laws and it is important that it keeps up with the technological advancements.

This paper aims to throw light on the way the interests of owners and other users can be balanced. The contemporary issues of relevance such as cyber space jurisdiction with respect to copyrights and implications of the principle functions of the internet will also be discussed. Further, the liability of various parties in the event of an offence committed online is also dealt with in this article. The International and national legislations that regulate the online activities of users are also dealt with in the article. The article elucidates the matters related to copyright infringement in a national and an international perspective including the moralities and ethical issues revolving around them.

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Introduction

Internet is the most important medium of communication of our times. It is widely viewed as the fastest growing communication phenomenon of all time. The Global online population increased from year 2002 exceeded 250 million users and reached the range of 300-500 million by the end of 2006 and by the end of 2013, the number of Internet users increased to 2,802,478,934.² In most regions, Internet population has reached mass populations to an extent that businesses cannot be run without the internet. With the constant advancement of technology and decreasing costs of telecommunications, it is believed that this growth will continue for years to come.

One of the most significant contributions of the internet is that it provides us an easy and quick access to innumerable references and sources. Easy accessibility has also resulted in several unauthorized use and copying of information available online which is copyrighted and for which author shall be credited. Internet has literally become a large copy machine, constantly used to transform and download the digital material for reference & research. But, it is often misused for unauthorized use, download or publishing of copyrighted / protected information. Hence this power of internet has both a positive and a negative side to it. Advantages being innumerable, main one being able to provide easy access to millions, spreading knowledge and making communication between two ends of the world; however there are disadvantages as well, one of them is copying of copyrighted materials, or unauthorized use or publications over internet.

² *World Internet Usage And Population Statistics*, www.internetworldstats.com.stats.htm (Last updated Dec.31, 2013)

Copyright is one of the oldest intellectual property rights, it is a law which protects the rights and ensures benefits to creators (authors) of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. It is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work.³ There could be minor difference in the composition of the rights depending on the work. Online copyright infringement is said to have occurred when a copyrighted work such as a song, movie, or text is copied, modified, displayed, or performed electronically without the permission of the copyright owner. When a copyright in a work of a person is infringed electronically, it becomes even more challenging to locate the infringer and penalize him. There is also a constant debate surrounding the liability of the internet service providers (for example website owners which serves as platform for online publishing of information, e.g.: YouTube, face book, etc.) in case of an infringement, and to what extent can these service providers be held liable for or what shall be their duties or responsibilities.

I. Principle Functions of the Internet and their copyright Implications

India has a very progressive Copyright Act. The amendments that were made to the Act in 2012 were in consonance with the WCT and WPPT. Since the copying and transmission of material over the internet takes place without any degradation to the original copy, it has raised several issues. Digitization has caused the cost of copying and transmission to almost zero.

The fundamental function performed by the Internet is the transmission of information of digital from one computer to another. At the functional lever, the internet is basically a communication technology.⁴ Any type of information, which can be translated to digital form, can be transmitted via the internet. Thus, any copyrightable material that can be transported via the internet is treated the same as those in any other media. Further, the fact that the information is available online does not constitute a waiver of copyright nor does it de-facto give any person license to download or reproduce that information without the knowledge of the copyright owner.

³ Ministry of Human Resource Development ,Department of Secondary Education and Higher Education
A Handbook of Copyright Law, <http://copyright.gov.in/documents/handbook.html> (Last visited Oct. 18, 2014)

⁴ Christopher Reed, *Internet Law: Text and Material*, 8 (2000)

The following uses of the internet may have implications on the copyright and have been assessed as follows:

1. Email

Email is described as sending a message from one person to another using a computer network. The message is sent, using a modem, to an organization that provides the user with Internet services. The receiver retrieves the message by downloading a copy of his file from the service provider. This act of sending and retrieving a message on its own does not violate the copyright of anyone. But, if a person sends any copyright material to others without the permission of the owner, it amounts to an infringement.

Bulletin board is another variation of the email where the user posts a message on a computer which houses the bulletin board and is which is controlled by the systems operator.⁵ This computer automatically forwards the message to the users who have subscribed to the board. Alternatively, users can obtain the message by gaining access to the computer housing the board and downloading the file into the computer's temporary memory.⁶

This bulletin board technology, with its ability to disperse vast quantities of information to a large number of users who have subscribed quickly has multiplied the opportunities for abuse of the technology. .Illegal distribution of copyrightable material on online bulletin boards has become a huge problem. The users who download and upload copyrighted materials without the permission of the copyright owner no doubt violate the copyright law, except when it is covered by exceptions and limitations, but whether bulletin board operators are also liable is a matter of debate.

2. Access to information

⁵ Mckenzie, Baker and Rober J. Hrt, *Guide to Intellectual Property in IT Industry*, 286 (1st ed., 1998)

⁶ Alka Chawla, *Law of Copyright: Comparative Perspectives*, 213 (1st Edn., 2013)

An organization opens up a database to access to a list of materials or indeed, the materials themselves, which can be transferred by File Transfer Protocol (FTP), FTP is a part of TCP/IP protocol suite. FTP works on the client server principle. This means that one communicating party runs client software which requests information and the other runs server software which meets the request.

The web creates a mesh of software links between the documents. Clicking on a hypertext link in a web document can take the user to another document on the same computer or to another document in another computer in some other part of the world. This is made possible by the hyper text transmission protocol (HTTP). Hyper Text markup language (HTML), which creates a unique URL for each document on the web. There are various ways by which information can be accessed.

3. Linking

Links are references to Internet addresses i.e. statements of locations without original contents, which fall under the category of facts. Linking is probably the most effective information sharing tool on the internet. There are three different types of links:

- i. Intra Page: Intra page links different parts of the same document. For example, a long document may have a link at the end which takes the user back to the beginning.
- ii. Intra Systems: Intra system Links connect different parts of the same server. An intra system link on a university's server might connect the home pages⁷ of two different departments.
- iii. Inter Systems: An inter system link connects documents of different servers. Millions of documents can be linked together through the World Wide Web too.

Linking can also be divided into

(a) Surface linking and

⁷ Stephen M Stewart, *International Copyright and Neighbouring rights* 198 (1983)

(b) Deep linking.

When the home page of a site is linked, it is the case of surface linking. When a link bypasses the home pages and goes straight to an internal page within the linked site, it is the case of deep linking. In it, the link is created not to the home page of the target site, but to a subsidiary page. A hyperlink used by a web site does not directly cause copying of any substantive content by anyone, but instead merely provides a pointer to another site. A surface link to a home page normally does not require permission, for the reason that going online creates an implied license to view the web site. Creation of a web site itself is an invitation to all to visit the site. Hence merely placing a surface link is not an infringement of copyright.⁸

The home page of a Web site is used as the entry point to information contained within the Web site: it welcomes users, explains the nature of the site and offers links that allow the user to navigate through the site. Deep links defeat a Web site's intended purpose and method of navigation. Further deep links may "steal" traffic from the linked site's homepage thereby decreasing the revenue that could be generated from advertising that is dependent on the traffic onto the site. For instance, if the target site depends on advertising revenues, those may be reduced if users are directed straight to a subsidiary page, bypassing pages with advertising. The technology of hyper linking may also aid in the distribution of creative material that belongs to someone else. 6Inline linking allows a website to import an image from another website and then include it on the website. The user is able to click on an image and then open a new window to display the full size image, within the original website. Deep linking to commercial Internet databases without the permission of the content owner could raise many problems. It is quite different for a search engine to deep link than a competitor of an e-business Web site to do the same. It would be difficult for any business to see its content being used by a competitor for free just because the new technology allows it. Many publishers are moving to curtail or block permanent deep links, as more free content moves behind registration screens or are shepherded after a few days into paid-for archives.⁹ But many Web sites would welcome deep links as well.

⁸ *Copyright and Fair Use*, <https://www.chillingeffects.org/topics/22> (Last visited Oct.10, 2014)

⁹ Drew Cullen, *Deep Links are legal* (Jul. 20, 2003), http://www.theregister.co.uk/2003/07/20/deep_links_are_legal

3.1 International Position

Internationally, there is no definite law that puts a ban on linking. Linking is sine qua non of the Internet's most prevalent information access tool, the World Wide Web, and there are innumerable links existing on the internet today. Links allow quick access to information that in normal circumstances would be close to impossible to find. Linking also allows the user to ascertain how intensely to research on a particular topic.

One of the first cases related Links with in regard to copyrights came to public eye copyright in *Shetland Times Ltd v. Dr. Jonathan Wills and Zet News Limited*¹⁰. In this case, both parties offered Internet based news service. In October, 1996, "Shetland News" reproduces verbatim a number of headlines from the Online edition right of Shetland Times as hypertext Links to corresponding news articles. This resulted in users bypassing the front page the Shetland Times news website and reading only the linked texts. When the case came before the court of sessions, the pursuers argued that both their websites and that of the defenders were capable programs and that the defenders infringed copyright. Granting an interim interdict, the judge ordered the website to be removed. There is nothing in the injunction suggesting that copyright can be employed to prevent the use of hypertext links from one site to another and the legal question was not whether links infringe copyright, but whether headlines are literary works and deserve copyright protection. One of the first cases in America was the *Ticketmaster Corp. v. Microsoft Corp*¹¹ the plaintiff; Here, Ticketmaster Corporation sued Microsoft for Microsoft's practice of deep-linking, without permission, deep within its site rather than to the home page. It was claimed by the plaintiff that Microsoft to all intents and purposes diverted revenue received from advertising that otherwise would have gone to the plaintiff.

Further, Free linking by Microsoft to the plaintiff's site could have devalued the contractual relationships that it had with other firms that had agreed to pay to link to the plaintiffs site. Besides, Ticketmaster had also contracted to give MasterCard prominence at its site. Microsoft's

¹⁰ 1997 SLT 669

¹¹ No. 97-3055 (CD CA, complaint filed on April 28, 1997)

bypassing of the home page threatened the ability of Ticketmaster to comply with that contract. During the pendency of the proceedings of the court

The parties entered into a settlement agreement whereby Microsoft agreed not to link to pages deep within the Ticketmaster site and also concurred that the links will point visitors interested in purchasing tickets to the ticketing service's home page.

3.2 Position in India

A site is put up by a person with an intention that knowledge that the whole world would have access to it. Since a surface link to a home page does not normally require any authorization, it is not an infringement. However, placing a deep link results in infringements and therefore its consequence is penal liability. Section 14 of the Indian Copyright defines copyright as the exclusive right to do or authorize the doing of any of the certain prescribed acts in respect of a work or any substantial part thereof, On the other hand, section 51¹² provides for the infringement of the copyright. By virtue of section 14 and 51, *reproducing any copyrighted work, issuing copies of the work to the public or communicating the work to the public* amounts to copyright violation. It is sometimes argued that deep linking amounts to reproducing the copyrighted work. This stance is, however, contradicted by another point of view according to which, the linking site is not reproducing any copyrighted work through deep linking. The reproduction happens at the end of the user who visits the linked page *via* the link.

¹² Section 51 of the Copyright Act, 1957 states: Copyright in a work shall be deemed to be infringed-- (a). when any person, without a license granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority under this Act— It. does anything, the exclusive right to do which is by this Act conferred upon the owner of the Copyright or ii. permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or
(b). when any person— i. makes for sale or hire, or sells or lets for hire, or by way of trade displays Or offers for sale or hire, or ii. distributes either for the purpose of trade or to such an extent as to Affect prejudicially the owner of the copyright, or iii. By way of trade exhibits in public, or iv. imports into India, any infringing copies of the work:
Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work, other Than a cinematograph film or record, for the private and domestic use of the importer.

Therefore, the linking site only informs people about the presence of the work and gives the address of the site where the work is present. The user uses his discretion to click on it to access the work. Also, it is argued that the linking site aids the distribution of the work¹³ and thus communicates in an unauthorized way.

Communication is said to have taken place if any work is made available for being seen or heard or otherwise being enjoyed by the public directly or *by any means of display* or diffusion other than by issuing copies of such work regardless of whether any member actually sees, hears or otherwise enjoys the work so made available.¹⁴ Since the expression '*by any means of display*' has been used to define communication, the definition of communication to the public could be extended to cover the communication of contents of a Web site too.

It would not be proper for the Indian legislation to include a provision banishing deep links altogether because the current provisions are sufficient to check the unauthorised use of someone's content through deep linking and using these provisions, courts can fill the vacuum by deciding from case to case basis; if a deep link has been created with bad intent and in order to derive unjust enrichment out of somebody's content then it could be enjoined. Before linking deep within a Web site, the prudent course for businesses and individuals would be to seek permission. And for the creators of a Web site who want that it is not linked to a pornographic or shabby site could place a prohibition in its 'terms of use' similar to, "*do not link to this site without our express consent*". Could one be liable for linking to a site that includes illegal material? It may be best to post a disclaimer on the site indicating that the links are for information only, and do not constitute an endorsement

4. Inlining

Inline link is another form of HTML link. A webpage is built up of text and images. Images are stored separately on a server. This enables the user to disable the images and read the pages in

¹³ Raman Mittal, *Copyright Law and the Internet* in S. K Verma & Raman Mittal (ed), *Legal Dimensions Of Cyberspace*, 121 Indian Law Institute, New Delhi,.

¹⁴ Section 2(ff) of the Copyright Act.

“text-only” mode if he so desires. Hence, the HTML Text document has to include a code () which tells the user’s browser the URL of the image and which instructs the browser to load the image automatically as part of the document if the user has not disabled images. This code can also be used to target images on other sites, in the same way as an ordinary link except that the target images load automatically at the user’s computer. No copy of the image is made on the host’s server. The link could be used to build up a complete *virtual document* consisting of images sourced from other hosts - but which on the home host consists of nothing but a few lines of text with pointers to the URLs of the target images. The document including the image is automatically assembled only when the user fetches the page from the home host, and comes into existence only on the user’s screen and computer.

The effect for the user is almost same as if the home host had copied the images onto his on host. However, by using pointers to the genuine works the home host avoids the infringing activity of storing copies on his own system. By using sophisticated programmes like Java and Javascript, it is possible to create much sophisticated virtual documents.¹⁵ Thus, inlining/in-line linking enables a web page to summon different elements from diverse pages or servers to create a new Web page. Instead of copying the elements to the composite page, the elements are linked in by ‘pulling in’ graphic or image files from another site and displaying on the composite web page. Thus, the composite page would consist of a series of links to other sites and servers. While browsing the composite page, the page directs the browser to get the pictures, graphics etc. from the original sources.¹⁶ In *Leslie A. Kelly v. Arriba Soft Corporation*,¹⁷ ditto.com, a visual search engine (formerly known as Arriba) crawled the web to produce thumbnail images of photographs and used them to link to the original pictures. Leslie Kelly, a professional photographer was upset that the search engine reproduced thumbnails of the images on his site which, when clicked, produced the full-size image in a window on Arriba's site. The page used so-called in-line linking to display the original full-sized image, surrounded by text describing the size of the image, a link to the original web site, the Arriba banner, and Arriba advertising. Kelly filed a suit alleging copyright infringement. A California District Court ruled that creating

¹⁵ Graham J H Smith, Bird & Bird, *Internet Law and Regulation*, 33 (3rd Edn.)

¹⁶ 82 F. Supp. 2d 211(SDNY 2000).

¹⁷ Case No. 00-55521, US Court of Appeals for the Ninth Circuit.

of the thumbnails and the inline-linking is justified under the fair use doctrine. On appeal, the Ninth Circuit Court of Appeals affirmed and reversed in part the district court's decision. The display of the tiny images was deemed to be legal fair use, but not the inline-linking.

The US Court of Appeals for the Ninth Circuit held that that unauthorized inline linking to images residing on the copyright owner's Web site violates the copyright owner's right of public display. The court rejected defendant's fair use defence and stated that inline linking diminishes the opportunities of the copyright owner to sell or licence the images on his own Web site. The Electronic Frontier Foundation (EFF) filed a brief, thereafter, urging the court to reconsider the part of its ruling on inlining to copyrighted images. The EFF argued that the ruling against "inline linking" threatened to transform everyday Web site activities into copyright infringements. Consequently, the court withdrew that portion of its opinion, which was relating to inlining, leaving it to the lower court to take a fresh look.

4.1 Indian Perspective

By virtue of sections 14 and 51, *reproducing any copyrighted work, issuing copies of the work to the public or communicating the work to the public* could amount to copyright violation. The person who employs an inline link on his site is not causing any reproduction of the copyrighted content.¹⁸ This is because the link's creator never copies the pirated content; instead merely provides a visiting browser with instructions to retrieve the image, which is then incorporated into the overall page on the user's site. Thus the only person who copies the protected image is the final user who never comes to know that his browser is fetching different elements from different sites. So, the reproduction, if at all any, takes place at the end of the user who visits the linked page via the link. Also, the creator of the inline link is not issuing copies of the work nor communicating or distributing the work to the public. But he can be said to be aiding in such communication and distribution.¹⁹

The definition of communication to the public under section 2(ff) of the Copyright Act³⁰ could be stretched to cover the communication of contents of a Web site on the Internet as the

¹⁸ Ankita Mathur, *Internet Linking: Stride of Copyright With Technology*, <http://www.legalserviceindia.com/article/169-Internet-Linking.html> (Last visited Oct. 26, 2014)

¹⁹ *Copyright Infringement in Cyber Space and Indian Laws*, <http://www.saraswatnet.com/article5.html> (Last visited Oct. 20, 2014)

expression 'by any means of display' has been used to define communication to the public. Section 14(a) (vi) grants the right of adaptation²⁰ only to the owner of copyrighted work. By inlining the linking site could take some elements from the linked site's multimedia settings and create its own site, thereby affecting the right of making a derivative work of the linked site because taking some elements from the multimedia setting and combining them with some other could well fit into the definition of adaptation. So, adaptation rights do come in picture vis-à-vis inlining.

4.2 Moral Rights

Inlining brings in the question of moral rights as well. Section 57 of the Copyright Act, 1957, which talks about *Author's special rights*, says:

1. Independently of the author's copyright, and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right--
 - a. to *claim the authorship* of the work; and
 - b. to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such *distortion, mutilation, modification* or other act would be prejudicial to his honour or reputation

2. The right conferred upon an author of a work by sub-section (1), other than the right to claim authorship of the work, may be exercised by the legal representatives of the author. Section 57 allows the copyright author to claim authorship of the work (*Paternity Right*). In case of inlining, the user is confused about the original source and hence may

²⁰ S. 2(a), Copyright Act, 1957 states:

"adaptation" means, -

- i. in relation to a dramatic work, the conversion of the work into a non-dramatic work;
- ii. in relation to a literary work or an artistic work, the conversion of the work into a dramatic work by way of performance in public or otherwise;
- iii. in relation to a literary or dramatic work, any abridgment of the work or any version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical;
- iv. in relation to a musical work, any arrangement or transcription of the work; and
- v. in relation to any work, any use of such work involving its rearrangement or alteration

never come to know about the author of an inlined work as the user may never know from where different elements of the site have emanated.

So, the practice of inlining may implicate the moral rights of the author. The author of the copyrighted work has a right to see that his work is not being *distorted, mutilated* or *modified (Right of Integrity)*. Copyrighted graphic image could be pulled into a site with its image appearing on a single page combined with other images, thus creating another work, virtually new and different from the original, thereby strongly implicating the right to integrity of the work. The combination of various elements could be termed as modification or even mutilation in certain circumstances. Even if a Web page allows others to link to it, it cannot be presumed that it has also granted permission to link to individual elements of the page.

If someone were to create a composite Web page by summoning various elements from a different Web site without necessary permission, it is clear that such a use would not be protected as fair use. By stripping an element of its context, one also strips many of the copyright privileges that may have been attached. It is considered a breach of net etiquette to link to anyone else's image through an inline link without permission.

Consequently, one should obtain permission from the copyright owner of the image prior to creating an inlining link. A complete ban on inlining could restrict the growth of the Internet. At the same time owner's content should not be subject to exploitation. In this situation, it is for the courts to decide upon the legality/illegality of inlining from case to case. The measure would always be the Copyright Act, the philosophy of which is amply clear. In case an inline link amounts to aiding in distribution or communication with dishonest intentions, the courts will come forward and declare such inlining illegal.

5. Framing

Framing was introduced in 1996 as proprietary feature of the netscape Navigator browser. Framing Technology allows a website designer to embed independently scrollable windows within its border or "frame". As the name suggests, a frame is a "bordered area of a webpage that

acts as an independent browser window that “frames” the contents of a secondary target webpage or web site. The technology allows one website operator to use intellectual property owned by another entity to sell banner advertising on its own site. To put it simply, Frames allow websites to split the display into separate areas or frames, each of which can act independently at the same time. When frames are used to access different websites then it becomes a violation.

A site using frames can be designed so that when the user clicks on a link to an external site, he sees the contents of the external site within a border generated by the original site. Frames provide an opportunity to encase someone else’s site in advertising generated by the linking site.²¹ When the user clicks on a link to another site from within a frame, instead of the target site’s content completely replacing the pointing site’s content, it appears surrounded by the material in the frames remaining from the pointing site. This arrangement has potential to undermine the assumptions on which advertising and sponsorship deals are done.²² Since it is possible for a site to call a frame's contents from a different location, a programmer might "frame" another's Web content beneath his own navigation or banners. This allows him to use creative content owned by another entity to sell banner advertising on its on site.²³ Moreover, because of their capacity to present data from several different sources as part of one unified display, frames can easily result in the juxtaposition of unrelated, even antithetical, pieces of content. ²⁴

In the US, the Visual Artists Rights Act specifically excludes from the scope its protection “electronic publication or similar publication”. Protection is accorded only to tangible goods with a limited number of physical copies. The legal status of framing is unclear under US law. One complexity that arises is that an implied license for the purpose of framing may simply not exist especially if the target document had been posted online before the technology for framing had been developed. In the case of *Futuredontics Inc. v. Applied Anagramic Inc.*²⁵, the defendant framed contents of the plaintiff’s rival dental services website including information about

²¹ Supra note 12

²² *Id.*, P. 40.

²³ 97 Civ.1190 (S.D.N.Y.).

²⁴ *Supra note* 14 p.200

²⁵ 1997 46 USPQ 2d 2005 (C.D. Calif. 1997)

trademarks and links to its web pages; It was held that such framing without permissions was a case of infringement.²⁶

In the same year, 1997, a group of newspapers and media companies led by the Washington Post sued Total News and others on the grounds of copyright and trademark violations for framing target documents from their sites. The matter was settled out of court. One of the issues which is relevant to framing is whether a derivative work has been created through the process of framing.

There are a number of cases which deal with derivative works. Among them are *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*²⁷, and *Lee v. A.R.T. Co.*²⁸, two US cases with similar facts but different results. In the latter the defendant was not held liable for buying note cards and mounting them on ceramic tiles but in the former the defendant was liable when the recent pictures he had previously bought after mounting them on tiles.

In *Lewis Galoob Toys, Inc. v. Nintendo, Inc.*²⁹ it was held that the visual displays produced by a device which altered the appearance of Nintendo games on screen did not amount to derivative works. A similar inference was reached in *Micro Star v. Formgen Inc.*³⁰. A preliminary injunction was denied in a case involving framing, *Futurodantics, Inc. v. Applied Anagramics, Inc.*, since the plaintiff failed to offer sufficient evidence that a derivative work had been created by framing.

On the contrary, framing has, at times, been considered to be a violation of the transformation right. In Germany, the Hanseatic Oberlandesgericht of Hamburg stated that the practice was illegal in the Roche Lexicon case although it did not consider the derivative work argument.³¹

Instead, it held that reproduction requires the consent of the copyright owner and it explicitly rejected the argument of an implicit license having been granted. In another German case, the OLG Celle also held that framing is illegal (in the Weyhe-online case) basing its conclusion on unfair competition regulations.

²⁶ *Linking and Liability*, <http://www.bitlaw.com/internet/linking.html> (Last visited Oct. 11, 2014)

²⁷ 856 F.2d 1341 (9th Cir. 1988)

²⁸ 125 F.3d 580 (7th Cir. 1997)

²⁹ [449 U.S. 340, 347 (1991)]

³⁰ 154 F.3d 1107 (9th Cir. 1998)

³¹ Saikia, Nandita, *Hyperlinks and Copyright Infringement* (February 1, 2010). Available at SSRN:<http://ssrn.com/abstract=1566724> or <http://dx.doi.org/10.2139/ssrn.1566724>

In the Dutch case of *KPN v. Xbase Software Ontwikkeling BV*, it was held that a frame provider could be penalised even if the derivative work was not created by him since he could be held guilty of contributory infringement.

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5.1 Indian Perspective

To test the legality of framing one has to refer to section 51 read with section 14 of the Copyright Act, 1957. The person who frames some other site's content on his site is not causing any direct reproduction of the copyrighted content. The framer never copies the pirated content; instead merely provides a visiting browser with instructions to retrieve the content, which is then incorporated into the overall page on the user's site. Thus the only person who copies the content is the final user who never comes to know that his browser is fetching different elements from different sites. Also, the framer is not directly issuing copies of the work nor communicating or distributing the work to the public as the user's browser is actually fetching the content directly from the owner's site. But he can be said to be aiding in such communication and distribution.

Section 14(a) (vi) grants the right of adaptation only to the owner of copyrighted work. The framing site could take some elements from the framed site's multimedia settings and create its own, thereby affecting the right of making a derivative work of the framed site because taking some elements from the multimedia setting and combining them with some other could well fit into the definition of adaptation. So, derivation and adaptation rights do come in picture vis-à-vis framing.

5.2 Moral right issues

Framing brings in the question of moral rights as well. Section 57(1) of the Copyright Act, 1957 allows the copyright author to claim authorship of the work. In case of framing the user is confused about the original source and hence may never come to know about the author. The user may never know from where different elements of the site have emanated. The creator of a frame does not literally copy the contents of the framed page but only directs the user's browser to summon content from another Web site and show the same along with the content of the framing site. Since the URL of the framed Web page does not appear on the screen, the user

³² Id.

accessing a framed site may not perceive the site as being framed and may attribute the appropriated material to the home site owner. This could implicate the right of the author to be identified as such, since the user never comes to know that he is viewing content from a different site.

Under section 57 (1) (b) the author of the copyrighted work has a right to see that his work is not being *distorted, mutilated* or *modified*. Content from various sites could be pulled into a single window, thus creating another work virtually new and different from the original thereby strongly implicating the right to integrity of the work. The combination of various elements could be termed as modification or even mutilation in certain circumstances.

The Copyright Act also talks about various rights of owners and authors of works and describes situations where these rights can be infringed. Imagine a situation akin to the *Washington Post* case. The world-renowned news portals make huge investments in terms of time, effort and cost to bring a news report. What if someone just frames the same by a simple technique? It would be wholly unfair to do so or to allow so. In this situation, it is for the courts to decide upon the legality/illegality of framing from case to case. The measure would always be the Copyright Act, the philosophy of which is amply clear. In case a frame amounts to aiding in distribution or communication with dishonest intentions, the courts will come forward and declare such framing illegal.

II. Liability of Internet Service Providers (ISP)

Most of the Internet copyright debate in recent years has centered on copyright liability of OSPs, BBS (Bulletin board system) and other service providers for infringing activities then place through their facilities. Copyright owners have sought to hold OSPs and BBS operators liable on theories of direct liability, contributory liability and vicarious liability.³³ All internet transactions work by the transmission of information from one place to another so the primary factors involved are the sender of the information and the receiver of the information. But the

³³ Melville B. Nimmer and David Nimmer, *Nimmer on Copyright*. 12 B178 (2001)

intermediaries also known as service providers are also involved in disseminating this third part context³⁴, like ISPs, OSPs and BBSPs.

1. ISP Liability in United States of America

US courts in settling the matter on ISP liability have decided a number of cases. In *Playboy Enterprises Inc v Frena*³⁵, the court held that an operator of a BBS, Frena, responsible for the infringement of the rights of distribution and display with respect to the copyright photographs of the plaintiff's magazine Playboy, which were distributed and displayed through the defendant bulletin board to the subscribers. Even though there was no evidence that the operators uploaded the photos themselves, the court viewed Frena as a more direct participant in the infringement, having set up a bulletin board that was devoted to the kind of activity that would ultimately lead to infringement. This fact was considered sufficient evidence for the court to find the direct infringement of the public distribution right.

In a later case of *Religious Technology Centre v. Online Netcom Communication services*³⁶, US Court refused to impose direct liability to the OSP for copies made through its service, at least where the service provider had no knowledge of the infringements.

The court held that:

Absent any volitional act on the part of the OSP or the BBS Operator other than the initial setting up of the system, the plaintiff's theory of liability, carried through its natural extreme, would lead to unreasonable liability. Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.

1.1 Contributory liability and the Napster case in USA

P2P Networking

³⁴ SK Verma, *Liability of Internet Service Providers, National Seminar on challenges of Internet /Cyber Laws and Enforcement of Copyright Law*, Indian Law Institute (2001)

³⁵ 839 F. Supp. 1552 (MD Fla. 1993)

³⁶ 907 f. Supp. 1361, 1367 & n.10 (N.D Cal 1995)

Peer-to-peer (P2P) is defined as two or more computers connected by software which enables the connected computers to transfer files or data to other connected computers. P2P is an application which allows users of the Internet to exchange files with each other directly or through a mediating server. The P2P technology creates a direct link, i.e. the file is directly transferred from one computer to the other without going through any mediating server. Napster and Gnutella are examples of this kind of P2P software.³⁷

Napster Case

*A&M Records v. Napster, Inc.*³⁸, famously known as the Napster case gives us a very interesting story. Napster was created by Shawn in 1999 and was the first user-friendly peer-to-peer (P2P) file sharing service, which allowed any user who had an account with Napster to access other users' MP3 files, easily downloaded them. It also introduced a simple searching ability from their central server that allowed users to quickly access a list of all the available files for which they would be searching. Napster rapidly rose in popularity to its peak in 2001, as of users all over the globe continued downloading song files for free from other computers around the world. However, Controversy over the Napster case made minds all over the world work and gauge the effect which softwares like Napster was going to have on the entertainment industry. The music industry sued Napster under a claim of copyright infringement.

The record companies in this case alleged the following:

1. Napster aided and facilitated the online trade of pirated digital music through the offerings of its services and software. Napster willfully engaged its contributory and vicarious infringement of their copyrighted works. Napster is fully aware that virtually all of the reproduction and distributions it enabled and discourages are infringing and violating the federal copyright laws
2. Napster users directly infringe the record companies' copyrights when they download music files from another person's computer into their own

³⁷Raman Mittal, *P2P Networks: Online Piracy of Music, Films and Computer Software*, 9 Journal of Intellectual Property Rights 440(September 2004), available at: <http://www.niscair.res.in/sciencecommunication/researchjournals/rejour/jipr/Fulltextsearch/2004/September%202004/JIPR-vol%209-September%202004-pp%20440-461.htm>

³⁸ 239 F.3d 1004 (9th Cir. 2001), available at: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=9th&navby=case&no=0016401&exact=1>.

3. Napster is liable for vicarious infringement of their copyrights because it has the ability to control the infringing conduct.
4. Napster derives financial benefit as a result of its users infringing activity from advertising fees that are allegedly based on its number of users. Thus, more the users Napster attracts, the more sound recordings it indexes, and more fees it will receive.

The arguments of Napster were as follows:

1. The technology of Napster falls within the safe harbor provisions of DMCA i.e. Section 512 (s) as it is an Internet Service Provider, Napster asserts that the user, not Napster initiates the transmission of mp3 files, the transmission is an automatic process in which Napster does not intervene, Napster as the service provider does not select the receiver of the MP3 files. It does not copy the files as they are transmitted nor does it modify them.
2. Napster's users' copying is non commercial and its use might in fact enhance CD sales or develop a demand online digital music, therefore Napster's service constitutes a fair use. Napster identified three points of fair use in which its service properly used copyrighted material:
 - a. Napster claimed that the network could be used to "sample" MP3 music files for a user to make a decision of whether or not to purchase the record.
 - b. "Space-shifting" was also claimed by Napster, a concept in which a user who already owns a legal copy of the music may legally download the MP3 file through Napster's network. This argument was proven invalid because when a user downloads a file in Napster, it is immediately made available to other users.
 - c. Napster also identified permissive distribution in its fair use arguments, in which an artist can give permission for distribution of copyrighted music through Napster's system. The court allowed this practice to continue.³⁹

³⁹ A&M Records v. Napster, available at: copyright.laws.com/famous-cases#sthash.PNevRGRh.dpuf (Last visited Oct. 25, 2014)

3. Napster relied on the doctrine of “staple article of commerce” framed by the Supreme court of US in the decision of *Sony v. Universal city studio* as Napster’s peer to peer file sharing technology in important an capable of substantial non infringing use. The principle that was laid down in the Sony case was that you should not outlaw new technology before all the implications and potential uses of the technology can be ascertained

The Decision:

The cases where vicarious liability can be imposed are the once where the direct infringer and the vicarious infringer were both commercial parties to a commercial endeavor. Moreover, Napster does not a have a specific right and ability to control or supervise direct infringer therefore, it cannot be held vicariously responsible.

At the district court, Judge Marilyn Hall Patel sided with the record companies and ruled that they had a valid argument against Napster and had successfully caused irreparable harm to the record industry through music copyright infringement. The Injunction against Napster was granted and the judge ordered that a plan of action must be taken by Napster to remove files protected under music copyright from their network. Napster instantly appealed to the decision to the United States Court of Appeals for the Ninth Circuit.

The Appeal

The injunction decision was actively countered by Napster through an argument. However, it was held by the court that even though Napster did not directly profit from the material that was distributed over their networks, the unwarranted copying of works amounted to music copyright infringement. The Ninth Circuit therefore agreed with the decision of the District Court' that Napster had jeopardized the record industry's sales.

Moreover, it was held by the court that since Napster had the ability to regulate what its users distribute over its networks, they had a responsibility to prevent music copyright infringement from taking place.

The ninth circuit court with respect to the issue of Contributory Infringement decided in favour of the plaintiffs. Napster had argued that they had no way to distinguish a copyrighted music file

and a file that was not copyrighted, so they should not be held liable for infringement. The court however, disagreed, and Napster was found to be held directly supporting the infringement of music copyright material.

With respect to Vicarious Infringement, The Ninth Circuit Court sided with the District Court, agreeing that Napster's primary draw to users was the ability to illegally obtain copyrighted work. Also, since Napster planned to expand and increase the number of its users in the future, their activities were ruled to be inductive to financial gain from illegal infringement.

2. Position in India

The liability of the Internet service providers is not expressly mentioned in the Copyright Act but the IT Act covers this grey area.

According to The Information Technology Act, 2000, ISP is a network service provider. It is defined under section 79 (a) as an “intermediary”. Section 2(w) of the Act defines "intermediary with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message”. Section 79 of the Act provides the ISPs with protection in certain cases of infringements provided they abide by the due diligence guidelines, prescribed and provided in the Information technology (Intermediary Guidelines) Rules, 2000 and efficiently impede the access of the infringed material on receipt of government's order. However, cases of both copyright and patent infringements are not given this immunity as they have been specifically excluded by way of proviso to section 81 of the Act.

Liability of ISPs in cases of Copyright Infringement is determined by the Copyright Act, 1957. Section 51 (a) (ii) of the act makes, any person providing any place for communication of infringing work, for the purpose of profit, to the public, liable of infringement unless he can prove that he had no knowledge or he had no reasonable grounds for assuming such communication to be infringing.

2.1 Why Onerous?

The phrase "any place" has been very widely interpreted by the Indian courts to include web space, making ISPs both proper and necessary parties in any copyright infringement across internet. In the case of *RK Productions v. BSNL*⁴⁰, the Madras High court suggested that without ISP's, piracy across the internet would not exist. While this observation is right, it is also true that there wouldn't be any Internet access as well. Further, It was also expressed the high court since ISPs have the power to block any website as per the provisions of the IT Act, it is their responsibility to ensure that objectionable or illegal content is not made available. The court was erroneous in its judgment in implying that it is the power of ISPs that make them liable for any copyright infringement.

In order to make the things a little balanced and in an attempt to provide some relief to ISPs, *certain amendments were made to the Copyright Act in 2012*. The following **safe harbour provisions** were added by the amendment:

52(1)(b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

52(1)(c) transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an infringing copy:

Provided that if the person responsible for the storage of the copy has received a written complaint from the owner of copyright in the work, complaining that such transient or incidental storage is an infringement, such person responsible for the storage shall refrain from facilitating such access for a period of twenty-one days or till he receives an order from the competent court refraining from facilitating access and in case no such order is received before the expiry of such period of twenty-one days, he may continue to provide the facility of such access;

These Sections were inserted with an intention to protect intermediaries only from accusations of secondary infringement and not from actions of primary infringement. The first part of the

⁴⁰ Civil Suit 208/2012, O.A No. 230 of 2012

provision refers to the intermediary getting immunity in respect of certain links, access, and integration which the rights owner has not explicitly prohibited, and the second part asserts that the exception to copyright infringement contained in the first part will only be applicable if the intermediary has no grounds to believe that the relevant content is infringing.

These provisions have not provided any substantial relief in the present situation of ISP Liability. The Delhi High Court, recently, in *Star India Pvt. Ltd v. Haneeth Ujwal*⁴¹, held that the ISPs are obliged to ensure that no third part violation of Intellectual property is taking place outside its network. The License agreement between the Department of Telecommunication and ISP was invoked by the honorable court to burden the ISP with the responsibility of making certain that no infringing activity is being carried on in its network. The court did not mention any of the harbor provisions that were introduced by the amendment.

Indian Judiciary seems to have a one sided approach in determining the Liability of ISPs in cases of infringement. The fact that ISPs lack the legal and institutional capacity to assimilate the infringing material across the millions of URLs that can be easily accessed on their networks. The courts fail to understand that without adequate legal support from the government, the courts lack the power to completely prevent the users to access these websites.

In *Kamlesh Vaswani v. Union of India*⁴², the petitioner filed a PIL before the Apex Court in 2013, in order to obtain a blanket ban on online pornography. In their defence, the Internet Service Provider Association of India argued before the court that "*they cannot be made liable for what people do on their networks just like telecom companies are not liable for peoples' conversation.*" This statement seems appropriate and applicable even in situations where they are not only held liable for copyright infringement but are also obliged to recognize or identify it.

Therefore, the pervasive situation with respect to the liability of ISPs is still very ambiguous. The judiciary in India as well as in other countries seems to have diverse views when it comes to fixing liability on the intermediaries. Even though the amendments made to the act in 2012 intended to provide some assurance to the ISPs, it has not been of much avail. It continues to be a grey area in the field of Copyright liability in cases of infringements made online.

⁴¹ CS(OS) 2243/2014

⁴² Writ Petition (Civil) No(s). 177 of 2013

III. Google's Digital Library case and Copyright Issues

1. Background

The case i.e. Authors Guild v. Google, Inc.⁴³ goes back to 2005 when the Authors Guild sued Google for digitizing books as part of the Google Book Search program called "Google Print" at the time.

Google had collaborated with university libraries, with an intention to scan books, index the contents, and provide both library users and the public with the ability to search through books. The Authors Guild complained that Google was "engaging in massive copyright infringement" by scanning books. They also alleged that Google is guilty of copyright infringement by displaying the search results to book-seeking users.

A case was filed in the Southern District of New York. The Judge rejected the class action settlement that was proposed and the case turned to questions regarding certification of the class and about the concept of fair use i.e. whether the actions of google came under the purview of "fair use". In May 2012, an order certifying the class was issued by the judge. It was also held that the Authors Guild had standing to sue on behalf of its members, a somewhat controversial proposition.

2. Fair Use

One of the main issues that were to be dealt with in this case was whether Google was protected by the fair use doctrine. As part of the briefing, in August 2012, Electronic frontier foundation (EFF) which was joined by hundreds of academicians and librarians, Association of Research Libraries etc across the United States filed an amicus brief supporting Google's fair use defense. The amicus brief pointed out a number of factors in favour of the fair use argument. Among others:

- Librarians across the country who were surveyed on the Google Book Search said that the service helped them find valuable research sources inside their own libraries as well as lead them to rare old books they could borrow from other institutions.

⁴³ 770 F.Supp.2d 666

- It was opined by many librarians that it was easier to purchase new books for their collections after discovering them through using Google Book Search.
- It was also the common opinion of most librarians that Google Book Search is a reference tool that helps people find books, and serves the public benefit.

However, before Judge Chin could rule on fair use, Google appealed the class certification order. In September 2012, the Second Circuit Court of Appeals stayed the lower court proceedings pending the class certification appeal. When that appeal was argued in May 2013, there was a bit of a surprise: The Second Circuit was far more interested in fair use than in class certification. In July 2013, the Court sent the case back to Judge Chin to decide the fair use issue.

In September 2013, Judge Chin heard oral argument on fair use. On November 14, 2013, he granted summary judgment for Google. He discussed each of the fair use factors and concluded that, as a whole, Google Books Search was fair use. His remarks made it clear that copyright serves, and does not impede the public interest⁴⁴:

The four factors that were considered by the judge were:

- the purpose and character of your use
- the nature of the copyrighted work
- the amount and substantiality of the portion taken, and
- The effect of the use upon the potential market.

In my opinion, Google, by providing an online database of books catered to the public interests significantly. It not only assisted in the progress of arts and sciences, but also maintained respectful consideration for the rights of authors and other creative persons, without compromising the rights of copyright holders. Google has become an extremely helpful research tool that allows students, teachers, researchers, and others to locate information and contents of

⁴⁴Authors Guild v. Google, *Part II: Fair Use Proceedings*,
<https://www.eff.org/cases/authors-guild-v-google-part-ii-fair-use-proceedings> (Last Visited Oct. 10, 2014)

the books more efficiently. Further, it has given scholars the ability, to conduct comprehensive searches of millions of books all over the world. It acts as a tool to preserve books, especially the old ones that can be easily forgotten or misplaced in the libraries, and it makes them accessible to users sitting in their homes far away. It also facilitates an easy access to books for print-disabled and remote populations. It creates new audiences and adds new sources of income for authors and publishers. Hence, everyone benefits.

IV. International Legislative Measures

The WIPO plays a vital role in the ongoing international debate to formulate uniform standards for copyright protection in cyberspace. There is a constant demand for additional and more effective protection by 'knowledge dependent industries' in the wake of advancement in the information technology. The organization administers the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty (known together as the "Internet Treaties"), which set down international norms to prevent unauthorized access to and use of creative works on the Internet or other digital and electronic networks.

The WCT deals with protection of authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs and the WPPT relates to protection of authors rights of performers and producers of phonograms.

The other instruments of regulating intellectual property rights including the Bern Convention and the Rome Convention were adopted or revised are becoming outdated and are not always able to accommodate the new types of technologically advanced works, new markets and new methods of dissemination. Therefore, the WCT and WPPT aim to resolve the dispute arising out of today's digital technologies in particular the dissemination of protected material over digital networks such as the Internet

Both treaties mandate the signatory countries to provide a framework of basic rights, allowing creators to control and/or be compensated for the various ways in which their creations are used

and enjoyed by others. Further, the treaties ensure that the owners of those rights will continue to be adequately and effectively protected when their works are disseminated through new technologies and communications systems such as the Internet. They also provide for provision of rights that are enjoyed even after one's death. The WPPT defines and provides for economical and moral rights of authors and also grants protection to the producers of phonograms and performers.

To maintain a fair balance of interests between the owners of rights and the general public, the treaties further leave it up to the countries to establish exceptions or limitations to rights in the digital environment. Therefore, countries may, in appropriate circumstances, can grant exceptions for uses deemed to be in the public interest, such as for non-profit educational and research purposes.

The treaties also necessitate countries to provide not only the rights themselves, but also two types of technological attachments to the rights. Their purpose is to ensure that right holders can efficiently use technology to protect their rights and to license their works online. The "anti-circumvention" provision, embarks upon the problem of "hacking": it requires countries to establish mechanism, adequate legal protection and effective remedies against the circumvention of technological measures (such as encryption) used by right holders to secure their rights.

1. World Intellectual Property Organization Copyright Treaty (WPT) 1996

The World Intellectual Property Organization Copyright Treaty, abbreviated as the WIPO Copyright Treaty (WPT), is an international treaty for the protection of copyright. It was adopted by the member states of the World Intellectual Property Organization (WIPO) in 1996. There has been a continuous demand for additional and more effective protection by 'knowledge dependent industries' in the wake of advancement in the information technology.

The primary purpose of this treaty is to develop and protect the rights of authors in their literary and artistic works in an efficient and standardized manner. The treaty itself recognizes that the driving force for this treaty has been the changes in social economic, cultural and technological development, which necessitated the introduction of new rules and clarification and

interpretation of old existing rules. The treaty also took into consideration the impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works.

The WPT reinforces the traditional golden rule underlying copyright protection that it serves as incentive for literary and artistic creation and that there is a need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.⁴⁵

The treaty takes also talks about the new development which is reflected in its protection to computer programs as literary works in its fourth article. Further, it extends protection to the arrangement and selection of material in database in addition to the traditional protection afforded to the authors of the literary and artistic works such as control over the rental and distribution of their copyrighted works in articles 6 to 8 which they may not have under the Berne Convention alone.

The treaty makes one more significant advance in the protection as it prohibits the circumvention of technological measures adopted by the authors for the protection of works as stated in article 11 and unauthorized modification of rights management information contained in works in article 12.

One criticism of the WPT is that it uses the 'one size fits all' approach and treats all the countries as same in spite of them being in different stages of economic development. Also, it did not make any reference to copyright term extension beyond the existing terms of the Berne Convention, but there was a degree of association.

Another loophole in the treaty is that it does not make any reference to copyright term extension beyond the existing terms of the Berne Convention, but there was a degree of association. This was because the United States Council passed both the Digital Millennium Copyright Act and Sonny Bono Copyright Term Extension Act, which enacts copyright term extension during the same week and used the same method using voice vote to make it less likely that the news media

⁴⁵*Summary of the WIPO Copyright Treaty (WCT) (1996,*
http://www.wipo.int/treaties/en/ip/wct/summary_wct.html. (Last Visited Oct. 15, 2914)

would report on the bills, in addition, the European Union adopted its own copyright term extension around the same time.

The WIPO Copyright Treaty is implemented in United States by the Digital Millennium Copyright Act (DMCA). The European Community has also approved the treaty by Decision of 16 March, 2000 by the European Council. The European Union Directive 91/250/EC creates copyright protection for software and 96/9/EC for database protection and European Copyright Directive 2001/29/EC prohibits devices for circumventing "technical protection measures" such as digital rights management largely cover the subject matter of the treaty.⁴⁶

2. World Intellectual Property Organization Performances and Phonograms Treaty (WPPT) 1996

The World Intellectual Property Organization Copyright Performances and Phonograms Treaty, abbreviated as the WPPT, is an international treaty for the protection of rights of performers and producers in an effective and uniform manner. It was adopted by the member states of the World Intellectual Property Organization (WIPO) in 1996. There has been a pressing demand for protection by entertainment industry in the wake of advancement in the information technology.

As the development and convergence of information and communication technologies have profoundly impacted the production and use of performances and phonograms, the need was felt to introduce new international rules. This need was further fuelled by the changes in social economic, cultural and technological development of the world economy.

The treaty reinforces the traditional golden rule of balancing of interests which is the underlying theme of copyright protection between the rights of the performers and producer of the phonograms and the larger public interest, particularly education, research and access to information. The treaty in the beginning clarifies that the rules laid down in this treaty are not in

⁴⁶ World Intellectual Property Organization Copyright Treaty, http://newmedia.wikia.com/wiki/World_Intellectual_Property_Organization_Copyright_Treaty (Last visited Oct. 22, 2014)

derogation with existing obligations under any other treaty and specifically under “International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations” done in Rome in 1961 (also known as Rome Convention). The central idea of the treaty is enumerated as under.

The treaty besides defining terms such as performers, phonogram, publication, broadcasting and communication to the public lays down the basic principle of national treatment. The treaty further, in chapter II lays down the rights of performers, which are divided into two – moral and economic rights. Moral rights pertain to the right to be identified with his performance and right to object to distortion, mutilation or other modification of his performance prejudicial to his reputation. The economic rights of the performer is further divided into two based on the form of performance. If the performance is unfixed, then the performer has an exclusive right of authorizing broadcasting and communicating to the public his unfixed performance and right of authorizing the fixation of his unfixed performance. Once the performance is fixed, the performer has the right to reproduce, distribute, give on rent and make it available to the public by wire or wireless means.

The rights granted to the producers of the phonograms, inserted in chapter III, also include the right of reproduction, distribution, give on rent and making it available to the public by wire or wireless means. Besides these exclusive provisions applicable to the performers and producers of the phonograms, there are certain provisions in chapter IV which are commonly applicable to the both performers and the producers of the phonograms. These include the right of the performers and producers of the phonograms to a single National treatment implies the treatment given to the national of the contracting country be extended to the nationals of other contracting country with regard to the exclusive rights specifically granted in the treaty equitable remuneration for the direct or indirect use of phonograms published for commercial purposes broadcasting or for any communication to the public.

This single equitable remuneration shall be ensured by the contracting states in their national legislations. The another right, which is commonly available to both includes the right concerning protection against circumvention of effective technological measures taken by the performers as well as the producers of the phonograms. The contracting states are under obligation to provide for effective legal remedy in this regard.

3. Bern Convention, 1886

It was based on three basic principles and contained provisions determining the minimum protection to be granted as well as special provisions available to developing countries which want to make use of them.

The three basic principles are the following:

- (a) Principle of national treatment: Works originating in one of the Contracting must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals.
- (b) Such protection must not be conditional upon compliance with any formality.
- (c) Such protection is independent of the existence of protection in the country of origin of the work

Further, the convention also provides for protection of moral rights which includes right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to his work, which would be prejudicial to his honor or reputation. Such rights are to be maintained even after his death until the expiry of the economic rights.

4. Rome convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961

It is the international convention for the protection of performers, producers of phonograms and broadcasting organisations and was held at Rome in 1961. The agreement, for the first time extended copyright protection to the author of a work to the creators and owners of particular, physical manifestations of intellectual property, such as audiocassettes or DVDs.

V. Jurisdictional issue and Applicable Laws in India

With the introduction of the internet and the transmission of information and transacting of business across borders, a number of issues have arisen on the legal front. In the traditional approach to jurisdiction, courts were invited to ask whether it has the territorial, pecuniary, or

subject matter jurisdiction to entertain the case brought before it. With the advent of the internet, the question of 'territorial' jurisdiction gets complex mainly because the internet has no boundaries. Therefore, while there are no borders between one region and the other within a country there are no borders even between countries.

Intellectual Property rights have a clear geographical limitation. Where registration is granted, say, of a trademark or a patent or copyright, it operates to stop others from infringing those rights within the territory of the state where the registration is granted. It prevents even those outside the territory of the state from infringing those rights within the territory. The statutory law, as enforced by courts of the territory, accords due recognition to this system. Outside of infringement actions, courts have in passing off actions sought to protect trademarks and trade names of users within the territory to the exclusion of those seeking to pass off their goods as that of the holder of the right.⁴⁷

Jurisdiction refers to judicial, legislative and administrative competence.⁴⁸ Although jurisdiction is an aspect of sovereignty, it is not coextensive with it. The laws of a nation may have extra-territorial impact extending the jurisdiction beyond the sovereign and territorial limits of that nation. This is predominantly so where the medium of Internet is used which recognizes no sovereignty and territorial limitations. The Indian jurisprudence regarding jurisdiction over Internet is in its early stages and is developing and growing in a systematic manner. The existence of Internet has reduced the safeguards usually available for the protection of various rights, including the copyright.ord This has given rise to the jurisdictional problems for all the countries of the world. The countries all over the world, coming in terms with this problem, have resorted to the only available method of dealing with this problem, i.e., by harmonizing their domestic laws with the various international treaties and conventions. This, however, has not completely removed the jurisdictional problems, but moderate success has been achieved by exercising the it by the municipal courts of foreign countries. This call for a long-arm jurisdiction

⁴⁷ Pravin Dalal, "The long arm jurisdiction of courts regarding Copyright Law in India", Journal of Intellectual Property Rights, Vol 9, November, 2004 available at: <http://nopr.niscair.res.in/bitstream/123456789/4890/1/JIPR%209%286%29%20557-567.pdf> (visited on October 21, 2014)

⁴⁸ Debbie Powar ,*Cyber Law India* , <http://www.studymode.com/essays/Cyber-Law-India-156580.html> (Last visited Oct. 20, 2014)

is particularly felt in cases of violations of various intellectual property rights, including the copyright.

1. Comparison of Provisions under CPC and Copyright Act

The rights conferred by the copyright law can be enjoyed and protected only if the same can be enforced through the court of law. The enforcement of these rights presupposes the existence of jurisdictional capacity⁴⁹ in the courts, tribunals or other authorities trying the matter. This jurisdictional capacity can arise in relation to the violations in real space, and cyber space (online issues). In India, the real space violation of copyright is taken care of by Section 62 of the Copyright Act, 1957 (hereinafter referred to as the Act). The scrutiny of the section shows that its scope is much wider than the jurisdictional ambits of Section 20 of the Civil Procedure Code (CPC).

The Copyright Act provides a wider jurisdictional power to the courts to try the matters pertaining to copy-right violations as compared to CPC, 1908 because Section 62 prescribes an 'additional ground' for attracting the jurisdiction of a Court over and above the 'normal' grounds as laid down in Section 20 of the Code. Secondly, Section 62 (2) starts with a non-obstante clause which will give an overriding effect to this Section in case there is any inconsistency between this section and the provisions of CPC. Lastly, the expression 'include'¹⁰, as used in Section 62(2), shows that it is capable of accommodating not only the traditional jurisdictional mandates, but also those requirements which may arise in future due to change in technology and other circumstances. It is presumed that the Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow changes ever since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is, nevertheless, to be construed in accordance with the need to treat it as a current law.

⁴⁹ The expression 'jurisdictional capacity' is limited only to 'territorial jurisdictional capacity' for the purposes of this article

The object and reason for the introduction of sub-section (2) of Section 62 was not to restrict the owners of the copyright in exercising their rights, but to remove any hindrances from their path.

In *Caterpillar Inc v Kailash Nichani*⁵⁰, the Delhi High Court held that Section 62 of the Copyright Act makes an obvious and significant departure from the norm that the choice of jurisdiction should primarily be governed by the convenience of the defendant. The legislature in its wisdom introduced this provision laying down absolutely opposite norm than the one set out in Section 20 CPC. The purpose is to expose the transgressor with inconvenience rather than compelling the sufferer to chase after the former.

Similarly, in *Exphar SA & Anr v Eupharma Laboratories Ltd & Anr*⁵¹ case, the Supreme Court has held that the jurisdiction for the purposes of Section 62 is wider than that of the Court as prescribed under the Code of Civil Procedure, 1908. Section 62(2) cannot be read as limiting the jurisdiction of the District Court to only those cases where one or more persons instituting the suit or other proceedings actually and voluntarily reside or carry on business or presently work for gain. It prescribes an additional ground for attracting the jurisdiction of a Court over and above the 'normal' grounds as laid down in Section 20 of the Code. Further, the appellant No 2 carrying on business within the jurisdiction of the Delhi High Court is certainly 'a person instituting the suit'. The Division Bench went beyond the express words of the statute and negated the jurisdiction of the Court because it found that the appellant No 2 had not claimed ownership of the copyright of the trademark, infringement of which was claimed in the suit.

2. Position in India in regard to Cyber space violation of copyright Laws: Case Laws

Since any technology or specific amendment is absent and is a relevant criteria for considering whether internet related activity - even if some degree of interactivity of the website were to enable a court, to exercise jurisdiction, where the essential ingredients of Sections 62(2) of the Copyright Act are absent, and where otherwise the defendant resides and works for gain outside

⁵⁰ 2002 (24) PTC 405(Del)

⁵¹ 2004 (2) Scale 589

jurisdiction of the Court. This contention is in fact raised in some recent cases. Hence it is important to discuss the following judgments.

The landmark case dealing with the extended jurisdiction of the courts for entertaining a suit of infringement was *Banyan Tree Holdings Limited v. M. Murali Krishna Reddy and Anr*⁵² (Banyan Tree Case). This case was related to infringement of domain names where the plaintiff was from Singapore and the defendants were from Hyderabad and the plaintiff had approached High Court of Delhi for seeking an injunction against the defendants. It discussed a number of cases, including position in US, UK and other countries. The following paragraphs have been included from the case law itself for comprehensive understanding of the issue:-

The court referred to the first decided case, relating to exercise of jurisdiction, which was related to online infringement of Trade mark and was based upon a defendant offering products or services on its web site- *Casio India Co. Ltd. v. Ashita Tele Systems Pvt. Ltd*⁵³. In this case, it was urged there that the circumstance of the defendant's web site being capable of being accessed from Delhi, was sufficient to invoke the territorial jurisdiction of this Court. Neither the plaintiff nor the defendant was residents of Delhi. The Court, through a single judge (Sarin, J) in *Casio* relied on the judgment of the High Court of Australia in *Dow Jones and Co. Inc. v. Gutnic*⁵⁴ which ruled that due to the ubiquity, universality and utility of the features of the Internet and Worldwide Web, any matter associated with it possesses global jurisdiction.

In *Super Cassetes Industries Ltd.v. Myspace Inc. and Anr.*⁵⁵, the High Court of Delhi decided on an issue relating to jurisdiction where a social networking site ie. Myspace, operating in U.S had violated copyright of the plaintiff by permitting the users of the site to upload cinematograph films, songs etc. of the plaintiff and allowing other users download them easily. It was held in paragraph 55.8 of the judgment that the website of the Defendants was is engaging in the online business of providing and exhibiting the songs and cinematograph films worldwide including India. The said website was usually accessed by Indians for downloading the songs of upcoming

⁵² 2008(38)PTC288(Del)

⁵³ 2003 (27) PTC 265 (Del.).

⁵⁴ (2002) HCA 56.

⁵⁵ 2011(48)PTC49(Del)

movies from the website of the Defendants. The Plaintiff had substantiated the cause of action by showing some instances of infringements which has been caused in relation to the specific works. Thus, the said commission of the tort had occurred in India wherein the Indian user goes to the website, the Defendants through its search engine exhibits the said works and the work is communicated to the public by sending the work to him and facilitating downloading or reaching to the computer of Indian user. Therefore, a part of cause of action had arisen by virtue of Section 20(c) of the Code of Civil Procedure. If that was of no help, then also by virtue of Section 62(2).

VII. Conclusion

Copyright is a very proactive law and it is important that it keeps up with the technological advancements. Protection of copyright in a digital medium goes against the ‘open source’ of the nature of the internet. The fair right use must be preserved. It is a privilege allowing users other than the copyright owner to use the copyrighted material in a reasonable manner without the owner’s consent. Thus there should be a balancing of interests. The recent case of Napster and the Google E-library case have jolted the digital industry as they now have to be very cautious and aware of their activities online regarding the copyright issues or else they may find themselves entwined in various law suits. With the advancement of the Internet, newer issues have emerged which are yet to be interpreted in a uniform manner. The issue of cyber space jurisdiction with respect to copyrights remains to be one of the grey areas. Further, With multiple parties being involved In different stages, it becomes difficult to fix liability in the event of an offence committed online.

There are a number of people who laud the virtues of free sharing of copyrighted material on the Internet. But, at the same time, the creators and authors and intellectual property rights holders have huge concerns regarding the protection of their copyrighted Works. They need to be assured that they can protect their property from piracy and control its use, before they make it available online. Therefore, there is a challenge to ensure that the laws of copyright adapt to the new technological environment in a way that caters and encourages creative activity rather than in a way that inhibits or discourage it. The key is to balance, which has always to be interpreted

and reinterpreted considering varying interests from time to time along with the advancement of technology.