LEGAL IMPLICATIONS OF THE CONVERGENCE OF TELECOMMUNICATION, BROADCASTING AND INFORMATION TECHNOLOGY

ABSTRACT
THEESIS
SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy
IN
LAW

BY
TABREZ AHMAD

Under the Supervision of
PROF. (DR.) AKHLAQ AHMAD
Dean and Chairman

FACULTY OF LAW
ALIGARH MUSLIM UNIVERSITY
ALIGARH (INDIA)
2005
ABSTRACT

The discovery of the existing material reveals that the rapid technological changes and the convergence of telecommunication, broadcasting and information technology challenge the existing legal institutions. The delicate balance of rights and obligations of intermediaries of Internet such as copyright owners, domain name holders, consumers, netizens and internet service providers can be upset when trying to keep the legal developments abreast with the technological advances.

Software and telecom companies, broadcasting organisations have all found a niche in cyberspace while legislation tries to keep a pace. We are still governing the converging technologies by the traditional Intellectual property legislations. Going by the latest events in the digital world, there are no doubts that the future balance of rights will depend on the current bargains and the judicial decisions about the extension of a central element in contemporary law - the intellectual property legislation.

Similarly, the emergence of digital and information technologies towards the concluding decades of the twentieth century as the defining paradigms of new age communication have raised a whole new set of challenges to the Intellectual property regime.

As more and more digital products in network environment are emerging efficient management and controlled distribution of such products have become one of the important considerations, as never before. The copyright owners are under a constant threat of loosing control over their products on the information superhighway and are implementing various technological adjuncts to retain control.

Differences in rules are beginning to be questioned. Now the regulation is a great challenge before the world because the way legal and regulatory reform is
carried out will determine the manner in which convergence affects our daily lives.

The fundamental problem in India is regulation of convergence. To overcome this problem the government of India has proposed the communication and convergence bill 2001.

The objectives of the bill are fairly well drafted and the intention to bring about a convergence between conflicting interests of all segments including the Government, Business and the Consumer are well stated. But the bill is totally silent on the copyright and trademarks implications of the converging technologies.

The converging technologies contributing the core issues. Telecom contributes with infrastructure regulation and access issues; broadcasting with access and content issues; IT contribute with new regulatory issues of copyright. Which are as follows: framing, hyper-linking, deep-linking, inlining, fixation, communication, publication, parallel imports, Rights Management Information, allocation of frequency spectrum, Fair dealing, implied license, Liability of Internet Service Providers (ISP), domain name and jurisdiction are challenges before the regulators.

So an effort is made to enquire the appropriateness, compatibility and efficaciousness of the traditional conceptual framework of telecommunication, broadcasting and information technology, a construct of technological age to encompass multimedia works, computer programme, and websites a creation of convergence age, and an enquiry into the possibility of umbrella legislation for convergent multimedia regulation.

The objective is to provide the Government with sound analytical instruments that will enable the tracing of a regulatory framework for the telecommunications, broadcasting and information technology sectors in a convergence environment, and taking in due relevance the need to safeguard the
public interest. The process for the “Convergence its implications and Regulation” involves a number of activities, of which present work is part, to collect, analyse and find out viable solutions.

The hypothesis is proved by using the different techniques, models in the present research work that the inherent difficulties of enforcing the rights and obligations the intermediaries of Internet world wide is the cause of digital intellectual property implications and the legal liability for copyright infringement may be on those who allow and enable the copyright infringers to exist namely the Internet service providers (ISPs).

A survey of 30 national and international statutes governing intellectual property was undertaken. Attention was paid in the survey to the following aspects, namely -, protection of multimedia products, software protection and combating piracy, protection of the contents on websites, domain names, and liability of Internet service providers.

Following are the findings of the survey and conclusions that are drawn in respect of the aforesaid aspects.

**Chapter I**, Introduces the subject and also deals with the justification of undertaking the present research, the area to be covered and methodology to be adopted.

**Chapter II**, Deals with the convergence and its regulation. It critically and comprehensively analyses the convergence bill 2001. The Communication Commission of India can regulate the content of programmes for various purposes such as “in the interest of the sovereignty and integrity of the nation”. This provision can be abused and used for “Censorship” of the media. This is the most contentious clause in the opinion of the media owners.
Abstract

In order to provide a mechanism for checking abuse of this provision, an additional “Citizen's Programme Code Committee” should be formed which can hear appeals from the aggrieved persons and provide its views.

If the decision of the committee is not acceptable, the aggrieved parties can resort to the legal remedy available through the Appellate tribunal. This will provide for a Citizen's group to sit in judgment of subjective issues such as “Indian Culture”, “Allowable degree of Violence”, “Decency in portrayal of Women” etc for which legal remedies are not always the right answer.

An applicant before the Tribunal can appear himself or authorize one or more Chartered Accountant, Company Secretary, Cost Accountant or a Legal Practitioner and proceeds to present his or its case before the tribunal. This restriction of representation to certain categories of professionals only is unnecessary and discriminatory. It is suggested that the appellant can authorize one or more persons of his choice to represent him without the need for such a person to be a Chartered Accountant etc. In such a case a Telecom Consultant can also represent the appellant.

Even though the objectives of the Bill provide that the Commission is duty bound to take care of consumer interest also, there is no evidence of how this can be achieved. It must also be accepted that “Consumer Interest”, “Business Interest” and “National Interest” will be conflicting in many areas and the Commission will be subjected to pressures from different sides. The national interest will be taken care by the Government and the Business interests will be taken care by the “Public Relation Managers”. The Consumer will have to however organize himself through voluntary organizations. The Bill can at least take note of the need for such organizations and if possible provide some support.

Provisions of Section 66 and Section 70 overlap with corresponding provisions in Information technology Act 2000 and provide for different
penalties/punishments. This will create unnecessary confusion. Our submission is that there must be similar penalties/punishments in both the provisions.

Whoever attempts to commit or abets commission of an offence will be deemed to have committed the offence”. This is a dangerous provision and can be misused by the Police to harass innocent individuals. This totally removes the concept of “Need for a Guilty Mind” for any offence and will bring all erroneous and unintentional violations under punishable offences. One simple example could be a “Wrong tuning of a Radio equipment to a frequency other than the intended frequency”. It is submitted that the Sec.71 of CCB should be deleted. Alternatively, it may be replaced if necessary by a provision which may state “Whoever willfully attempts to commit or abets the Commission of any offence, under the provision shall be punishable with such punishment as may be deemed reasonable under the circumstances of the case and any such punishment shall not exceed half of the maximum punishment that could have been levied if the offence had been committed willfully”.

A license would be required for any “Wireless equipment”. In order to avoid confusion, the consumer equipments such as Mobile phones, Cordless telephones, Radio sets, and Television sets, and infrared remote operating devices etc should be specifically exempted. So there is emergent need to suppress the license raj in this area.

ICT and media convergence issues are primarily about improving the efficiency of market economies, and how changes in regulation can facilitate this process. It is likely to be of primary interest for countries that already have an established effective independent telecom regulator. Multi-sector regulation issues are primarily about establishing the efficiency and effectiveness of regulation so it can be a catalyst for network and economic development. It is likely to be of primary interest to countries that have not yet established effective telecom regulation. Each regulatory option arises from an initial diagnose of different
problems, and represents different priorities and pathways to achieving a very similar set of development objectives.

Indecision of policy makers in setting clear parameters for the development of convergent activities is a major stumbling block in many Asian countries. This not only retards the growth of many new beneficial systems and services, but also prolongs the agony of incumbents to adjust to the new environment while even basic services continue to be widely inaccessible.

The slowness of the reaction of regulators often means resorting to largely unsatisfactory stop-gap measures in order to cope with the rapid technological changes. Instead, regulators need to plan ahead with flexible frameworks of dealing with largely unforeseen and unpredictable technological and market changes. Governments cannot shy away from convergence or they will deny themselves necessary advancement while continuing to keep their people at a disadvantage.

Getting the regulatory house in order remains a primary challenge in much of Asia. Encouraging examples of providing for a proper regulatory environment are being developed in Hong Kong and Singapore. Providing for a reasonably autonomous converged regulatory agency apart from vested operational interests is becoming increasingly important. Promoting reasonable competition and encouraging the private sector to participate is also needed along with the continuing divestment of government interest in traditional communications industry incumbents.

Focusing on providing transparent and fair regulation for the development of technologies and services to meet information needs and desires in the face of inevitable social and political changes from within and outside countries is the challenge to address in Asia as well as an opportunity not to be missed.

The discovery reveals that the proposed bill is not sufficient to meet the new challenges in the convergence environment.
Abstract

Our submission is that, there is a need to adopt a flexible method of regulation in India while a new comprehensive law is being drafted so that regulation of communications should sustain changes in a converging environment.

Chapter III deals with the copyright protection of multimedia products in the convergent environment. Generally, the various rights included under copyright are the rights of authorship, reproduction, distribution, broadcasting, adaptation, translation and communication to the public. These rights allow the copyright owner to control the use of these protected works.

While the shape of copyright law has always been drawn by the developments in the technological world, the emergence of digital technologies towards the concluding decades of the twentieth century as the defining paradigms of new age communication have raised a whole new set of challenges to copyright regimes. All works can now be digitalized whether they comprise texts, images, sound, animation, photograph and once digitalized the various elements are all 'equal' and can be merged, transformed, manipulated or mixed to create an endless variety of new works. Earlier rights of reproduction and distribution affected only tangible physical copies of a work.

The question is how to qualify digital off-line and on-line media from a copyright perspective. The significance of the issue lies in the fact that the relevant categorization entails different legal consequences and the presence of multimedia work defies existing classification under the copyright law.

The multimedia work can be classified as computer programme since every multimedia work will have a software component. As there are separate provisions for rights and authorship of a computer programme distinct from literary works in the Copyright Act, this could be a possible solution. However, issues may arise on the retention of separate copyrights in the works incorporated in the multimedia, in terms of section 13 of the Copyright Act 1957 and the rights
of performers in the product. At present, large numbers of multi-media works are being created by combining pre-existing works.

As for the persons who actually make available and download copyrighted works, the law is very clear. Section 14 says that issuing copies of work or communicating the same to public amounts to infringement. So, a person who downloads software like Napster and implements the same on his machine is making the copyrighted work available to any member of the public who has the corresponding software installed on his machine. The person who actually downloads the file containing copyrighted work is reproducing the work without the consent of the copyright owner, so is guilty of copyright violation as well. Section 51(b)(ii) says anyone who distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright. Any person making available copyrighted works over P2P network may not be trading in the same but he is nevertheless distributing such work, which combined amount to gigantic proportions affecting prejudicially the interests of copyright owner.

Now for networks akin to Gnutella or Kazaa, where there is no central server brokering the requests of people, it is rather hard to stop the system in one go. There is no one person or entity that it managing the affairs. The entire thing is managed by a software and that is already out and lakhs of people have made copies of the same. So we can stop P2P file sharing only with the help of ISPs,

Increasingly, technological solutions are being found for the problems posed by the new technologies through access control or copy control mechanisms such as encryption technology or water marking incorporated into works distributed over digital networks with a view to protecting them from illegal exploitations. Encryption, watermarking, coding, encapsulating copyrighted works in a tamper-resistant electronic envelope, electronic lamination, etc., have already been experimented with. But a complete reliance on the exclusivity based on technology could result in gagging of fair use which will be fatal to the balance represented by ‘copyright’.
Our submission is that due to the nature of digital content, a combination of commercial, technological and legal solutions will be utilised to manage copyright material.

**Chapter IV** Deals with the laws governing computer software and measures of controlling the software piracy.

The vexed question is how Software industry would be protected from the piracy? Without strong protection Internet piracy will be mushrooming.

In India, though the IT Act 2000 has been passed but Internet jurisprudence yet to emerge at par with the west.

The technological measures to combat piracy are essential coupled with strong legal protections must be adopted and more importantly, vigorously enforced worldwide, if sufficient intellectual property incentives are to be upheld. In the absence of suitable legal rules and regulation, digital technology has the potential to undermine the tenets of copyright and related rights.

Moreover, the adjustments that had to be introduced to update copyright rules, namely, the WCT and its implementing Acts, considerably strengthened copyright to such extent that right owners will now have stronger rights than ever before and the rights of users are going to be confined to those for which they had specifically contracted and paid.

Surely, one may say that this reinforced right holder's position shall hardly counterbalance the threats of piracy. Provided this, the very challenge for copyright in the digital era shall be to maintain the delicate balance between the right owners' and authors' interests and the public interests that successfully contributed to progress in the analogue era.

There is an urgent need to strike a balance whereby online copyright infringement is prevented without interfering the legitimate uses of software and computer programmes or limiting the opportunities offered by digital technology.
and the Internet, Combating software piracy in order to foster the growth of electronic commerce requires a multi-faceted strategy. It is our submission that Indian government should amend the present copyright act and IT Act 2000 on the line of U.S. No Electronic Theft (NET) Act 1997 and the DMC Act 1998

The software piracy and music piracy is a threat to the Indian economy our present copyright law is not sufficient to tackle the piracy. Our submission is that the govt., should make a separate law to tackle the piracy related crimes.

Chapter V examines the trademark protection to domain names, control of cybersquatting and protection of contents in websites. There is no doubt that cyber-squatting is the most contentious issue in the Cyber Law area throughout the world. Since the Internet is a global phenomenon, steps are already afoot to tackle the menace of domain name disputes, especially cyber-squatting, on an international level.

In catena of cases Indian courts have decided that the domain names are trademarks and can be registered as trademarks. The Law of passing off action is fully applied to domain names.

Bringing cyber-squatting within the framework of the Trade Marks Act, 1999, would result in granting trademark holders more extensive protection than what the legislature originally intended. The development may not be healthy because, although the intention of the Court may be to discourage cyber-squatting and curb a social evil, it may result in dangerous precedents, where even genuine registrants of domain names may be adversely affected.

It is pertinent to mention that as the decisions of the WIPO do not have any precedent value and are further subject to the decision of a Court of a competent jurisdiction, the subject of domain name disputes is certainly going to be a contentious issue in bringing actions done over the net under the framework of the existing law.
Abstract

It is evident that domain names and their misuse by private as well as public portals and firms have become rampant in the absence of a strong jurisdictional jurisprudence. The Internet is a global collection of computer networks and requires global solutions and regulation in a new millennium for a world committed to the digital technology and welfare of the netizens through it. In the light of above discussion is submitted as follows:

The first Come first served basis for registration of Domain name was responsible for the spurt in the growth of cybersquatting or the process of registering a domain name which legally belongs to anothers. The existing TLDs or Top Level Domains have been a big target of cyber squatting. It is possible that with the introduction of the new TLDs, cyber squatting will increase. The Existing ‘UDNDRP’ is a very limited policy and allows only for limited grounds to get back domain names.

In the existing proposals for new top level domain, there are no mechanisms to prevent cybersquatting. It is yet to be seen how ICANN proposes to prevent the recurrence of cybersquatting practices in the TLDs. Therefore, it is clear that the situation is at present not very clear and it is yet to be seen how ICANN proposes to meet the challenges of cybersquatting in the times to come.

This part highlights the scenario when contents of a Website re exploited by others without the owner's permission or knowledge. The discussion is centred on copyright issues involved in the practices of Linking, Inlining and Framing technologies that are normally being used on the Internet.

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 could amount to copyright violation. But in case of deep linking, the linking site is not reproducing any work. The reproduction, if at all, takes place at the end of the user who visits the linked page via the link. Can the linking site said to be issuing copies of the work or communicating it to the public? Technically, the linking site
is only informing people about the presence of the work and giving the address of the site where the work is present. It is the user's discretion to access the work by clicking the link. Nevertheless, the linking site is definitely aiding in the distribution of the work.

The definition of communication to the public as provided in 2(ff) could be stretched to cover the communication of contents of a Web site on the Internet as the expression 'by any means of display' has been used to define communication.

Without deep linking the Internet as we know it would collapse. One couldn't have a search engine, for example. But some grey areas do need to be addressed. It is quite different for a search engine to deep link than a competitor of an e-business Web site to do the same. Deep linking to commercial Internet databases without the permission of the content owner could raise many problems.

So, should law be amended to stop deep linking without permission of the owner of the content? Or should the law provide complete immunity to links of all kinds? Internationally, no law till date has put a ban on deep linking. There are indeed problems in doing so. On the one hand, one has to consider the rights of the owner of content and, on the other hand, the interest of the society for which growth of the Internet is all important.

Inlining or 'In-line linking' enables a Web page to summon different elements from diverse pages or servers to create a new Web page. Inlining is different from deep linking where the user is usually aware that he has "changed pages", either from the different appearance of the newly accessed page, or from the change in the URL address displayed in the Web browser.

By inlining the linking site could take some elements from the linked site's multimedia settings and create it's 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. Inlining brings in the question of moral rights as well. Section 57 of the Copyright Act, 1957, which talks about Author's special rights. So, the practice of inlining may implicate the moral right of the author. The doctrine of moral rights in India is developed through the judicial pronouncements.

Web browsers allow Web authors to divide pages into "frames". A frame is an independently controllable window on a Web site through which pages from another Web site can be viewed. 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 own site. A typical use of frames is to have one frame containing a selection menu and another frame that contains the space where the selected (linked to) files appear.

As in linking and inlining one has to turn to section 51 read with section 14 of the Copyright Act, 1957 to test the legality of framing. The person who frames some other site's content on his site is not causing any direct reproduction of the copyrighted content. 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 it's 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.
Framing brings in the question of moral rights as well. Section 57(1) of the Copyright Act, allows the 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 original source and hence may never come to know about the author.

It would not be proper for the Indian legislation to include a provision banishing deep linking, inlining and framing altogether because the current provisions are sufficient to check the unauthorized use of someone's content through deep linking, inlining and framing.

In this situation, it is for the courts to decide upon the legality/illegality of linking, inlining and framing from case to case. In case a link, inline and frame amounts to aiding in distribution or communication with dishonest intentions, the courts should come forward and declare such are illegal.

Therefore, the imperative need of the hour is that the legislature catches up with the technical developments and passes a separate law prohibiting cybersquatting or any other malafide registration of a domain name.

Chapter VI Points out the difficulties in fixing the liability of Internet service providers for copyright infringement.

There is a clear need for international consensus on the law relating to the Internet. Due to the 'global nature of the Internet's purely national responses to the copyright problems... are inadequate' and 'a convergent approach is required'. It is obvious that due to the nature of the Internet ignoring boundaries, national law and territorial sovereignty are incapable of meeting the demands of this new technology. However, it will be shown that international efforts to date have been, at best, inadequate to meet these demands.

The TRIPs agreement resulted in no consensus in the area of copyright and technology. Thorny issues surrounding copyright protection for electronic
commerce were not addressed explicitly in TRIPs, requiring the negotiation in 1996 of the Copyright Treaty and the Performance and Phonograms Treaty under the auspices of WIPO'.

Unfortunately the twin WIPO treaties failed to directly legislate on issues relating to the Internet. To reach the goal of international regulation of the Internet one must be realistic and look at specific problems that can be remedied in the short term. However it is currently more of a moot point; nations are, at present, unlikely to relinquish sovereignty to an international 'Internet police force'. Therefore, pragmatic reform options are proposed.

Countries should come to an understanding on the liability that should be placed on Internet Intermediaries, particularly ISPs. A degree of copyright enforcement can be achieved by holding ISPs liable for the actions of their users. ISPs are better targets for lawsuits, as they will typically have deeper pockets than individual users. A pragmatic approach would be to only hold intermediaries responsible for infringing content where they were made aware of the content, were able to control the content, and failed to act promptly. Evidence of this approach can already be found in the American DMCA and the European E-Commerce Directive. The issue of an appropriate definition for ISPs needs to be considered because a wide definition may not reflect the true services provided by the multitude of providers in existence.

In addition, when considering ISP responsibility, the level that they should monitor their users should be discussed. This monitoring function was left in flux after the ambiguous ruling in Napster. But in the recent case Metro Goldwyn V. Grokster on 27th June 2005 US Supreme Court clearly held that ISPs are liable if they encourage users to trade songs, movies and television shows online without paying for them.
However, a clear statement of responsibilities and duties is crucial, not just for traditional ISPs, but also for employers, educational institutions, and cyber cafe owners among others.

If ISPs are given the responsibility to act as judge and jury over contents then the likelihood is that they will err on the side of caution and remove all material that might be infringing. This would lead to many fair uses of copyrighted material being denied. ISPs should not be made to actively monitor their users or content their users upload. Instead a more pragmatic approach should be adopted. The international community should follow the lead of Europe with the E-Commerce Directive where ISPs do not have a general obligation to monitor. They should only act when they have notice of clearly infringing content. Also, an element of good faith on the part of the ISP should be included so that they can contact copyright holders if they accidentally discover possibly infringing content.

It is particularly important to obtain wide support for an ISP-related agreement, as countries that did not sign up would become data havens for ISPs allowing infringing content. Wide support might be achieved by the agreement encouraging ISPs to take initiative and regulate themselves.

It is submitted that by including ISPs in deciding their level of responsibility and engaging them in the issue of copyright infringement, they will more receptive to their duties on the Internet and have a better understanding of the appropriate law.

Chapter VII contains conclusions and suggestions. On the basis of the survey in the existing material the researcher has suggested as follows to meet the new challenges.

Intellectual property industry associations/ convergence societies should launch an extensive campaign through print and electronic media highlighting the adversities associated with the convergence. Lectures, seminars, workshops etc.
could be organised in schools, colleges, universities and other places to create a consciousness among people against the evils of piracy. The message should be conveyed in clear terms that in the long run piracy is against the interest of all in the society excepting the pirates.

A dedicated institute may be established as a nodal agency to deal with matters of Convergence of Information and communication technologies its impact on IPR, and e-commerce particularly relating to copyright and trademarks. The institution say the Indian Institute of Convergence Technology (IICT) should offer regular courses on Convergence and organise relevant training programmes for all concerned with the IPR like the producers, and sellers of Intellectual property products, E-commerce industries, industry associations, the police and the public at large. Besides, the institution should work in close liaison with the government and Intellectual property, e-commerce industry associations and provide guidance in policy matters.

A fund could be set up to research more successful technological protection schemes.
LEGAL IMPLICATIONS OF THE CONVERGENCE OF TELECOMMUNICATION, BROADCASTING AND INFORMATION TECHNOLOGY

THESIS
SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy
IN
LAW

BY
TABREZ AHMAD

Under the Supervision of
PROF. (DR.) AKHLAQ AHMAD
Dean and Chairman

FACULTY OF LAW
ALIGARH MUSLIM UNIVERSITY
ALIGARH (INDIA)
2005
Dedicated
to my Parents
and Wife
Certificate

This gives me immense pleasure to certify that Mr. TABREZ AHMAD, Department of Law, Aligarh Muslim University, Aligarh has completed his Ph.D. thesis entitled "Legal Implications of the Convergence of Telecommunication, Broadcasting and Information Technology" under my supervision.

This is the first Ph.D. thesis in the field of Cyber law submitted in the department. The study is an original contribution in the field of Cyber law. Mr. Tabrez has collected valuable materials from various sources and thereafter analysed the same in a systematic manner. Latest cases have been incorporated which will prove to be of immense help for researchers and various agencies.

I wish him success in life.

(Prof. Akhlaq Ahmad)
CONTENTS

Acknowledgement ........................................................................................................... vii
List of Tables ..................................................................................................................... x
List of Abbreviations ........................................................................................................ xi
List of Cases ....................................................................................................................... xiv

Chapter- I: General Introduction ...................................................................................... 1

[A] Technological Developments and the Convergence Phenomenon ............................... 5
  1. The Emergence and Convergence of Communication, and Computer Technology .......... 5
  2. Convergence of Communication and Broadcasting Technology ......................... 9

[B] Legal Regime and Convergence .................................................................................. 13
  • Review of existing literature ....................................................................................... 15
  • Identification of the Issues ......................................................................................... 16
  • Inquiry and Objective .................................................................................................. 17
  • Hypothesis ................................................................................................................... 18
  • Methodology ............................................................................................................... 19
  • Chapterisation ............................................................................................................. 20

Chapter-II: Convergence and Regulation: An Overview ................................................ 21

INTRODUCTION ................................................................................................................. 22

[A] New Regulation for the convergence sector ............................................................... 26

  1. Objective of the Convergence Bill ............................................................................. 30
  2. Convergence bill: The regulatory framework ............................................................ 35
  3. The communication convergence bill and freedom of speech and Expression ............. 37
  4. Convergence Bill and the spectrum management ....................................................... 38
  5. Deficiencies inherent in the Bill .................................................................................. 42

RECAPITULATION ............................................................................................................ 47
Chapter III: Copyright of Multimedia Products in Convergent Environment

INTRODUCTION

[A] Music Piracy

[B] Features of digital content

[C] Copyright protection of digital material
   1. Audio-visual
   2. Auditory and musical content
   3. Material communicated to the public
   4. Author’s rights in copyright
      a) Material form
      b) Computer generated or assisted creations
      c) Transient copies
      d) Licenses
      e) Authorisation

[D] Protection of Multimedia Works: online
   1. P2P Networking
      a) Napster
      b) Post Napster P2P Networks
      c) Extent of Damage by P2P Networks
   2. Reaction of the Copyright Industries
   3. Indian Legal Landscape vis-à-vis Networks like Napster, Gnutella and Kazaa
   4. Management of Copyright in Digital Environment
      a) Right Management Information
      b) Technological Protection Measures

[E] Protection of Neighbouring rights
   1. Neighbouring Rights in the Copyright Triangle
   2. Neighbouring Rights of Convergence Transmitter
   3. Indian Position
Chapter IV: Software Protection in Convergent Multimedia Environment

INTRODUCTION

[A] Legal Issues of Software copyright
1. Right of Reproduction
   a) The European Union
   b) The US Position
   c) The WIPO Copyright Treaty, 1996
2. Right of Communication to the Public
3. The Right of Distribution

[B] Technical challenges of software copyright
1. Ease of reproduction
2. Ease of dissemination
3. Concentration of value
4. Collective Management of Copyright
5. Jurisdictional Issues

[C] Software Piracy
   a) Indian Perspective
   b) Software Piracy in U.S.A.
   c) Latin America
   d) North America
   e) Asia Pacific Countries
   f) Remedies
Chapter V: Protection of Domain Names and its Contents 144

INTRODUCTION .......................... 146

[A] The Concept of Domain Names ................................................................. 148
1. Generic Top Level Domain Names ......................................................... 151
2. Geographical Top Level Domain Names ................................................. 151
3. Registration of Domain Names ............................................................... 152
4. Importance of a Domain Name ............................................................... 152
5. Infringement of Trade Marks vs Infringements of Domain Names ................................................................. 153

[B] Cybersquatting ........................................................................... 154
1. Acquisition of Domain Names ............................................................... 158
2. Identification of Cybersquatting ............................................................ 159
3. Types of Domain Name Disputes ........................................................... 160
   a) Disputes Based On Illegitimate Claims
   b) Disputes Based On Legitimate Claims
   c) Reverse Domain Name Hijacking
4. Remedies available ............................................................................. 163
5. Measures to fight a Cybersquatter ....................................................... 164
   a) Fighting Under the ACPA
   b) Using the ICANN Procedure
   c) Alternate Dispute Resolution (ADR) for Domain Name

[C] Indian Scenario .......................................................................... 168
1. Linking ......................................................................................... 169
2. Inlining ....................................................................................... 178
3. Framing ...................................................................................... 184
4. Content on Domain names or websites: copyright registration .......... 187

[D] Passing off Action on Internet: Judicial Direction ....................... 189

[E] Internet and the Problem of Jurisdiction .......................................... 206
Chapter VI: Internet Service Providers Liability for Copyright Infringement

INTRODUCTION ........................................................................................................ 231

[A] Theories on Internet Service Providers Liability for Copyright Infringement ............................................ 234

1. Direct Infringement .................................................................................. 234
2. Vicarious Infringement ........................................................................... 235
3. Contributory Infringement .................................................................... 236
4. Exemption from Liability as Public Utilities .............................................. 237

[B] Caching ........................................................................................................... 238

1. Information Residing on systems or networks at the direction of users .................................................................. 239
2. Transitory communication ..................................................................... 239

[C] Fair Use .......................................................................................................... 239

1. WCT ............................................................................................................ 240
2. The European Union .................................................................................. 241
3. The US ....................................................................................................... 241
   a) Factors of Fair Use
      (i) The Transformative Factor: The Purpose and Character of Use
      (ii) The Nature of the Copyrighted Work
      (iii) The Amount and Substantiality of the Portion Taken
      (iv) The Effect of the Use Upon the Potential Market
   b) The De Minimis Defense
   c) Acknowledgement of the Source Material

[D] Internet Service Providers Liability in USA .................................................. 246

1. Online copyright infringement case history ................................................. 249
2. Legislative activities and policy arguments........................................260
3. The online copyright infringement liability limitation act of 1998. ..261

[E] Liability of Internet Service Providers (ISP) and similar operators in India ........................................................................................................262

1. ISP liability under the Copyright Act, 1957........................................264
2. ISP liability under the Information Technology Act, 2000.................265
   a) Classification of ISPs under the IT Act, 2000
   b) Filtering ISP liability through the IT Act
3. Exemption from liability of an Internet Service Provider...............267
   a) Lack of Knowledge
   b) Due diligence
4. Justification for the liability of ISPs in the cases of copyright infringement on the Internet.................................................................268

RECAPITULATION .................................................................................... 270

Chapter VII: CONCLUSION AND SUGGESTIONS.................................271

Bibliography .............................................................................................. 286
Appendix ...................................................................................................... 295-350
Acknowledgement

In reality, all thanks due to Allah, the Lord of the World, Who out of his infinite love for his unworthy bandsman made it possible to complete this work. Blessings and salutations on the noble Prophets of Allah and on the last of them Hazrat Mohammad (SAW).

I am grateful to a number of persons, institutions and multimedia houses for accomplishment of this work. It may not be possible to name them all but I am thankful to all of them for the patronage given to me.

As I take up the pen to express my sense of obligation the name of Prof. Akhtaq Ahmad, AMU, Aligarh strikes my mind instantaneously, not simply because of he is being my supervisor and mentor but primarily for the fact that it is he who being perpetually on the look out for unexplored ground persuaded, nay literally prevailed upon me to devote my time and energy to studying this burning problem. Thus Prof. Akhtaq Ahmad has been the moving spirit behind all my efforts as well as ever vigilant guide in executing the present study. Inspite of his otherwise busy schedule, being the Dean and Chairman, Faculty of Law, and Proctor of AMU, Aligarh, he always found time for going through and scrutinizing my work, diligently making corrections and providing guidelines. I do not have adequate words to express my profound gratitude to him.

I am deeply indebted to Prof. Mohd. Ishaque Qureshi (Ex-Dean and Chairman, Faculty of Law), presently Professor in Madurgo University, Department of Public Law, Nigeria made me understand the art of conducting research. He always inspired me to look beyond the formalistic paradigm. I have no words to express my gratitude.

I am deeply under gratitude to Prof. Saleem Akhtar (Ex-Dean and Chairman, Faculty of Law), who always enthused me by making scholarly suggestions and even provided me study materials in furtherance of my work. I extend my heartful thanks to him.

I would like to express my profound sense of gratitude to Prof. I. G. Ahmad, Dean, Faculty of Law, University of Calcutta and Prof. M. Shabbir, In-charge Dr. Ambedkar Chair of Legal Studies and Research, AMU, for unparalleled guidance, sympathetic and inspiring attitude.

(vii)
I owe heartfelt gratitude to Prof. Shreya Matilal, Director Haldia Law College, Prof. Tabrezuddin, Haldia College, for inspiring attitude and constant encouragement.

I am thankful to Prof. N.R. Madhav Menon, Director, National Judicial Academy Bhopal, Prof. S.K. Verma, Ex-Director, Indian Law Institute, New Delhi, Mr. Praveen Anand, Advocate Supreme Court of India, Mr. Anees Ahmad, Advocate, Supreme Court of India, Mr. Ajit Joy, Senior Superintendent of Police, Ranchi, Prof. Kamal Puri, Queensland University, Australia, Dr. Raman Mittal, Indian Law Institute, New Delhi, Mr. Arun Jetly Ex. Union Law Minister, Prof. N.S. Gopal Krishnan, Ex-Faculty, NLSIU, Bangalore, Prof. V.S. Rokhi, Ex-Director, National Law Institute University, Bhopal, Prof. Zakaria Siddqi, Ex-Faculty, International Islamic University, Malaysia, Prof. Misbahul Hasan, Faculty, International Islamic University, Malaysia, Prof. Afzal Qadri, Dean Faculty of Law, Kashmir University, Prof. Annie George, Programme Officer, World Intellectual Property Organization, Prof. K. Gopinath, Indian Institute of Science, Bangalore for valuable suggestions and clarifying some of my doubts in Computer Science, Intellectual Property Law and convergence.

I am beholden to my learned teachers Dr. I.A. Khan, Dr. Faizan Mustafa (Registrar, A.M.U., Aligarh), Dr. Javed Talib, Dr. Badar Ahmad, Dr. Mohammad Ashraf, Dr. M.Z.M. Nomami, Mr. Naqees Ahmad and other esteemed teachers of the faculty whose scholarly personalities and encouraging attitude helped me in the pursuit of this study.

I express my sincere gratitude to all my school teachers of Ashrafia Nursery, Ashrafia Inter College, Janta Inter College, Mahul, Shibli National Inter College, Azamgarh (U.P.). Their critical teachings have heavily influenced me in developing academic interest.

I shall be lacking in my duty and love if I do not mention my beloved father Mr. Firoz Ahmad Khan and Mother Mrs. Jabila Begum who kindled the flame of learning in me and to their encouragement, affection, sacrificial devotion and prayers, I describe all my success.

I feelingly recall here my late loving elder father Mr. Sayeed Ahmad Khan who always encouraged me from my childhood for higher studies. I am extremely grateful to him and pray that may Allah rest his soul in peace.

I am grateful to my uncle Shaheen Ahmad Khan, maternal uncle Suhail Ahmad Khan, Father-in-law Mr. Syed Wasim Ahmad Warsi, mother-in-law Razia Khanam brothers Mr. Farvez, Mr. Zubair, Mr. Arif, Shamsher, Sisters Mrs. Shabnam, Tabassum,
Tarannum, Anjum, Nargis and Kulsoom; Brother-in-laws Mr. Mohd. Rais (Indian Embassy Jeddah, KSA), Mr. Shabbir, Mr. Nayeem, Mr. Lutfur Rahman and Mr. Syed Jalal Akbar, Sister-in-law Mrs. Salma Warsi for their moral support and valuable suggestions.

I am thankful to my elder brother, Hafiz Ozair Islahi. It was he who always encouraged and inspired me to undertake higher studies and to devote myself to intellectual pursuit. I owe to him deepest most affectionate gratitude for his contribution in making what ever I am today.

I express sincere thanks to all my precious friends Mr. Shamim Firdous, Mr. Shah Raziaq Khalid, Mr. Khalid Usman Ansari, Mr. Misbahuddin Siddiqi, Mr. Zillur Rahman, Mr. Khaliq ur-Rahman, Dr. Md. Arshad, Mr. Imran Sarfaraz, Mr. Abdullah, Mr. Muzaffar, Dr. Afzal, Mr. Qadir, Mrs. Sathna and Mrs. Moni Rani for their valuable guidance and encouragement.

I am thankful to the librarians and staff of the American Centre, British Council, Indian Law Institute, National Law School, Bangalore, NUJS Kolkata, Haldia Law College, NASSCOM, Maulana Azad Library and that of Law Library of Aligarh Muslim University.

I am thankful to Mr. Naimuddin Khan for nicely typing and setting the thesis.

Last but not the least thanking would mean a small thing, for my wife Asma whose love, affection and co-operation have been foundation of successful completion of this work. During the days I sweated on this project unmindful of domestic interest, she looked to my convenience and put up gladly with all kinds of hardship in order to keep me in the right frame of mind to presue my work to the finish. I acknowledge with love the receipt of her help.

The errors and omissions that remain are mine.

Aligarh:  
Tabrez Ahmad

(ix)
# LIST OF TABLES

<table>
<thead>
<tr>
<th>Table</th>
<th>Description</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table I</td>
<td>20 Highest Software Piracy Countries</td>
<td>131</td>
</tr>
<tr>
<td>Table II</td>
<td>Software Piracy and Revenue Losses in India 1995-2000</td>
<td>133</td>
</tr>
<tr>
<td>Table III</td>
<td>North American Piracy Rates 1995-2000</td>
<td>134</td>
</tr>
<tr>
<td>Table IV</td>
<td>Revenue Losses from Piracy in North America 1995-2000</td>
<td>135</td>
</tr>
<tr>
<td>Table V</td>
<td>Asia-Pacific Highest Piracy Rates 1995-2000</td>
<td>136</td>
</tr>
<tr>
<td>Table VI</td>
<td>Asia Pacific Highest Rates of Revenue Losses 1995-2000</td>
<td>136</td>
</tr>
<tr>
<td>Table VII</td>
<td>Software Related Patent Statistics of USPTO</td>
<td>140</td>
</tr>
<tr>
<td>Table VIII</td>
<td>The Current Generic Top Level Domains</td>
<td>151</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
<td></td>
</tr>
<tr>
<td>3G</td>
<td>Third Generation Mobile System</td>
<td></td>
</tr>
<tr>
<td>3GPP</td>
<td>Third Generation Partnership Project</td>
<td></td>
</tr>
<tr>
<td>ACPA</td>
<td>Anti-cybersquatting Consumer Protection Act, 1998</td>
<td></td>
</tr>
<tr>
<td>ADR</td>
<td>Alternate Dispute Resolution</td>
<td></td>
</tr>
<tr>
<td>BBC</td>
<td>British Broadcasting Corporation</td>
<td></td>
</tr>
<tr>
<td>BBS</td>
<td>Bulletin Board System</td>
<td></td>
</tr>
<tr>
<td>BS</td>
<td>Broadcasting Satellite</td>
<td></td>
</tr>
<tr>
<td>BSA</td>
<td>Business Software Alliance</td>
<td></td>
</tr>
<tr>
<td>CAS</td>
<td>Conditional Access System</td>
<td></td>
</tr>
<tr>
<td>CBS</td>
<td>Communication Broadcasting Satellite</td>
<td></td>
</tr>
<tr>
<td>CCB</td>
<td>Communication Convergence Bill, 2000</td>
<td></td>
</tr>
<tr>
<td>CCI</td>
<td>Communication Commission of India</td>
<td></td>
</tr>
<tr>
<td>CD</td>
<td>Compact Disc</td>
<td></td>
</tr>
<tr>
<td>CDN</td>
<td>Content Delivery Network</td>
<td></td>
</tr>
<tr>
<td>CD-ROM</td>
<td>Compact Disc Read Only Memory</td>
<td></td>
</tr>
<tr>
<td>CNN</td>
<td>Cable News Network</td>
<td></td>
</tr>
<tr>
<td>CRAT</td>
<td>Cyber Regulation Appellate Tribunal</td>
<td></td>
</tr>
<tr>
<td>CS</td>
<td>Communication Satellite</td>
<td></td>
</tr>
<tr>
<td>DD</td>
<td>Delhi Doordarshan</td>
<td></td>
</tr>
<tr>
<td>DMCA</td>
<td>Digital Millennium Copyright Act, 1998</td>
<td></td>
</tr>
<tr>
<td>DNS</td>
<td>Domain Name System</td>
<td></td>
</tr>
<tr>
<td>DOT</td>
<td>Department of Telecommunication</td>
<td></td>
</tr>
<tr>
<td>DTH</td>
<td>Direct to Home</td>
<td></td>
</tr>
<tr>
<td>DTO</td>
<td>Direct to Operator</td>
<td></td>
</tr>
<tr>
<td>DVD</td>
<td>Digital Video Disc</td>
<td></td>
</tr>
<tr>
<td>EFF</td>
<td>Electronic Frontier Foundation</td>
<td></td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
<td></td>
</tr>
</tbody>
</table>
GPRS   General Packet Radio Service
HSCSD  High Speed Circuit Switched Data
IANA   Internet Assigned Number Authority
ICANN  Internet Corporation for Assigned Names and Numbers
ICT    Information and Communication Technologies
IFPI   International Federation of the Phonographic Industry
IP     Internet Protocol
IPs    Internet Protocols
IRD    Integrated Receiver Decoder
ISPs   Internet Service Providers
IT     Information Technology
ITA    Information Technology Act, 2000
ITU    International Telecommunication Union
LAN    Local Area Network
MSP    Music Service Provider
MTNL   Mahanagar Telephone Nigam Ltd.
NASSCOM National Association of Software and Service Companies
NATO   North Atlantic Treaty Organisation
NIC    Network Information Centres
NSI    Network Solution Incorporation
OSP    Online Service Providers
P2P    Peer-to-Peer
PCs    Personal Computers
RAM    Random Access Memory
RBI    Reserve Bank of India
RIAA   Recording Industry Association of America
RMI    Rights Management Information
RTL    Religious Technology Centre
SD     Sub Domain
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>SEBI</td>
<td>Securities and Exchange Board of India</td>
</tr>
<tr>
<td>SIIA</td>
<td>Software and Information Industry Association</td>
</tr>
<tr>
<td>SLD</td>
<td>Second Level Domain</td>
</tr>
<tr>
<td>TLD</td>
<td>Top Level Domain</td>
</tr>
<tr>
<td>TRAI</td>
<td>Telecom Regulatory Authority of India</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Trade Related aspects of Intellectual Property Rights</td>
</tr>
<tr>
<td>TV</td>
<td>Television</td>
</tr>
<tr>
<td>UDNDRP</td>
<td>Uniform Domain Name Dispute Resolution Policy</td>
</tr>
<tr>
<td>URL</td>
<td>Universal Resource Locator</td>
</tr>
<tr>
<td>WAP</td>
<td>Wireless Application Protocol</td>
</tr>
<tr>
<td>WCT</td>
<td>WIPO Copyright Treaty</td>
</tr>
<tr>
<td>WDM</td>
<td>Wave Division Multiplexing Technology</td>
</tr>
<tr>
<td>WIPO</td>
<td>World Intellectual Property Organisation</td>
</tr>
<tr>
<td>WPPT</td>
<td>WIPO Performance and Phonograms Treaty</td>
</tr>
<tr>
<td>WWW</td>
<td>World Wide Web</td>
</tr>
</tbody>
</table>
3. A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)  
11. *Buma and Stemra v. Kazaa* Cause list number KG 01/2264 odC (Judgement passed by the President of the Amsterdam District Court on November 29, 2001).


23. *Galaxy Electronics Pty Ltd. v Sega Enterprises Ltd.*, (1997) 37 IPR 462. 61, 64


28. *Kazaa v. Buma and Stemra*, Judgement delivered by the Amsterdam Court of Appeal (Fourth three-judge civil section) on March 28, 2002. 77


33. **MAI Systems Corp. v. Peak Computer, Inc.**, 991 F.2nd 511, 518 (9th Cir 1993).

34. **MAI Systems Corporation v Peak Computer Inc.** [197] 991 F 2d 511 (2nd Cir 1993) [cited in Ronald Katz & Lateef Mtima, "Uncertainty Reigns in software cases"]

35. **Mangolia Metal Co. Ltd. v. Tendam Smelting Syndicate Ltd.**, (1900) 17 RPC 477 at 484.


43. **Nicholson & Sons. Ltd. case Application** (1931) 48 RPC 477 at 484.

45. *Panavision International L. P. v. Toeppen,* 141,F.3d.1316 (9th Cir.1998).


52. *Rediff Communications Ltd. v. Cyberbooth,* AIR 2000 Bomb. 27.


57. Roland Co. v Lorenzo and Sons and Galaxy Electronics Pty Ltd v Sega Enterprises Ltd., (1997) 37 IPR 462


60. Sega Enterprises v MAPHIA, (1994) 857 F Supp 679 (ND Cal) [cited in Angela Bowne at 140].


64. Southern Bell Tel. & Tel v. Associated Tel. Directory Publishers, 756 F.2nd 801 (11th Cir.)


66. Tata Sons Ltd. v. Manu Kosuri, 2001-432.

67. Ticketmaster Corp. v. Microsoft Corp., No. 97-3055 (CD CA, complaint filed on April 28, 1997).


(xix)

70. *Trumpet Software Pty Ltd v Ozemail Pty Ltd.*, (1996) 34 IPR 481.


*****
Chapter- I: General Introduction

[A] Technological Developments and the Convergence Phenomenon

1. The Emergence and Convergence of Communication, and Computer Technology

2. Convergence of Communication and Broadcasting Technology

[B] Legal Regime and Convergence

- Review of existing literature
- Identification of the Issues
- Enquiry and Objective
- Hypothesis
- Methodology
- Chapterisation
Chapter- I: General Introduction

The term convergence is liberally applied, both as a common descriptor and a glowing buzzword with some staying power, to the broad set of technological developments, industry restructuring and regulatory changes taking place that combine aspects of one seemingly separate undertakings. What is perhaps surprising is the scale and scope of changes that are occurring due to the ongoing process of convergence. The convergence of technologies, services and industries has been the subject of much policy discourse in recent years. The blurring of distinctions between previously differentiated industry segments is perhaps the most important dimension, and challenge, for policy makers. Changes in markets have also led to the convergence of ownership and services across national boundaries, creating gaps and contradictions in national policy.

In such a context, convergence means reacting to new structures and services that do not fit well into current policy regimes. Convergence thus poses special challenges to the industry and policy makers alike as they come to grips with the almost overwhelming onslaught of technological change that continues to create new opportunities for services previously unimaginable.

But it is not just the technologies that concern us. It is the social change that accompanies the technologies that must be our prime concern. The new technologies are doing much more. They are changing the way we live-the way we work, relax, manage our money, trade and communicate with each other. The new technologies are changing the way we perceive people, cultures, countries and companies and our expectations of them and also our expectations of ourselves.

The development of communication can be divided into three generations. The first generation of communication method that exhibited a real-time nature was telegraphy. The telegraph allowed an instantaneous transmission of text characters to a remote receiver. Telegraphy utilized a coded translation (via the
Morse code, among other) of letters and numbers into on/off digital representations that could be easily decoded at the remote end by a trained human operator, who listened to the clicks of a remote solenoid. Later, telegraph progressed to a constant-length code that was encoded and decoded by mechanical means. This coded representation became the basis for storage, retrieval, and transmission of text by computers. Although telegraphy provided an important means of communication for critical business and personal one-way communication, it created little change in everyday life. The invention and proliferation of the telephone, on the other hand, did provide pervasive change in everyday interpersonal communication. Unlike written correspondence or telegraphy, two parties could now give immediate feedback by responding to statement, answering questions, providing needed information, or taking needed action. In addition, the telephone added a critical component one could not only recognize the other person's voice, but hear the tone, urgency, and emotion that is so important to effective interpersonal communication. Subsequently, the development of wireless voice communication through two-way radio equipment provided similar benefits without the need for fixed wiring.

The deployment telephone and two-way radio systems have brought us instantaneous voice communication. As a result, we can have quick and easy voice access to others around the world, and even in aircraft and ships at sea.

Video communication has also moved quickly to influence our everyday lives. From the early beginnings of television, we have had the ability to communicate fixed and moving images in real time. One-way transmission of video and audio content are now second nature, although recent years have seen the addition of more extensive content selections through cable and direct satellite transmission. Now technological advancement will allow new applications for video communication that are not limited to a single direction, one-to-many mode.
Chapter I: General Introduction

The Second-generation systems of communication are digital and capable of providing voice, data and fax transfer, apart from a range of other value-added services. At present second generation systems are still evolving with ever-increasing data rates via new technologies such as HSCSD (hereinafter referred as high-speed circuit switched data) and GPRS (hereinafter referred as general packet radio service). At the same time, there is an increasing demand from consumers for data delivery, telephony services, global roaming, E-mail, video and Internet access on one single device. These needs have resulted in global standards that are more open, like Wireless Application Protocol (hereinafter referred as WAP). Applying high-speed data transfer and radio terminal technology (like bluetooth).

The third generation systems of communication are now evolving to provide the bandwidth required for multiple usages. The 3G (hereinafter referred as third generation mobile system) enable multimedia and is currently in the process of being standardised under 3GPP\(^1\) (hereinafter referred as third generation partnership project) that is a Standardisation body with representatives from Asia, Europe and the America, which is helping to establish technical specifications.

For the first time a merging of communications media is becoming practical. Properly implemented, this will make immediately available the vast knowledge base we have been busy computerizing. It will also make direct voice and video communication ubiquitous. Data sharing, with adequate security and safeguards, we allow information and commerce flow freely. We will create a true global village; with instantaneous multimedia communication, which will provide substantial increases in productivity, a better quality of life, enhancements in education and recreation, and cross-cultural understanding.

\(^1\) Global body bringing together worldwide standards organisations, including ETSI (q.v.) and US (Committee T1), Japanese (ARIB and TTC) and Korean (TTA) members. Its mandate is to reach an agreement on a common radio interface in order to determine a standard for third-generation mobile telecommunications systems (UMTS). ETSI transferred the work carried out within the SMG committee on UMTS to the 3GPP. Some of the 3GPP's partners are the GSM Association, UMTS Forum and Ipv6 Forum.
Chapter I: General Introduction

[A] Technological Developments and the Convergence Phenomenon

This part mainly discusses technological aspects of convergence.

1. The Emergence and Convergence of Communication, and Computer Technology

Historically communications, broadcasting, and computers emerged and developed independently. In communications technology, the telegram appeared in the 1830s and developed into a network covering the North American continent in the 1880s. The invention of the telephone in the 1870s began the age of individual communication technology. With wireless communication technology developed in the 1890s, inter-continental communication became practical.

In the field of broadcasting, radio broadcasting appeared in the 1920s and soon became an important and influential medium for propagating culture. Following the radio, television broadcasting emerged after a decade, spreading rapidly and having great influence.

Compared to communications and broadcasting technologies, the emergence of computer technology is relatively recent. The first computer was invented in 1946, but computer technology did not become an important tool for business until the mainframe computers of the 1960s. The spread of computer technology to the individual level occurred during the 1980s when the personal computer emerged in the market.

Since the 1960s, technology to permit remote use of computers over the communication network became practical and it was utilized by airline reservations and banking systems. This technological development made it possible to use the network originally dedicated to voice communication to transmit digital information.
Chapter I: General Introduction

At the same time, the communication network itself began to be digitalised; specifically transmission lines and exchanges were converted from an analog to a digital basis. This digitalisation of communication and linking of computers with communications networks was not actually convergence though real convergence between computer and communication technology did not occur until the Internet emerged.

The Internet was developed in the 1960s as a defense project in the United States. Its commercial use began early in the 1990s and explosive penetration occurred after 1995. The Internet can be said to be a convergent product of communication and computer. The key to the Internet's penetration is its connectivity, which is realized by its autonomous architecture and flexible Internet Protocols (hereinafter referred as IPs). Another key to the expansion of the Internet network is its distributed nature such that each user can dispatch information without relying on the facility of a central telecommunication carrier. In addition, the fact that Internet tariffs remained basically flat regardless of the volume of transactions stimulated the emergence of rich content such as pictures and movies. This would never have happened if charges were traffic-sensitive as was the case with telecommunication’s service. Now, the convergence of telephone communications into the Internet is destroying the existing business model of telecommunications operators. The phenomenon that every single device and service is available and compatible in Internet Protocol (hereinafter referred as IP) is called "everything over IP."

The power that drives the convergence of communications and computers is the progress in broadband communication technology. The performance of computers has doubled every 18 months since the early 1980s, in what is known as Moore's Law. Over the same period, the digital-exchange was introduced in the communications field and communications rates were falling due to price competition. The performance of communications technology did not improved as significantly as computer performance over this period, however one reason is that
telecommunications is a regulated industry. Another reason is that a large part of the initial telecommunications cost consists of manpower and civil engineering costs, which are not sensitive to technological innovation. The remaining bulk of the industry's costs are for exchanges, which have a depreciation span of more than 10 years and therefore are not sensitive to technological evolution.

These conditions changed in about 1995, however, with the Internet boom. As already mentioned, with the Internet, a computer itself performs as an exchange or a router and it has a very short depreciation period. On the regulatory side, by its nature, the Internet has a non-regulated tariff structure, which has promoted the emergence of new service providers and competitors.

Coincidentally, a technological breakthrough in telecommunications transmission technology also took place around 1995. This particular innovation called WDM (hereinafter referred as wave division multiplexing technology) was an optical transmission technology that enabled passing multiple optical transmissions with different wavelengths through a single optical fiber. This evolution caused communication transmission performance to improve at a rate surpassing Moore's Law, doubling every 12 months according to what is called Gilder's Law. As a result, Internet routers, that are exchanges consisting of computers, could not catch up with the potential speed of transmission lines. This phenomenon implies that in the future photonic exchange might take the place of the convergence of all communication into the IP. Moreover, wireless communications also experienced a breakthrough around 1995 with digital wireless technology as second generation mobile penetrated rapidly around the world. The decline in costs and evolution of technology are continuing with the emergence of a third generation.

The significance of this emerging broadband technology is not limited to the fact that it permits transmitting moving images. Instead, Broadband makes it possible to move such activities as financial services onto the network, making them easily accessible and combinable with many other services. Unbundling of financial
services into separate financial service functions that can be bundled with communication services on the network thus creates new services and platforms. Indeed, every service industry has begun to converge and new services are emerging constantly.

A fundamental change in the communication paradigm occurring in parallel with broadband is the transition to ubiquitous networks and distributed communication architecture. A ubiquitous network means that communications power exists everywhere and everything is connected. Dispersion of communication power has shifted from the state to enterprises and now to individuals. This phenomenon is the main source of problems with governance today.

At the same time, distributed communication technology allows individuals to communicate autonomously with each other in a peer-to-peer manner. As already mentioned, this capability is inherent in the Internet. And this is the very reason why Internet space has expanded so rapidly—each user can be an originator of information without going through a central computer. In addition, peer-to-peer capability has recently created Napster and Gnutella, which are applications that enable users to exchange music data directly with each other. These applications have also raised serious problems relating to infringement of copyrights and thus have focused attention on the rules and governance of Domain names and contents of websites.

Recent technological development has also created the possibility of distributed wireless communication systems. In the architecture of the existing mobile wireless communication system, every transaction basically goes through the exchange stations on the premises of a telecommunications operator. New types of wireless communication systems, such as wireless Local Area Network (hereinafter referred as LAN) or ad-hoc communication system have more Internet-oriented communication architecture, in which each terminal can communicate directly with every other one and a chain of such connections creates a network. It is significant
Chapter 1: General Introduction

that the capability and cost-performance of this distributed technology are evolving rapidly compared to the centralised architecture of the existing wireless network. This phenomenon is breaking down the common assumption that communications must be carried out by telecom operators, and thus it is causing a change in paradigm from a carrier model to a user model. This change is again raising issues about the policy for allocating the frequency spectrum.

2. Convergence of Communications and Broadcasting

The convergence phenomenon generated by such technological developments can be divided into the following categories.

Convergence of Services: The first aspect of convergence is observed in the emergence of intermediate services that link communications and broadcasting. Private, one-to-one communication was the essential attribute of communications technology, but now the Internet Protocol permits using the communications network to deliver information to many people, such as replaying content on the Internet by means of streaming technology. The joining of Internet and communications technologies will realize communications of a public nature whereby voice and moving images are transmitted to a number of recipients. The types of 1-to-1 information delivery already available over the communications network include electronic bulletin boards, email, facsimile transmissions, video teleconferencing systems, and homepages. On the other hand, in broadcasting—which was originally based on mass communications-broadcasting satellite (hereinafter referred as CBS) and communications satellite (hereinafter referred as CS) broadcasting also permit new services with a similar nature of specificity. These intermediate services that have the features of both communications and broadcasting are expected to expand in the future as well.

Convergence of Terminals: The second aspect of convergence is "terminal convergence", a phenomenon in which terminals, or information
appliances, are being developed to use for both communications and broadcasting. Recently, personal computers (hereinafter referred as PCs) with built-in television (hereinafter referred as TV) tuners have appeared on the market. With these terminals one can not only view terrestrial wave broadcasts, but also record and compile programs. A Korean Internet site that permits on-demand access to already broadcast terrestrial wave programs is enjoying growing popularity. Also, an electrical appliance manufacturer has come to market with a set-top box that enables Internet access through a TV set. These trends all demonstrate the active promotion of terminal convergence, offering both communications and broadcast services over a single terminal.

**Convergence and Changes in Industrial Structure:** As the demand for content increases in the wake of expanding broadband capabilities in access loops and the spread of digital broadcasting, mechanisms are being developed that allow general users stress-free access to content. They will enable the delivery of all kinds of content such as publications, video, music, and games through a variety of terminals.

Content-delivery models between providers and consumers and among companies are also diversifying as content-delivery markets continue to expand. For example, a fee-based service providing video within the Internet using streaming technology has been started.

At the same time, however, these developments have opened up a new and serious social problem that has rapidly expanded in recent years - the peer-to-peer exchange of content. For example, huge communities such as Fast Track and Gnutella, which consist of more than 40 million people, have emerged for the purpose of exchanging content over the Internet as the source code or software on which they are based has already been made public, peer-to-peer content exchanges are likely to continue even if content producers prevail in pending litigation.
According to a survey by Gartner Group in August of 2001, only six percent of Internet users who downloaded music files from the Internet within the past three months paid the required fees. Governments and private industry must take concrete steps to establish appropriate copyright-handling systems and transaction rules if a healthy content distribution structure is to survive. Of course, the formulation of global rules is made even more problematic by the existence of those who refuse to recognize copyrights for such content.

Expansion of the Platform Business: Many types of network infrastructure must be developed to support the full-scale deployment of BS, digital CS, and Internet broadcasting and the proliferation of providers of music and video content through the Internet. The required infrastructure includes stable transmission, rate-charging and payment, authentication, copyright protection (e.g., conditional access system (hereinafter referred as CAS), and management services, all of which will utilize high-speed backbone circuits. For instance, e-commerce, where anybody can easily buy or sell products using high-quality video images, presents a number of credit risks ranging from whether purchasers actually receive the products they expect to whether sellers get paid for what they sell. Reflecting that, new services are being designed to reduce such credit risks and they are expanding as expected. As a matter of fact, escrow services (intermediate services to guarantee the safety of transactions) by financial institutions and trading companies as well as other credit-related businesses have emerged within the past several years.

Moreover, there is an increasing demand for content delivery network (hereinafter referred as CDN) services. CDN services provide a better environment for the distribution of large-capacity content (such as animated programming) that relies on broadband access. They deploy content-servers capable of handling accelerated speeds on networks located close to data distributors and consumers. Such platform markets are expected to grow even more rapidly under the current environment in which the convergence of communications and broadcasting is picking up speed.
Convergence throughout Industry: The expansion of IT-related business centered on the Internet in the late 1990s was promoted by: (1) the growing proportion of the Internet community that was using mobile and (2) the construction of LANs within industrial firms and the involvement of individual users in the broadband network. As a matter of fact, the possibility that convergence generates of being able to deliver high-quality images and sound is having an effect in many other industries in addition to broadcast and communication. For example, in the medical and nursing care industries, networks linking hospitals, pharmaceutical companies, and testing companies enables the sharing of share massive amounts of patient information such as test results and diagnostic images. In the case of the education industry, technology that enables delivery of high-quality images promotes distance learning. In the publication and newspaper business, e-documents and e-newspaper delivery services are expected to proliferate with the full-scale development of e-paper technology exploiting prime quality images.

This phenomenon enables consumers to access any type of content at anytime and anywhere. Such inconveniences as finding a document out-of-stock would not occur anymore under such environment. It would also become much easier to enlarge the typeface or transfer the written content to a digital voice recording Suppliers as well as consumers benefit from this technological development. For example, book and newspaper publishers will face much less inventory risk. Thus, it is expected that paper-medium will slowly become extinct.

Moreover, the banking business is expected to shift from office-based operations to net-based operations. This shift will enable banks to distribute the same or even better services to customers located anywhere at anytime through devices such as high-definition type mobiles. Or, as Wells Fargo Bank of the U.S. is doing, they may install television monitors at various office sites and offer such teleconferencing services as customer consulting.
Securities business can use this technological capability of high-quality image or voice delivery to convey Investor Relations information or video comments of their financial analysts and economists; for example, as Nomura and Merrill Lynch are doing. They can also use it to transmit such information to the sales staff.

Within the distribution industry, the technology enables firms to take on the role of delivering promotional images for new products or they can use it to create powerful communication campaigns.

For the real estate industry, the capability of delivering high-quality images over a network to potential buyers will enable firms to promote properties or even execute entire transactions without taking prospective buyers to visit each alternative property.

Finally, the advertising industry will also experience the shift from paper-based to network-based medium along with the newspaper and publishing industry. The shift may have an even stronger impact on the structure of the advertising industry, as existing mass paper-based advertisements give way to more individualized, private delivery through moving images or voice.

These convergence phenomena point to the coming of vertical integration through cross-industry alliances that extend far beyond the domain of individual industries. Moreover, applying this new technology with high-quality moving images and sound in each industry can create new businesses opportunities. On the other hand, firms that cannot adapt to the speed of these changes are likely to disappear in the near future.

[B] Legal Regime and Convergence

Our legislation has not really kept pace with technology, and the 120 year old Telegraph Act (1885) still governs telecasting, although it was originally meant for telegraph, wireless, military and defense equipment. In the 1920's when the radio
was started, it was covered by Telegraph Act. We did not bother till 14 to 16 years ago, because everything was under the government's monopoly. The government is now conducting several exercises in this regard. The government passed Cable television Network regulation Act 1995, Telecom Regulatory Authority of India Act 1997 and Information Technology Act 2000.

Convergence connoting the provision of different kinds of services over the existing infrastructure, and the enhancement of existing technologies so as to provide a wide variety of services is a relatively new phenomena; in addition, the rapid technological development are leading to an inability to predict the emergence of new services. The existing legislations are proving inadequate in dealing with the emerging scenario of convergence. Furthermore, the existing licensing and registration powers, and the regulatory mechanisms for the telecom; information technology and broadcasting sectors are currently spread over different authorities. Therefore a flexible type of legislation to accommodate and encourage permutation and combination of technologies and services is required. The Indian Communication Convergence Bill, 2001 (hereinafter referred as CCB) proposes to establish a structured mechanism to promote, facilitate and develop in an orderly manner the carriage and content of communications (including broadcasting, telecommunications and multimedia) in the scenario of increasing convergence of technologies.

These rapid technological changes challenge the existing legal institutions. The delicate balance of copyrights in our society can be upset when trying to keep the legal developments abreast with the technological advances. Software and telecom companies, broadcasting organisations have all found a niche in cyberspace while legislation tries to keep apace. We are still governing the converging technologies by the traditional Intellectual property Laws. Such as Copyright Act 1999, The Patent Second Amendment Act 2005 and Trademark Act 1999. Going by the latest events in the digital world, there are no doubts that the future balance of
Chapter I: General Introduction

rights will depend on the current bargains and the judicial dimension decisions about the extension of a central element in contemporary law - the intellectual property.

Differences in rules are beginning to be questioned. Similarly, it is an open issue to what extent regulation in the different content areas should converge.

Now the regulation is a great challenge before the world because the way legal and regulatory reform is carried out will determine the manner in which convergence affects our daily lives.

The fundamental problem in India is two-fold. Firstly, whether it is regulation of convergence, secondly or it is convergence of regulations. To overcome this problem the government of India has proposed the CCB.

The objectives of the bill are fairly well drafted and the intention to bring about a convergence between conflicting interests of all segments including the Government, Business and the Consumer are well stated. But the bill is totally silent on the copyright implications of the converging technologies.

The main control centre for the Convergence legislation lies with the communication commission of India (hereinafter referred as CCI). But the proposed provisions in the bill requires to be re-examined because it looks that the provisions may not be able to materialise the esteemed objectives to satisfy all the intermediaries such as, Copyright owners, Domain Name holders, Internet service providers, consumers and netizens of the convergence.

Review of the Existing Literature

Although lot of literature is available on the issues relating to Telecommunication, Broadcasting and Information Technology. The existing literature, which has been surveyed, includes websites, books, various articles published in journals, magazines, and newspapers. Cases decided by various high courts, Supreme court of India and foreign courts, various statutes, Bills, and reports.
Yet no attempt has so far been made on the question of Legal Implications (with special reference to Intellectual Property implications) of the Convergence of Telecommunication, Broadcasting and Information Technology.

It has now become imperative to go for an in-depth research so the problems of convergence could be understood and viable, pragmatic and durable solution could be arrived. So the hardship to copyright holders of multimedia works, computer software, Internet service providers, domain name holders can be mitigated. The harmful impact of convergence on society can be removed, real objectives of convergence could be achieved and a healthy, risk free environment for e-commerce could be created.

Identification of the Issues

Developments are rapid and involve much more than transmitting and processing of information. They involve non-routines works unstructured activities, and novel formulations. Information technologies erode boundaries between countries, and help in process of globalisation.

The converging technologies contributing the following issues are noteworthy: Telecom contributes with infrastructure regulation and access issues; broadcasting with access and content issues; together with IT the different areas contribute with new regulatory issues of intellectual property rights (hereinafter referred as IPR). Which are as follows: framing, hyper-linking, deep-linking, inlining, communication, publication, parallel imports, rights management information (hereinafter referred as RMI), Fair dealing, implied license, liability of internet service providers (hereinafter referred as ISP), domain name, jurisdiction are a challenge before the regulators.

These issues are of the general societal importance of convergence policies, the balance between benefiting from industrial complementarities and the problems of media concentration, and access to networks and content.
Information and communication technologies (hereinafter referred as ICT) provide many opportunities to deliberately, negligently or unwittingly infringe upon rights. Internet service providers' liability is a major focus area within the debate about infringement of intellectual property rights. There are many issues in the intellectual property rights debate, some of them are noted as follows: Finding the balance between preventing intellectual property rights violations and protection of intellectual property rights violations; Electronic content, electronic distribution mechanisms, and so on make it difficult to determine who is the original owner of the intellectual property rights. In peer to peer networks, who the perpetrator is and where infringement occurs is totally dynamic and difficult to track; Technological innovations and innovative applications of ICT for different purposes offer new means for the stealing, modifying, copying and other tampering of electronic content; Limited systems, resources and human resources capacity to monitor intellectual property rights violations in India.

The Inquiry and objective

It is an inquiry into the appropriateness, compatibility and efficaciousness of the traditional conceptual framework of telecommunication, broadcasting and information technology, a construct of technological age to encompass multimedia works, computer programme, and websites a creation of convergence age, and an enquiry into the possibility of umbrella legislation for convergent multimedia regulation.

An effort would be made to enquire in the following matters during the course of discussion: whilst convergence is occurring at the technology level, to what extent and at what speed is this happening at the industry, service and market levels? Are the effects of convergence already being felt in the business world and in our everyday lives and if so, in what way? What is the likely impact of the barriers, which may have a significant impact on the convergence process? Whether and if so, to what extent convergence challenges the principles underpinning existing regulatory
approaches in the telecommunications, media and information technology (hereinafter referred as IT) sectors? Are the definitions in the telecommunications, media and IT sectors in national and/or Community legislation adapted to the convergence process? What is the impact of convergence on intellectual property (esp. on copyrights and trademarks)? Does the existence of different regulatory authorities or ministries responsible for different aspects of telecommunications, media and IT activities offer a workable structure for regulatory supervision in the light of convergence? Is further action required at an international level in light of convergence?

The objective is to provide the Government with sound analytical instruments that will enable the tracing of a regulatory framework for the telecommunications, broadcasting and information technology sectors in a convergent environment, and taking in due relevance the need to safeguard the public interest. The process for the “Convergence its implications and Regulation” involves a number of activities, of which this research is part, to collect, analyse and find out viable solutions.

Hypothesis

Due to Convergence of telecommunication, broadcasting and information technology the transmission of information, whether voice, data, sound or pictures, in digital form may be carried over broadcast networks or over terrestrial wired or wireless infrastructure.

The regulatory framework, which governed each technology separately became inappropriate and the fundamental change in the communication paradigm occurring in parallel with broadband is the transition to ubiquitous networks and the distributed communication architecture, now the communications power exists everywhere and everything is connected. Dispersion of communication power has shifted from the state to enterprises and now to individuals.
This phenomenon is the main source of the problems with regulation and governance today. Convergence is therefore an engine, which creates new services and industries. At the same time, convergence generates new-types of problems that old rules cannot cover. The delicate balance of copyright and trademark in our society can be upset when trying to keep the legal developments abreast with the technological advances.

On the basis of the above observations we may develop a hypothesis that the inherent difficulties of enforcing rights and obligations of the intermediaries such as copyright owners, consumers, netizens, domain name holders and Internet service providers of Internet worldwide is the cause of digital intellectual property implications and the legal liability for copyright infringement may be on those who allow and enable the copyright infringers to exist namely Internet Service Providers.

**Methodology**

Primarily this is a study based on the Doctinal method which is descriptive and analytical. The bibliographical references followed are based on the ISO recommendations (ISO/R 690-1968 E) which have been approved by India also. The major source of material was the Internet. However, some landmark cases text books, journals, magazines, newspapers are also consulted. The study, to begin with, was causing some difficulties in getting the basic information on the convergence. One of the reasons for that was the topic is very innovative, fast changing and no proper research was done in the field in India. Within the above limitations, we approached the study by seeking information from experts in the field. Attempts were made to extract information on various aspects of convergence matters form the main pillars of this channel. Information was also sought from apex industry associations, Telecom Regulatory Authority, Ministry of Information Technology and national association of software and service companies (hereinafter referred as NASSCOM).
Chapter I: General Introduction

Chapterisation

The whole research is systematically divided into seven chapters keeping in mind the interdisciplinary nature of the subject.

Chapter I deals with a brief introduction to telecommunication; broadcasting and information technology. It also defines the convergence of these three different sectors and its regulatory implications.

Chapter II deals with the convergence and its regulation. It analyses the convergence bill 2001.

Chapter III examines the copyright law governing the multimedia products in convergent environment.

Chapter IV deals with the laws governing computer software and measures of controlling the software piracy.

Chapter V examines the trademark protection to domain names, control of cybersquatting and protection of contents in websites.

Chapter VI points out the difficulties in fixing the liability of Internet service providers for copyright infringement.

Chapter VII provides conclusion and suggestions.
Chapter- II: Convergence and Regulation: An Overview

INTRODUCTION

[A] New Regulation for the Convergence Sector

[B] Convergence Bill: A Critical Analysis

1. Objective of the Convergence Bill
2. Convergence Bill: The Regulatory Framework
3. The communication convergence bill and freedom of speech and Expression
4. Convergence Bill and the spectrum management
5. Deficiencies inherent in the Bill

RECAPITULATION
Chapter II: Convergence and Regulation: An Overview

INTRODUCTION

The convergence in India has arrived faster than expected. The convergence would help in web casting, video on demand, Internet via cable. The much-awaited delivery of Internet through cable network has already started in Delhi, Mumbai, and Kolkata etc.

The optical fiber cable carries more bandwidth resulting in more signals being carried with superior clarity. The cable companies are expected to rule the roost due to investments made by them in the cable networks. The upgradation of cable network (optical fiber). The Mahanagar Telephone Nigam Limited (hereinafter referred as MTNL) poses tough competition for all the ISP’s. As it can pump the broadband network on its existing network at a very low cost.

The cable operators deliver the cable and satellite channels to the consumers. With more and more channels going pay to air, would open up subscription revenue for the broadcasters. In future it will emerge a major source of revenue and much larger than the advertisement revenue stream. The channel will be carried on two platforms - Direct to Operator (hereinafter referred as DTO) and Direct to Home (hereinafter referred as DTH). Both the services have user addressability in matter of convergence.

Direct To Operator

The DTO is a step, moving towards subscription channels. In DTO channels are digitized and encrypted by the broadcaster. It operates using C band. The signals are downloaded by the cable operator by using the integrated receiver decoder (hereinafter referred as IRD) and distributed to cable homes.

\(^{2}\) below 4800 Mhz
The DTO transmission helps in saving of the cost, tracking the subscription revenue but calls for additional investment for the decoders for down linking of signal.

It is capitalizing on price sensitiveness of consumers of India, who would not be willing to subscribe to the high cost DTH services. The subscription of the convergence is expected to the Rs 250 per month per subscriber in India.

**Direct To Home**

It offers an alternative to the DTO service addressing superior reception with advance level of multi channel subscription revenue for broadcaster. The digitized channels are broadcast using the Ku band\(^3\). The consumers have the option to receive more than one signal, which are down linked by the consumer directly by using dish antenna at their home.

DTH can broadcast more than 100 channels using IRD, which ensures conditional access on payment of subscription. The investment of dish antenna and other hardware is borne by the consumer. The installation cost of DTH is high enough to deter price sensitive consumer of India and it is estimated that subscription of 2 million consumers would be needed to make the service profitable.

DTH can be broadcast using C band or Ku Band. The transmission at C band needs dish antenna of 3-4 meters. This C band preposition does not seem to be possible in metros where the potential consumer of the DTH would reside.

The Ku band, which requires antenna of 60-75 cm, would attract the attention of consumers. The government currently, does not permit the transmission of signals at Ku band in India.

---

\(^3\) above 4800 Mhz
The growth of Cable and Satellite has opened a new vista for the Indian media sector. In a short span of two years, more than 60 (national, regional and foreign) channels are broadcasting in India. It is expected that more than 30 new channels would be launched in the next three years.

The popularity and growth of channels would be driven by originality and quality content (five to six hour a day of Original Programming). The entertainment has found its roots in the regional market also. The growth of regional channels would come on the expense of falling advertising revenue of the regional print media.

The US experience suggests that while the average TV homes were able to receive 57 channels in 1998, the number of channels actually viewed were 13 - the term 'viewed' is defined as 10 or more continuous minute’s content and delivery for loyal audience. The current mushrooming of channel suggests that shakeout in the industry is inevitable.

The total advertising on the C&S TV was Rs 27912 million for 2000. Since majorities of the channels are free to air and subscription market is yet not developed, we have made our assumption on the basis of free to air channels. Although the subscription market is larger than the advertising market it will add substantial revenue to the broadcasters.

Content has emerged as king in the fierce battle of television channels. The success of channel is dependent on the quality of content, which attracts the attention of an audience. The content would drive the success of the channel. With more than 40 (national and regional) channels on air and 30 more lined up in the next two years. Demand for content is expected to grow by 40 percent for three years.

The television software industry is valued at Rs. 5840 million. Content has high recyclable value, no storage cost and can be exported. A successful and good quality content has high recyclable value and can also be delivered
through various delivery mechanisms such as Compact Disc, and Web Casting.

Current original programming is 5 hour per day per channel and with the competition intensifying it could be increased to seven hours/day/channel. This would translate into substantial opportunity of the content providers. As the industry experience suggests, the average production by a content producer is six to eight hour a week. This translates into an opportunity for 35 producers in the current demand scenario and more to join the fray.

The content is shown either on terrestrial or C&S Network. The popularity of content depends upon the understanding of the audience and making the right genre of program for the target audience. The availability of intellect and low manpower cost has made the Indian content popular world over and an export of content has opened a new revenue stream for the content provider.

A good quality content has a recyclable value, can be exported and can add to the revenue stream of the IPR holder. The content producers working with Delhi Doordarshan (hereinafter referred as DD) have built up a substantial library of content and are exploring the same.

The merger between telecommunications, computer and broadcasting is going to change the way people will work, play and live. The 'convergence' of these technologies has given birth to the prospect of multimedia services, which will offer interactive computer based applications that will combine text, graphics, audio and animation features into a media experience for users.

The increasingly competitive environment in the multimedia industry promises tremendous user benefits through increased savings in time, greater choice, and an explosion of innovative services and products. This is the promise, to date, truly interactive services allowing the viewer to descend through a series of levels of information are still at the experimental stage.
Chapter II: Convergence and Regulation: An Overview

The development of multimedia services will not replace judgment value that is provided by the traditional media. Hence, the traditional media will still have a large role to play in the new multimedia world.

Multimedia has the potential to vastly increase the range of services available, and offer its users a larger choice of applications but new technology alone will not ensure success; it is the people who use it who will decide the future of multimedia. The users' wants and needs; how they will manage the flood of options; and, above all, whether or not they will pay for the freedom of choice are what counts.

Technological and institutional 'Convergence ' has become a cliche of the information age. In its current usage it refers to two distinct though related phenomena. The way that all transmission media become bit-carriers so that different 'network platforms' can carry similar kinds of services and the tendency of the previously separate worlds of broadcasting, film, telecommunication, publishing and computing to become involved in each other's business.

Recent examples of new, convergent services include: Services delivered to TV sets via systems like Web TV; E-mail and World Wide Web access via digital TV decoders and mobile telephones; Using the internet for voice telephony.

[A] New Regulation for the convergence sector

The Information Technology Act, 2000 (hereinafter referred as ITA, 2000) has regulations that define what is right or wrong as to the one aspect of the content delivery namely the "Obscenity". The range of powers that the Act provides for the "Controller" has already raised alarms in the industry. Lack of checks and balances for the operations of the Adjudicating Officer and the CRAT (hereinafter referred as Cyber Regulation Appellate Tribunal) has also been brought to the public notice.
Chapter II: Convergence and Regulation: An Overview

Even before the ink has dried on the notification of the ITA-2000 Rules, there appears on the horizon a new regulation of momentous importance to the Netizen community of India. This is coming in the form of the "Regulation of the Convergence sector".

Securities and Exchange Board of India (hereinafter referred as SEBI) is contemplating regulation of "Content Relating to Investments". SEBI may also step into the area of "Regulating Content on Corporate Web sites". SEBI is already regulating the "Financing of DotCom Companies" through an exclusive attention. Reserve Bank of India (hereinafter referred as RBI) is contemplating regulation of "E-Commerce initiatives of Non Banking Finance Companies and Banks". These regulations may fall in the purview of the Finance ministry.

Until the Cable Internet takes off, telephone remains the critical last mile connectivity device for all Netizens. Today, telephone costs are around 75% of connectivity costs in paid services and are the only costs of connectivity in respect of "Free Internet Access Services". Poor quality of connectivity is a factor, which makes this cost higher than what it seems to be. Netizens who are concerned about their rights are therefore extremely unhappy with the services of the Telecom sector and are living in the hope that after the privatization of the DOT, there could be an improvement in its services and pricing policies.

Now we have also to watch out for the new "Regulator for the Convergence Sector" that is CCI proposed in the CCB to be set up. This regulation would cover Internet, Broadcasting, and Telecom sectors. A huge part of the Cyber society would be affected by any legislation in this regard.

[B] Convergence Bill 2001: Critical Analysis

Technological developments are posing a huge challenge to the lawmakers. The unprecedented growth in Internet as a medium for Commerce has already
necessitated the passage of the ITA 2000, which has given Legal recognition for Electronic Documents and Digital Signatures\textsuperscript{4}; Definition of various kinds of Cyber Crimes\textsuperscript{5} and a justice dispensation mechanism\textsuperscript{6} for handling these Crimes.

Close on the heels of this landmark legislation, the continued developments in the technology that drives the Internet has now brought us to the threshold of another significant piece of legislation in the form of the CCB.

The need for this legislation has been forced on the society because the present laws that govern the areas of Telecom, Broadcasting and information technology have been found insufficient to meet the needs of the present day requirements. They had been framed when each of the communication mediums such as the Telephones, Radio, and Television had evolved independently over a long period and were governed by different sets of laws.

Gradually, the wired network of the Telephony and the Wireless network of the Audio broadcasting started exploiting the satellite communication facility along with the Television broadcasting. Thus resources such as “Satellite Communication Bandwidth” became common to the different media. Thus the concept of “Convergence of the Media” emerged.

Today, Technology has brought Internet, Broadcasting and Telephony on a single platform of distribution. In the consumer’s perspective the Personal Computer today is a Communication device, which can also be used for Telephony as well as receiving audio and video, broadcasts. Similarly, the Web TV can be used for surfing the Internet and for sending E-Mails. The WAP has converted the mobile phone into an E-Commerce tool. In the business perspective, the infrastructure available for meeting the needs of one of the media can be more effectively utilized if applied to other media as well.

\textsuperscript{4} IT Act, 2000 Sec 14-16
\textsuperscript{5} Ibid. Sec 65-78, 80
\textsuperscript{6} Ibid. Sec 48-64
Chapter II: Convergence and Regulation: An Overview

Thus an ISP thinks of “Internet telephony” and the “TV broadcaster” thinks of “Internet delivery of TV Content”, as a natural business strategy.

The historic legal framework which had not envisioned this convergence, naturally failed to fulfill the aspirations of the society since they placed artificial barriers of “licensing” on various service providers as well as the consumers. This led to flouting of law by many individuals as well as service providers.

Recognizing the changing needs of the society, Indian Government has now decided to revise the legal framework applicable to the Broadcast and Telecom sectors so that the benefits of technology can be harnessed. This appreciation of the need for ‘Convergence Laws” has been brought out in the objects of the Bill which states as follows:

“One of the basic objectives of this Act is to provide for a regulatory mechanism, which facilitates convergence and therefore, remains valid over a period of time. Convergence in this context means convergence of mediums or technologies facilitating provision of all services by using a given facility or network and vice versa. It also means convergence of services at the provider’s end as well as the consumer’s end, meaning, thereby, a service provider should be able to provide a whole range of technologically feasible services and a consumer should be able to receive all services through a given terminal at any time and place of his choice.”

In order to remove the hurdles arising out of past legislations, the Bill will repeal many of the earlier legislations7.

The licensees who are operating under the provisions of these laws will now be required to make a fresh application for license within 6 months of the Bill coming into force with the appropriate authority under the new Bill.

---

7 The Indian Telegraph Act, 1885; The Indian Wireless Telegraphy Act, 1933; Telegraph Wire Unlawful Possession Act, 1950; Cable Television Networks (Regulation) Act, 1995 and The Telecom Regulatory Authority of India Act, 1997.
India is said to be only the second country in the Asian region to bring a separate Bill for the Convergence Industry and we need to appreciate the futuristic thinking, which is behind this bold initiative.

1. **Objective of the Convergence Bill**

The basic objectives as stated are to facilitate convergence of Communication both at the provider’s level as well as the user’s level. It recognizes that the technology makes it possible to provide and receive different services from common facilities or equipments.

Is this convergence carried through the other features of the regulations? Let’s look at the detailed provisions to check whether the lofty objectives are addressed optimally in the provisions.

The main control centre for the Convergence legislation lies with the CCI as defined in Chapter III. This will be a body corporate with perpetual succession with power to hold and dispose property. The Commission will

---

8 First in Malaysia, Malaysian Communications and Multimedia Act, 1998; Act No. 588, 589.

9 Appendix I as well as Chapter IV of the draft CCB. The Communications Commission of India while exercising its functions shall be guided by the following principles: (i) that the communication sector is developed in a competitive environment and in consumer interest; (ii) that communication services are made available at affordable cost to all especially uncovered areas including the rural, remote, hilly and tribal areas; (iii) that there is increasing access to information for greater empowerment of citizens and towards economic development; (iv) that quality, plurality, diversity and choice of services are promoted; (v) that a modern and effective communication infrastructure is established taking into account the convergence of information technology, media, telecom and consumer electronics; (vi) that defence and security interests of the country are fully protected; (vii) that introduction of new technologies, investment in services and infrastructure, and maximisation of communications facilities and services (including telephone density) are encouraged; (viii) that equitable, non-discriminatory interconnection across various networks are promoted; (ix) that licensing criteria are transparent and made known to the public; (x) that an open licensing policy allowing any number of new entrants (except in specific cases constrained by limited resources such as the spectrum) is promoted; and (xi) that the principle of a level playing field for all operators serving consumer interest, including existing operators on the date of commencement of the Act, is promoted.
Chapter II: Convergence and Regulation: An Overview

consist of 9 members including the Chairman and ex-officio member namely the Spectrum Manager.

The Chairperson and not less than 5 members of the commission will be permanent members. The members would be appointed by Central Government, by notification from amongst persons from various specialized fields such as broadcasting, telecommunications, information technology, finance, management and law. A person who is in Government has to retire or resign to take up this appointment and shall not have any financial or other interests as is likely to affect prejudicially his functions.

The permanent members will hold office for 5 years. A member (Other than the Chairman) who doesn't attend three consecutive meetings shall be deemed to have vacated his office.

The above provisions provide for representation of different specialists, reasonably insulates them from Government influence so that the Commission can be administered impartially.

It is only in case of Spectrum management that the Government has retained direct control since the Spectrum Management Committee will have a cabinet secretary as its Chairman. The Spectrum Manager who will be a member secretary of the Commission will be appointed by the Government and nothing prevents a "Professional of Impeccable International Standing " being appointed for the purpose.

Considering the importance of regulating the spectrum allocation as a part of international understanding, one cannot disagree with the need for a "Spectrum Management Committee " in addition to the Commission.

This committee will probably have "Technical Experts" while the Commission may have Judicial and Business Management Experts.
A lot of criticism has already been made on this part of the draft bill stating that the “Commission” will be a puppet in the hands of the Government.  

In exercising its licensing and regulatory functions the Commission shall follow such policy directives as may be communicated to it in writing by the Central Government from time to time. Such directives may include the

---

10 Power to make recommendation in certain cases 19. The Commission may at any time make appropriate recommendations to the Central Government with regard to any particular practice or practices that impinges upon or adversely affect the interest of the sovereignty and integrity of India, security of the state, friendly relations with foreign countries or State, public order, decency or morality.

Codes and Standards 20. The Commission shall by regulations from time to time specify programme codes and standards which may include inter alia practices – (i) to ensure that nothing is contained in any programme which is prejudicial to the interests of the sovereignty and integrity of India, the security of State, friendly relations with foreign States, public order or which may constitute contempt of court, defamation or incitement to an offence. (ii) to ensure fairness and impartiality in presentation of news and other programmes. (iii) to ensure emphasis on promotion of Indian culture, values of national integration, religious and communal harmony, and a scientific temper. (iv) to ensure in all programmes decency in portrayal of women, and restraint in portrayal of violence and sexual conduct; (v) to enhance general standards of good taste, decency and morality. (vi) to ensure avoidance of offence to religious views and belief; and (vii) to be followed in connection with the prevention of unjust and unfair treatment in any programme, and unwarranted infringement of privacy in, or in connection with, obtaining of material included in such programme.

Hearing of complaints and resolution of disputes by the Commission 21. (1). The Commission shall - (a) decide any dispute or matter – (i) between two or more service providers on issues relating to spectrum interference, interconnectivity, denial of fair access and practices restrictive of fair competition; and (ii) between a service provider and a group of consumers. (iii) arising out of enforcement of any provision of this Act; (b) hear and determine any complaint from any person regarding contravention of the provisions the Act, rules, regulations or orders made thereunder including contraventions relating to any formulated codes and technical standards, and of other terms and conditions subject to which any license or registration was granted; and if necessary refer the matter for adjudication under Chapter X. (2) For purposes of sub section (1) the Commission shall pass such orders and issue such directions as it deems fit. (3) The Commission shall endeavour to decide disputes and complaints referred to in sub-section (1) as expeditiously as possible.

Directives by the Central Government.

22. (1) In exercising its licensing and regulatory functions the Commission shall follow such policy directives as may be communicated to it in writing by the Central Government from time to time. Such directives may include the route and the mode in which any services are to be licensed, whether by way of auction or in any other form. (2) In framing the policy directives the Central Government shall take into account the objectives and guiding principles governing the administration of the Act. (3) The decision of the Central Government whether a question is one of policy or not shall be final. (4) The Commission may request the Central Government by means of a written communication for a review of any policy directive, and if any such request is made the Central Government will respond in writing to such request with all expeditious dispatch.

11 Ibid.
route and the mode in which any services are to be licensed, whether by way of auction or in any other form.

In framing the policy directives the Central Government shall take into account the objectives and guiding principles governing the administration of the Act.

The decision of the Central Government whether a question is one of policy or not shall be final.

The Commission may request the Central Government by means of a written communication for a review of any policy directives, and if any such request is made the Central Government will respond in writing to such request with all expeditious dispatch.

The above provisions have to be read together with the powers of Judiciary conferred on the Commission protecting the members from arbitrary dismissal and harassment from the Government.

If therefore the Commission consists of "Men of Steel" "Who do not crawl when asked to bend", the Commission can work independently of the Government influence. On the other hand, there may be ugly situations when

12 Sec. 14. (1) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:- (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses or documents; (e) subject to the provisions of section 123 and 124 of the Indian Evidence Act, 1972, requisitioning any public record or document or a copy of such record or document, from any office; (f) dismissing an application for default or deciding it, ex-parte; (g) setting aside any order of dismissal of any application for default or any order passed by it, ex-parte; and (h) reviewing its decisions; (i) granting interim relief; and (j) any other matter which may be prescribed. (2) Every proceeding before the Commission shall be deemed to be judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code and the Commission shall be deemed to be a civil court for the purposes of sections 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. (3) The Commission shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Commission shall have powers to regulate its own procedure, including the fixing of places and times of business.
the Commission\textsuperscript{13} may try to assume for itself arrogatory powers and take up a confrontationist attitude with the Government. The experience of Telephone Regulatory Authority of India (hereinafter referred as TRAI) may be behind the framers who drafted this clause.

It may be noted that the Powers of the Government over the Commission is restricted to “Policy” matters and not operational matters. The first option to determine what is a “Policy Matter” of course lies with the Government but is subject to judicial review if required. Hence this may be treated as an “Enabling Provision” and not an attempt at “Backdoor Control of the Media”.

It must be admitted however that at this point of time we are commenting on the provisions of the draft Bill without imputing any prejudice to the Government in its future actions. We may not rule out the possibility of some members of the Commission towing the political line of the Government and the Commission not being “Citizen Centric”. We feel that this should be criticized at the appropriate time when and if it happens rather than pulling down the proposed legislation on a speculative fear.

Even though in respect of the formation of the “Cyber Regulations Committee”, and in defining the powers for the “Adjudicating officer” under the Information Technology Act, the Government did disappoint the Citizens,

\textsuperscript{13} 16. (1) The Commission shall set up a Panel from amongst Members appointed under subsection (2) of section 7 to deal with matters in relation to the content in content application services, and the Chairperson shall preside over the meetings of the Panel: Provided that wherever necessary the Chairperson may place before the Commission any issue relating to the matters referred to in this section. (2) Except for the power to make regulations, the Commission may, by general or special order, make provisions for the distribution of its business amongst Members as may be considered appropriate and necessary. (3) For the discharge of its functions under this act, the Commission may, if it considers necessary, set up bureaus or divisional organizations on the basis of its principal workload operations and subject to the provisions of section 53, such bureaus or divisional organizations shall be provided with such officers and other employees as are necessary to perform their functions. (4) The Commission may, by order in writing, authorize any District Magistrate or Sub-Divisional Magistrate in any area or any other officer of the Central Government or State Government or Union territory Administration to implement and ensure compliance of its directions and orders; and when so directed or authorized, such Magistrate or officer shall be bound to implement and carry out such directions and orders.
and a similar approach to the CCB cannot be ruled out, it would still be a speculation and hence we need to moderate our criticism if any.

One reason for us to be more optimistic this time is the fact that one of the problems that had been pointed out with reference to the Information Technology Act namely the need to have a “Multi Member Appellate Tribunal” has been implemented in this Bill showing some responsiveness to public opinion. Let’s hope that such wisdom will continue in the appointment of persons to the Commission.

In the mean time, experts in the industry can start identifying persons whom they would like to see in the Commission. Even after the formation of the Commission, the society can form a “Shadow Commission” with a private initiative to act as a pressure group on policy matters regulations”.

It is such voluntary Citizen watchdogs that are necessary to prevent misuse of the provisions of the Bill. Such bodies can also take the responsibility for representing Consumer interest if required.

Otherwise the provisions of the draft bill regarding the Composition of the Communication Commission appear to be reasonable and do not require major modifications.

The CCB will operate a regulatory mechanism that will revolve around the following functions:

2. **Convergence bill 2001: The regulatory framework**

In the proposed CCB the CCI may regulate the following.

Provide and monitor of Licenses to four categories namely: Network Infrastructure Facilities; Network Services; Application Services and Content Application Services.

CCI may also regulate the following:
Determine appropriate tariffs and rates for services; manage “Frequency Spectrum Usage”; lay down advertising codes for content; protect consumer interest; lay down commercial and technical standards for the service; adjudicate and enforce penalties on violation of provisions through an adjudicating officer; hear appeals against such awards at the communications appellate tribunal; monitor the system for anti national activities and intercept communication when required; take over communication facilities in times of emergency such as war or national calamity.

In order to administer the regulations the proposed “Communication Commission of India” will have a head office in New Delhi and regional offices in Mumbai, Calcutta, and Chennai.

The Four categories of licenses that will be regulated are defined as under:

1) **Network infrastructure facilities include all of the following network facilities:** Earth stations; fixed links and cables; public pay phone facilities; radio communication transmitters and links; satellite hubs or; towers, poles, ducts and pits used in conjunction with other network facilities.

2) **Network Services may include all of the following network services:** Bandwidth Services; broadcasting distribution services; cellular mobile Services; customer access services or mobile satellite services

3) **Application Services include all of the following Application Services:** PSTN Telephony: Public Cellular Telephony Services; IP Telephony; public pay phone service; public switched data service.

4) **Content Applications Services may include all the following Content Application Services:** Satellite broadcasting; subscription broadcasting; terrestrial free to air TV broadcasting; terrestrial radio broadcasting.
3. The communication Convergence bill and freedom of speech and expression

A close examination of the proposed CCB provides that the bill is "Indirect Censorship" of the private sector broadcast media and infringes on the "Freedom of Speech and Expression" guaranteed in the constitution. 14

There are some points, which are agitating the mind and require further action.

It is to be accepted that all "Legislations" by definition represent some curbs on the freedom of some members of the society. The purpose of law is to ensure that there is an equitable distribution of scarce resources in the society. If legislation does not "Regulate", there will not be "Freedom for All" but only "Freedom for the Privileged". It is one of the fundamental duties of any Government that society needs to be regulated if it has to remain "Civilized".

The Indian private sector TV media has shown in the past that they are politically as partisan as a Government media could be in respect of a ruling party. Channels such as Fashion TV and Star World are obscene, as an Indian average citizen would view.

Before the advent of private sector TV broadcasters in India, Indian common man relied more on British Broadcasting Corporation (hereinafter referred as BBC) Radio for authentic information about controversial happenings in India. However, in recent days, BBC TV’s coverage of Kashmir, particularly its coverage on a non-existent military excess using clipping from Chechnya has proved that BBC is also a partisan media.

In fact the Indian TV viewer is today aware that the truth always lies in between two rival media reports. Public know that due to Political or

14 Article 19(1) (a) of the Indian Constitution.
Chapter II: Convergence and Regulation: An Overview

Commercial considerations, there is rarely a media that can not be manipulated and is not manipulated. There are many non-partisan reporters and journalists but they are often used by the media owners to project one particular viewpoint only. After all, we all know what happened during the emergency in 1975 in India when barring a few publications such as “Indian Express” the others “Crawled when they were asked to bend”.

In such a scenario, the visually powerful media such as the TV Broadcasting cannot escape being brought under some kind of regulation. Hence the question of not having regulations has no place for discussion.

What is relevant however is that the regulation has to be “Fair”, “Reasonable” and “Safe guarded against possible misuse”. One way by which the “Safety Catch” can be built into legislation is to make the administrators accountable to public. But such an effort will work only if “Judiciary” is itself “Fair” and “Efficient”. For the time being, we can accept that the judiciary in India is by far “Fair”. However no body can vouch for its efficiency.

In view of what is stated above, in any legislation what we need to look forward are those aspects of a proposed legislation that try to make it “Fair”, “Reasonable” and "Amendable for Accessing.

We also need to see if the legislation is “Citizen Centric” or “Regulator Centric” or “Business Centric”. Any legislation exists for the “People” and therefore every legislation has to be “Citizen Centric”.

4. Convergence Bill and the spectrum management

One of the important provisions of the CCB refers to the policies regarding Frequency Spectrum Management\textsuperscript{15}, which refers to the

\textsuperscript{15} Chapter VI : Frequency Spectrum Management Spectrum Management Committee 23. (1) The Central Government shall be responsible for coordination with international agencies in respect of matters relating to Spectrum Management and also for allocation of available spectrum for strategic and non-strategic or commercial purposes. (2) For the purposes of discharging the responsibility under sub-section (1), the Central Government shall establish, by notification, a Spectrum Management Committee with the Cabinet Secretary as its Chairman and consisting of
management of the "Radio Frequency Band" and is the combination of administrative and technical procedures necessary to ensure the efficient operation of radio communication services. Radio Frequency Spectrum and satellite orbits including geo-stationary satellite orbits are scarce natural resource, susceptible to harmful interference and is international in character since radio waves cannot be confined to national boundaries. Like any other natural resource it cannot be owned but shared amongst various countries, services, users, technologies, etc. Assignment of frequencies is governed by international treaty formulated under the aegis of International Telecommunication Union (hereinafter referred as ITU). In accordance with international treaty all frequency bands are shared by all countries for different types of radio communication services and there are no exclusive frequency allocations for a particular service, country, user or organisation.

such other members as may be notified by it from time to time. (3) The Central Government shall notify Wireless Advisor to the Government of India as Spectrum Manager, Government of India, to act as Member-Secretary of the Spectrum Management Committee. (4) Subject to general supervision and control of the Spectrum Management Committee, the Spectrum Manager shall, inter-alia, perform the following functions, namely: - (i) to co-ordinate with international agencies, matters relating to overall spectrum planning, use and its management; (ii) to carry out spectrum planning, and assign frequencies to the Central Government and to State Governments to meet their vital needs, including those of defence, national security and of the public service broadcaster. (iii) to allocate frequencies or band of frequencies including frequencies which are to be assigned by the Commission; and reassignment of frequencies from time to time. (iv) to review constantly and make available as much spectrum as possible for assignment by the Commission, in particular by optimising usages, and. (v) monitoring as appropriate, in consultation with the Commission, the efficiency of the utilisation of the spectrum by all users including investigation and resolution of spectrum interference; and (vi) after meeting the requirements of the Central Government and of State Governments for fulfilling their vital needs including those of defence, national security and public service broadcaster, the Spectrum Manager shall make the spectrum available, to the maximum extent possible, for assignment by the Commission, both in the shared as well as in the exclusive bands. (5) Subject to the general supervision and control of the Spectrum Management Committee, the Spectrum Manager shall assign frequencies on payment of such fee as may be prescribed. Assignment of spectrum 24. (1) The Commission shall be responsible for assignment of the non strategic and commercial spectrum to various users: Provided that the Commission shall assign such frequencies in case these are not exclusively allocated to it, only with the prior approval of the Spectrum Management Committee. (2) Whenever the Commission seeks allocation of additional spectrum for assignment, including in the shared bands, a process for mutual consultation between the Commission and the Spectrum Manager shall be initiated in such manner and within time frame as may be prescribed. Commission to notify schemes for assignment of spectrum 25. (1) Before assigning any part of spectrum, the Commission shall prepare and notify from time to time one or more schemes or plans for such assignment, after such public hearing as it may consider appropriate. (2) The Central Government may, by notification, determine the class or classes of persons or services for preferential assignment of any frequency or spectrum by the Commission.
Accordingly, the frequencies are shared by various organisations like Defense, Police, Intelligence and other Security agencies, Public Telecommunications, Broadcasting, Railways, Public Utility Organizations, Oil and Electricity Grids, Atomic Energy, Mining and Steel, Shipping and Airlines, and so on, for variety of applications including aeronautical and maritime safety communications, radars, seismic surveys, rocket and satellite launching, earth exploration, natural calamities forecasting etc. A frequency, which is being used in one place by private operator, may be used by a Government agency for some other purpose in another place leading to the frequency reuse on spatial basis.

With the proliferation of new technologies being inducted in to the country, the demand on spectrum by users has increased manifold. Modern telecommunication technologies rely heavily on radio communications. Newer and newer radio communication services, technologies and applications are emerging on the horizon with tremendous speed, further exponentially increasing the demands on the already congested radio frequency spectrum.

Thus, spectrum is the most fundamental, but at the same time, a highly scarce resource, which is essential for development of all radio, based telecommunication services. Therefore, efficient spectrum management needs to be the art and science of carefully planning spectrum allocation in a coordinated manner without compromising national interests and then speedily and efficiently assigning frequencies for the benefit of users at large and with minimum scope of harmful interference.

All the North Atlantic Treaty Organisation (hereinafter referred as NATO) countries and several NATO allies have adopted the ‘NATO Band’ for their defense requirements of the spectrum. The non-‘NATO Band’ therefore accommodates most of the commercial / public service telecom in those countries. Several countries, including India, have not adopted the ‘NATO Band’ for their defense spectrum requirements. In view of this, the cost-effective commercial equipment bought by India from these countries fall in
the non-'NATO Band', a good part of which overlaps the Indian Defense Spectrum bands. It is this important factor, which has resulted in major contentions of the commercial public telecom services with the already occupied defense spectrum bands.

Added to this, is the fact that Indian defense also buys a sizeable part of this telecom/radar and avionics equipment requirements from both NATO countries and non-NATO countries. These factors have resulted in major spectral constraints, in the bands allotted to defense.

Also, there are applications where, in effect, 'fences' can be built around electro-magnetic 'spaces'. By so controlling the performance characteristics and placement/operation of radio equipment, the concept of the spectrum, as an economic resource, can be conceived similar to real estate. It is occupied, but not consumed or depleted by its users. Scarcity results from the occupation of a channel/band/window by one operator by preventing others from using the same channel/band/window at the same time. As in real estates, the usable quantity of the resources can be expanded with additional capital investment like sky-scrappers creating more space on a given part of the land - through such methods as channel splitting, innovative modulation techniques, spread spectrum, etc. Viewed in terms of this limited analogy, equipment standards are analogous to architecture and separation rules with power limits are analogous to 'fences' separating the parts of the land.

The CCB envisages that the Spectrum Management Responsibilities would be entrusted to a "Spectrum Management Committee" with the cabinet secretary as its Chairman and consisting of such other members as may be notified from time to time. The Central Government will also notify one of its officers as the "Spectrum Manager, Government of India" to act as Member Secretary to the Spectrum Management Committee: to co-ordinate with international agencies; carry out spectrum planning and allocate frequencies; monitor, review and re-allocate frequencies.
Additionally, the Spectrum Management Committee may have to decide on "Pricing" of the Spectrum including allocation of "Free Spectrum" for some public utilities, the manner of allocation including: Auctioning" etc. The Committee will also have to consider the security aspects and policies to ensure protection of national interests. It may also be necessary for the Committee to lay down policies on Standards, Specifications, and equipment authorisation.

5. **Deficiencies inherent in the Bill**

The maximum penalties provided under the Act in various sections range from Rs 5 Crore to Rs 50 crore. Even though they represent only the upper limit of the penalties, they serve as an indication of the likely level of punishment for any violation. If the amount is too small, it may encourage the violators to take chance. If the penalties are stiff they could serve the purpose of being a deterrent against violation. However they place too large a discretion in the hands of the Adjudicating Officer and can be misused. The indicated levels of penalties could be a source of corruption in the dispensation of justice. It must be remembered that in respect of the Convergence law, the offender can be a multi national with Billions of dollars of assets or a neighborhood cable operator or an individual. The damages caused and the required penalty for a similar offence may be therefore varies from a few millions of dollars to a few hundred rupees. However the adjudicating officer\(^{17}\) could use his discretion to impose any penalty higher than what is reasonable.

---

\(^{17}\) 42. (1) Any penalty imposed under this Chapter shall not exceed fifty crore rupees. (2) The Adjudicating Officer shall, While adjudging the quantum of civil liability, under this Chapter, the Adjudicating Officer, have due regard to the provisions of this Act, and also to the following factors, namely:- (a) the amount of revenue loss to the Government; (b) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; (c) the amount of loss caused to any person as a result of the default; (d) the repetitive nature of the default; and (e) that the amount adjudged shall be such as may act as a deterrent even though no financial loss has been caused by such contravention.
Chapter II: Convergence and Regulation: An Overview

It is therefore suggested that all reference to any rupee value of the penalties in Chapter X are removed and replaced with "Such penalties as may be considered reasonable with reference to the circumstances of the case".

A similar argument can be extended to the suggested fines and maximum term of imprisonment suggested under Chapter XV. Even though the indication of the maximum levels of punishments is in the interest of the public, at the levels of punishments used they can only act detrimental to the interest of the public.

A new trend in legislation may therefore be started by introducing one limiting clause for the entire Chapter XV stating that- "Any fine imposed under the Act would not exceed Rs 1 Crore and any imprisonment ordered would not exceed 5 Years."

A license\(^\text{18}\) would be required for any "Wireless equipment". In order to avoid confusion, the consumer equipments such as Mobile phones, Cordless telephones, Radio sets, and Television sets, and infrared remote operating devices etc should be specifically exempted.

Under Sec. 18 (2) (iii), CCB the powers of the commission can fix the tariff for various services. In as much as these services are of commercial nature, there should be no interference in the activities of the private operator. The Commission can however use its discretion to provide more licenses if any operator is overcharging the consumers or retain the powers to interfere only when the operator is charging a "usurious" rate for the services.

---

\(^{18}\) Section 5, CCB. 5. (1) No person shall possess any wireless equipment without obtaining a license in accordance with the provisions of this Act: The draft Notification has to be issued simultaneously with the Act otherwise the Commission will be inundated with a large number of applications for licences for services and facility which are currently in wide spread use. Provided that the Central Government may by notification exempt in public interest any person or of persons or any wireless equipment or categories of wireless equipment from the provisions of this section. (2) Nothing contained in sub-section (1) shall apply to any person or equipment, already licensed under section 4.
Chapter II: Convergence and Regulation: An Overview

If the pricing of the services is to be determined by the Commission, financial closures for projects cannot be achieved without the clearance of the price structure. It will also be difficult for the operators to introduce new services in tune with the market demand without the delays that would accompany the prior clearance of the product pricing.

The Clause 18 (2) (iii) may therefore be deleted.

The Commission\textsuperscript{19} can regulate the content of programmes for various purposes such as “in the interest of the sovereignty and integrity of the nation”. This section can be abused and used for “Censorship” of the media. This is the most contentious clause in the opinion of the media owners.

In order to provide a mechanism for checking abuse of this provision, an additional “Citizen’s Programme Code Committee” should be formed which can hear appeals from the aggrieved persons and provide its views.

\textsuperscript{19} 18. (1) It shall be the duty of the Commission to facilitate and regulate all matters relating to carriage and content of communications. (2) Without prejudice to the generality of the provisions contained in subsection (1), the Commission shall- (i) Carry out management, planning and monitoring of the spectrum for non-strategic/commercial usages subject to the provision of section 24A; (ii) grant licenses for purposes of the Act, and determine and enforce license conditions and determine fees (including fees for usage of spectrum) wherever required; (iii) determine appropriate tariffs and rates for licensed services, wherever considered necessary and keeping in view the objectives and guiding principles in the Act; (iv) ensure that the grant of licenses will not result in eliminating competition or in one or more service providers becoming dominant to the detriment of other service providers or consumers; (v) promote competition and efficiency in the operation of communication services and network infrastructure facilities; (vi) formulate and determine conditions for fair, equitable and nondiscriminatory access to a network infrastructure facility or network service such other related matters in respect thereof; (vii) take measures to protect consumer interests and promote and enforce universal service obligations; (viii) formulate and lay down programme and advertising codes in respect of content application services; (ix) formulate and lay down commercial codes in respect of communication services and network infrastructure facilities (including equipment); (x) carry out any study and publish findings on matters of importance to the consumers, service providers and the communications industry; (xi) institutionalise appropriate mechanisms and interact on a continual basis with all sectors of industry and consumers, so as to facilitate and promote the basic objectives of the Act; to encourage self regulatory codes and standards; (xii) report and make recommendations on such matters as may be referred to it by the Central Government; (xiii) report and make recommendations either suo moto or on such matters as may be referred to by the Central Government in the matter prescribed (xv) perform all or any functions in furtherance of the objects of this Act, or such as may be prescribed. (3) The commission shall ensure transferancy whilst exercising its powers and discharging its functions.
If the decision of the committee is not acceptable, the aggrieved parties can resort to the legal remedy available through the Appellate tribunal. This will provide for a Citizen’s group to sit in judgment of subjective issues such as “Indian Culture”, “Allowable degree of Violence”, “Decency in portrayal of Women” etc for which legal remedies are not always the right answer.

An applicant before the Tribunal can appear himself or authorize one or more Chartered Accountant, Company Secretary, Cost Accountant or a Legal Practitioner and proceeds to present his or its case before the tribunal. This restriction of representation to certain categories of professionals only is unnecessary and discriminatory. It is suggested that the appellant can authorize one or more persons of his choice to represent him without the need for such a person to be a Chartered Accountant etc. In such a case a Telecom Consultant can also represent the appellant.

Even though the objectives of the Bill provide that the Commission is duty bound to take care of consumer interest also, there is no evidence of how this can be achieved. It must also be accepted that “Consumer Interest”, “Business Interest” and “National Interest” will be conflicting in many areas and the Commission will be subjected to pressures from different sides. The national interest will be taken care by the Government and the Business interests will be taken care by the “Public Relation Managers”. The Consumer will have to however organize himself through voluntary organizations. The Bill can at least take note of the need for such organizations and if possible provide some support.

49. An applicant or appellant may either appear in person or authorise one or more chartered accountants, or company secretaries, cost accountants or legal practitioners, or any of his or its accredited officers to present his or its case before the Appellate Tribunal. Explanation: For the purpose of this section— (a)”Chartered accountant” means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act; (b)”company secretary” means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act; (c)”cost accountant” means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 and who has
Provisions of Section 66 and Section 70 overlap with corresponding provisions in Information technology Act 2000 and provide for different penalties/punishments. This will create unnecessary confusion.

Whoever attempts to commit or abets commission of an offence will be deemed to have committed the offence. This is a dangerous provision and can be misapplied by the Police to harass innocent individuals. This totally removes the concept of "Need for a Guilty Mind" for any offence and will bring all erroneous and unintentional violations under punishable offences. One simple example could be a "Wrong tuning of a Radio equipment to a frequency other than the intended frequency".

This Sec. 71 of CCB should therefore be deleted. Alternatively, it may be replaced if necessary by a provision which may state “Whoever willfully attempts to commit or abets the Commission of any offence, under the Act shall be punishable with such punishment as may be deemed reasonable under the circumstances of the case and any such punishment shall not exceed
half of the maximum punishment that could have been levied if the offence had been committed willfully”.

RECAPITULATION

With respect to convergence of telecommunications, broadcasting and information technologies, the main questions in the chapter are to what extent different communication infrastructures can be regulated in the same manner and to what extent infrastructure and content can be regulated by one common set of regulations. The general trend around the world is to move towards common infrastructure regulation encompassing formerly more separate infrastructures, e.g. fixed telecom, mobile communications, cable and possibly terrestrial broadcasting. However, there are also some inchoate tendencies towards institutions with responsibility for joint infrastructure and content regulation. Indeed, the answers will be different in different countries. There is no one formula that can be used in all countries. Yet, countries will have to approach the issues of convergence in a forward looking manner not only for determining new rules for interconnection, universal access and access to scarce resources, but also for building a regulatory framework for increasing the growth potentials in a networked economy.

ICT and media convergence issues are primarily about improving the efficiency of market economies, and how changes in regulation can facilitate this process. It is likely to be of primary interest for countries that already have an established effective independent telecom regulator. Multi-sector regulation issues are primarily about establishing the efficiency and effectiveness of regulation so it can be a catalyst for network and economic development. It is likely to be of primary interest to countries that have not yet established effective telecom regulation. Each regulatory option arises from an initial diagnose of different problems, and represents different priorities and pathways to achieving a very similar set of development objectives.
Our submission is that, there is a need to adopt a flexible method of regulation in India while a new comprehensive law is being drafted so that regulation of communications should sustain changes in a converging environment.
Chapter-III: Copyright of Multimedia Products in Convergent Environment

INTRODUCTION

[A] Music Piracy

[B] Features of digital content

[C] Copyright protection of digital material

1. Audio-visual
2. Auditory and musical content
3. Material communicated to the public
4. Author's rights in copyright
   a) Material form
   b) Computer generated or assisted creations
   c) Transient copies
   d) Licenses
   e) Authorisation

[D] Protection of Multimedia Works: online

1. P2P Networking
   a) Napster
   b) Post Napster P2P Networks
   c) Extent of Damage by P2P Networks
2. Reaction of the Copyright Industries
3. Indian Legal Landscape vis-à-vis Networks like Napster, Gnutella and Kazaa
4. Management of Copyright in Digital Environment
   a) Right Management Information
b) Technological Protection Measures

[E] Protection of Neighboring rights
   1. Neighbouring Rights in the Copyright Triangle
   2. Neighbouring Rights of Convergence Transmitter
   3. Indian Position

[F] Legal Provisions for Technological Measures
   1. WIPO Copyright Treaty, 1996
   2. Digital Millennium Copyright Act, 1998
   3. The EU proposed Directive on Copyrights.
   4. Indian Position

RECAPITULATION
Chapter- III: Copyright of Multimedia Products in Convergent Environment

INTRODUCTION

The early 21st Century has been described as the Information Age. It is a period in which the most valuable resources are access to and control over information. As a result copyright and other intellectual property laws are of increasing significance. The success of a commercial enterprise depends, amongst other things, upon its ability to effectively exploit its information resources. Furthermore, social and political intercourse relies heavily on the quality and volume of these intangible assets that are available. Developments in broadband communications, digitalisation, convergence and globalisation raise serious implications for all regulatory regimes - especially that of the law of copyright of multimedia products. Following an analysis of each of the four factors, we will examine the nature of digital material and the rights over such material conferred by the copyright regime in this chapter. Finally possible technological, commercial and legislative solutions to the challenges of the digital domain will also be discussed.

Digitalisation refers to the ability of a person or system to convert a piece of information; a representation of reality is recording of some matter into digital form. In a digital world, all creation be it a novel, a poem, a shopping list, a painting, a photograph, a movie or a recording - are reducible to strings of noughts and ones. It is possible to digitalise anything not ostensibly physical. All material, content and information that can be represented in some virtual manner is capable of being

---

23 Ian McDonald, Digital publishing and copying: issues for authors and publishers. at P. 87
24 John Perry Barlow, The Economy of Ideas; Lewis Lee & J Scott Davidson, Intellectual Property for the Internet at P. 77
recorded in digital code. In a discussion of virtual reality, Mille noted: "The digitalisation of representations of any nature has made all kinds of shapes, colours, lights, odours, temperatures and almost any expression of reality susceptible of being recorded, stored, processed, reproduced, and transmitted by computer means. Digitalisation is the essence of the concept of dematerialisation, "a term which describes the result of the passage of goods and services from a physical medium to a logical medium (e.g.: paper money is the physical medium of money, the information that the PS [payment system] of a store exchanges with the computer of a bank is a logical medium)." The digitalisation of all tangible subject matter has produced a kind of "technological Latin. This is due to common formats emerging for the storage, manipulation and transfer of digital material. Boundaries of language, geography and proprietary technologies are being stripped away in the digital domain. There are serious issues for the application of copyright in this context. The digitisation of intellectual property enables it to be used in many different media, to be copied at the same quality as an original, to be manipulated and distorted, and to be distributed throughout the world cheaply, easily and speedily.

When the Copyright Act 1957 was first drafted, there were clear distinctions between the various technologies addressed. Television, radio, published literature, artistic works, phonograms and other items were relatively autonomous. However, as Yastreboff explains, "Information services which were once delivered by 'distinct and separate technologies (such as paper, cassette tape, video and CD may now be

25 Robyn Coyle. Copyright & Cyberspace - Divergent Notions.
26 Virtual reality has been described by some as an interactive world or a "consensual hallucination" - Nick Weston. Copyright and Virtual Reality Technology: A Bandaid on the Bleeding Edge. P. 72
27 Antonio Mille. Copyright in the Cyberspace Era. P.570
28 Ibid
29 Dr Andrew Christie. Towards a new Copyright for the New Information Age. P. 146; see also Copyright Convergence Group, Highways to Change - Copyright in the new communications environment P.4.
30 In the context of text files, the Rich Text Format (RTF) has become a de facto standard for some purposes.
31 However, computer software posed some problems when it first received protection under the copyright law.
delivered by the same or interchangeable technology'. That is, 'digital technology provides a common universal language for all services', including text, voice, image and graphics.\(^{32}\) This phenomenon is known as convergence.

Network convergence refers to the merging of infrastructure and communications systems. As a result, previously distinct services such as radio and television broadcasting, telecommunications, publishing and cable services have begun to merge. Organisations, in adapting to these new realities, have also displayed an element of convergence in that one entity may now be involved in both content creation and distribution, or in the creation of different types of content\(^{33}\). Personal computers are able to carry out tasks that were previously the domain of separate autonomous appliances and systems. Such a development was discussed in Audio-Visual Copyright Society Ltd v New South Wales Department of School Education:\(^{34}\) "with the prospect of moving from analogue to digital recording, there would be a convergence of television, VCR, computer and digital recording technologies into a single living room Internet communication, information and entertainment unit. It would be connected to the web by optical fiber and/or satellite and receiving and recording information, video, film and music on-line from a provider to be accessed instantly or at some later time. If this level of service were achievable, the need to copy might decrease significantly."\(^{35}\)

This universal communication device is known as a Central Information Appliance.\(^{36}\)

---

\(^{32}\) Natalia Yastreboff. Copyright for online databases on the Internet - Part I. P. 36 [quoted from the Highways to Change - Copyright in the new communications environment report]

\(^{33}\) Highways to Change - Copyright in the new communications environment at 3, citing the 1992 OECD report, Telecommunications and Broadcasting: Convergence or Collision.

\(^{34}\) (1997) 37 IPR 495.

\(^{35}\) (1997) 37 IPR 495 per Sheppard P at 512. Such a device will dominate our communication, information and entertainment activities in the near future. The capacity of modern personal computers to fulfill entertainment, communication and information functions is a precursor of the future impact of a Central Information Appliance.

Flowing from the above, there have been calls for legal and regulatory convergence. In the light of the overlapping technological functions being provided by various digital systems, commentators argue that a common regulatory structure is necessary. The Digital Agenda Act and the Electronic Transactions Act, 1999 are two examples of this development in Australia and proposed CCI in India.

One striking example of convergence has been the emergence of multimedia. Multimedia encompasses "the convergence of video, audio and telephony technologies. It is a single work combining a rich variety of underlying works such as text, sound and visual images, both still and moving".

The significance of convergence should not be understated. The World Intellectual Property Organization (WIPO) Copyright Treaty of 1996 (the WCT) recognized the profound impact of the development and convergence of information and communication technologies on the creation and use of literary, musical and artistic works.

**Broadband communications**

In recent years communications technologies have developed rapidly. Not long ago data transmission speeds of 2400bps were common. Present compression technologies and infrastructure improvements facilitate 56Kbps transmissions over conventional telephone lines.

---

37 Wright & Green leaf, "Law, Convergence and Communicative Values on the net".
38 The Digital Agenda Act received royal assent on 4 September 2000 and Commenced on 4 March 2001.
41 Although strictly speaking the term is a misnomer, it captures the concept of a cross content presentation. The media involved (the form of presentation or storage) is actually singular (typically a CD-Rom), it is the contents of the storage media that have multiple characteristics.
42 Jenny Zaverdinos. Legal Aspects of Multi-media - Enforcing Copyright" P. 151.
43 bits per second (bps) is a measurement of the speed of a flow of data across a communications link.
Chapter III: Copyright of Multimedia Products in Convergent Environment

The next generation communications technology, such as fiber optics and satellite transmission, is known as broadband communications. Complementing the increased speeds of communications links have been improvements in the quality and reliability of these systems. Sophisticated software controls have enabled the creation of error correction and monitoring systems that significantly enhance the quality of the end product. Some telephone conversations are now carried using Internet protocols, due to their cost-effectiveness.

Broadband systems allow massive amounts of data to be transmitted almost instantaneously. This facilitates usage of communications links not previously considered commercial. For example, a few years ago it was not unusual for an hour to be required to download a song over the Internet. Now businesses are developing around the concept of online distribution of music. Transmission of feature films, in the near future, will enable video on-demand. When combined with convergence and digitalisation, the emergence of broadband communications technology poses a number of challenges for copyright management. It means that vast amounts of data, representing nearly all information, content or material, can be transmitted from one person to another quickly, easily, cheaply and reliably.

[A] Music Piracy

Music Web Sites are a splendid example of the digital era’s dramatic impact on copyright. Music Web Sites basically operate in two modes: by means of the exploitation of a musical database or by means of a file sharing system between Internet users.

---

44 This is based on a land transport analogy. Current communications are likened to a narrow street and are compared to the future systems being a broad highway (also known as the superhighway). The label broadband is also based on a pipeline analogy. Previous generations of communications links have been likened to a narrow pipe through which only small amounts of data can be transported at any one time.

45 See Ozemail www.ozemail.com.au

46 Copyright Reform and the Digital Agenda (Proposed Transmission Right, Right of Making Available and Enforcement Measures) at 3.48

47 Video on demand is considered to be a service that will encourage mass-market acceptance and use of Internet-type technologies (known colloquially as a “killer application”).
Chapter III: Copyright of Multimedia Products in Convergent Environment

The first system implies the organisation of an initial database which is put on the Music Service Provider’s (hereinafter referred as MSP) server. These sites enable users to listen in audio streaming musical works or to download them in Mp3 format.

The second is based on specific software able to connect users, which are in possession of songs in digital format with users wishing to get a copy of these files: it is the case of Napster and Gnutella.

A MSP willing to make business in compliance with copyright law shall acquire or obtain a licence from the proper right owners as to all the rights that shall be used for the operation of the site. When giving the site’s users access to the musical database the MSP first makes use of the right of communication to the public of the works. Then, when the user has opted for a specific file to download, here comes the reproduction right: every download implies a reproduction of the digitised version of the work.

In order to avoid unauthorised duplication of the work downloaded, the MSP might use some technological devices (such as watermarks) to prevent further copying activity. In any case the MSP will insert specific language in the terms and conditions of the license whereby any user’s reproduction of downloaded works shall be forbidden.

If the user just wishes to listen to a song instead of acquiring a copy of it, he might be able to do so by means of audio streaming. Obviously, the user’s machine

---

48 The technology Mp3 (Mpeg layer 3) permits rapid and efficient conversion of compact disc recordings into files easily accessed and transmitted over the Internet. It is able to sensitively reduce the dimension of a musical file, which as such would be to heavy to circulate in the Web, by means of compression of information originally stored in the file. The quality of sounds is not diminished and is comparable in all material respects to the one of the original work recorded on a CD.

49 The file sharing systems, which have proved to be very successful among the Internet users, are deemed to ease infringement of copyright works. In fact, every time users share an Mp3 files they substantially reproduce it; an activity, which is often not authorised by right owners.

50 Similarly to the radio operational, the streaming technique allows to listen to a work without making any permanent copy of it. Unlike the radio, the user may chose the work to be played and the time of such transmission.
will need to process the information stored in the file in order to transform it into audible sound. That will imply an ephemeral reproduction in the RAM memory of the user's P.C. In that case a temporary reproduction of the work, for technical purposes has taken place.

The sound recording industry faces three types of piracy. First, there is a simple way by which songs from different legitimate cassettes/CDs (and thus different right holders) are copied and put in a single cassette/CD. These are then packaged to look different from the original products and sold in the market. Second, there is counterfeiting, when songs are copied in to and packaged to look as close to the original as possible using the same label, logos etc. These products are misleading in the sense that ordinary end users think that they are buying original products. The third form of music piracy is bootlegging, where unauthorised recordings of performance by artists are made and subsequently reproduced and sold in the market. All these happen without the knowledge of the performers, composer or the recording company.

Earlier the music piracy was confined to cassette tapes only. With the advent of CDs in the eighties it was thought that piracy of sound recordings would become things of the past. But in reality CD piracy is the greatest threat to today's music world. Infact, with CDs piracy has got an international vigour. Fortunately or unfortunately, CD industry is still in it nascent stage in India. At present CD market is just 2 to 3 percent of the overall music market in the country. CDs have not taken off mainly because of high prices. In India CDs are sold on an average price ranging between Rs.150 to Rs.550. Considering price of cassettes, the price differential (between cassettes and CDs) is quite high and prohibitive for ordinary music lovers.

Cassette piracy in India is as old as the cassette industry itself. Govt. policy put music industry in the small-scale category and volume of a record company's cassette production was restricted to 300,000 units per annum. This led to a wide gap in the demand supply front, which was ultimately bridged by the pirates. India is
the world's sixth largest pirate market in value terms but third in volume terms. The sale of pirated cassettes/CDs (both in number & value) is also on the rise in the country. However in contrast to many developed countries piracy of CDs is low in India. At present CD piracy is below 10% level.\(^{51}\)

The popularity of Indian music has gone beyond the national boundaries. There is large demand for Indian music in the neighboring countries such as Pakistan, West Asia as well as far off countries like USA, Canada and the UK. Indian music is also pirated in some of these foreign countries, the notable among these being Pakistan and the West Asia. Similarly, foreign audio products are also subject to piracy in Indian soil.

[B] Features of digital content

Content, stated for text, data, sounds, images or other records of the results of a person's observation or perception. Digital content is that content which can be stored in digital form. Hardware and software may be required for the recording, storage, use and later perception or observation of the phenomena. Due to the character and nature of digital content, copyright and other legal regimes struggle to regulate its use and exploitation. Digital material is inexpensive to work with and is easily manipulated, stored, copied and transported. Further it leaves minimal records and fundamentally challenges our economic notions of value and price. Many traditional disincentives to copying do not apply to the digital medium and as a result creators fear a loss of control over their work.\(^{52}\)

The equipment needed to use, create, transform and communicate material stored in digital form is relatively inexpensive. CD players, personal computers and scanners are present in many people's homes and most businesses. Further, it is a

\(^{51}\) UNESCO conference on higher education in India country paper.htm

\(^{52}\) As discussed above, the copy of digital content is of identical quality. The copy can be made with significant expense or effort and is particularly difficult to identify and police. Finally, practical advantages of using the original item, such as the convenience
straightforward task to take existing digital material and create a derivative, either by combining two pre-existing items or by adding one's own creation to existing material. Any commercially available word processing program has the capacity to create digital content. Further, such programs allow a user to easily adapt or manipulate existing digital material. Combined with a scanner or manual data entry, an individual is able to convert any text-based material into digital content. Such content is then easily stored and used. The same is true for audio, audio-visual and visual material although slightly more complex equipment and software is needed. Storage is much simpler in the context of digital material. Whereas a collection of books may require a room full of shelves, the same material in digital form can be stored on a CD taking a fraction of the space.

Information or data can be readily retrieved. The extensive indexing and searching technologies available enhance this capability. Digital material can be transported almost instantaneously, effortlessly and inexpensively.

For example, international communications links allow high-speed transportation of audio-visual files with high accuracy and minimal errors. The cost of such is at least comparable to voice communications and, using the Internet, may be far cheaper.

Unlike physical uses of content, no records need be kept of the use of digital material. Perfect quality copies may be made that are indistinguishable from the original. There are usually no restrictions on the number of copies that can be made. These copies can be made in a very short period of time and for almost no cost. These factors pose considerable problems for civil or criminal authorities. Traditional economic concepts of value are difficult to apply in the digital domain. Scarcity, in terms of physical units or copies, is not an issue. The effort involved in the production or creation of extra copies and reproductions of content may be minimal or almost non-existent.
Chapter III: Copyright of Multimedia Products in Convergent Environment

Conventional economic analysis suggests that the equilibrium price of a good or service provided within a competitive market will approach its marginal cost. Marginal cost per unit of production of a copy or reproduction of digital content is negligible and from a competitive cost point of view the equilibrium price is almost nothing. Hence, the competitive market may be unable to price digital content, or may conclude that such content should be free. There may be challenges in identifying which party deserves economic compensation.

For example, how would the market respond to a person who uses digital recording devices to convert an analogue sound recording into a digital one?

[C] Copyright Protection of Digital Work

Protection of digital material under the Copyright depends upon whether the material can be included within one of the specific categories of works and no works. Most digital content does not fit easily into only one category. This is no; a new issue for the copyright regime; however, with the impact of convergence digital material is particularly difficult to characterise. More significantly, some material may not fit into any of them.

Instead of strictly following the discrete categories provided for in the Act, the following discussion groups together the main kinds of digital content according to the stimuli observed. Following that, the copyright protection afforded to the various kinds of content is considered. Finally, some issues common to the different types of content are discussed.

1. Audio-visual

A cinematograph film is defined as: "the aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing; of being

---

53 John Jackson and Campbell McConnell, Economics Chapter 26 "Price and output determination: Pure competition"
shown as a moving picture; of being embodied in another article or thing by the use of which it can be so shown and includes the aggregate of the sounds embodied in a sound-track associated with such visual images". A number of cases have examined the scope of the film category, especially in relation to digital content. As noted earlier, Galaxy Electronics Pty Ltd. v Sega Enterprises Ltd., discussed whether a computer game could be categorised as a film. The court approached the issue from a "technology-neutral" perspective and held that the effect observed by the viewer was the important issue, not the means utilised. Therefore, the fact that the images and sounds were stored in digital files on a computer instead of conventional magnetic film was not material. Computer games challenge the traditional concept of a motion picture film. Each time the game is played; the sequence of sounds and images presented to the user varies, depending upon the user's interaction with the computer program. The court held that this "non-linear" content could still be categorised as a film. That no "two sequences of images will be identical, since the actual images seen in any particular game reflect player input, did not mean that the sequence was incapable of coming within the definition of 'cinematographic film'.

The South African Supreme Court came to a similar conclusion in Golden China Game Centre v Nintendo. Many examples of multimedia are likely to be protected under the cinematograph film category. It is uncertain, however, how broadly courts will interpret the concept of a film. Although a number of courts have protected relatively non-linear computer games as films, the games in question have had a limited number of possible scenarios. In each the game's authors created all the scenarios, at least to an extent. Whether a reference work such as an online

---


55 News Section: National Reports [1997] 2 EIPR 37 at 38

56 News Section: National Reports [1997] 9 EIPR 229


59 News Section: National Reports. 9 EIPR 1997. P.232. It can also be said that the images themselves were only created immediately prior to them being presented by the computer itself.
encyclopedia would be similarly protected is uncertain. It would be harder to characterise as a cinematograph film. However, a court may be willing to characterise this as a collection of numerous literary works, sound recordings and cinematograph films. For example, in Ahn v Midway Manufacturing Company a court had to consider the protection afforded to the components of another computer game. In the production of the game, actors had been choreographed and filmed in various scenes to be used in the program. The court was willing to protect the choreography itself as a separate item of content, regardless of the fact that it was commissioned for and used in a larger work.

2. **Auditory and musical content**

Auditory material may receive copyright protection under two main headings. First, a musical item may be characterised as a musical work. Musical is not defined in the Act but McKeough and Stewart suggest that it involves a "combination of melody and harmony". This may be broader than music's general meaning, which is the "art of combining sounds of voice(s) or instrument(s) to achieve beauty of form and expression of emotion". Second, a sound recording, being "the aggregate of the sounds embodied in a record" is an item capable of protection. A "record" means a disk, tape, paper or other device in which sounds are embodied." There appears to be little doubt that a selection of sounds embodied in digital form will receive copyright protection as a sound recording.

3. **Work communicated to the public**

Separate from the underlying materials involved, copyright exists in the manner that content is communicated to the public. For example, copyright exists in the sounds and or images transmitted to the public in a broadcast. The published edition of a

---

60 No 95 C 0719, ND III May 28, 1997 [Cited in Meeka Jun .Mortal Kombat over Digitized Images in Video Games]

61 Copyright Act, 1905 of Australia, section 4

literary, dramatic, musical or artistic work receives copyright protection, albeit a
different collection of rights to the original work itself.

4. **Author's rights in copyright**

The Copyright provides a bundle of rights to owners. These vary according to the
categorisation of the content in question. Creators may exercise these rights and
restrict or authorise their exercise by other difficulties in the digital domain. However,
there are serious commercial issues involved. This is due to the nature of digital
content. The natural disincentives to copy or reproduce content, such as economies
of scale and the lower quality of copies have largely disappeared. As digital content
is easily copied, transmitted and manipulated, the potential for abuse of the
commercial rental rights is extraordinary. Difficulties arise when identifying
adaptations and derivative works as a result of the ease with which digital material
may be manipulated. Further, certain processes inherent in the use of digital
technology may involve adaptations and derivations - such as the translation of
instructions between different levels of software code or from one operating system
to another. Although this is not new it is a more severe manifestation of the issue that
exists in the physical realm. Reproduction and copying (the duplication rights) are
not generally defined. Duplication "under the copyright law occurs simply by
transferring copyrightable content from one digital storage device to another." To
reproduce is generally to "produce a copy or representation of" an item, to "cause [it]
to be seen, heard etc again" or to cause a second object to be "made in imitation of"
the first. Duplication may involve more than one medium, form of storage or
presentation. For example, in *Roland Co v Lorenzo* and Sons a reproduction was
held to have occurred where text stored in a digital file was printed out on to paper.

---

64 i.e. from source code to object code.
65 Concise Oxford Dictionary
66 Lewis Lee & J Scott Davidson P. 77.
Where the material in question is a musical, literary, dramatic or artistic work, the reproduction must be in material form to infringe the copyright owner's rights.

a) **Material form:** One element of a number of the copyright owner's rights is the concept of material form. It is defined in the Act to include "any form (whether visible or not) of storage from which the work or an adaptation, or a substantial part of the work or adaptation, can be reproduced." This is sufficiently broad to include the storage of content already in digital form and also the digitalization of other content. Hence the duplication of a digital text file or audio track would constitute a reproduction or copy in material form. Further, the scanning of an image to create a digital file would probably constitute a reproduction or copy in material form. This corresponds to the technology-neutral approach taken in cases such as *Roland Co. v Lorenzo and Sons* and *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd.* From *Roland Co. v Lorenzo and Sons* it appears that a work saved in digital code on a computer disk is in material form. The binary code was held to constitute "a form of storage from which" the content could "be reproduced". If in Roland the printing on paper of a digital word processing file was considered a reproduction of the literary work contained in the file, then it is logical to assume that the scanning of a printed page of text to create a digital file would also constitute a reproduction. This same reasoning should apply to the digitalisation of visual and auditory material, as well as sound recordings.

b) **Computer generated or assisted creations:** Although most works have an identifiable author, in some situations the identification of an author can be a problem. In the digital domain, this poses two main issues. There may be material for which no direct human effort can be identified. An example would be weather information generated by a satellite and transmitted to the earth. The author, for copyright purposes, of such material would probably be the person who

---

67 See the discussion of the WIPO proceedings under the heading "Transient copies" in the section "Possible legislative changes".

68 (1992) 22 IPR 245.
Chapter III: Copyright of Multimedia Products in Convergent Environment

primarily made the arrangements to facilitate the collection and transmission of the information. digital technology appear to be responsible for the results. In Express Newspapers Plc v Liverpool Daily Post and Echo Plc\(^69\) the author of the computer software at issue was held to be the creator of the results from the computer program's use. In this case the software was designed to generate various patterns and sequences. In situations where the technology, such as word processing software, is akin to a tool being utilised to achieve a user's purposes, the results of this effort are likely to be owned by the user. In Roland Co v Lorenzo and Sons\(^70\) Pincus J explained that, in the light of Express Newspapers "obviously the author of the letters and symbols typed onto a word processor is the author of the printout". By contrast, the user of a multimedia work, although influencing which images and sounds are perceived, would probably not hold copyright in any results. It is acknowledged that there will be intermediate cases where the characterization is much more difficult. Indeed, it is possible that some situations will appear to be cases of joint authorship.

c) Transient copies: A few cases have examined the status of temporary copies such as those created in a computer's Random Access Memory (RAM) during its use. In MAI Systems Corporation v Peak Computer Inc\(^71\) the plaintiff claimed that Peak had infringed MAI's copyright by copying software owned by MAI into the RAM of a third party's computer. The ninth circuit appeals court held that MAI had "adequately shown that the representation created in the RAM is 'sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated' for a period of more than transitory duration".\(^72\) A statement was issued by the 1996 WIPO conference that, "The reproduction right, as set out in

\(^{69}\) [1985] FSR 306 [cited in Roland at 252]

\(^{70}\) (1991) 22 IPR 245.

\(^{71}\) [197] 991 F 2d 511 (2nd Cir 1993) [cited in Ronald Katz & Lateef Mtima, "Uncertainty Reigns in software cases"].

\(^{72}\) Ronald Katz & Lateef Mtima [quoting from the judgement - (1993) 991 F 2d 511 at 518-9].
Article 9 of the Berne Convention, and the exceptions permitted there under, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.\(^\text{73}\)

In Copyright Reform and the Digital Agenda exclusion for transient copies party the right to control whether their material is made available regardless of whether or to what extent it is accessed. This enables a party to take action without having to prove access and transmission, which as noted before, is a difficult task in the digital domain. Second, the right extends to situations in made in the course of communications was proposed. The Report justifies this in terms of achieving a balance between the rights of the copyright owner and the public: "The extension of the copyright owner's reproduction right to cover certain temporary and incidental reproductions made in the course of transmissions would tilt the copyright protection too far in favour of copyright owners. The proposed exclusion from their reproduction right of temporary copies made in the course of transmissions is an important part of the proposed scheme's balancing of the interests of owners of copyright and reasonable needs of users for access in the new communications environment."

The Digital Agenda Act inserted a new section 43A. This provides that the copyright in a work is not infringed by the "temporary reproduction of the work or adaptation as part of the technical process of making or receiving a communication". At present certain copies are made in the carrying out of tasks other than communications. For example, most computer applications copy software from permanent storage\(^\text{74}\) to temporary storage\(^\text{75}\) during normal use. Such copying is

\(^{73}\) Copyright Reform and the Digital Agenda P. 340.

\(^{74}\) i.e. the hard disk

\(^{75}\) i.e. RAM memory
exempted under section 43A. It may be that an implied license exists according to the analysis below.

The Copyright Reform and the Digital Agenda report observes that copies made to RAM or for the purpose of making material available to the public are not exempt. The researcher’s view is that a broader exemption than the new section 43A would have been appropriate. An exemption that covers duplications made in the course of all uses of material that have been authorised by the owner and require the creation of temporary duplications is preferable. This would promote the aims of technological neutrality and simplicity.

d) Licenses: A copyright owner may permit another person to do an act within the scope of the owner's exclusive rights by granting them a license. Such a license may be express or implied. The license may be contractual but this is not always so. Trumpet Software Pty Ltd v Ozemail Pty Ltd\(^76\) examined the position of no contractual licences.\(^77\) Trumpet produced software and distributed it as shareware.\(^78\) This arrangement constituted a license binding the recipients of the software. The Court used the contractual principle of implied terms,\(^79\) combined with the written instructions bundled with the software, to ascertain the nature of the licence: "The Court considered that the rights granted to shareware distributors or users fell between a bare licence and a contractual licence. In effect, it was found that distributing software as shareware gave rise to certain quasi-contractual rights to the

---

\(^{76}\) (1996) 34 IPR481

\(^{77}\) A copyright owner may utilise a shrink-wrap licence, where the terms of the licence are wrapped in plastic packaging and are only available to the consumer after purchasing the product. Although under general contract law the terms must be agreed between the parties prior to the purchase, as opposed to being unilaterally imposed by one party later, ProCD Inc v Zeidenberg [(1996) 86 F.3d 1447 (7th Circuit) - cited in Copyrights No 24 and by in Angela Bowne at 141] held that a shrink-wrap-type licence is valid.

\(^{78}\) That is, they had provided copies to the public for the purpose of evaluation and required that, should a consumer wish to continue using the product after a trial period, they would make a payment to the company.

\(^{79}\) Michael Pattison & Moana Weir, "First case on the legal protection of shareware - Trumpet v Ozemail" P. 67.
world at large. In determining what these quasi contractual rights actually are, the Court adopted a contractual analysis by relying on the doctrine of implied contractual terms. By acting in breach of these terms, Ozemail was outside the scope of the licence and hence breached Trumpet's exclusive rights. Some have argued that an implied licence to make, at the least, transient copies would accompany the distribution of materials using a number of digital technologies. This is largely academic in relation to electronic communications of works following the insertion of section 43A. However, it is still important in other contexts such as temporary copies made in a computer's RAM (as discussed above). To access or use digital content by the only methods available, one often needs to make temporary copies. An example of this is use of word processing software. For a user to utilise the software, elements of the software are retrieved from permanent memory (such a hard disk or CD-Rom and temporarily stored in the computer's RAM. A license may be implied in this situation, although, "Traditionally, Courts have been slow to imply licences or permission to reproduce copyright works in the absence of clear expression to do so by the copyright owner. It remains to be seen how the Courts will deal [with] the question of implied licence[s] where material is placed on the Internet in circumstances where there is often full knowledge that the material could be copied" Pendleton notes that although in the physical realm a person may read a document or listen to a song without the need for a licence from the copyright owner, with digital content some form of licence may be needed. It is likely that courts will imply a licence from the act of voluntarily making their material available in a form that requires temporary copies to be made so that the material can be used. The implication rules such as "commercial necessity" and that the term "goes without saying" support this argument.

e) Authorisation: The right to authorise a person to do an act encompassed within a copyright owner's exclusive rights is also an exclusive right of

---

the copyright owner. In Australia, the leading case on the meaning of authorise is *UNSW v Moorhouse*. In that case the High Court held that to authorise meant to "sanction, approve and countenance". In respect of digital content, a number of cases have discussed whether a party, usually a service provider or carrier of some sort, had authorised a breach of copyright. Due to the logistical difficulties involved in monitoring breaches of copyright by individual users in a dynamic environment such as digital communications, copyright owners have tended to pursue service providers and carriers. In *Religious Technology Centre v Netcom Online Communications Services* the court held that the operator of a bulletin board service was not liable, as they were simply conduits for communications between unrelated third parties. However in *Playboy v Freno* and *Sega Enterprises v MAPHIA* the bulletin board operators were held to be liable, as they had been more than just passive carriers. A number of lawyers and commentators have called for reform in the copyright liability of service providers and carriers. The decision in *Telstra v APRA* implies that many such entities could potentially be liable for the conduct of the users of their systems. The Australian reports recommended that the concept of authorisation be used to regulate the liability of users and carriers. However, cases such as *APRA v Telstra* revealed that legislative amendment is required. In response, the Digital Agenda Act inserted a new section 39B that clarifies the position of carries and carriage service providers (amongst others) in respect of breaches of copyright by persons using facilities provided by them. Section 39B provides: "A person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because another person uses the facilities

---

81 Section 13(2) provides "the exclusive right to do an act includes the exclusive right to authorise a person to do that act".

82 (1975) 133 CLR 1 www.austlii.edu.au/au/cases/cth/high_ct/133crlr1.html (references are to paragraph numbers in the AUSTLII publication.

83 Gibbs J at para 10, Jacobs J (with whom McTiernan ACJ agreed) at para 9.

84 (1993) 839 F Supp 1552 (MD Fla) [cited in Angela Bowne at 140]

85 (1994) 857 F Supp 679 (ND Cal) [cited in Angela Bowne at 140]
so provided to do something the right to do which is included in the copyright." As a result, an "innocent" carrier would not be liable for its client's breaches of copyright. The scope of the exemption, however, is uncertain.

Jurisdictional issues seriously complicate the use or protection of copyright material. Although regulated by a number of international treaties, copyright law is basically national. Each legislated regime is different and there are many countries that have not ratified the primary treaties.

[D] Protection of Multimedia Works: online

Digital technologies have made possible the creation of works with much more versatility than in the past. A work may now consist of literary, artistic, musical and dramatic elements and may also include a phonogram and a cinematographic film.

Multimedia works by their basic premises are works combining different elements, such as text, sound, still visuals and moving images, into a single medium. Increasingly works from different categories are being fixed in a single medium of expression. Works from protected by copyright have become less and less differentiated by type and more and more equivalent to one another because they are in the same medium. This equivalence of works in digital form has made it increasingly easy to create a difficult-to-classify work by combining what have previously been thought of as separate categories of works for copyright purposes. This has given rise to the consideration of forming a separate category under the present Copyright laws for future.

The user can 'interact' with the work in ways previously unknown. He can make alterations and additions and even create a new work out of the stock of existing ones. If the rights for all classes of works were the same, then perhaps, this

---

86. *i.e.* the *Berne Convention for the Protection of Literary and Artistic Works 1886* and the *WCT*.

would not have been a major issue. But the law as it stands in India, distinguishes between different classes of works in the matter of rights. For example, the rights in a literary work and those in a cinematographic film are different. There is no rental right in a literary work, whereas there is such a right in cinematographic film.\(^8\) The authorship may raise another problem, as the criterion of authorship is different between literary, dramatic, musical and artistic works on the one hand and cinematographic films and sound recordings on the other hand.\(^9\)

What kind of protection does a multimedia work attract in its individual combination of component parts. The question is how to qualify digital off-line and on-line media from a copyright perspective. The significance of the issue lies in the fact that the relevant categorization entails different legal consequences and the presence of multimedia work defies existing classification under the copyright law.

It is not a new type of work to the extent that a multimedia product can fall under one or several, already existing, categories. Protection of the individual elements of a multimedia work must not be confused with protection of the multimedia production as a whole. In accordance with the existing provisions of the Copyright Act it remains possible to dispose of the individual contributions separately, even after the individual elements have been combined in one single work.

The actual classification of a particular multimedia product will depend on the type of work and on the different and specific characteristics of each individual multimedia product. Therefore, it has to be decided on a case-by-case basis. To the extent it is a literary work it gets protected as such; to the extent it is a cinematographic work, it attracts copyright protection as a cinematographic work.

---
\(^8\) See, S. 14(a) and (d) of Copyright Act, 1957.

and to the extent that it is a pure phonogram, its producer is protected. The final interpretation, of course, will then often be in the hands of the courts.

It is possible to consider and treat multimedia products as works similar to cinematographic film in the sense of section 2(f) of the Copyright Act, 1957. It seems possible to classify and to treat multimedia productions as collections of literary or artistic works in the sense of Article 2(5) of the Berne Convention and they might also fall under the category of compilations of data or other material in the sense of Article 10(2) of the TRIPS Agreement. There is also a view that multimedia work be classified as computer programme since every multimedia work will have a software component. As there are separate provisions for rights and authorship of a computer programme distinct from literary works in the Copyright Act, this could be a possible solution. However, issues may arise on the retention of separate copyrights in the works incorporated in the multimedia, in terms of section 13 of the Act and the rights of performers in the product. At present, large numbers of multi-media works are being created by combining pre-existing works. The classification of multi-media works is an issue, which needs to be looked into in depth.

There is nothing new in the combination of several types of works within one larger work or on one data carrier; phonograms and cinematographic works are examples from the past. What is new is that text, sound and visual information is now presented and stored in digital form. However, it would not be advisable to equate all multimedia works with the exiting category of cinematographic works. The fact is that a multimedia work taken as one single product does not exactly fit any of the existing categories of works protected under the regime of copyright. The fact that digital

---

90 S. 13(4) of Copyright Act, 1957, provides: "The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the sound recording is made."

91 As per S. 38(4) of Copyright Act, 1957, once a performer has consented to the incorporation of his performance in a cinematograph film, his performer's right in that performance ceases to exist, whereas in the case of other classes of works there is no such provision.

92 See, TC James, supra note 89 at 429.
products are vulnerable not only to copying of the whole work but also vis-à-vis copying of parts of the work poses additional problems. According to the previous prevailing opinion, unauthorized appropriation of parts of a work only amounts to an infringement of copyright where the relevant part attracted protection as such.

It still remains to be decided whether multimedia works should be regarded as a separate category of works protected under the regime of copyright. Since it has not yet been clarified to what extent multimedia works fall within one of the above-mentioned types of work, it should be pointed out in legislation that a work can consist of the combination or merging of other works. This would ensure that the prerequisites of protection were not examined separately but in relation to the multimedia work as a whole, which would enable protection of the interactivity so characteristic of many multimedia works, provided that it fulfils the originality requirement.

1. **P2P Networking**

Peer-to-peer (hereinafter referred as P2P) is defined as two or more computers connected by software which enables the connected computers to transit files or data to other connected computers. In recent usage, P2P has come to describe applications in which users can use the Internet to exchange files with each other directly or through a mediating server. It is helpful to think of the P2P network as a conversation between computers – some computers are “talking” while others are “listening”. The P2P connection means that it’s a direct link,. The file is being directly transferred from one computer to the other, it is not going through any mediating server. Napster and Gnutella are examples of this kind of P2P software.

**a) Napster:** Napster was created by 10-year-old Shawn Fanning in 1999 and it quickly became popular around the world and pioneered the concept of P2P file sharing. With Napster, individual people stored files that they wanted to share (typically mp3music files) on their hard disks and shared them directly with other people.
In order to enjoy a free music file First of all one had to become a member of Napster service by downloading the Napster software on one's computer. The Napster software was available for free at the Napster’s Web site ‘www.napster.com’. After implementing the Napster software the computer became a small server\(^{93}\) able to make files available to other Napster users. Then the computer connected to Napster’s central servers. The Napster software that a member downloaded on his computer automatically told Napster central servers that these were the music filed on his computer. So, the Napster central servers had a complete list of every shared song available on every hard disk connected to Napster at that time. A Napster user could send a request to the Napster server for a particular piece(s) of music. Now the Napster server did not contain any music on its own server but had a list of all the music that was available on the Napster members’ computers. The list was dynamic in nature as the music files available depended on which member was online at a particular time. The entire user community could be searched for artists or titles in seconds. One could simply type in the name of an artist or song, receive a list of what was available, and then downloaded the music from another user’s hard drive.

Napster grew to having 57 million users of its service with a consistent 1.6 million using the system at any given time.\(^{94}\) Napster became so popular so quickly because it offered a unique product -- free music that anybody obtain nearly effortlessly from a gigantic database. You no longer had to go to the music store to get music. You no longer had to pay for it. You no longer had to sorry about cuing up a CD and finding a cassette to record it onto. And nearly every song in the universe was available. At its peak, Napster was perhaps the most popular Web site ever created.

\(^{93}\) Technically, all computers can be divided into two categories, client and server. A client computer avails of the services provided by the server computer and the server computer serves the client computers.

But for the music industry Napster was a big, automated way to illegally copy copyrighted material. The music industry was against Napster because people could get music for free instead of paying for a CD and any music downloaded was considered a loss of business opportunity. The industry sued Napster under a claim of copyright infringement. Napster’s defence was that it contained no copyrighted music filed on its servers. It just had a list of what was available on Napster’s users’ computers. So, if at all any one is liable for copyright infringement it is the person who downloads the copyrighted product or the person who makes it available and not Napster itself. But the court had sufficient reasons to injunct Napster for copyright infringement. The court said that putting the list on the Web site was akin to running a huge distribution network. Napster’s key weakness lay in its architecture – the way that the creators designed the system. The central database of song titles was Napster’s Achilles’ heel. The court\(^5\) ordered Napster to stop listing the music files which were under copyright protection and there was no means with Napster to segregate copyrighted music filed from those that were in public domain. The only option with Napster was to shut down the database and the absence of a central database killed the entire Napster network.

b) Post Napster P2P Networks: With Napster gone, what the world had at that point was something like 100 million people around the globe hungry to share more and more files. It was only a matter of time before another system came along to fill the gap. One distinguishing feature of the P2P services that came after Napster was that they had no central server maintaining direct file listings of all the files. The other distinction was that Napster was related to music files and that too specifically mp3 files. But most of these new softwares, Gnutella, Kazaa, etc., allow any type of files to be transmitted and downloaded.

Gnutella is an underground variant of Napster whose popularity has risen dramatically in the wake of the litigation in which Napster had been embroiled.

Gnutella has dozens of clients available. Some of the popular Gnutella clients include: BearShare, GnuCline, LimeWire, Morpheus, and XoloX. Given that there is no central server to store the names and locations of all the available files first, one has to install a version of Gnutella on one's computer and type in the name of the song/film or any other file one wants to find. The machine knows of at least one other Gnutella machine somewhere on the network because it has been told the location of the machine by typing in the IP address, or because the software has an IP address for a Gnutella host pre-programmed in. The machine sends the file name typed in to the Gnutella machine(s) it knows about. These machines search to see if the requested file is on the local hard disk. If so, they send back the file name (and machine IP address) to the requester. At the same time, all of these machines send out the same request to the machines they are connected to, and the process repeats. After getting all of the search results the machine directly contacts the computer that has the desired file. It is an extremely simple and clever way of distributing a query to thousands of machines very quickly.

Kazaa is the latest version in the P2P technology which is spreading like a wildfire. Kazaa was originally established in the Netherlands. Kazaa network is built on a technology called the Fast-track technology. This is different from Gnutella in the manner that this software actually converts certain good quality computers in a particular network into supernodes\footnote{Any computer using Kazaa Media Desktop can become a supernode if they have a modern computer and are accessing the Internet with a broadband connection. Being a supernode does not affect the performance noticeably. If your computer is functioning as a supernode other Kazaa Media Desktop users in your neighbourhood will automatically upload to your machine a small list of files they are sharing, whenever possible using the same Internet Service provider. When they search, they send the search request to you as a supernode. The actual download will be directly from the computer who is sharing the file, not from the supernode. The download goes from them to the person who wants it.} which perform the listing function. The P2P searches occur through users with these supernodes. A supernode contains a list of some of the files available and where they are located. The Kazaa software first searches the nearest supernode to a user and then refers his search to other supernodes and so on. This process is designed to make searching as fast as...
possible and means that searching will take place only through the files that have been indexed by the supernodes.

In Buma and Stemra v. Kazaa\textsuperscript{97}, an action for copyright infringement was brought against Kazaa by Buma and Stemra in a Dutch Court. The Plaintiffs, Buma and Stemra, a Dutch Copyright licensing group, sued Kazaa for the distribution of software which allowed users to make unauthorized copies of copyrighted works. In November of 2001, the district court of Amsterdam ruled in favour of the copyright industry and ordered Kazaa to remove its website. Kazaa, thereupon, filed an appeal vide matter Kazaa v. Buma and Stemra\textsuperscript{98} in the Amsterdam court of appeal. The court of appeal decided in Kazaa's favour and reversed the findings of the district court starting that the Kazaa technology has many other substantial and legitimate uses such as trading jokes and personal photographs apart from the fact that it could be used for copyright violations. Further, after release Kazaa.com is not monitoring the way it is being used and is not in a position to control it.

However, in the meantime, Kazaa had already left Holland; Sharman Networks purchased the rights to distribute the software from its Dutch owners, and Kazaa is now managed from Australia, but incorporated in Vanuatu, a South Pacific island.

In Metro Goldwyn Mayer Studios v. Grokster et al.\textsuperscript{99}, a roster of entertainment conglomerates accused Fast Track-enabled services kazaa, Morpheus, and Grokster of profiting from a “21st century piratical bazaar.” Record labels and movie studios wanted the services closed and fined $150,000 for each illegally traded song or movie. It was finally held that the absence of any central control over

\textsuperscript{97} Buma and Stemra v. Kazaa, Cause list number KG 01/2264 odC (Judgement passed by the President of the Amsterdam District Court on November 29, 2001).

\textsuperscript{98} Kazaa v. Buma and Stemra, Judgement delivered by the Amsterdam Court of Appeal (Fourth threejudge civil section) on March 28, 2002.

\textsuperscript{99} MGM Studios Inc and others v. Grokster Ltd and others, decided by the US District Court for the Central District of California on 25 April, 2003.
how users used the P2P systems in question meant that, unlike Napster, there was no liability on the suppliers for vicarious or contributory infringement of copyright.

The Industry was successful in the initial legal battle against Napster but it has been unsuccessful in the later ones against Kazaa, Morpheus and the like as these networks do not depend on any central server for their operation.

But on 27th June 2005 US Supreme Court struck down the decision of US district Court and held that P2P file sharing of copyrighted materials free of cost is illegal and those who are encouraging users to trade songs, movies and television shows on-line without paying for them will be liable.

c) Extent of Damage by P2P Networks: Millions of people around the world have downloaded P2P softwares and are increasingly using them to exchange music, movie and software files. According to CNET.download.com there are over 2.5 million downloads per week of the Kazaa Media Desktop Software and 111 million downloads of the Gantella-based Morpheus software accounts per week. According to The International Federation of the Phonographic Industry (hereinafter referred as IFPI)\(^{100}\), an organization representing the recording industry worldwide, for the year 2001, worldwide record sales were US$ 33.7 billion dollars. The availability of free music on the Internet was blamed for the 5% drop in global sales of compact discs.\(^{101}\) In the year 2002, global sales were down 9.2%. World sales recorded music fell by 10.9% in value and by 10.7% in units in the first half of 2003. Interim sales of all audio and music video formats were worth $US 12.7 billion, compared to $US 14.2 billion in the same period of 2002.\(^{102}\)

The stakes as reported by the Industry are definitely high. The Industry points the finger directly at the Internet. But these figures have all been brought out by the

---

\(^{100}\) IFPI comprises a membership of more than 1500 record companies, including independents and majors, in over 70 countries (http://www.ifpi.org/).


\(^{102}\) See, ibid.
Chapter III: Copyright of Multimedia Products in Convergent Environment

Industry. Moreover, it can't be said with unfailing certainty that how much of this loss is due to online piracy. So, on the question of the impact this activity is having on entertainment company profits one has to be agnostic: other factors, such as the state of the economy, and the easy availability of CD's and DVD's in the form and containing the tracks that users want, will also have a bearing on the sales of pre-recorded music, films and software. There is also a tendency by the entertainment industries to argue that every copy made through the medium of file-sharing is a lost sale and missed business opportunity. That begs the question as to whether the person who made the copy would have actually paid to acquire a legitimate copy had the alternative not been available.

In India, the problem of infringement through the Internet has yet to reach the magnitude that it has in some developed countries – we have had no Napster-like problem on anything like the same scale, audio cassettes still being the most common and most accessible form in which copies of sound recordings are stored, being much cheaper and more widespread than the digital alternative. That situation could no doubt change.

2. Reaction of the Copyright Industries

For the audiovisual industry, Napster was a loud wake-up call. The online file-sharing service demonstrated that people using readily available equipment could easily download and distribute digital music and movie en masse, regardless of copyright. No surprisingly, that sent the audiovisual industry into a panic. After all,, one theory goes, if you can get digital files for free, why would you ever pay for a movie ticket or a CD?

The industry argues that online piracy eliminates the economic incentives for a business to invest millions in the production of movies, software, video games, CD's, etc. A business will no longer get a return on its investment if a consumer can
just get it for free online. In that manner Internet piracy would hinder the growth of creativity.

Shocked and dismayed, the industry in the last couple of years has been fighting this menace of ‘piracy’ on all possible fronts that include, lobbying, litigation, legislation and technological measures. The industry is starting to prosecute not only companies like Napster but also individuals who download copyrighted content and the persons who make it possible namely the Internet service providers. A recent example of such litigation is RIAA v. Verizon Internet Services, Inc where the Recording Industry Association of America (hereinafter referred as RIAA) served Verizon, an Internet service provider, with a subpoena demanding that the service provider disclose the identity of a user who uploaded more than 600 songs while connected to the company’s Internet service. Verizon protested, but recently a US district court judge ruled in favour of the RIAA and ordered Verizon to reveal the user’s identity.

3. Indian Legal Landscape vis-à-vis Networks like Napster, Gnutella and Kazaa

Let us examine a network like Napster functioning in India which allows people to share and distribute music, films and computer software. Section 51 of the Copyright Act says that in case anyone does anything the exclusive right to do which is by this Act conferred upon the owner of the copyright, his act amounts to infringement of copyright. Section 14 of the Copyright Act which governs the domain of exclusive rights granted to copyright owners says that making copies of any work by using whatever medium, communicating the work to the public or issue copies of the work to public fall within the domain of exclusive rights of a copyright

---


104 See Supra note 89.

105 See Supra note 88.
owner. So, if any person is running a network like Napster in India he could be liable for encroaching upon the exclusive rights of the copyrights owner as he is essentially facilitating the communication of the work to the public. In case he take up an argument like Napster that well “I am not making anything available, I just have a listing.” Even in this case the man could be held responsible under section 63 of the Act which says:

a. the copyright in a work, or

b. any other right conferred by this Act, except the right conferred by section 53A shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees (Emphasis added)

In this case the person who runs such a system like Napster would be held guilty of abetting the infringement, as without such a network it would have been virtually impossible for people to share copyrighted works.

Further section 51(a)(ii) says that in case a person permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement, he shall be liable for infringement of copyright. The expression any place could well be construed to mean virtual place as well.

As for the persons who actually make available and download copyrighted works, the law is very clear. Section 14 says that issuing copies of work or communicating the same to public amounts to infringement. So, a person who downloads a software like Napster and implements the same on his machine is making the copyrighted work available to any member of the public who has the

---

106 S. 63, Copyright Act, 1957.
107 S. 51(a)(ii), Copyright Act, 1957.
corresponding software installed on his machine. The person who actually
downloads the file containing copyrighted work is reproducing the work without the
consent of the copyright owner, so is guilty of copyright violation as well. Section
51(b)(ii) says anyone who distributes either for the purpose of trade or to such an
extent as to affect prejudicially the owner of the copyright. Any person making
available copyrighted works over P2P network may not be trading in the same but
he is nevertheless distributing such work which combined amount to gigantic
proportions affecting prejudicially the interests of copyright owner.

Now for networks akin to Gnutella or Kazaa, where there is no central server
brokering the requests of people, it is rather hard to stop the system in one go.
There is no one person or entity that it managing the affairs. The entire thing is
managed by a software and that is already out and lakhs of people have made
copies of the same. You can't really outlaw the installation and use of that software
as it could legally be used for sharing files which are not protected by copyright. But
individuals who use such software for sharing copyrighted works remain guilty under
the above stated provisions of Copyright Act. But catching them is rather difficult.
But, potential liability is made easier to document by the fact that P2P applications
create long user sessions that present adequate opportunity to trace users back to a
point of origin. The court would have to find a way to block all such network traffic
at the ISP and the backbone levels of the Internet to stop people from sharing.\textsuperscript{108}

4. Management of Copyright in Digital Environment

As more and more digital products in network environment are emerging, efficient
management and controlled distribution of such products has become one of the
important considerations, as never before. Digital and Information technologies
combined together have made the management and administration of copyright
quite difficult. It has made reproduction, distribution and communication of works

\textsuperscript{108} The exact liability of ISPs and how one could go about tracing copyright infringers with the aid of ISPs
is described in the subsequent section on the liability of ISPs.
easier and within the competence of ordinary individual. Now copies can be made at an amazing speed with absolute fidelity to the original and transmitted over vast distances and dispersed to millions of people in a few minutes or even seconds. This has opened up the possibilities of widespread unauthorized copying and distribution of copyrighted works materially affecting the economic interest of the owners.

a) Right Management Information: The primary requirement for the automated grant of rights in a digital context is that the protected work and subject matter can be identified as such belonging to the relevant authors and rights holders and the licensing terms must also be available electronically. On the one hand, this information must be easily readable to a potential user; on the other hand it should not be easily erasable so that it remains embodied during the subsequent stages of exploitation in connection with the work. In addition, right holders must be able to prove their authorship and ownership of rights in case of infringement; the relevant information should not be discernible to third parties and should remain embodied within the work even after the latter has been adapted, or where parts of the work are used.¹⁰⁹

This is possible only if certain data which identifies the work, the author of the work, the owner of the work, or information about the terms and conditions of use of the work which are necessary for licensing and payment of licence fee, are embedded in the work. This data is classified as “rights management information” in the WCT and WPPT. The WCT defines rights management information as:¹¹⁰

Information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represents such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.


¹¹⁰ Art. 12(2) of WCT.
Contracting parties to the Internet treaties have to provide legal remedies against any kind of removal or alteration of any of the above information as well as distribution or communication to the public of copies of work with such removals or alterations.\textsuperscript{111}

Section 52A of the Copyright Act, 1957 provides for certain information to be displayed on cinematographic film and sound recording. The information could be described as a part of ‘rights management information’. But this provision is not adequate for the administration of the rights in the digital environment and further it is limited to two classes of works only. Also in this case, the onus is on the copyright owner. A considerable amount of work is being done on “copyright tagging” and developing “unique identifiers” so that the owners of digital material will be able to identify their property wherever it is and however it has been modified or distorted. This will overcome many of the problems of identification.

‘Rights management information’, as a technological adjunct providing legal support to network-based rights management systems will enhance the ability of rights holders to exploit their property on the Internet, and allow consumers to rely on the accuracy of the information they receive so they can feel secure transacting online.\textsuperscript{112}

b) Technological Protection Measures: When a digital product is made available for access on the Internet, anyone in the world becomes capable to

\textsuperscript{111} Art. 12(1) of WCT States:

"Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;
(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

download the product free of charge, use it without restrictions, incorporate the product into his own product and make the resulting product available in a global network, hence competing with the product of the creator himself. This is about how technology can assist a crafty person to exploit someone else's work digitally. In order to fight this loss of control over the product in the digital environment the legal instrument as such are not sufficient. To a large extent the solution to a loss in technical control is being sought in technology itself.

Increasingly, technological solutions are being found for the problems posed by the new technologies through access control or copy control mechanisms such as encryption technology or water marking incorporated into works distributed over digital networks with a view to protecting them from illegal exploitations. Encryption, watermarking, coding, encapsulating copyrighted works in a tamper-resistant electronic envelope, electronic lamination, etc., have already been experimented with.

The need of technology is not only for preventing the work from being stolen and misappropriated, but also for detecting infringements and misappropriations.

[E] Protection of Neighbouring Rights

Neighbouring rights or related rights were unknown in the Indian copyright Act 1957, But has accommodated some of them with in "Copyright law". The expressions "Neighbouring rights or related rights are therefore, not very common in India. As for neighbouring rights, the Rome Convention is the important starting point. The actual title of the convention is completely self explanatory regarding the subject matter protected i.e. the International Convention for the protection of performers, Producer of Phonograms and Broad Casting organization.

The Neighbouring Rights are similar to the rights protected by copyrights and are applied to protection. In other words, these are rights, which are neighbours of
traditional copyrights and are some time called as "Derivative Rights." These rights arise from distribution or dissemination of traditional copyright work.

There are three broad categories of such rights:

1. Performers Rights
2. Broadcasters Rights
3. Rights of Producers of Phonograms/Sound Recording.

The international treaties and convention lays down the basic standards of protection to the Neighbourings Rights are:


The Rome Convention\textsuperscript{113} definitely is against unauthorized reproduction of their productions and fixations of their performance and it also provides limited rights for broadcasting organizations. The Convention further provides the term of protection to be for a period of 20 years. It also provides for the protection against the "Secondary users" Phonograms such as broadcasting. The Geneva Convention is mainly against piracy. Further provides for the protection of Phonograms against unauthorized reproduction and distribution for a minimum term of 20 years and satellite Convention specific purpose unauthorized distribution of satellite signals.

\textsuperscript{113} "Pioneer Convention in the area of the protection of neighbouring rights".
Role of the WIPO

The world Intellectual Property organization in the Diplomatic Conference on Certain Copyright and Neighbouring Rights adopted the WIPO Performances and Phonograms Treaty\textsuperscript{114}. The preamble is stated as follows:

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible.

Recognizing the need to introduce new international rules in order to provide adequate solution to the questions raised by economic, social, and technological developments.

The WIPO Copyright Treaty, 1996

The WIPO Copyright Treaty (WCT) originated in the WIPO program to update the major international copyright treaty, the Berne Convention\textsuperscript{115}. The original purpose was to make explicit in the Berne Convention that computer programs and databases are protected as copyright subject matter and to update the convention concerning use of copyrighted works in digital, electronic environments\textsuperscript{116}.

The major issues that arose in the Diplomatic Conference was the liability of the on-line service providers or Internet service providers and the other communication entities that facilitates access to the internet and that Art.9 of the Berne Convention applies to the use of works in digital form and the storage of protected work in digital form in an electronic medium constitutes a reproduction.

\textsuperscript{114} on 20\textsuperscript{th} December 1996

\textsuperscript{115} This work programme started in 1989 and included discussion of the relevant copyright issues by seven committees of Experts. This process was known as the “Berne Protocol”

\textsuperscript{116} It was in the WIPO Diplomatic Conference in Geneva, Switzerland, which met from Dec. 2-20, 1996, that the work on the treaty was completed. It should be further mentioned that this treaty was enacted under the provisions of Art. 20 of the Berne Convention.
Now dealing with the various provisions of the WCT. The preamble to the Convention highlights the necessity to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible and recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by the new economic, social, cultural and technological developments.

Article 1 enumerates that this treaty is a special treaty within the meaning of Art. 20 of the Berne Convention and that this treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

Art. 2 reiterates that copyright protection is extended to expression and not ideas. Art.3 mentions that the provisions as given in Art. 2 to Art.6 of the Berne Convention shall be applied by the Contracting Parties mutatis mutandis.

Art 4 of the WCT make it clear that computer programs are protected as literary works under Art.2 of the Berne Convention, whatever are the mode or form of their expression. The Diplomatic Conference also adopted an agreed statement concerning the relationship between the treaties, Art. 2 of the Berne Convention and the Provision on computer program protection in TRIPs.\(^{117}\)

Art.5 of the Treaty states that parties must accord copyright protection to database that constitute “intellectual creations”. The copyright law protects thus the compilation of data or the content but the protection does not extend to the content itself unless the content is independently the work of the intellect, in which case only to enjoy a separate copyright. The Diplomatic Conference adopted an “agreed statement” which read as follows:

---

\(^{117}\) "The scope of protection for computer programs under Art.4 of this Treaty, read with Art. 2, is consistent with Art.2 of the Berne Convention and on a par with the relevant provisions of the TRIPs Agreement."
“The scope of protection for computer programs under Art.5 of this Treaty, read with Art. 2, is consistent with Art. 2 of the Berne Convention and on a par with the relevant provisions of the TRIPs Agreement.”

Art. 6 of the WCT provide that authors enjoy the exclusive right of authorizing the making available to the public of copies of their works. The Diplomatic Conference adopted an “agreement statement” concerning Art. 6 (right to distribution) and Art. 7 (right of rental) of the Treaty to confirm that these right apply to fixed copies, embodied in tangible objects.\(^{118}\)

The Treaty permits, but does not obligate, the parties to limit the public distribution right by the ‘first sale” or “exhaustion of rights” doctrines. These doctrines are applied usually to limit the public distribution right to the first date authorized by the copyright owner.

Art. 7 of the WCT mentions that the authors of computer programs, cinematographic work, and embodied in phonograms enjoy a generally exclusive right of authorizing the commercial rental of these works. The Diplomatic Conference adopted an “agreed statement” concerning rental of works in phonograms.\(^{119}\)

There are three exceptions to the exclusive rights. They are:

- In the case of computer programs. The right does not apply where the computer program itself is not essential object of the commercial rental.

- In the case of cinematographic works, the right does not apply unless the commercial rental in a given country has lead to widespread unauthorized reproduction of copies, which materially impairs the right of reproduction.

\(^{118}\) “As used in these Articles the expression ‘copies’ and ‘original copies’ being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”

\(^{119}\) “It is understood that the obligations under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who under that Contracting Party’s law, are not
• As a concession to Japan, if a country’s law in effect on April 15, 1994 provides only a right of equitable remuneration for rental of work in phonograms, that remuneration right satisfies the treaty obligation as long as there is no “material impairment” of the exclusive right of reproduction.

Art. 8 of the WCT specifies that authors enjoy the exclusive right generally of authorizing any communication to the public by wire of wireless means, if the public can access the communication at different times and places.\textsuperscript{120}

Art. 11bis (2) of the Berne Convention permits compulsory licensing of broadcast and communications to the public. Therefore what it means is that Art. 8 amount to a transmission right, which extends to digital online and interactive communications, as well as analogue communications. The reference to individual choice of reception is intended to exclude broadcasting; a right that remains governed by the existing Berne Convention. Also, the public communication right of the new Treaty explicitly cannot prejudice the existing public performance, broadcasting and communication rights of authors as set out in Berne Articles 11(1)(ii), 11bis(2) (i) and (ii) 11 ter(1)(ii), 14(1) (ii) and 14 bis (1).

Art. 9 of the WCT deals with the provision that in respect of photographic works the Contracting parties shall not apply the provisions of Art. 7(4) of the Berne Convention for deciding the duration of the Copyright work.

In the entire Treaty there are two limitations to the exercise of the exclusive rights of the authors. Art.2 enumerates the “idea-expression dichotomy” that is only expressed works are protected by the copyright laws and the copyright law does not prevent the copying of ideas, concepts and methods. And the second exception is

\textsuperscript{120} The “agreed statement” on this article as adopted by the Diplomatic Conference reads as follows:

“it is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty of the Berne Convention. It is further understood that nothing in Art. 8 preclude a Contracting Party applying Art. 11bis (2).”
Chapter III: Copyright of Multimedia Products in Convergent Environment

enumerated in Art. 10, which do not conflict with the normal exploitation of the work and do not unreasonably, prejudice the legitimate interests of the author. The "agreed statement" adopted by the Diplomatic Conference provides that Contracting Parties may extend into the digital environment any existing limitations and exceptions that have been considered acceptable under the Berne Convention. They may also device new exceptions and limitations "that are appropriate in the digital network". Finally, the conference expressed an understanding that Art. 10(2) of the WCT "neither reduces nor extends the scope of applicability of the limitation and exceptions permitted by the Berne Convention.

Art.11 of the WCT establish a new kind of legal protection for authors. Treaty adherents shall provide not only adequate legal protection against copyright infringement but the Contracting Parties shall provides protection to the authors so that such protection also available against devices or services that defeat anti-copy right technologies.

Art.12 deals with the obligations concerning right management information.\textsuperscript{121}

The above articles of the WCT provisions provide the legal status of the law, as it exists today in the digital era. Article 13 to 25 of the WCT deals with the administrative and the implementing issues of the Treaty.\textsuperscript{122} India is not a signatory to the WCT.

\footnotesize\textsuperscript{121} Rights management information is defined as information which identifies the work, the author of the work, the owner of any rights in the work, or information about the terms and condition of use of the work, and any numbers or codes that represents such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public. It lays down that treaty adherents must provides adequate and effective legal remedies against any person knowingly performing prohibited acts relating the removal or alteration of electronic right management information.

\footnotesize\textsuperscript{122} The WCT is not yet in force because as per Art.20 the Treaty can enter into force three month after 30 instruments of ratification or accession by states have been deposited with the Director General of WIPO. Presently though fifty-one countries have signed the Treaty only 19 have approved it by the July 15,2000.
Chapter III: Copyright of Multimedia Products in Convergent Environment

WIPO Performance and Phonogram Treaty, 1996

The Diplomatic Conference also adopted this WIPO Performances and Phonogram Treaty (hereinafter referred as WPPT) on December 20, 1996. Till the July 15, 2000, fifty countries had signed the treaty and 16 countries had ratified the treaty. India is not yet a signatory to the Treaty. 123

The preamble to the Treaty highlights the importance of the new economic social, cultural and technological developments, the development and the convergence of information and communication technologies on the production and the use of performances and phonograms and the need to production and the use of performances and phonograms and the need to maintain a balance between the rights of the performers and producers of phonograms and the larger public interest, particularly education, research and access to information.

This Treaty through Art.3 ensures that the Contracting Parties shall accord protection to the performers and producers of phonograms who are the nationals of the other Contracting Parties provided such performers or producers of phonograms would meet the criteria for eligibility for protection as mentioned in the Rome Convention. Art. 4 contain the National treatment clause.

It is Art. 5, which embodies the principle of moral rights. According to this provision if the work of the performer is distorted in any way then the moral rights of the performer is infringement, as this would be prejudicial to his reputation. Further, the moral right of the author enjoys a greater duration of protection than the economic rights.

Art.6 provide protection to the economic rights of the performers in their unfixed performances. Art. 7,8,9 and 10 gives the performers the exclusive right of

123 This has not yet come into force. Art. 29 of the Treaty enumerate that this treaty will enter into force three months after 30 instruments of ratification or accession by state have been deposited with Director General of WIPO.
Chapter III: Copyright of Multimedia Products in Convergent Environment

authorizing the direct or the indirect reproduction of their performance fixed in the phonograms in any manner or forms, making their work available to the public, commercial rental of their work to the public and also the transmission of their work to the public by wireless and wired means, respectively. Chapter III of the Treaty comprising of Articles 11 to 14 gives the same exclusive rights to the producers of phonogram.

Art. 15 provides that the performers and the producer of the phonograms shall enjoy the right to a single equitable remuneration for the direct and the indirect use of phonograms published for commercial purpose for broadcasting or for any communication to the public. Article 16 deals with the limitations and exceptions to the rights of performers and producers of phonograms. Art 17 grants that the period of protection of performers shall be till the end of 50 years computed from the end of the year in which the performance was fixed in a phonogram. For producers of phonograms the term of protection is until the end of the period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

Art. 18 of the Treaty provides that the Parties shall provide adequate legal protection and effective legal remedies to the performers and the producers of phonogram from the use of technology which would restrict their exclusive rights. Art. 19 of the Treaty embody the concept of “Right Management Information System”. To remove or alter any electronic rights management information without authority and also if any of the exclusive right of the performer or producer

124 It defines this system as which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represents such information, when any items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or phonogram to the public. The Article mentions that the Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts or with respect to civil liberties having reasonable grounds to know that it will induce, enable facilitate or conceal an infringement of any right covered by the Treaty.
of the phonogram is violated without the needed authority then it would amount to altering the right management information system.

There is no formality and no reservations to this treaty shall be allowed. The administrative and the final clause are mentioned in the final chapter of the treaty. Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms. Recognising the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information. Have agreed as follow:

Inspite of all these desires and recognition WIPO could not recognize the rights of converge transmitters.

1. Neighbouring Rights in the Copyright Triangle

Copyright sustains a triangle of relationships. While industrial property tends to establish bi-polar linkages between right-owner and user-copyright has, on the right-owner side, both creators and entrepreneurs. As against users, their interests are largely the same: to ensure that the use of works is licensed and that the returns of use are maximized. But between them, there will exist tensions over how works may be exploited economically and how returns are to be divided. This has indeed been so in every country from the moment when published and other investors have pressed for protection to be accorded in the name of their authors. Thus in the era of convergence of information technology, the convergence transmitters have a realistic claim to share the field of copyright and neighbouring rights.

---

125 Article 20 of the treaty provide that There is no formality and Article 21 provides that subject to the provisions of Article 15 no reservations to this treaty shall be allowed the administrative and the final clause are mentioned in the final chapter of the treaty.
It is the cultural value attaching to authorship, which provides such copious moral legitimacy for legal protection. Not only are authors given a longer-lasting right than could possibly be needed by way of economic incentive; entrepreneurs are also to justify related rights, which protect their own investments in cultural productions.

Michel Foucault's questioning essay, "what I am Author?" has sustained a school of writing about copyright and related rights which envisions a brave new world, of freely co-operating writers and artists, each contributing to evolving work, each offering selfless support and accepting enlightened criticism. At least in its beginnings, the Internet has seemed to offer a medium peculiarly suited to such an aetherial Academe.

The uncalculating of ideas has long been part of scholarship of shared interest of many kinds. If new technology enables that process to evolve, so much the better. But to suppose that it will supplant the need for informational, educational and entertainment material which is generated upon the expectation of a market return is the stuff of dreams. Copyright will remain because it provides necessary protection for the investment of intellectual effort and capital in material, which is not produced in order to be freely shared. The law may have to be somewhat adapted, but its moral mainspring that works should not be substantially copied or otherwise taken without authority expresses a justification for legal intervention, which will remain very widely accepted. This is the raison d'être for the neighbouring rights of the convergence transmitters.

The earlier copyright law of the United Kingdom adopted a strategic division between true authors rights and the neighbouring or related rights of investors which was in the van for its time: German legislation, for instance, was adopted a similar pattern only in 1965. This division, however, has been obliterated in the 1988 Act of U.K. Instead for better, for worse the two types are listed indiscriminately. In each case the copyright is in a work and it is granted initially in most cases to an "author" who "creates" it. All is resolved in a grossly misshape definition of the "creator". The
shift is typical of that old strain of common law thought which sees no difference of kind between true creators and investors in the creators of other; and which is inclined to prefer the latter to the former.

In the meantime, the tensions between the world of “mixed” system as in UK and India and the world of “authors and neighbours” established in Continental Europe seem to be increasing. These are reflected also in differing concepts of originality, different rules about initial ownership of rights, different attitudes to moral rights and different approaches to legally guaranteed shares in economic returns.

2. Neighbouring Rights of Convergence Transmitter

When materials ranging from e-mail to multimedia are transmitted through convergence of information and communication technology, transmission is done in digital form. It is a broadcast of a new generation. Can these transmissions be protected by a copyright or a related right?

A recent Scottish case, The Shetland Time v. Jonathan Wills\textsuperscript{126} and another has dealt with the issue whether such links are themselves protected by copyright. In this case, The Shetland News (News), an on line newsmagazine had developed the practice of citing on its Web site headlines from a rival news service. The Shetland Times (Times). These headlines were highlighted as hypertext links so that, by clicking on the link icon, the Internet user was taken from the News Web site to the relevant story in the Times site. The Times argued that its headlines were protected by copyright under the copyright law of U.K. both as “literary works” and as “cable programmes”. At an interlocutory hearing, the judge found that the Times did have an arguable case on both counts.

The issue of whether news headlines can enjoy protection, as literary works was not a new one, and case law indicated that the courts are generally reluctant to

\textsuperscript{126} (1997) FSR 604
grant copyright protection to them. In addition, even if a court were to find at a full hearing of the case that the Times headlines were literary works, it would only mean that care should be taken not to use headlines as links to other Web sites, or any other phrases which might be held to be literary works. What is significant, however, is whether at a final hearing, a court would find that the headlines were protected as “cable Programme”.

**Right to Issue Works to the Public:** The rights of convergence transmitter include the right to issue copies of the work to the public. It may well be an infringement of copyright for a bulletin board operator to transmit a message to a group of subscribers since the public can be a limited group. On the other hand, it has been argued that “issuing” would probably require a positive act by the bulletin board operator and, therefore, automatic transmission would not amount to a positive act. It has also been asserted that an infringement of this exclusive right is unlikely where the transmission is triggered by the subscriber, although the equivalent right has been relied on in a U.S. case, *Playboy v. Frena.* In that case, the operator of a bulletin board, Frena, admitted that Playboy were freely available of bulletin board, but claimed that photographs had been placed on Frena’s bulletin board by subscribers. The court held that Frena had infringed copyright.

**Right to Public Performance:** Performing, showing or playing the work in public is an infringement of copyright in many jurisdictions. There are arguments that this exclusive right could be infringed by making available the work on a bulletin board or Web site. This is more likely to be a problem where a work is sent at the same time to a large group of subscribers, particularly since a small group can constitute the public. If many individuals access at different times, a public performance is less likely. In Australasian PRS v Telstra, as Australian court held that playing music to the “hold” facility of a telephone exchange system was not public performance.

---

**Broadcaster and Convergence Transmitter:** Transmission of a work over the Internet will not constitute broadcast as per the presently prevalent definitions of broadcasting which requires "transmission by wireless telegraphy". Let us look at some of the definitions.

According to WPPT "Broadcasting" means the transmission by wireless means for public of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting" transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

According to Rome Convention "Reproduction" means the making of a copy of a fixation; "Broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds; "rebroadcasting" means the simultaneous broadcasting by one broadcasting organization of another broadcasting organization.

**3. Indian Position**

In India the Copyright Act 1957, deals with the rights of Broadcasting Organisations and of Performers in Chapter VIII. In section 37 it lays down as follows: Broadcast reproduction right.

1. Every broadcasting organization shall have a special right to be known as "broadcast reproduction right" in respect of its broadcasts.

2. The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which broadcast is made.

3. During the continuance of a broadcast reproduction right in elation to any broadcast, any person who, without the licence of the owner of the right does any of the following acts of the broadcast or any substantial part thereof:
a) re-broadcasts the broadcast; or

b) causes the broadcast to be heard or see by the public on payment of any charges; or

c) makes any sound recording or visual recording of the broadcast; or

d) makes any reproduction of such sound recording or visual recording where such initial recording was done without licence or where it was licensed, for any purpose not envisaged by such licence; or

e) sells or hires to the public, or offers for such sale or hire, any such sound recording or visual recording referred to in clause (c) or clause (d).

Shall, subject to the provisions of section 39, be deemed to have infringed the broadcast reproduction right.

Section 39 specifies act, which do not infringe broadcast reproduction right or performer’s right: No broadcast reproduction right or performer’s right shall be deemed to be infringed by

a. the making of any sound recording or visual recording for the private use of the person making such recording or solely for purposes of bonafide teaching or research; or

b. the use consistent with fair dealing, or excepts of a performance or of a broadcast in the reporting of current events or for bonafide review, teaching or research; or

c. Such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under section 52.
Section 39 A states as follows: "Section 18, 19, 30, 53, 55, 58, 64, 65 and 66 shall, with any necessary reproduction right in any broadcast and the performer's right in any performance as they apply in relation to copyright in a work.

Provided that where copyright or performer's right subsists in respect of any work or performance that has been broadcast, on license to reproduce such broadcast shall take effect without the consent of the owner of rights or performer, as the case may be, or both of them.

[F] Legal Provisions for Technological Measures

Technological solutions play a major role in the commercialisation and regulation of digital content. The attempt to find a technological solution is not new. Throughout the history of copyright law, creators have attempted to ban or restrict the use of technologies that facilitate the exploitation of their work and to encourage the introduction of technologies that assist them to protect their material.

Technological measures are technologies, devices or components that, in the normal course of their operation, are intended to prevent or inhibit the infringement of copyright or any right related to copyright or sui generis right related to databases. Such measures are, for instance, encryption and decryption, de-scrambling or other transformations of the work.

The European Commission's green paper on copyright and related rights in the Information society\textsuperscript{128} aptly drew the attention on a pivotal feature of the digital era: technology now enables one to keep track and control dissemination and use of copyright works in the networks.

\textsuperscript{128} Green Paper on Copyright and Related Rights in the Information Society of the Commission of the European Community, COM (95) 382-
Chapter III: Copyright of Multimedia Products in Convergent Environment

The electronic future prospected in the U.S. White Paper\textsuperscript{129}, as well as that for which most content providers are getting prepared, implies massive use of technological measures\textsuperscript{130}. Technical measures can control and limit access and copying of the copyright material and are able to protect a service (Pay TV, Web sites) or some specific content.\textsuperscript{131} Another kind of technological protection is the one offered by the RMI that can support digitised works, specifying the name of the work and of the author, the owner of any right in the work, the terms and conditions of use of the work and any number or code representing such information.

Copyright owners, willing to exploit such potential, put vigorous pressure upon the legislator in the last years for the inclusion of specific previsions about technological measures to protect copyright. The point of the right owners was that technical measures as such would not have been effective if not coupled by adequate legal protection: circumvention of such measures should thus have been legally sanctioned.

Hence, an important part of the US digital agenda at WIPO's negotiations for the Copyright Treaty was the establishment of a new international norm to address this specific issue.

1. World Copyright Treaty, 1996

Under art. 11 of WCT,\textsuperscript{132} "Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

\textsuperscript{129} The US White Paper is a document issued on 1995, by the Information Infrastructure Task Force Working Group in Intellectual Property Rights, appointed by Clinton's administration, to address policy recommendations to promote development of the national information infrastructures.


\textsuperscript{131} T. Vinje. Copyright Imperiled. E.I.P.R. 1999, p. 196

\textsuperscript{132} Art. 11 of WCT states: Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.
measures that are used by authors in connection with their rights [...] which are not authorised by the author concerned or permitted by law".

Art. 12 of the Treaty obliges contracting parties to provide adequate and effective legal remedies against any person knowingly performing certain acts being aware that in doing so he will induce, enable, ease or conceal an infringement of any right covered by the Treaty or the Berne convention. Such conduct shall consists in: (a) the removal or alteration of any electronic rights management information without authority; (b) the distribution, import for distribution, broadcasting or communication to the public, without authority of works or copies of works knowing that electronic rights management has been removed or altered without authority.

While the provision concerning the Rights Management System did not raise any particular criticism, the adoption of the language provided by in art. 11 provoked an intense debate both in the drafting phase and in the further analysis carried by some scholars. The Digital Millennium Copy Right Act (hereinafter referred as DMCA) and the proposed EU directive expressed even greater disagreement, with reference to the implementation of this article on copyright.

In particular, serious concern has been expressed as to the possible consequences of the adoption of these technical measures and of concrete the enforcement of the rule set forth in art. 11. In fact, circumvention of these measures could be held as an infringing behaviour both in case of would-be pirates trying to force the barrier held by the technical devices and in case of lawful exercise of a fair use exception; but as the wisely underlined not all circumvention is bad.

133 P. Samuelson (1997).
135 According to, T. Vinje (1996), technical protection systems will be deployed not only to prevent infringing reproduction but also to hinder lawful reproduction, i.e. falling under one of the cases of fair use. That is to say that technical measures can exceed, in away, the level of protection granted by copyright and may be able to impede the full operation of the fair use mechanism.
Why should a person - even assuming he is able to do so - be obliged to circumvent a technical measure in order to benefit under a fair use exception to copyright? And what about technically protected works, which have already fallen in public domain or that, are not entitled to copyright protection for lack of creativity?

In this fashion the digital era, despite of the fears expressed by right holders, is more likely to affect the exercise of exceptions rather than the exercise of rights. ¹³⁶

Protection of technical measures may bring to even more broad distortions of the present IP legal system depending on the way legislators does tackle the problem of the manufacture of devices and equipment, which are able to circumvent technical measures.

There are basically two approaches to address this objective: the "act approach" or the "device approach". Legislators may opt for specific sanctions targeting acts of circumvention without authority or for the broader solution to punish people that import, produce, market or sell technical devices that may disable technical protection.

2. Digital Millennium Copyright Act, 1998

Moving beyond from the WTC provisions, the US opted in the DMCA for this broader scope of protection but provided for substantive exceptions and limitations to that principle.

The DMCA expressly prohibits on one side the unauthorised access to a work by circumventing technical measures put in place by the author. On the other side it prohibits the manufacture or making available of products and services that defeat measures controlling access or measures that prevent reproduction.

The DMCA, on the same vein of EU proposed directive, prohibits devices that are primarily designed or produced for the purpose of circumventing; that have only

¹³⁶ T. Vinje (1999), id, p.197.
a limited commercially significant purpose or use other than to circumvent; or are marketed for use in circumventing. Anyway, in order to reset a proper balance with public interests need was felt in the drafting phase of such Act to clearly define the borders of this strengthened copyright by granting some specific exceptions.\(^{137}\)

Anyway, the DMCA shall be considered as midway between WCT and the EU proposed directive.

3. **The EU proposed Directive on Copyrights**

This proposal, which has opted as for a "device prohibition" policy, despite of its being not yet enacted has already been received with harsh criticism by scholars.

Here again, in addition to the sanctioning or mere circumvention of technical measures, specific language was added in order to provide for adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services that; are promoted, advertised or marketed for the purpose of circumventing; have only a limited commercially significant purpose or use other than to circumvent, or are primarily designed or produced, adapted for the purpose of enabling or facilitating the circumvention of any effective technological measure.\(^{138}\)

It is worth noticing that this "device approach", which both EU and US opted for, may give rise to a number of major concerns.

The "device prohibition" policy clearly aims at anticipating the forbidden conduct punishing acts that may lead to circumvention, in order to prevent massive

\(^{137}\) Significantly, fair use exceptions were inserted in DMCA as to circumvention for the purposes of reverse engineering, for the benefit of encryption research, for tests to measure the security of a computer and for law enforcement and intelligence activities.

\(^{138}\) According to scholars such provision is not coupled with adequate exceptions and limitations and strongly unbalances the previous system to the benefit of right owners.
infringement. Therefore, Member States shall use this policy very cautiously. The risk
would be otherwise to unjustifiably put the burden of the proof as to rightful
behaviour upon the manufacturer/dealer. This would impose an unsustainable
degree of uncertainty over these subjects: any device as such may be used for proper
or unlawful purposes. As a result devices able to defeat technical measures could
simply disappear from the market, at least the "official one": was this the original aim
of the legislator?

In short, the outcome of this new set of rules may be that those limitations of
the copyright which in the analogue world successfully balanced the interests of the
right owners with the ones of the public might not apply anymore, due to an
undesired effect of these new provisions. To make a long story short, anti-
infringement measures for the digital era do not appear to be accompanied by
sufficient ad-hoc exceptions.

4. Indian Position

Technological protection measures are designed to prevent, in the digital networked
environment, the unauthorized access to or use of works protected by copyright. Their
legal protection comes as a third, cumulative, layer of protection for rights owners, in
addition to copyright protection itself and to the technical protection of work.

As per the Copyright Act, 1957 knowingly making or possessing any plate for
the purpose of making infringing copies of a copyrighted work is a punishable
offence. The definition of 'plate' under the Copyright Act is very wide indeed. It
includes:

S. 65 of the Copyright Act, 1957:
Possession of plates for purpose of making infringing copies. – Any person who knowingly makes, or
has in his possession, any plate for the purpose of making infringing copies of any work in which
copyright subsists shall be punishable with imprisonment which may extend to two years and shall also
be liable to fine.

S. 2(t) of Copyright Act, 1957.
In any stereotype or other plate, store, block, mould, matrix transfer, negative duplicating equipment or other device used for or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which sound recording for the acoustic presentations of the work are or are intended to be made.

This definition to a great extent provides protection for the technological protection measures adopted by a copyright owner. Taking a lead from Article 11 of the WCT some countries of the world have already enacted anti circumvention provisions like in Digital Millennium Copyright Act, 1998 in USA, in Australia in 2000, European Directive 2002 and in Canada and Japan. The debating point for India is whether to put such provisions in the Copyright Act, 1957? Since anti circumvention provisions have bearing on the fair use provisions, the suitability of these provisions for India is being discussed in the subsequent para.

The basic principle of copyright like other intellectual property rights is the balance of the interests of the individual creator and that of the society at large. The limitations placed on copyright serve to balance the interests of authors against the legitimate interest of the copyright industry, users and the general public especially in freedom of information and freedom of intellectual creation. Therefore, the laws while granting exclusive rights to authors or producers of creative works limit those rights in time. Even during the period of copyright, certain special uses are allowed without any specific permission from the copyright owners such as for private, academic, educational, judicial or legislative purposes.\(^\text{141}\)

The exclusivity of copyright is indeed based on law and the same is balanced by ‘fair use’ provisions. Technological protection measures allow the exclusion of uses. However, while copyright is limited in many ways, exclusivity based on technology is potentially unlimited. It may, for example, be possible by way of technology to exclude others from using information which is not copyrightable, or to exclude acts which are not restricted acts under copyright, either because they do not fall under the definitions

\(^\text{141}\) See, s. 52, Copyright Act, 1957.
of the exclusive rights or because they are explicitly exempted by way of fair use. With the technological protection measures and accompanying legal provisions against their circumvention, the exclusivity of copyright is sought to be extended over and above what was envisaged by the legislature.

How should the legislature deal with this phenomenon of expanding exclusion? Should the policy which is expressed in copyright law, of which the limitations on the right are an integral part, be preserved – or should the broader exclusivity based on technology be endorsed? The legislator must decide either to maintain the limitations on the control that a copyright holder can exercise over the use of copyrighted product, or to in effect protect technological measures. Technology – at this stage – is simply not developed enough to accommodate all the subtleties of the law. A complete reliance on the exclusivity based on technology could result in gagging of fair use which will be fatal to the balance represented by 'copyright'.

The latest but not least dangerous factor that is challenging the future copyright system is the development of a highly restrictive contractual practice (online licenses, or to use another fancy name, click-wrap licenses), which tends to sensitively diminish the scope of the rights granted to the user. The user who is willing to buy a copyright product on line, by clicking on the suitable button of the seller's web page, automatically accepts terms and conditions of the license granted by the right owner. One of the issues to be soon addressed shall be to assess the validity of contractual provisions that curtail user's privileges derived by law.

The balance between private user's and right holder's interests should not be negotiable at a contractual level and is an issue that can only opportunely be addressed by a parliament (or in any case, the legislator only).


143 M. Ricolfi, A copyright for cyberspace? The European dilemmas".
Some correct suggestions are prompted, wisely enough this time, by the UE legislation: both computer software directive and database protection directive provide for nullity of the provisions aiming at limiting or abolishing the exceptions both directives are granting to the benefit of users.144

RECAPITULATION

The digital domain has begun to seriously challenge the copyright system, both in India and abroad. We cannot simply rely on legalistic interpretations because technological developments may marginalise copyright as a force in creative and commercial affairs. Dramatic growth in broadband communications, convergence of technology systems, digitalisation of content and the globalisation of human interactions have changed the context within which copyright operates. Copyright exists to regulate the use of content and to balance the rights of creators and the general public.

In the digital domain, there is some uncertainty whether copyright is the most suitable regime to undertake this function. Due to the nature of digital content, a combination of commercial, technological and legal solutions will be utilised to manage copyright material.

Owners need to explore the potential for the application of technological solutions that substantially discourage or even prevent unauthorised use and dealings. Digital watermarks and content that relies on network access provide two of the most promising examples of these. Business entities can be expected to adapt existing schemes and to develop new ones to deal with the challenges of new environments. This has been and will continue to be the case in the context of digital copyright.

---

144 See art. 9.1 of Computer Software EU directive 91/250.
Some of the business solutions are such that they would be successful in the absence of technological or legislative developments. However, most of them rely on technological measures for their efficacy. Access and advertising based regimes provided the first generation of digital content enterprises.

Evolution of cross marketing, first-to-market and service focused firms can be observed at present. In the future, electronic commerce and virtual community centered organisations will probably dominate themselves; solve the dilemmas facing regulators and copyright owners. However, measures such as the new technology-neutral communication rights will provide greater certainty for all and more flexibility for copyright owners.

****

144 See art. 9.1 of Computer Software EU directive 91/250.
Chapter- IV: Software Protection in Convergent Multimedia Environment

INTRODUCTION

[A] Legal Issues of Software copyright
1. Right of Reproduction.
   a) The European Union
   b) The US Position
   c) The WIPO Copyright Treaty
2. Right of Communication to the Public
3. The Right of Distribution

[B] Technical challenges of software copyright
1. Ease of reproduction.
2. Ease of dissemination
3. Concentration of value
5. Jurisdictional Issues

[C] Software Piracy
   a) Indian Perspective
   b) Software Piracy in U.S.A.
   c) Latin America
   d) North America
   e) Asia Pacific Countries
   f) Remedies

[D] Software Patents

RECAPITULATION
Chapter- IV: Software Protection in Convergent Multimedia Environment

INTRODUCTION

The ability of copyright law to absorb changes and the general perception that digitisation imposes new revisions of the international Conventions and Treaties inspired different positions among scholars. W. Cornish (1999) recognises that new technologies for the creation and storage of cultural works threatens copyright, but adds that what is historically remarkable is its resilience. On the contrary, referring both to patents and copyrights, J. Reichman (1995) suggests that new hybrid legal regimes emerged outside classical frameworks, thus violating economic premises and historical balances of rights. Nevertheless, both authors underscore the increased extension of copyright protection. Increased capacity to store, transmit and process information enhances the ubiquity of creativeness, on one hand, multiplying the distribution chains for cultural goods and, on the other hand, making it easier to copy them the immediate consequence of both is a gradually decreasing on the number of exceptions to the monopoly. This trend touched all fair uses, and led to the question about what will be the implications on economic competition and technological diffusion.

Copyright in the last century has illustrated how the law has dealt with technological developments. The latest challenge has been posed by the advent

---

147 The advent of Radio broadcasting and later that of the television broadcasts followed by the photocopying machines. Copyright law managed to encompass these changes without having to be changed.
of the digital technologies. As a response to the aforementioned, the two ‘fast tracked’ WIPO Digital Treaties were adopted in 1996.\(^\text{148}\)

In some respects copyright is relevant to convergence, not at all. The titles of copyright conferences typically do not refer to “convergence”, but use the terms “information society” or “digital environment” or multimedia environment. Why? Copyright law has by and large been formulated according to principles of “technological neutrality”. It has focused on the nature of the use of the work, rather than the medium by which the use is accomplished, or the physical facilities or equipment involved. Thus the law has granted to music composers the right to reproduce the work, to adapt it, to perform it publicly, and to communicate it to the public.

Nevertheless convergence is of course relevant to copyright. The same forces that give rise to convergence have also given rise to problems for copyright model of technological neutrality: the technique and media have changed to such an extent that rights drafted to be neutral and capacious may either no longer fit, or may fit too much. It has therefore become necessary to re-examine the question of what rights should exist in which works, and how they can be enforced and licensed, in order to maintain meaningful incentives and appropriate balances. In other words, the causes of convergence may also lead to a potential convergence of separate right in the copyright “bundle” and a shift in the established boundaries, categories and roles of copyright law.

[A] Legal Issues of Software Copyright

Now these days Software is one of the most important technologies of the information age. Software is defined as a set of instructions which when incorporate in a machine readable form is capable of causing a computer to perform a particular task. The definition under WIPO, draft model provisions for the protection of computer software comprises of three components:

\(^\text{148}\) The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty
Chapter IV: Software Protection in Convergent Multimedia Environment

113

i. Computer Programme.
ii. Programme descriptions, and
iii. Supporting material.

"Software" is a general term for what is fed into a computer, whereas the machines themselves are known as the hardware." Thus, the question of the extent to which proprietary rights may exist in computer programmes has becomes an important issue. But the U.K. Copyright Act 1956 and its Indian counterpart, Copyright, 1957 and similarly the American Copyright Law prior to 1976 revision, were all silent on the question of computers probably as it were still days for computers. But 1994 Amendment has significantly changed the position. These changes are of particular importance to the computer industry in that a new "rental right" of computer programs has been created, the traditional fair dealing exceptions has been eliminated and radical new penalties have been imposed on users of infringing programs. India has most stringent copyright laws in the world. The term 'literary work,' includes computer programmes, tables and compilations including databases.\(^{149}\)

Copyright confers on the authors of a literary, dramatic or musical work, the exclusive right to reproduce the work in any material form including the storing of it in any medium by electronic means. This extends to computer programmes. As provided vide section 2(0) and in section 14 (a) (i). The definition of 'cinematograph film' and 'sound recording' contained in section 2 are also including 'digital' copies of such work. The law is crystal clear about the rights of licensee. A computer programme licensee does not have a right to lend on otherwise transfer programme copy, unless authorized by the copyright owner. The copy right, Act 1957 was extensively amended in 1999 and covered a remaining gaps and make it ensuring compliances with TRIPs; WIPO copyright treaty, and WIPO Performances and Phonograms Treaty.

\(^{149}\) Section 14(a)(1), Copyright (Amendment) Act 1994.
i. These amendments had been enacted in complete oblivion of the emergence of the Internet and its implications: our Copyright Act is fully protected the new challenges of Software Piracy.\textsuperscript{150}

This provision was clearly in consonance of Article 8 of WCT. Which provides the authors 'the exclusive right of authorizing any communication to the public of their works, by wire, or wireless' the Copyright (Amendment) Act 1994 does appear to cover the dissemination of copyrighted work through the Internet.

It is clear that copyright Act protects computer programmes by considering it as literary work and includes tables, and compilations including databases. It is not necessary for the creation or enforcement of copyright to register the copyright.

\textsuperscript{150} The related provisions are:

i. Section 2(ffb) provides that "computer includes any electronic or similar device having information processing capabilities further section 2 (o) deals that computer programme and databases are considered literary work section 2(ffc) define computer programme means a set of instructions expressed in words, codes, schemes or in other form including a machine readable medium capable of sensing a computer to perform a particular task or achieve a particular result.

ii. Section 14(9)(i). Which confers on the author of a literary, dramatic or musical work the exclusive right to reproduce the work in any material form including the storing of it in an in medium by electronic means. This includes computer programmes under S.2 (0) of the Act 1994 and also includes digital works.

iii. Section 52 confers certain acts not to be the infringement of copyright. Certainly the digital delivery system is a real threat to the Software Industry.

iv. Section 2 (ff) provides the "Communication to public means making any work available for being seen or heard or other wise 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 of the public, actually sees, hears, or otherwise enjoys the work so made available.

Explanation:- 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 public.

v. Section 2 (dd) provides that "broadcast" means Communication to the public:

i. By any means of wireless diffusion, whether in any one or more of the forms of signs, sounds, or visual images, or

ii. By wire and includes a re-broadcast.
1. Right of Reproduction

The right "to reproduce the copyrighted work" is normally termed as the basic right granted to the copyright owner. There are various acts that are considered to be reproduction.\(^{151}\)

Inclusion of a copyright protected work or the object of a related right in any offline, digital storage device, for example Compact Disc Read Only Memory (hereinafter referred as CD-ROM), and Digital Video Discs (hereinafter referred as DVD); Scanning of printed works; any other digitisation of copyrighted works; Uploading of copyright protected works; Downloading of protected works; Storage, including transient storage of protected works.

In digital technology, the well-established lines between copying and reading, sale and reuse, performance and viewing become blurry.\(^{152}\) A good example is the dilemma concerning ephemeral or temporary copies used to view works online.\(^{153}\) The pertinent question is whether such copies, made as a result of the internal workings of a computer, infringe on the authors' right of reproduction.

The Berne Convention does not define the scope of the right of reproduction. Article 9(1) of the Berne Convention covers all forms of reproduction in any manner or form. This provision is encompassed in Article 9 of the Trade Related aspects of Intellectual Property Rights (hereinafter referred as TRIPS) Agreement as well as Article 1 (4) of the WCT. This was presumed to extend to digital works.\(^{154}\) There were scholars who had certain doubts as to


\(^{153}\) Due to the technological processes of computer technology, temporary copies are also made when a temporary copy is received in the memory of a computer for display on the computer screen. Thus the simple access of the work online would constitute a reproduction. See I. GINSBURG. Putting Cars on the Information Highway; Authors, Exploiters, and Copyright in Cyberspace., In Columbia Law Review, 1995 .p. 1476.

\(^{154}\) Art 9 of the Berne Convention covers all forms of storage including electronic forms.
whether transitional storage may always be considered fixation and thus 
reproduction.\textsuperscript{155} They were of the opinion that works were not sufficiently fixed if 
they were purely evanescent not transient in nature as those briefly projected on 
the screen shown electronically on Television or cathode ray tube, or captured 
momentarily in the Random Access Memory (hereinafter referred as RAM) of a 
computer.\textsuperscript{156}

Another interesting aspect that has been brought about by the digital age 
is that of hypertext links. There are several arguments but the general consensus 
is that the hyper-linking does not necessarily amount to a reproduction unless a 
party deliberately pastes advertisements on the page he has made the hyperlink 
to while by-passing the initial front page.

\textbf{a) \textit{The European Union:}} Currently the European Opinion on the 
above matter is not yet law but is contained in the Proposed "Infosoc" 
Directive.\textsuperscript{157} The exclusive right of reproduction should be subject to an exception 
to allow certain acts of temporary reproduction, which are transient or incidental 
reproductions, forming an integral and essential part of a technological process 
carried out for the sole purpose of enabling efficient transmission in a network by 
third parties. These acts should have no separate economic value of their own.\textsuperscript{158} 
The Proposed Directive however leaves it to the member states to make 
exceptions.\textsuperscript{159} The Infosoc Directive grants the copyright owner the right to

---

\textsuperscript{155} The Report on Discussions by the Working Group of the Subcommittee on Multimedia Copyright 
Council. Study of Institutional Issues Regarding Multimedia, Agency for Cultural Affairs, 

\textsuperscript{156} Although the author uses the term memory, he is quick to point out that the computer's 
memorisation does not amount to fixation.

\textsuperscript{157} J.Reichman ,Charting the collapse of the patent-copyright dichotomy: premises for restructured 
international intellectual property system. 1995. In F. ABOTT, T. GOTTIER and F. GURRY ,The 
International; (1999),

\textsuperscript{158} Proposed European Directive on the Harmonisation of certain aspects of copyright and related 
rights In the Information Society. Brussels, 14\textsuperscript{th} September 2000 [9512/00] Legislative Acts and 
other Instruments. See Paragraph 33 of:’ the preamble and Articles 2 and 5 of the said Directive.

\textsuperscript{159} Id Article 5 (2)
control the temporary reproduction of his copyrighted works in cyberspace but provides for exceptions and limitations.\textsuperscript{160}

\textbf{b) The US Position:} A simultaneous fixation (or any fixation) meets the requirements if its embodiment in a copy or phono-record is sufficiently permanent or stable to permit it to be perceived reproduced or otherwise communicated for a period more than transitory duration.\textsuperscript{161} For software and multimedia works, reproduction occurs by making a temporary copy and copying it into the RAM of the users' computer.

From the foregoing, it is clear that it would not be justified to deny the characterisation and qualification of an act that involves fixation even if the fixation was for a fraction of a second in the fear of over stretching the application of the right of reproduction. Under United States Case Law, the Ninth Circuit Court held that the loading of copyright software into the random access memory of the computer for the purpose of viewing system error and diagnosing problems in the computer was considered copying under copyright.\textsuperscript{162} The decision has been followed in subsequent US court decisions.

\textbf{c) The WIPO Copyright Treaty:} The Treaty is silent on the issue of the temporary or ephemeral copies.\textsuperscript{163} This was due to the controversy it created during the 1996 WIPO Diplomatic conference that eventually adopted the two WIPO treaties.\textsuperscript{164} During the conference, both the EU and the US representatives supported the inclusion of temporary (or ephemeral) copies within the reproduction right, but this was met with stiff opposition especially from the representatives of the telecommunication companies and Internet service providers. Some Delegations were willing to accept the controversial proposed Article 7 (1) if it were modified while others were willing to accept it without

\textsuperscript{160} Id

\textsuperscript{161} United States Copyright Act, section 101

\textsuperscript{162} MAI Systems Corporation v Peak Computer Inc., 991 f.2d 511 (1993)

\textsuperscript{163} Art 8 & 9 of the treaty. Save for the inclusion of Article 9 in the Treaty.

\textsuperscript{164} The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty
alteration but subject to the amendment of Article 7 (2). Eventually the controversial Section 7 did not secure a place in the final treaty. In place of the draft, an agreed statement was adopted by vote confirming the application of Article 9 of the Berne Convention (with its exceptions) in the digital environment.

There is currently no international consensus about the treatment of temporary copying vis-à-vis the right of reproduction granted to the copyright owner. This is a fundamental challenge presented to copyright law by the digital agenda, for the refusal to cover such copies would undermine the very basis of copyright, while to give copyright owners more protection online than they have in the analogue world would upset the balance between the users' interest on the one hand and the copyright owners' interests on the other.

2. Right of Communication to the Public

Digital Transmission is the transmission of works and objects of neighboring rights via the digital networks such as the Internet. The question was how to treat the digital transmissions.

The right of communication to the public is covered by the Berne Convention. Under the national level, differing concepts are used for broadcasting, communication to the public and public performance. There are some countries where the concept of performance is broader and covers the communication to the public and broadcasting while in some other countries

---

167 M. Fiesort. Towards a Global Solution: The Future of copyright in a digital environment at page 123
168 See Articles 11, which grants the right to broadcasting and communication to the public. Article 11 bis, which grants the same right to authors of literary and artistic works and Article 1 Iter (ii) that grants the authors of literary works the exclusive right of authorising any communication to the public of the recitation of their works.
169 Id See the law of Intellectual Property Code of France, articles L..122-2 and L..122-1 and the Copyright act of the United States of America, Section 101
the right of broadcasting covers the communication to the public.\(^{170}\) In certain countries the concept of communication includes the communication to the public.

**The World Copyright Treaty:** The WCT provides for the exercise of the right to communication to the public, by wire or wireless means, by the copyright owners, including the making available to the public of their works in such a way that the members of the public may access these works from a place and at a time individually chosen by them.\(^{171}\)

Article 8 gives the authors an exclusive right of all communications to the public, including the making available of the members of the public in any circumstances and the provision of physical facilities for facilitating communication does not in itself amount to communication to the public. This ensures that an exclusive right, in particular, in respect of on demand transmissions, thus excluding any form of broadcasting of predetermined programmes.\(^{172}\)

The mere provision of services for the transmission of digital works should not be construed as communication to the public. This means that telephone companies and online service providers are not liable for infringing the exclusive right of communication to the public by providing the users with facilities for transmitting digital works.\(^{173}\)

The proposed 'Infosoc' Directive \(^{174}\) adapts a similar approach as that adopted by the WCT. The US Law does not contain a provision for communication to the public and thus treats digital transmissions as distributions to the public. However, case law recognises the rights of the authors to control

\(^{170}\) Id Section 39(1) of the Copyright Decree of Nigeria 37 Article 8 of the WCT

\(^{171}\) Article 8 of the WCT


\(^{173}\) This was one of the issues that were discussed at the WIPO conference in Geneva in 1996 and was part of the US digital Agenda.

\(^{174}\) Article 3 of the Directive
the digital productions of their work and the right to control digital transmissions of their works to the public.

3. The Right of Distribution

Just as the author has the exclusive right to control the reproduction of his works, he also has the exclusive right to control the distribution of the works. The right of distribution is related to the right of reproduction. The right holder will not be able to effectively exercise the right of reproduction if he has no control over the distribution of the reproductions of his works. The exercise of this right is in perfect harmony with the doctrine of exhaustion: the right-holder only exhausts the right of distribution with regard to the specific copy that has been put on the market and he has not waived his other rights such as the reproduction of the work.

In the digital era, distribution is no longer part of the derived from the right of reproduction but is part of the reproduction process itself. The Berne Convention does not recognise the right of distribution except in the case of cinematographic works. The WCT, however, grants the authors of literary and artistic works the exclusive right to authorise the making of the available to the public of the original works through transfer of ownership.

The mode and media of reproduction, distribution and communication to the public is no longer restricted to the traditional formats such as the paper format for books and documents, audiovisual cassettes for audiovisual works and

175 See The case of Sega Enterprises Lili v Maphia 857 F stpp 679 [1994].
176 See The case of Playboy Enterprises v Frena 839 F Supp 1552 [1993].
177 43 Article 14 (1) and 14 bis (1) of the Berne Convention.
178 Article 6(1) of the WCT. 'Nothing in the treaty shall affect the freedom of contracting parties to determine the conditions, if any, under which the exhaustion of the right in paragraph one applies after the first sale or transfer of ownership of the original or copy of the work with the authorisation of the author'; Article 6 (2) of the WCT. The performers also have the right of authorising the broadcasting and communication to the public of their fixed performance as well as the fixation of their unfixed performances They also have the same rights vis-à-vis their fixed performances The performers and producers of phonograms also enjoy the right to equitable remuneration for broadcasting and communication to the public.
the traditional analogue means of communication. The works can now be transmitted over the Internet and electronic copies of the various copyrighted works are easily available to the users at a cheaper rate and of high quality.

[B] Technical challenges of software copyright

According to the Berne convention\textsuperscript{179}, the definition of the protected subject matter encompasses every production in the literary, scientific and artistic domain, regardless of its form of expression; musical composition with or without words; dramatic works; cinematographic works; drawings, paintings, architectural drawings, sculptures and photographic works, amongst others. Pursuant to art. 10 of the 1994 TRIPS computer software shall be regarded a literary work.\textsuperscript{180}

All these works - with the exception of visual arts ones (sculptures and paintings) - can be put into digital form.

Digitisation has dramatically changed the environment in which copyrighted works are exploited. This technological revolution, which, brought about scores of new fancy expressions and definitions, like information society, information superhighways and globalisation, cyberspace to quote the most popular ones - is due to the combination of different factors.

Development of electronic networks and of other communication technologies, have played a major role in this technological revolution.

These factors directly affect the operation of rights on protected works and therefore pose the latest challenges to copyright, for the reasons enumerated hereunder.

\textsuperscript{179} Article 2 of the Berne Convention.

\textsuperscript{180} Sec. 2(o) of the copyright Act. The same provision extends the protection granted to intellectual creations to compilation of data by reason of their selection or arrangement of contents.
Chapter IV: Software Protection in Convergent Multimedia Environment

1. Ease of reproduction

First of all, as said before, digital works can be reproduced rapidly and cheaply without any tangible loss of quality.\(^{181}\)

Secondly, due to the widespread use of the digital technology in cyberspace, digital works can be reproduced and distributed by anyone with the requisite facilities. In addition one can purchase low cost equipment such as CD burners and reproduce Compact discs for commercial purposes.

Moreover, whenever a file is transmitted from one user to another, a temporary file is created to facilitate the transmission of digital works. Digital technology involves cases of ubiquitous\(^{182}\), incidental temporary reproductions.\(^{183}\) Actually the definition of temporary reproduction, encompassing in itself the concept of transient and of mere ephemeral reproduction has become one of the hottest points in the legal debate around the scope of protection of copyright in the digital era.\(^{184}\)

Anyway, this relentless, ubiquitous activity of reproduction of information, be it voluntary or not, temporary or permanent, could not but urge the need for an adjustment of the existing legal framework of copyright.

2. Ease of dissemination

The combination between digital technology and the worldwide networks of telecommunications (so far Internet is perhaps the most well known between

---

\(^{181}\) Sections 37 and 38 of the copyright act.


\(^{183}\) Temporary and involuntary reproductions may take place in the server of the telecommunication provider when works are transmitted from a user to another or in the Random Access Memory of Personal Computers every time one listens in audio streaming to a musical work by means of his P.C. (we will come later on this issue) or, more simply, every time an Internet user browses on the net, temporarily downloading the contents of a web site.
those means) ignited this process of potentially unlimited dissemination of the
digitised works.

By a few 'clicks' and a basic program for electronic mail, not only can one
send the same works via the Internet to hundreds of recipients all over the world
but also these persons can engage in further mailing generating an endless
dissemination, starting from a single digital copy of a work. In other words, once a
digital version of a copyright work is first put on the net, or made otherwise
available to third parties, it becomes virtually subject to infinite reproduction and
dissemination and it looks almost impossible to stop such process. This is
obviously regarded as a threat to right owners and, obviously, lawmakers that set
the previous rules for copyright could not predict and aptly cover such an aspect.

This scenario will get even more appalling (for right owners) when broad
band technology will allow even more speed circulation on the net of huge
amount of data and when the actual Internet network will be complemented by
other communication technologies.

3. Concentration of value

Digital works can be compressed and stored in Compact Discs and other
technical devices that make a high concentration of information available in one
single carrier such as CDs and the Digital Video Disc -DVD which has a higher
storage capacity for audio-visual works.

This specific feature of digital technology sensitively contributes to the
dissemination of knowledge in so far as it substantively reduces all practical
disadvantages previously coupling the circulation of tangible carriers of
information. Not surprisingly encyclopaedias, directories, in the recent times
increasingly delivered in digital version.

Moreover this storage capacity gave birth to a new category of works
resulting from the combination of images, sounds and texts, the so-called
multimedia works. Such works take advantage of the interactivity of the P.C.
operation and have a tremendous impact in communication and didactic activities. Moreover, these are works that require remarkable investments and human resources and usually result in a valuable compilation of protected works. Multimedia works do fall within the scope of protection of copyright, though creating several problems in determining their concrete legal framework. Needless to say, multimedia works are exposed to the same threatens as the other copyright works.

Coming back to the compression and storage of information issue, CDs, as highlighted above, can easily be reproduced by unprofessional operators. Some software programs already popular in the market may further compress stored data in order to ease their transmission on the net (by breaking them into small packages of information). It is the case of the so-called Mp3 files for musical works, on which we will soon revert. Therefore, people may take advantage of these new opportunities offered by technology basically in two ways: either by simply duplicating CDs or by creating their own CDs from files retrieved on the net.

This phenomenon shall be liable to cut off the intermediary level from the marketplace in the next few years (what is to point then to go to a shop and buy intangible goods, such as digitised works?) and is able to transform each user in a potential competitor of the seller who first put the digital product in the market.  

This convergence of information and communication technology is considerably altering the terms of business in copyrighted works and has an impact in the way works are created, distributed, reproduced, performed, licensed, managed and sold.

Above all, this created broad awareness of some paramount issues.

---

185 M. Ricolfi, Intellectual Property and Legal Order
First of all the strong potential for massive global piracy which is alerting right owners (that is to say quite often, publishers and recording industries) seeing their substantial investments vanishing by means of unauthorised reproductions on the net.

Secondary and some how consequently, this revealed the need for an extra-territorial approach in determining a new set of rules to face these technical challenges. There are a number of major jurisdictional issues, which still need to be suitably solved and meanwhile create a high level of uncertainty in justice.

Moreover, network and communication are global in their very essence: therefore legal solutions need to be global too. Thus the promotion of the WIPO Copyright Treaty by the international community, the TRIPS Agreement came too early to address the issues brought about by the Internet such as the digital transmissions and the ephemeral copies that are essential to the Internet.

4. Collective Management of Copyright

The technological advances have both negative and positive connotations to the collective management of copyright. The exclusive rights granted by copyright are the basis for collective management and the challenges to these rights do affect the collective management as in the case of the right to reproduction and the issue of temporary copies: the collecting societies can only collect royalties in the digital environment if they fall within the scope of ‘reproductions.’

Multimedia involves the storage and use of text, sounds, graphics and moving images in digital format. Its contents are normally varied and contain a variety of works. The different works incorporated in the multimedia works are protected under copyright. For instance, any original literary works or original dramatic works contained therein are protected as literary and dramatic works respectively. Works that are normally defined as literary, dramatic, musical and artistic can all be recorded in digital form; a compendium of a coalescence of

---

different copyrights for instance, a digitised encyclopaedia. Digitisation provides a homogenous medium whereby a whole range of works, which were previously distinct is stored as one product.

The three main characteristics of a multimedia work are:

a) it must be stored in a digital form

b) the possibility of storing the copyright protected works in different categories

c) interactivity.

There are different types of multimedia products. The producer of a multimedia work requires the authority of various right holders to use their works in his production. There is need to obtain a balance between the authors' interests and the producer. This is where the collecting society comes in. The producer cannot go to each individual right holder to get their individual authority and it is thus more practicable to go through the respective collective administration societies to obtain the authorisation.

The individual management of rights has been proposed as an alternative to the collective management of rights. The proponents of this theory believe that with the new technologies, a right holder would be able to monitor and license the use of his works by the multimedia producers. But the individual management would be costly and difficult for the users as well as the right holder.

5. Jurisdictional Issues

The use of works in cyberspace is governed by copyright legislation but the main question is, which country's legislation is applicable as the Internet has no physical boundaries as such. The copyright works can be downloaded from practically any corner of the earth where the necessary facilities are available. In the case of the infringement of these rights, which laws would be used to determine the case? Would the law be that of the country where the works are
uploaded (country of origin) or would it be that of the country where the works are downloaded? (recipient country). 188

It is trite law that the extent of the protection as well as the means of redress afforded to the author to protect his rights shall be governed exclusively by the laws of the country where the protection is claimed. 189 Ordinarily, copyright is claimed where the work is exploited and thus the place where the infringement has occurred. 190

In the digital world, one has to consider the following; firstly, the place where the given transmission is deemed to have taken place and secondly, what country's legislation to apply. There are several schools of thought on this matter and one proposes the general analogy of the Internet transmissions to the Satellite broadcasting approach. 191 This would mean that the law of the country of origin should apply. 192 Others are of the opinion that the laws of the recipient country should apply. This could be problematic as the works are downloaded in several countries, so which of these laws would apply? 193

The jurisdictional issues raised by the Internet cases are still subject to the Private International law rules and in most cases will rely upon the law of the countries where the infringement took place.

[C] Software Piracy

Advances in digital technology, as was pointed out in the introduction are presenting various challenges to the copyright world. The ease at which copyrighted works can be copied, reproduced and disseminated in cyberspace

188 See opinion by P. Schonning. The Internet and the applicable copyright Law: A Scandinavian Perspective". In E.I.P.R 1999 . 45.
189 Berne Convention Article 5 (2)
190 The Berne Convention refers to lex loci delicti
191 See the Satellite and Cable Directive 93/83 of September 1993
193 As there are many countries involved, the possibility of forum shopping arises.
makes it easier for the transmission of unauthorised work by third parties. The problem is not peculiar to the digital age but has simply been amplified and this is detrimental to the copyright industry as a whole. The measures that have been taken to try and curb this menace are both legal and technical.

Software Piracy or counterfeiting is defined as the illegal copying of software combined with unauthorised duplication of genuine trademarks and documents. Software piracy takes place in many forms, the most common occurrence being in the following:

**Office Copying:** Generally, licenses for one or a few copies of a computer package/programme may be purchased for a business or in a workplace. As, requirements increase; illegal copies are made from one of the licensed programmes and installed in other computers. In addition, office software is often illegally copied into the home computer of an employee or vice-versa.

**Network Piracy:** Software piracy often occurs on computer networks when a software program is accessed by more users than what a license permits. Many network user organisations fail to realise this as a violation of copyright law.

**Internet Piracy:** With the advent of Internet and the increasing use of Internet, the software piracy has grown dramatically in recent years. Through Internet, programs are uploaded to bulletin board systems or commercial on-line services, which, in turn, can be downloaded or sent via electronic mail to individuals who may not hold a license to use these.

**Resellers:** The sellers of computer software particularly the unauthorised retailers are also involved in selling pirated softwares. They simply copy the original (licensed) softwares into floppy discs or in CD ROMs and sell them to the end users or install them in users' hardware.
Hardware Sellers: Computer dealers more particularly, the unauthorised hardware suppliers who assemble components and sell computers to the users with software already installed. Unfortunately, in most of the cases these computers are loaded with unlicensed software. In such cases, unless a license and software manuals are provided with the sale, it is likely that programs have been illegally copied.

Counterfeiting: Counterfeitors try to fool the consumers by selling duplicate softwares. The purchasers feel that they have bought a legitimate product in the sense that the packaging and manuals look like original products. These may actually be fakes and carry the common risk of operational defects and viruses.

This is hard fact that software publishers are unable to compete with counterfeit operation that duplicate their programmes and distribute them directly to consumers on street corners and shops throughout the world at a very low price. In Asia pacific countries where domestic governments are very fastly investing billions of dollars in building technology infrastructures, such large investment go unprotected without substantially enhanced education and strong copyright laws and its enforcement campaigns to end the piracy menace. In India, the expansion of software products into international markets has played a key role in the software industry's success. To maintain a competitive advantage, in International markets it is necessary to rely on intellectual protection, education and computer infrastructure. On the other hand, some argue that the lower levels of personal income justify software piracy. This is misleading, because Globally, Computer software is only used by a relatively small group of individuals and organisations affluent enough to have a purchase capacity, not the average citizen. If individuals and organizations can afford to buy computer hardware, they have no excuse for pirating software.

Our submission is that the software piracy can be prevented, if the Government can play a significant role in shaping an environment friendly to
software industry development by protecting intellectual property, encouraging research and development through the introduction of R&D credit system and to reduce import duty, concessions for corporate licenses, site licenses, and reducing taxes on capital gains. The emerging nations, as well as a more developed nations, must be encouraged to protect and enforce intellectual property rights and to reduce all tariff and non-tariff based barriers to trade.


The Business Software Alliance (hereinafter referred as BSA) and Software and Information Industry Association (hereinafter referred as SIIA) released a global study on software piracy. It estimate 231 Million Software application were pirated world wide during 1998 out of the 615 million application installed. This is an increase of 2.5 million from what was pirated in 1998. Piracy related revenue losses to the global software Industry were estimated at U.S. $ 11 billion. Globally 5% to 7% of world trade is in counterfeited and pirated products. It is very difficult to estimate the losses. U.S. copyright Industries alone estimate that $20-22 billion dollars is lost each year due to copyright piracy around the world on the other hand U.S. business Industry alone losses $ 12-16 billion a year counterfeiting and totaling 40% of all Software revenue. Many regions experienced smaller dollar losses in 2000 compared to 1999. A combination of slow growth and somewhat lower prices for software slightly reduced the dollar losses due to piracy. Dollar losses rose in the Asia/Pacific region, growing to over $ 4 billion for the first time. In fact, it was the region with the highest dollar losses in 2000. Western Europe was second with slightly more than $ 3 billion in losses. There were no significant shifts in piracy in 2000. Eastern Europe, at 63% was the region with the highest piracy rate in every study since 1994. The North American region continued to be the area with the lowest piracy rates at 25% a slight decline over 1999. Western Europe continued as the region with the second lowest piracy rate at 34% and showed the smallest year-over-year change in piracy of any region. The Asia/Pacific region was the only region that increased its
rate of piracy in 2000, rising to 51%. Asia had a four-percentage point drop in the piracy rate. In 2000, it was 52% down from 56% in 1999. (See Table I & II)

Table I: 20 Highest Software Piracy Countries

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Vietnam</td>
<td>99%</td>
<td>98%</td>
<td>97%</td>
<td>98%</td>
<td>97%</td>
</tr>
<tr>
<td>China</td>
<td>96%</td>
<td>96%</td>
<td>95%</td>
<td>91%</td>
<td>94%</td>
</tr>
<tr>
<td>Indonesia</td>
<td>97%</td>
<td>93%</td>
<td>92%</td>
<td>85%</td>
<td>89%</td>
</tr>
<tr>
<td>Ukraine/Others CIS</td>
<td>95%</td>
<td>92%</td>
<td>93%</td>
<td>90%</td>
<td>89%</td>
</tr>
<tr>
<td>Russia</td>
<td>91%</td>
<td>89%</td>
<td>92%</td>
<td>89%</td>
<td>88%</td>
</tr>
<tr>
<td>Lebanon</td>
<td>88%</td>
<td>93%</td>
<td>93%</td>
<td>88%</td>
<td>83%</td>
</tr>
<tr>
<td>Pakistan</td>
<td>92%</td>
<td>88%</td>
<td>86%</td>
<td>83%</td>
<td>83%</td>
</tr>
<tr>
<td>Bolivia</td>
<td>89%</td>
<td>88%</td>
<td>87%</td>
<td>85%</td>
<td>81%</td>
</tr>
<tr>
<td>Qatar</td>
<td>89%</td>
<td>87%</td>
<td>87%</td>
<td>80%</td>
<td>81%</td>
</tr>
<tr>
<td>Bahrain</td>
<td>90%</td>
<td>89%</td>
<td>89%</td>
<td>82%</td>
<td>80%</td>
</tr>
<tr>
<td>Kuwait</td>
<td>89%</td>
<td>88%</td>
<td>88%</td>
<td>81%</td>
<td>80%</td>
</tr>
<tr>
<td>Thailand</td>
<td>80%</td>
<td>84%</td>
<td>82%</td>
<td>81%</td>
<td>79%</td>
</tr>
<tr>
<td>El Salvador</td>
<td>92%</td>
<td>89%</td>
<td>87%</td>
<td>83%</td>
<td>79%</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>89%</td>
<td>83%</td>
<td>81%</td>
<td>80%</td>
<td>78%</td>
</tr>
<tr>
<td>Oman</td>
<td>95%</td>
<td>93%</td>
<td>93%</td>
<td>88%</td>
<td>78%</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>98%</td>
<td>93%</td>
<td>90%</td>
<td>80%</td>
<td>78%</td>
</tr>
<tr>
<td>Romania</td>
<td>86%</td>
<td>84%</td>
<td>86%</td>
<td>81%</td>
<td>77%</td>
</tr>
<tr>
<td>Guatemala</td>
<td>89%</td>
<td>86%</td>
<td>85%</td>
<td>80%</td>
<td>77%</td>
</tr>
<tr>
<td>Paraguay</td>
<td>89%</td>
<td>87%</td>
<td>85%</td>
<td>83%</td>
<td>76%</td>
</tr>
<tr>
<td>Jordan</td>
<td>83%</td>
<td>80%</td>
<td>80%</td>
<td>75%</td>
<td>71%</td>
</tr>
</tbody>
</table>

Source: www.bsa.org.

On the other hand, in past studies, IPR has recorded several reasons for the decline in the software piracy. These are as under:

i) As PC technology and the demand for software spread from the US to other countries during the 1990's, there was at times a lag between the demand for software and the effective distribution of legal software. This led to cases of piracy as an expedient way to use PCs. The software industry has worked hard to have a legitimate sales presence
in every country, making legal software sales and support easier to obtain;

ii) Software companies have increased the availability of user support for their products outside of the U.S. purchase of legal software;

iii) Prices for original software have declined over the past decade, making the benefits of original software more competing against the risks of software piracy;

iv) The BSA and other organizations have promoted the need to purchase legal versions of software and, the importance of intellectual property rights. This has included high-profile legal actions against companies suing illegal software;

v) In an increasingly global market place, a company’s risk of being caught suing illegal software extends beyond the legal implications and includes their business practices and credibility;

vi) Effects to increase government cooperation to provide legal protection for piracy have also assisted in stemming the growth of piracy.

a) Indian Perspective: Software piracy committed in India is a complex problem. India has corporate piracy, individual piracy as well as in most of the cases government using pirated software. As per, software piracy in India estimated at about 63% and increased in 2001 to 70%. However piracy is more prevalent amongst the small office, home office users and Training institutes about 61% of corporate Industries are using pirated software. In 1999, the Indian software Companies has lost more than $ 245 Million.

---

194 1 May 2000, NASSCOM has conducted the survey.

195 (See table -111) in 2001.
Table – II: Software Piracy and Revenue Losses in India 1995-2000

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Year</th>
<th>Software Piracy rate</th>
<th>Software Revenue Losses ($1000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>01</td>
<td>1995</td>
<td>78%</td>
<td>$155,645</td>
</tr>
<tr>
<td>02</td>
<td>1996</td>
<td>79%</td>
<td>$255,344</td>
</tr>
<tr>
<td>03</td>
<td>1997</td>
<td>69%</td>
<td>$184,644</td>
</tr>
<tr>
<td>04</td>
<td>1998</td>
<td>65%</td>
<td>$197,338</td>
</tr>
<tr>
<td>05</td>
<td>1999</td>
<td>61%</td>
<td>$214,557</td>
</tr>
<tr>
<td>06</td>
<td>2000</td>
<td>63%</td>
<td>$239,629</td>
</tr>
<tr>
<td>07</td>
<td>2001</td>
<td>70%</td>
<td>$245,000</td>
</tr>
</tbody>
</table>

An example can be cited in this regard. It was on a cold December morning that the battle was taken right into the fort of software pirates at Nehru Palace in South Delhi. Experts of Business Software Alliance, a global support group of software firms, formal that of the 625 CDs seized 583 were compilations of illegal Microsoft products valued at Rs. 3.1 crore. This was one of biggest pirated software hauls in the country, drove home the point that software piracy wouldn’t be tolerated any longer. In December an elephant carrying the banners of BSA and NASSCOM (National Association of Software and Service Companies), With NASSCOM President Late Dewang Mehta perched on top, crushed about 300 counterfeit CDs heaped together for a photo-top at Nehru Palace. Nehru Palace happens to be the biggest software piracy center in India with shops selling software packages at unbelievable rates. Indian Software Industry employees 7.5 Lack programmers more than Germany and Italy. Software exports are expected to increase by more than 60% in 2002 because due to strong copyright protection and its effective enforcement.

b) Software Piracy in U.S.A.: Software piracy committed in the U.S. is a greatest challenge to existence of the computer Software sector and created several problems. In 1996. Software publishers suffering losses of more than $ 2.3 billions in retail sales. Since 1994 business software pirated in US Cost publishers $ 8.9 billion. That nearly 75% pirated rate in U.S and abroad seriously damages the American companies' abilities to compete successfully in the global market place and develop the next generation of next cutting edge software.
The U.S. the largest personal computer Software markets in the world, and also leads the world in piracy losses. It is estimated that $2.6 billion worth of personal computer business application software was pirated in the U.S. in 2000. This represents about 27% of the total losses, although the U.S. bye 46% of the world’s packaged by Software. Japan’s software piracy is much higher rate than U.S. In the United States 24% of all business Software is unlicensed it is fact that software piracy is damaging the economy of the country. In 1999 the U.S.A. suffered staging 107,000 job losses, $5.2 billion is in lost wages and 1.8 billion dollars in tax revenue losses due to piracy.

U.S.A. alone 62% of all business software in 1998 was illegal a reduction to 25% market would have generated and extra job in 1998 and 291,600 more by 2002. The government has generated $4.86 billion in tax revenue in 1999 and $8.6 billion by 2002.

c) Latin America: Latin America experienced a small decline in the average piracy rate in 2000. The piracy rates in Brazil and Mexico, the two largest economies in the region, remained unchanged, at 57.8% and 56% respectively. The piracy rate in Argentina, the third largest economy in the region, was also at 58% in 2000.

d) North America: Both the United States and Canada experienced declines in the piracy rate in 2000, with the U.S. at 24% the lowest in the world, and Canada at 38%. (Table III & IV).

**Table –III: North American Piracy Rates 1995-2000**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.A.</td>
<td>26%</td>
<td>27%</td>
<td>27%</td>
<td>25%</td>
<td>25%</td>
<td>24%</td>
</tr>
<tr>
<td>Canada</td>
<td>44%</td>
<td>42%</td>
<td>39%</td>
<td>40%</td>
<td>41%</td>
<td>38%</td>
</tr>
<tr>
<td>Total</td>
<td>27%</td>
<td>28%</td>
<td>28%</td>
<td>26%</td>
<td>26%</td>
<td>25%</td>
</tr>
</tbody>
</table>
### Table -IV: Revenue Losses from piracy in North America 1995-2000 ($1000)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>U. S. A.</td>
<td>2,940,294</td>
<td>2,360,934</td>
<td>2,779,673</td>
<td>2,875,185</td>
<td>3,191,111</td>
<td>2,632,438</td>
</tr>
<tr>
<td>Canada</td>
<td>347,085</td>
<td>357,316</td>
<td>294,593</td>
<td>320,636</td>
<td>440,101</td>
<td>304,999</td>
</tr>
<tr>
<td>Total</td>
<td>3,287,379</td>
<td>2,718,251</td>
<td>3,074,266</td>
<td>3,195,821</td>
<td>3,631,212</td>
<td>2,937,437</td>
</tr>
</tbody>
</table>

**e) Asia Pacific Countries:** Several large countries in Asia Pacific region experienced increases in their piracy rates in 2000 rising to 51%. For example, Japan's rate increased to 37%, China's rate increased to 94% and Korea's rate increased to 56%.

Several other countries showed very little changes in their piracy rates in 2000. India had a 63% piracy rate, up from 61% in 1999 and in 2000 and increased in 2001 up to 70%. Hong Kong had a 57% piracy rate, up from 56% in 1999. Australia had a 33% piracy rate, up from 32% in 1999.

New Zealand, with a 28% piracy rate in 2000, continued as the country with the lowest piracy rate in the Asia/Pacific region. Vietnam, with the highest piracy rate in the region. China, with 94%, followed as the country with the second highest piracy rate.

In Asia Pacific where domestic governments are investing billions of dollar in building technology infrastructures, such large investment go unprotected without substantially enhance education and enforcement campaigns to end the piracy problem.

This region was the only area that increased its piracy rate in 2000, to 51% from 47% in 1999, but Asia Pacific is also a region of vast economic developments.
The Japan has great economic strength as well as a high level of computer use and software piracy.

In addition, Asia pacific accounted for the largest piracy losses at nearly $4.1 billion or 35%. Japan's piracy rate increased in 2000. The countries with the highest piracy rates were Vietnam 97%, China 94%, and Indonesia 89%. The countries with the highest dollar losses were Japan $1.6 billion, China $1.1 billion and Korea $302 Million (See table V & VI). The decrease can be attributed to the fall of application prices rather than to increase policing or change in attitude.

**Table- V: Asia-Pacific: Highest Piracy Rates 1995-2000**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Vietnam</td>
<td>99%</td>
<td>99%</td>
<td>98%</td>
<td>97%</td>
<td>98%</td>
<td>97%</td>
</tr>
<tr>
<td>China</td>
<td>96%</td>
<td>96%</td>
<td>96%</td>
<td>95%</td>
<td>91%</td>
<td>94%</td>
</tr>
<tr>
<td>Indonesia</td>
<td>98%</td>
<td>97%</td>
<td>93%</td>
<td>92%</td>
<td>85%</td>
<td>89%</td>
</tr>
<tr>
<td>Pakistan</td>
<td>92%</td>
<td>92%</td>
<td>88%</td>
<td>86%</td>
<td>83%</td>
<td>83%</td>
</tr>
<tr>
<td>Thailand</td>
<td>82%</td>
<td>80%</td>
<td>84%</td>
<td>82%</td>
<td>81%</td>
<td>79%</td>
</tr>
</tbody>
</table>

**Table- VI: Asia Pacific Highest Rates of Revenue Losses 1995-2000 ($1000)**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Vietnam</td>
<td>35m</td>
<td>15.2m</td>
<td>10.1m</td>
<td>10.3m</td>
<td>13.1m</td>
<td>34.9m</td>
</tr>
<tr>
<td>China</td>
<td>443.9m</td>
<td>703.8m</td>
<td>1.4b</td>
<td>1.1b</td>
<td>645.4m</td>
<td>1.1b</td>
</tr>
<tr>
<td>Indonesia</td>
<td>150.9m</td>
<td>197.3m</td>
<td>193.2m</td>
<td>58.7m</td>
<td>42.1m</td>
<td>69.9m</td>
</tr>
<tr>
<td>Pakistan</td>
<td>14.2m</td>
<td>23.1m</td>
<td>20.3m</td>
<td>21.7m</td>
<td>19.6m</td>
<td>12.3m</td>
</tr>
<tr>
<td>Thailand</td>
<td>99.1m</td>
<td>37.0m</td>
<td>94.4m</td>
<td>48.6m</td>
<td>82.1m</td>
<td>53.0m</td>
</tr>
</tbody>
</table>
For combating the software piracy, there is a need for a "multifold approach" on following guidelines:

1. Effective and efficacious legislative program against software piracy is required.
2. Piracy Awakening Program through Public awareness, education, dissemination of information, advertisements on T.V., Radio, Website etc.
3. To educate the corporate users about the Indian Copyright law and its enforcements.
4. Periodic identification of the dimensions and devices involved in the software Piracy.
5. Awareness and Training of Police officers and Law enforcement Authorities.
6. Distribution of brochures explaining about software piracy and the Law.
7. Anti piracy billboards, stickers etc. are to be distributed and pasted.

In Russia, the IPR experts have a opinion that "The web is becoming an increasingly attractive bootlegging distribution channel for pirated Music Originating in many part of Russia. About 95% of all Music sold in Russia is illegal. The reason pirates do so well is because of Russia's Tax-Law enforcement procedure. One of the worst offenders was a site called the Russian Music Portal at www.rmp.ni. Which Khodakahor said started providing the same music as Zvuki.ni. without paying the licensing fee.

Khodakov sued rmp.ni owner Alexander Antonor, under a Russian Statute that allows the plaintiff to collect upto $ 150,000 in damages. It is the first Internet piracy suit in the country. On the other hand the Russians have not acceded to digital copyright treaties, so computer piracy is ensuring as a great problem.

The Recording Industry Association of Japan Recent survey 2001 have revealed that at least 5.4% of Internet user in Japan use file- sharing software to illegal share Music files resulting in an estimated loss of 14.3 billion yen in revenue.
f) Remedies: The Indian Copyright Act, prohibits unauthorized duplication of digital Music on Internet, making multiple copies, CDs for use by different users with in an organization, and giving an pirated song, discs to another individual. If caught with pirated music discs, CDs etc, the copyright infringer may be tried under both civil and criminal law. The present copyright amendment Act 1999 makes a punishment more stringent.

In 1994 the criminal penalties have been substantially increased by an Amendment in Copyright Act 1957. Section 63B provides a minimum jail term of 07 days for copyright infringement. The Act further provides for fines up to Rs. 20,0000 and Jail term up to three years or both.

In U.S.A the pirates may be liable under both civil and criminal law. In Civil cases the infringer liable for damages suffered by the copyright owner plus any profit of the infringer that are attributable to the copywriting or statutory damages up to $ 150,000 for each work infringed under section 504 D of Title 17 U.S. Code.

In Criminal cases the maximum sentence for piracy to infringe to copyright is 5 year in prisons and $ 250,000 fine or both. The No Electronic Theft (NET) Act 1997 makes it easier to prosecute software pirates on the Internet. You can be prosecuted even if you do not make money from your infringement.

In Hong Kong, the Intellectual property department has announced that the use of pirated or unlicensed software, Music CDs and Cassettes will become a criminal offence from a HK$50,000 fine and four years imprisonment or both.

Recently the Taiwan’s Cabinet has approved a piracy law that makes Piracy a criminal offence. The law came in response to U.S.A. presume to protect.

Intellectual property, the Regulation will allow officials to impose penalties and criminal punishment.
[D] **Software Patents**

Different countries deal with patent issues in different ways. Indian Government has excluded the software patent\(^\text{196}\) by Patent amendment act 2005. The European Union, for example, adopts a very cautious approach to patents. In the USA, there is a significant interest in patent issues. It has been suggested that, following the change to US patent law by the Federal Court of Appeals in *State Street Bank and Trust Corporation v. Signature Financial Group*, many dotcoms and venture capitalists (among others) are rushing to register patents. The reason for this is that the *SBTC v. SFG* case allowed business methods to be patentable. In 1998, about 1 300-business method applications of this nature were filed. This number jumped to 2600 in 1999. There has been some debate over whether patent laws ever excluded business method or software. Interestingly, Article 27 of the Trade-Related Aspects of Intellectual Property agreement permits patents for inventions in all fields of technology.

Considering the extent to which computer programmes and communications software are growing in market size and economic value, the nature of protection to be provided is extremely important. Software is easily reproducible and can be copied cheaply. It can easily be converted from one computer language to another. In the absence of devices that inhibit copying, the cost of copying software packages for most systems is low. Even where direct copying is not possible, resourceful computer programmers and engineers can often reverse engineer the programmes.

In India, a copyright lasts for the life of the author, plus 60 years, whereas tenure of a patent may last for 20 years inline with the recommendations of TRIPS. Although, Indian software developers have a minimal presence in the area of software patenting, the total number of US patents granted to India in all fields till year 2000 is 743 as compared to 1337045 to USA assignees, which is

---

less than 0.03% of total patents. Even in those, drugs and pharmaceuticals are the prime contributors.  

Again, in the case of software, the share of Indian patents filed in the US, or even in Europe is negligible. This is substantiated from the list given below which gives the list of US patents in electronic and IT granted in year 2000 to Indian assignees.

**Table VII: Software Related Patent Statistics of USPTO**

<table>
<thead>
<tr>
<th>Applicant Country</th>
<th>Percentage of total software related patents grounds (Year wise at USPTO)</th>
</tr>
</thead>
<tbody>
<tr>
<td>USA</td>
<td>62</td>
</tr>
<tr>
<td>Japan</td>
<td>28</td>
</tr>
<tr>
<td>Europe</td>
<td>07</td>
</tr>
<tr>
<td>Canada</td>
<td>1.5</td>
</tr>
</tbody>
</table>

The above figures indicate that the Indian scientists are still not in a position to take advantage of patents in area of software. Only when we become somewhat comparable to advanced countries in number of national/international patents filed, the country may gain from software patenting provisions in India. No doubt India to be a global player in the area of computer software patents. It is a high time to enhance its R & D investments and bring about changes in consonance with Developed Countries.

One of the consequences of software patenting may be flooding of foreign software patents in India. This may have an extra burden on our infrastructure and so the requisite infrastructure has to be emplaced first. Even in the US, those they have a well-established infrastructure with a large number of qualified patent

---

197 As regards S/W patents, a patent (US Patent No. 5,987,513) dated 16.11.1999 entitled "Network management using browser based technology" by Prithvi Raj et al. Wipro limited Cupertino based Indian as inventors. A few more such patents may be there.
examiners, many cases are challenged. Moreover, software patents may also result in increased litigation in India. The Indian legal system is, at present, inadequately equipped to handle such highly techno-legal cases. Also, delays in resolving patent related issues due to the legal system being overloaded will defeat the very purpose of patenting software, which has a very short life.

The Indian Information Technology industry, is at present, catering software services primarily to export markets. In this context, patent being territorial in nature, they will still have to file international patents for IP developed by them. The impact of permitting software patent in India needs to be examined mainly in this context.

The vexed question is how Software industry would be protected from the piracy? Without strong protection Internet piracy will be mushrooming.

Copyright works of many different kind appear on the Internet inter-alia information on internet web pages - these might be artistic works, drawings, and design, business brochures, product specifications; information which can be downloaded from web pages such as music or computer software or literary, artistic or other works, computer software which is protected by copyright itself and which enables the software and systems to work; and postings to bulletin boards and newsgroups by individuals.

The Copyright legislation in many countries did not cover the new digital frontier efficiently. The Indian Copyright Act was Amended in 1994 to cover electronic information still there is a need of further amendment.

In India, though the IT Act 2000 has been passed but Internet jurisprudence yet to emerge at par with the west. In England, all the information available on the Internet comes under the Copyright Designs and Patents Act 1988.

The IT Act empowers policeman to enter and search premises where they suspect a Cyber Crime is being committed or is being plotted. This is a carry over
from the IPC with a weak that only senior policeman under the Act-- a Dy. S.P. can investigate Cyber Crimes. This is too draconian. Most of police officers are not well versed with the computer literacy. It is necessary that the government should dilute the search and seizure clauses so that raids can only take place after complaints are lodged and to make it mandatory for investigators to produce a warrant. This will limit investigators powers.

**RECAPITULATION**

There is an urgent need to strike a balance whereby online copyright infringement is prevented without interfering the legitimate uses of software and computer programmes or limiting the opportunities offered by digital technology and the Internet, Combating software piracy in order to foster the growth of electronic commerce requires a multi faced strategy. Most people do not purposely break the law. They would never consider stealing a package of software from the shelf of a retail store. But those who copy software without authorization is also stealing intellectual property, and they should also understand the consequences of their action both under civil and criminal action. It is our submission that Indian government should amend the present copyright act Act, 2000 on the line of U.S. No Electronic Theft (NET) Act, 1997 and the DMC Act, 1998

The technological measures to combat piracy are essential coupled with strong legal protections must be adopted and more importantly, vigorously enforced worldwide, if sufficient intellectual property incentives are to be upheld. The copyright laws do not appear to have developed adequately in line with technological advances. In the absence of suitable legal rules and regulation, digital technology has the potential to undermine the tenets of copyright and related rights.

Moreover, the adjustments that had to be introduced to update copyright rules, namely, the WCT and its implementing Acts, considerably strengthened copyright to such extent that right owners will now have stronger rights than ever
before and the rights of users are going to be confined to those for which they had specifically contracted and paid.

Surely, one may say that this reinforced right holder's position shall hardly counterbalance the threats of piracy. Provided this, the very challenge for copyright in the digital era shall be to maintain the delicate balance between the right owners' and authors' interests and the public interests that successfully contributed to progress in the analogue era.
Chapter-V: Protection of Domain Names and its Contents

INTRODUCTION

[A] The Concept of Domain Names
1. Generic Top Level Domain Names
2. Geographical Top Level Domain Names
3. Registration of Domain Names
4. Importance of a Domain Name
5. Infringement of Trade Marks V/S Infringements of Domain Names

[B] Cybersquatting
1. Acquisition of Domain Names
2. Identification of Cybersquatting
3. Types of Domain Name Disputes
   a) Disputes Based On Illegitimate Claims
   b) Disputes Based On Legitimate Claims
   c) Reverse Domain Name Hijacking
4. Remedies available
5. Measures to fight a Cybersquatter
   a) Fighting Under the ACPA
   b) Using the ICANN Procedure
   c) Alternate Dispute Resolution

[C] Indian Scenario
1. Linking
2. Inlining
3. Framing
4. Content on Domain names or websites: copyright registration
5. Judicial Directions
6. Passing off Action

[D] Passing off Action on Internet: Judicial Directions

[E] Internet and the Problem of Jurisdiction
1. Use of Signs on Websites?
2. Threatened Infringement of a Trademark in a foreign country
3. Enforcement of Judgments in Foreign Trademark Infringement Cases

RECAPITULATION
INTRODUCTION

With the advent of the Internet, the world today is witnessing a revolutionary change in the field of communication. A convergent digital environment has the feature of being, in terms of costs of delivery, not as related to distance as conventional media. In respect of the Internet, a specific feature called logical addressing has been developed which allows the user to reach a graphical or multimedia location where information is delivered to him in an interactive way. Both these issues may have an impact in respect of trademark protection.

Trademark issues related to convergence pertain to the use of digital highways in order to achieve lower costs of internationalisation. However, as traditional law on unregistered trademark has been established to protect local small enterprises, a retooling of this specific issue may be investigated in order to take into account the current, de-localised digital environment.

The Internet seems to have exploded on the forefront of several commercial establishments, organisations, governments and institutions. Flashing an Internet address has become a sine qua non for almost every organisation. It goes without saying that as the awareness of the Internet grows, the number of web sites grow correspondingly. Such growth of web sites has also given rise to a new area of disputes - domain name disputes.

A trademark can be defined as a distinctive design, picture, emblem, logo or wording affixed to goods for sale to identify the manufacturer as the source of the product. The question that attracts the attention of anybody is, does a Domain Name come under the Definition of a Trademark? The answer is found when both their nature and scopes are analyzed - under law a trademark is used in commerce to represent a product or a business while on the other hand a
Domain Name is a word or a phrase registered in the Domain Name System (hereinafter referred as DNS). Moreover a Domain Name is not a corollary to the trademark system. Nevertheless, previously decided Domain Name disputes have given Domain Names as much protection as trademarks. In Cardservice International Inc v. McGee it was held that Internet Domain Names are of importance and are entitled to equal protection as a trademark. The Indian stand point on the status of Domain Names is also encouraging as in the Rediff case it was held that a Domain name is more than an Internet address and is entitled to equal protection as trademark. In the Yahoo case, The Delhi Court held that although services may find place in the expression used in Section 27 and Section 29 of the Act, services rendered have to be recognised for an action of passing off. But the most commendable Judgement which sets the record right as regards to the nature of Domain names in relation to Trademarks is the Bennett Coleman & Co case decided by the WIPO wherein it was held that Domain name registrations cannot be confined to comparisons with Trade mark registration or other rights in the country where the site is hosted. Further buttressing the strength hold of Domain Name in the ever growing scope of E-Commerce is the fact that consumers have now begun to attribute Domain Names with goodwill, reputation, dependability and brand following similar to that of a trademark.

Cyber-squatting is a form of speculation where a domain name is registered with the intention of selling off the same. Cyber-squatting is the practice by means of which a person or legal entity books up the trade mark, business name or service mark of another as his own domain name for the purpose of holding on to it and thereafter selling the same domain name to the other person for valuable premium and consideration. Cyber-squatters book up domain names of important brands in the hope of earning quick millions.

198 42 USP Q2d 1850
199 Rediff Communications Ltd., v. Cyberbooth, AIR 2000 Bom 27.
201 Trade and Merchandise Marks Act, 1958
This chapter gives an overview of the relationship between Trademarks, Domain names, specific issue of Cyber-squatting, and protection of contents in a websites.

[A] The Concept of Domain Names

Essentially, trademarks are names and symbols that a company uses to identify its goods or services in the marketplace. Trademarks identify the source of the product and also help to indicate the quality of a product or service. The trademark law seeks to provide effective protection of trademarks and prevent the use of fraudulent marks on merchandise. The Act seeks to prevent consumer confusion as to the source of particular goods or services by prohibiting a subsequent competing business from using an identical or extremely similar product or symbol as that of the previous competitor.

There was no Trademarks Act in India until 1940 and it provided for registration of Trademarks including Certification Trademarks. Then came to be enacted The Trade & Merchandise Marks Act 1958, which brought the concept of Part A for registration of Trademarks which were distinctive and for registration of Trademarks in Part B of the Register, which were capable of distinguishing goods which the proprietor of a trademark is or may be connected in the course of trade from goods in the case of which no such connection subsisted. Keeping in view the developments in trading & commercial practice, increasing globalisation of trade & industry and the need for simplification and harmonization of trademark management systems it was felt necessary for the Parliament to pass new legislation. Thus the Trade Marks Act 1999 & the Trade Marks Rules 2002\(^{202}\) are passed.

The Act enlarges the definition of "Mark" and "Trademark". It also provides for Registration of "Collective Marks" and "Service Marks" in addition to goods. Article 15 to 18 of TRIPS provides that term of registration should not be for less than 7 years. In the Indian Act of 1999 the term of Registration is for 10 years and for renewal it is for a term of 10 years. The Act has abolished the

\(^{202}\) Came into force with effect from 15th September 2003
concept of Defensive registration of well-known marks. It has, however, given effect to Article 6 of the Paris Convention.\(^{203}\) It has prohibition for registration of well known Trade marks as provided for in Section 11 of the new Act read with the definition of "Well Known Trade Mark" as provided for in section 2(1)(zg). Certain sections are set out which deal with registration of Trademarks Annexure "A".\(^{204}\) Thus sections covered under definition of "Certification Trade Mark", "Collective Mark", "Mark", "Service", "Trade Mark", and "Well Known Trademark" are set out along with text of sections on "Absolute Grounds for refusal of registration u/s 9," Relative grounds for refusal of registration "u/s 11 and Registration in case of honest concurrent use" u/s 12 & "Effect of Acquiescence".

---

203 Tehemtan N. Daruwalla www.aippi.com

204 ANNEXURE "A"

Definitions and interpretation:

2(1)(e) "certification trade mark" means a mark capable of distinguishing the goods or services in connection with which it is used in the course of trade which are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics from goods or services not so certified and registrable as such under Chapter IX in respect of those goods or services not so certified and registrable as proprietor of the certification trade mark, of that person; 2(1)(g) "collective mark" means a trade mark distinguishing the goods or services of members of an association of persons (not being a partnership within the meaning of the Indian Partnership Act, 1932(9 of 1932) which is the proprietor of the mark from those of others; 2(1)(m) "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof; 2(1)(z) "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveyance of news or information and advertising; 2(1)(zb) "trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and- (i) in relation to Chapter XII(other than section 107), a registered trade mark or mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and (ii) in relation to other provisions of this act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services; and some person having the right, either as proprietor or by way of permitted user, to use the mark with or without any indication of the identity of that person, and includes a Certification Trademark or collective mark; 2(1)(zg) "well-known trade mark", in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first mentioned goods or services.
Chapter V: Protection of Domain Names and its Contents

It may be noted that the use of trademark for export trade whether it be in respect of goods or in relation to services for use outside India is deemed to be use of trademark or service mark in India for any purpose for which such use is material under the Trade Marks Act 1999 or any other law which will include the law of passing off or criminal proceeding based on trademarks or service marks.

Essentially, a domain name is the Internet equivalent of a telephone number or a geographical address. The communications format used on the Internet is known as the Internet Protocol (IP). As part of the IP, Internet addressees are comprised of a string of digits delimited by periods (commonly called "dots"). The delimited field indicates the network, sub-network and the local address, read from left to right. A typical Internet address might appear as '11.23.55' where '11' denotes the network, '23' denotes the sub-network and '55' denotes the computer itself. This all-numeric form is known as the IP address. As with IP addresses, domain names are also delimited with periods (dots), which are read from right to left. Thus, the domain name 'esselpropack.com' indicates '.com' as the network and 'esselpropack' as the sub-network. The domain name at the extreme right is called the 'Top Level Domain' (hereinafter referred as TLD) and any domain to the left of the TLD and separated by a ' .' (dot) is the Second Level Domain (hereinafter referred as SLD). A domain to the left of the SLD is known as the Sub-domain (hereinafter referred as SD). The SD, SLD and the TLD put together comprise a 'Domain Name'. Thus, in the domain name 'law.esselpropack.com', '.com' is the TLD, 'esselpropack' is the SLD and 'law' is the SD. There are two types of TLD Names, Generic and Geographic.

\[\text{\footnotesize{205 u/s 56 of the Act of 1999}}\]
\[\text{\footnotesize{206 Chapter XII of the New Act (Trademark Act, 1999)}}\]
1. **Generic Top Level Domain Names**

Table VIII: The current generic Top Level Domains

<table>
<thead>
<tr>
<th>Domain</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>.com</td>
<td>For commercial use.</td>
</tr>
<tr>
<td>.edu</td>
<td>For educational institutions.</td>
</tr>
<tr>
<td>.org</td>
<td>For miscellaneous and non-profit organisations.</td>
</tr>
<tr>
<td>.net</td>
<td>For Networking providers.</td>
</tr>
<tr>
<td>.gov</td>
<td>For Government organisations.</td>
</tr>
<tr>
<td>.int</td>
<td>For International treaty organisations</td>
</tr>
<tr>
<td>.mil</td>
<td>For Defence.</td>
</tr>
</tbody>
</table>

Generic domain names are issued by Network Solutions Inc. (hereinafter referred as NSI) as part of the Inter NIC. Generic domain names are unique to the entire world. To register a domain name with NSI, one needs to visit the InterNIC website and fill in the forms and comply with the other stipulated formalities. Generally, NSI assigns domain names on a first come, first served basis. NSI will not exercise veto power over a requested name, so long as that name is not identical to one already assigned within the TLD.

2. **Geographical Top Level Domain Names**

Geographical TLDs end with a two-letter code, which is assigned to each country. For example, '.in' (India), '.fr' (France), '.aus' (Australia), '.uk' (United Kingdom) and so on. Each country has an agency that handles registration of geographical domain names. These agencies are also known as Network Information Centres (hereinafter referred as NIC). Each country has its own registration policy and domain names ending with a geographical TLD are issued only to persons operating within the said country.
3. Registration of Domain Names

The domain names were initially registered by NSI only, who had the sole monopoly to register the TLDs. This monopoly of NSI continued for many years and only in 1999, the Internet Corporation for Assigned Names and Numbers (hereinafter referred as ICANN) allowed other accredited registrars to register domain names. Today there are a large number of registrars with whom one can register a TLD.

4. Importance of a Domain Name

Since it is not possible to remember each and every numerical value of an IP address, the system of domain names evolved. Internet domain names, in a common man’s language, are used as an easy-to-remember substitute for the specific IP address. The dominant purpose of the domain name is simply to provide an easy method for remembering another’s electronic address. It’s a unique name used to identify, among other things, a specific web site.

Domain names are nothing but proxies for the IP address, although there is no logical correspondence between the IP address and the domain name. When computers communicate on the Internet, they do not ‘talk’ in terms of domain names, but interpret a domain name into the corresponding IP address. All servers on the Internet interpret the same domain names the same way. That is the reason why when one types ‘esselpropack.com’, one is taken to the web site hosted by Essel Propack, irrespective of where the person accessing the data is located or which server he is connected to. It is essentially for this reason that domain names are unique and therefore, identical domain names cannot be offered to two separate entities.

The unique feature of domain names is that the said domain names are given on ‘first come, first serve’ basis. This feature of domain names gives rise to numerous legal issues and disputes. Thus, the important thing in domain names registration is speed. To take an example, the domain name www.microsoft.org’
was available and was registered by Amit Mehrotra much before Microsoft Corporation could think of it. This led to numerous ticklish legal issues. Microsoft Corporation, despite having the trademark Microsoft, could not get the domain name ‘www.microsoft.org’ because of the ‘first come, first serve’ criteria of domain name registration.

5. Infringement of Trade Marks V/S Infringements of Domain Name

Domain name disputes are relatively unheard of in the Indian Courts. There have been hardly a handful of reported decisions regarding domain name disputes and the case law has still not developed in India. However, with the use of the Internet catching up at an amazing pace in the country, the Indian courts would surely be faced with domain name disputes in times to come. Infringement refers to a dispute where the original registrant intentionally trades off the resemblance between the domain name and another famous trademark. Thereafter, the registrant tries to en-cash on the reputation of the trademark holder by running a business similar to that of the trademark holder. In such cases, the use of the mark (domain name) would be illegal under the existing trademark law, regardless of whether the infringement occurred as an Internet domain name or in any other context.

The standard factors which determine infringement under the traditional trademarks law like:

1. the strength of the trademark,
2. the deceptive similarity between the plaintiff’s and the defendant’s mark,
3. the likelihood of confusion in the minds of the public, etc., would apply in cases of infringement of domain names also.

In Concurrent Claims of domain name disputes, there is more than one legitimate user of the domain name. Apparently, there is no intention to trade off a trademarked name and little or no potential for confusion between the products of the conflicting claimants. Both parties have a particular trademark of their own or a valid reason to use a particular domain name. For example, both Moonlight
Computers and Moonlight Dry Cleaners would be interested in registering the domain name 'moonlight.com'.

**[B] Cybersquatting**

Cyber-squatting occurs when domain names bearing a resemblance to famous trademarks are registered by persons hoping to sell the registration to the corresponding trademark holder. Typically, in such cases, persons who have absolutely nothing to do with the name, virtually pirate the name by obtaining a SLD registration with the '.com' TLD of a well-known company or brand.

The practice that's come to be known as cybersquatting originated at a time when most businesses were not savvy about the commercial opportunities on the Internet. Some entrepreneurial souls registered the names of well-known companies as domain names, with the intent of selling the names back to the companies when they finally woke up. Panasonic, Fry's Electronics, Hertz and Avon were among the "victims" of cybersquatters. Opportunities for cybersquatters are rapidly diminishing, because most businesses now know that nailing down domain names is a high priority.

If you own a trademark and find that someone is holding it hostage as a domain name until you pay a large sum for it, you may be the victim of cybersquatting. You can either sue to get your domain name and possibly some money damages under a 1999 federal law known as the Anti-Cybersquatting Consumer Protection Act, or you can initiate arbitration proceedings under the authority of the Internet Corporation of Assigned Names and Numbers (ICANN) and win the name back without the expense and aggravation of a lawsuit.

The most important criteria for determining trademark infringement, i.e., likelihood of confusion, is completely absent in the case of cyber-squatting, as no one can be confused by a blank screen. Cyber-squatters never make pretense of being a company whose name they control. The problem of cyber-squatting is more acute than it seemingly is because as already mentioned, any given Internet domain name, consisting of the exact combination of numbers, letters and
Chapter V: Protection of Domain Names and its Contents

characters, can be registered by one entity only. If someone attempts to register a domain name previously registered by someone else, he will be prevented from doing so because of the prior registration of that domain name on a 'first come, first serve' criteria by the first user.

Although cyber-squatting may seem a nuisance from a social point of view, one has to examine whether it would be illegal under Indian law or fall within the ambit of protection granted by the Trade Marks Act, 1999. In the case of cyber-squatting, the cyber-squatter does not offer for sale any goods or services nor does he attempts to trade any goods or services as that of another trademark owner.

Moreover, even a registered trademark owner is subject to a disclaimer if a trademark contains any matter, which is common to the trade or is otherwise of a non-distinctive character. The registration is granted subject to the condition that the proprietor shall disclaim any right to the exclusive use of such part or of all or any portion of such matter.

Therefore, going back to the above said hypothetical example, if 'Moonlight Computers' registers its trademark in India, subject to the disclaimer that it would not claim any exclusive rights over the word 'moonlight', it cannot be said that its trademark is violated if a cyber-squatter registers a domain name, 'moonlight.com' and puts up a picture of a moon on the said website.

The Trade Marks Act stipulates that when a mark is registered subject to such limitation, the use of a mark in a manner to which the registration does not extend, would not constitute an act of infringement.

The next question, which would arise, is whether an action of passing off can be maintained in the context of domain name registrations. The Act provides that the jurisdictional District Court may grant an injunction as a relief in a suit for passing off. Essentially, an action for passing-off lies where misrepresentation is likely to be caused or wrong impression created in the minds of ordinary
customers causing injury to the owner of the mark. The tendency to mislead or confuse forms the gist of a passing-off action and the plaintiff need not establish fraud, actual damage or actual deception. The main question is not the intention of the alleged infringer in using trademarks but the probable effect of such action on the minds of the customers.

Recently the Supreme Court of India in Cadila Health Care Ltd. Case has made a distinction between British Law and Indian Law regarding the application of passing off action.

Broadly, two tests are applied in a passing-off action for determining the question whether the plaintiff is entitled to an injunction. These tests are: -

- Whether the words used in the trade name of plaintiff are mere descriptive words of common use or they have come to acquire a distinctive or secondary meaning in connection with the plaintiff's business?

- Whether there is a reasonable probability that the use of the name adopted by the defendants was likely to mislead the customers of plaintiff by reason of similarity of the two trade names?

The purpose of passing off, which is a tort, is basically to protect commercial goodwill to ensure that peoples' reputations are not exploited. The law of passing off is based on economic policy, the need to encourage enterprise and to ensure commercial stability. The law of passing off is complementary to the codified trademark law and is based on common law. To succeed in a claim of passing off, the plaintiff has to establish the existence of the business reputation, which he seeks to protect, the possibility for confusion and deception and, therefore, the probability of sufferance of damage.

208 http://www.asianlaw.org/latest.htm
209 Cadila Healthcare Ltd. Appellant v. Cadila Pharmaceuticals Ltd. Respondent, AIR 2001 Supreme Court 1952, Para 33 and 35. The Indian Court in Catena of Cases has relied on common law doctrine of passing off an action.
Chapter V: Protection of Domain Names and its Contents

The courts over the world have generally frowned over cyber-squatters and have protected the plaintiffs under the trademark law. Although the decided cases seem to have great persuasive value for the Indian judiciary, one has to keep in mind that the decisions have been passed on the basis of the applicable codified trademark laws.

On close analysis of the majority of disputes relating to Domain Names the paramount issues involved in such disputes principally revolve around the following cause of action claims.

**Bad Faith**

A registration of a Domain Name is one in 'bad faith' when the registration was for the primary purpose of disrupting the business of a competitor *Infospace.com Inc. v. Hari Prakash*. Also lack of legitimate interest in respect of the Domain Name also gives rise to an action based on bad faith. In *World Wrestling Federation Entertainment, Inc. v. Michael Bosman*, the panel held that if a person seeks a Domain Name for valuable consideration in excess of any out of pocket costs directly related to the Domain Name then he has said to have used the Domain Name in Bad faith. In order to resist an action under bad faith 'a connection or nexus between the mark used in relation to the goods and the person claiming a right to use the same *Kirloskar Diesel Recon Pvt.Ltd. v. Kirloskar Proprietary Ltd.*' must be shown. Moreover, if a 'Cybersquatter' is able to show a reason for registering the Domain Name other than to sell it back to the trademark owner, then the courts will allow him to continue to use the mark. However in *Sporty's Farm. v. Sportsman's Market, Inc.*, the court held that even if a necessary ingredient for a successful Cybersquatting charge was not satisfied under the Act but under the unique facts of the case Omega Engineering was held to have acted in bad faith.

210 AIR.1996.Bom 149]
Dilution

Dilution can be defined as the 'lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of competition between the owner of the famous mark and other parties, or the likelihood of confusion, mistake or deception'. Dilution is regarded as unfair competition. In order to prove a violation under federal Trademark Dilution Act, a Plaintiff must show that the 1) mark is famous; 2) the defendant is making a commercial use of a mark in commerce; 3) the defendant's use began after the mark became famous; and 4) the defendant's use of the mark dilutes the quality of the mark by diminishing the capacity of the mark to identify and distinguish goods and services. In the Panavision case *Panavision International L. P. v. Toeppen* a leading case on dilution theory, the court found a new form of dilution outside of the traditional tarnishment and blurring. The Delhi High Court in a landmark judgement *William Grant & Sons. v. McDowell & Co. Ltd.* recognised a hitherto unacknowledged form of 'loss to business' and 'loss of reputation', namely the 'dilution of the image' of a trademark.

1. Acquisition of Domain Name

An individual or an entity can employ a Domain Name only have registered the Domain Name for their use. The organization responsible for overall coordination and management of the DNS is the 'Internet Assigned Number Authority' (Hereinafter to be referred as IANA). In the U.S today the major part of the assignment of the Domain Name is done by the registry called as the 'Network Solutions Inc.'. The world over the assignment and registration of Domain Names are carried out by registries called as 'Network Information Center'.

---

211 141,F.3d.1316 (9th Cir.1998)
212 (1994) 5 IPA 29.
However the most significant development in the world of Internet has been the establishment of the non-profit organization called the 'Internet Corporation for ICANN. It is a global organization created for the in OCTOBER 1998 by a broad coalition of the Internet's business, technical, academic and user communities. ICANN is assuming responsibility for a set of technical function previously performed under the U.S Government contracted by IANA and other groups. The ICANN today is responsible for managing and coordinating the DNS to ensure 'Universal Resolvability'. To categorically state the core ambit of ICANN’s function is to develop and manage Internet policy and logistics related to (i) Internet Protocol (ii) IP address and (iii) Domain Names.

The assignment of Domain Names is carried out by the administrator, of a desired TLD, who is authorized by ICANN. The applicant can be made electronically by means of online forms for registration of the Domain Name available with the respective TLD administrators. Only Domain Names which had previously not been assigned are open for assignment and every applicant must ensure that the Domain Name he seeks to register does not infringe any others trademark.

With the upswing of E-commerce millions of dollars change hands on the Internet and these economics are translated principally between Domain Names, thus resulting in Domain names becoming the bone of contention.

2. Identification of Cybersquatting

As a general rule, first check to see if the domain name takes you to a legitimate website. If the domain name takes you to a website that appears to be functional and reasonably related in its subject matter to the domain name, you probably aren’t facing a case of cybersquatting. However, you may have a case of trademark infringement.

But if your browser produces any of the following results, you may have a case of cybersquatting on your hands:

1. you get a "can’t find server" message
2. you get an "under construction" page, or

3. you get a page that appears to have no relationship to the meaning of the domain name.

Although each of these results suggests the possibility of cybersquatting, there may also be an innocent explanation, especially if the website is still under construction. You can reserve a domain name for two years, so the fact that a website is not up and running, even months after the name was reserved or registered, does not necessarily mean that the registrant doesn’t have perfectly legitimate plans to have a website in the future.

Before jumping to any conclusions, contact the domain name registrant. To find the name and address of a domain name owner, you can use the "WHOIS Lookup" at whois.net. Find out whether there is a reasonable explanation for the use of the domain name, or if the registrant is willing to sell you the name at a price you are willing to pay.

Sometimes, you may find that paying the cybersquatter is the easiest choice. It may be a lot cheaper and quicker for you to come to terms with a squatter than to file a lawsuit or initiate an arbitration hearing: these processes cost money, and although you may be able to recover your costs and attorney fees if you win, there is no guarantee; it’s completely up to the judge.

3. Types of Domain Name Disputes

As more and more users choose to ride the Cyberwave to further their interests, the incidents of Domain Name Disputes also seem to be burgeoning. Although it is an accomplished fact that the Domain Name Registration is based on ‘first come first served basis’, the registry of Domain Names does not determine the legality of the Domain Name Registration or otherwise evaluate whether that the Registration may infringe upon the rights of a third party\(^2\). Hence any Domain Name is open for challenge.

\(^2\) American Civil Liberties Union v. Reno., 929 F-Supp 824, 830, 845 (ED P 1996)
As many as 2162 Cases have been decided by WIPO, which is an ICANN accredited Organization (Approved effective 1 December 1999) alone until the end of February 2001. Although the natures of Domain Name Disputes vary still they can categorically be grouped under 3 distinct heads:

**a) Disputes Based On Illegitimate Claims:** In the Disputes relating to illegitimate claims to Domain Names, cases of 'Cybersquatting' form the core of such types of disputes. Let us now analyze the phenomenon of 'Cybersquatting' in medias res. Under the Anti-Cybersquatting Consumer Protection Act 1999, 'cybersquatting' means registering, tracking in, or using a Domain Name with bad faith intent to profit from the goodwill of a trademark belonging to someone else.\(^{215}\) The 'Beologic Case'\(^{216}\) is a classical illustration of 'Cybersquatting' where a Danish law student registered a number of famous Danish trademarks in the U.S under various Top Level Domains and he then attempted to resell them at a profit. His act was held violative of Paragraph 1 of The Marketing Act as well as Danish common law that it amounted to the converting of another's property right to his own use and profit.

A 'Cybersquatter' may be described as 'one who knowingly reserves with a Network Information Center a Domain Name consisting of the mark or name of a company user for the purpose of relinquishing the right to the Domain Name back to the legitimate owner for a price.\(^{217}\) A close corollary to 'Cybersquatting' if 'Typosquatting' - herein a 'Typosquatter' registers a Domain Name which is a variant of a famous trademark with the intent of profiting out of the goodwill of the famous trademark. The Rediff case\(^{218}\) is one such illustration of 'Typosquatting' wherein the respondent registered a Domain Name, which was similar to the plaintiffs Domain Name.

\(^{215}\) See “Cybersquatting : What it is and what can be done about it”, Stephen Elias and Patricia Gima.

\(^{216}\) In Re., beologic, Municipal Court of Copenhagen., 2 December 1997


Thus “Any person who deliberately registers a Domain Name on account of its similarity to the name, brand name or trademark of a unconnected commercial organization must expect to find himself on the receiving end of an injunction...” \(^{219}\). In *Bennett Coleman & Co Ltd. v. Long Distance Telephone Company* and in *Bennett Coleman & Co Ltd. v. Steven. S. Lalwani* the Respondents were ordered to transfer the Domain Names and as they did not have legitimate interest in the Domain Names.

b) **Disputes Based On Legitimate Claims:** Disputes based on illegitimate claims are most often ‘open and shut case’ but the disputes based on legitimate claims pose a great problem for the adjudicators. These genre of disputes involve parties having a legitimate claim to a Domain Name and since there can be only one registration for a particular Domain Name there lies a matter for adjudication. As the trademark laws are territorial in nature many parties use the same name as a trademark without causing infringement. But the ambit of Domain Names is universal in nature thus giving vent to the issue of territoriality.

Thus when the parties intend on registering their trademarks as Domain Names a hornet’s nest is stirred thus giving rise to the most complex problem in Domain Dispute Resolution. Buttressing the universal scope of Domain Names is an *American case* \(^{220}\), which highlighted the fact that an injunction granted in respect of a jurisdiction, may have the effect of a “global injunction”.

There are two types of legitimate competing claims dispute. In the first type, both the parties have a trademark claim in the Domain Name and in the second type of disputes only one party has a trademark claim while the other has only a legitimate claim to the Domain Name. Since the DNS is not a corollary to the trademark system it is not incumbent for a legitimate Domain Name holder to have a trademark claim.

\(^{219}\) *Marks and Spencer PLC v One in a Million*, 1998 VSR 265

A shining illustration of a legitimate claim dispute can be seen in *Infospace.com., Inc. v. Infospace Technology Co. Ltd.*, wherein both the parties had asserted a legitimate claim over a Domain Name. The Panel giving the benefit of the doubt to the Respondent stated that the onus is on the complainant to show that the Respondent lacked a right or legitimate interest in the Domain Name.

As legitimate claim disputes are the most challenging types of disputes for the adjudicators and since there is lacuna in the law to decide disputes of legitimate claims the best approach to adjudicate such matters would be to base the adjudication based only purely on facts and circumstances that surround the dispute.

c) **Reverse Domain Name Hijacking:** ‘Reverse Domain Name Hijacking’ is an offshoot of a legitimate claim dispute, wherein a powerful company tries to force a small user to give up a Domain Name that was legally acquired in good faith by the small user. The law is *per se* in favour of the holder of a legitimate Domain Name, in the *New York Stock Exchange Case*\(^{221}\) the Court held that innocent third party users of a trademark or service mark have no duty to police the mark for the benefit of the marks owner. The powerful companies nevertheless resort to coercive measures like constant threat of legal proceedings in a bid to, firstly to intimidate the user into relinquishing his right in the Domain Name and to transfer the same to them. As such kind of bullying is rampant on the Internet the Internet community has been extremely hostile to such online bullies.\(^{222}\)

4. **Remedies available**

The World Intellectual Property Organisation (WIPO), a treaty organisation with more than 170 nation states as its members, undertook a series of consultations concerning the management of the domain name system. Finally, in April 1999, WIPO issued its final report including its recommendations to ICANN. Most of the


\(^{222}\) For more information on this issue. Cf. The Domain Name Rights Coalition at http://domain-name.org.
WIPO recommendations were approved by the ICANN and have been incorporated in the current UDNDRP.\textsuperscript{223}

The UDNDRP is the latest breath of fresh air in the fight against cybersquatting. Under the said Policy, a summary procedure is adopted to adjudicate the complaint of any complainant relating to any domain name on payment of processing fees. This policy has been in operation from the last five years. Under the said Policy, Indian companies are also beginning to get back their legitimate domain names. The domain names ‘www.theeconomictimes.com’ and ‘www.timesofindia.com’ have been won back under the said policy. Two recent successes for Indian Companies under the said policy include winning back the domain names ‘www.tata.org’ and ‘www.philipsindia.com’ by TATA and Philips India respectively.

5. Measures to Fight a Cybersquatter

A victim of cybersquatting in the United States can now sue under the provisions of the Anti-cybersquatting Consumer Protection Act (ACPA) or can fight the cybersquatter using an international arbitration system created by the Internet Corporation of Assigned Names and Numbers (ICANN). The ACPA defines cybersquatting as registering, trafficking in or using a domain name with the intent to profit in bad faith from the goodwill of a trademark belonging to someone else. The ICANN arbitration system is considered by trademark experts to be faster and less expensive than suing under the ACPA, and the procedure does not require an attorney.

\textsuperscript{223} It has come into effect from 1st January 2000.
a) Fighting Under the ACPA: The Anti-cybersquatting Consumer Protection Act (ACPA) authorizes a trademark owner to sue an alleged cybersquatter in federal court and obtain a court order transferring the domain name back to the trademark owner. In some cases, the cybersquatter must pay monetary damages.

In order to stop a cybersquatter, the trademark owner must prove all of the following:

a. the domain name registrant had a bad-faith intent to profit from the trademark
b. the trademark was distinctive at the time the domain name was first registered
c. the domain name is identical or confusingly similar to the trademark, and
d. the trademark qualifies for protection under federal trademark laws -- that is, the trademark is distinctive and its owner was the first to use the trademark in commerce.

If the person or company who registered the domain name had reasonable grounds to believe that the use of the domain name was fair and lawful, they can avoid a court decision that they acted in bad faith. In other words, if the accused cybersquatter can show a judge that he had a reason to register the domain name other than to sell it back to the trademark owner for a profit, then a court will probably allow him to keep the domain name.

b) Using the ICANN Procedure: In 1999, after assuming control of domain name registration, ICANN adopted and began implementing the Uniform Domain Name Dispute Resolution Policy (hereinafter referred as UDNDRP) a policy for resolution of domain name disputes. This international policy results in an arbitration of the dispute, not litigation. An action can be brought by any person who complains (referred to by ICANN as the "complainant") that: a domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; the domain name owner has no rights or
legitimate interests in the domain name, and the domain name has been registered and is being used in bad faith.

All of these elements must be established in order for the complainant to prevail. If the complainant prevails, the domain name will be cancelled or transferred to the complainant, but financial remedies are not available under the UDNDRP.

c) Alternate Dispute Resolution (ADR) for Domain Names: A domain name dispute resolution system established by the ICANN is beginning to bear fruit. ICANN established the system under the UDNDRP adopted on August 26, 1999, and the first forum opened for business on December 1, 1999. The policy is binding on all domain name registrars in the "com", "net" and "org" top-level domains.

The system offers an expedited administrative proceeding for trademark holders to contest "abusive registrations of domain names," and may result in the cancellation, suspension or transfer of a domain name by the registrar. Complaints may be filed with one of three ICANN-approved centers: the WIPO Arbitration and Mediation Center (Geneva, Switzerland), the National Arbitration Forum (Minneapolis, Minnesota), and the Disputes.org/eResolution Consortium (Amherst, Massachusetts & Montreal, Canada). Additional centers may be approved by ICANN at a later date.

The clearest advantages of the ICANN dispute system are its quick resolutions and relatively low costs. Respondents must reply to the complaints within 20 days, and once the submissions are complete the panel has 45 days to issue its decision. The parties have the option of a panel of one or three arbitrators, selected from a list of ICANN-approved experts in intellectual property matters. The panel will then base their decision on the filings alone, as no personal appearances are allowed under the UDNDRP rules, unless there are

exceptional circumstances. The parties may even conduct the entire proceeding through electronic filings. All final decisions are then listed on the ICANN web site (www.icann.org), along with a list of pending matters.

Costs can range from $1,000 to $3,500 or more, depending on the number of domain name disputes involved and the number of panelists selected to resolve the dispute. The costs are born by the complainant, unless both parties opt to have a three-person panel hear the matter, in which case the costs are split.

Despite the recent enactment of federal cybersquatting laws, the UDNDRP appears to be developing into a popular alternative to litigation in domain name disputes. Between December 1, 1999, and March 15, 2000, approximately 300 complaints had been filed with the three dispute resolution service providers. The first case to be decided resulted in a transfer of the domain name www.worldwrestlingfederation.com to the World Wrestling Federation from a man in California who purchased the initial registration. Since then nearly 40 complaints have been resolved by the panel, settled or withdrawn. The parties always retain the option of pursuing legal action.

The possibility for a quick resolution may have been a factor in decisions by such major corporations as Fox, Christian Dior, Nabisco and Hewlett Packard to forego litigation in favor of the ICANN forums, even though relief under the UDNDRP is limited to a transfer, cancellation or suspension of the domain name, as opposed to potential statutory damages.

There has been some concern expressed over a potential bias in favor of the trademark holders. Of the nearly 40 cases resolved, 28 have resulted in the transfer of a domain name to the complainant, and only six complaints have been decided in favor of respondents. Whether this is evidence of bias in favor of the trademark holders or pervasive cybersquatting remains to be seen.
[C] Indian Scenario

The Domain Names or Web sites are soaked in information, much of it with varying degrees of copyright protection. In fact, the reality is that almost everything on the Web is protected by copyright law. E-business Web sites are a composition of materials, often consisting of words, graphics, audio, and video, that are expressed to the consumer as information content. The owners and Web site developers carefully select the content to sell the company’s product or service. The subject matter expressed in the site is an electronic publication of the content. The owners and Web site developers carefully select the content to sell the company’s product or service.

Since, designing, producing, and maintaining a sophisticated Web site is very expensive, protecting content ownership is extremely important. As Web sites become more and more interactive with consumers, their creation, design, and maintenance place enormous demands on innovative marketing techniques that should be legally protected.

Never before has it been so easy to violate a copyright owner’s exclusive right to copy the material. Everyone with a computer and an Internet connection creates his own Web pages and thus becomes a publisher. Hence the rules that once applied to only a few companies bind million of people now.

Imagine having paid a Web site developer hundreds of thousands of Rupees to launch a killer application and acquiring millions of Rupees from a venture capitalist firm, only to discover that another e-business is using your online material. Or consider a scenario where a Web site is linked or framed to an e-business that displayed copyrighted material without the owner’s consent. This part highlights the scenario when contents of a Web site are exploited by others without the owner’s permission or knowledge. The discussion is centred on copyright issues involved in the practices of Linking, Inlining and Framing technologies which are normally being used on the Internet.
1. Linking

The interactive feature of the Internet's most popular information access tool, the World Wide Web, to hyperlink\textsuperscript{225} defines its very culture distinguishing it from any other communication medium. On the Internet, a link is a selectable connection from one word, picture, or information object to another. Links usually appear as highlighted, underlined, otherwise prominent text or picture that can be selected by the user (with a mouse or prominent text) or picture that can be selected by the user (with a mouse of in some other fashion), resulting in the immediate delivery and view of another file. The highlighted object is referred to as an anchor. The anchor reference and the object referred to constitute a link.

A link is simply a connection between the content of two different files or between different parts of a single file. A link may lead either to another file in the same Web site, or to a file on a different computer located elsewhere on the Internet. Internet browsers automatically decipher the instructions given by links and retrieve the specified file. A single Web page may contain many links to other Web pages. That same page may itself be the 'destination' of hundreds, or thousands of other links on other pages.

Linking is the \textit{sine qua non} for the World Wide Web and in fact links are what make the World Wide Web a web. Links allow quick access to information that otherwise could take much time and effort to find. Consequently, if linking were disallowed or made illegal, the Web would no longer exist.

Linking is of two types:

\textbf{Surface linking}: When the home page of a site is linked, it is the case of surface linking.

\textbf{Deep linking}: When a link bypasses the home page and goes straight to an internal page within the linked site, it is the case of deep linking.

\textsuperscript{225} On the Web or other hypertext systems, hyperlink is a synonym for both link and hypertext link.
The Web was built for the purpose of enabling hypertext capabilities, allowing one site to link to and access another. In most cases, the owner of Web page will desire the page to be the destination of as many links as possible because more links would mean more hits, and more hits would in turn mean wider dissemination of whatever information the page is designed to get across. To date, Web site owners have made money primarily from the sale of advertising at their sites. The advertising rate is set keeping in mind the number of people who visit the site. From a revenue perspective, Web site owners should encourage the practice of linking. The conventional view has held that sites welcome linking from others because it increases traffic, advertising rates, and hence, revenue.

The problem arises only with regard to the practice of deep linking. The home page of a Web site is used as the entry point to information contained within the Web site and 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 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. A link is just a URL, the Internet address of a Web site and, therefore, like a street address is not copyrightable. But this technology of hyperlinking may aid in the distribution of creative material that belongs to someone else.

In the Ticketmaster Corp. v. Microsoft Corp.\(^{226}\) case, the plaintiff, Ticketmaster Corporation sued Microsoft for Microsoft’s practice of linking, without permission, deep within its site rather than to the home page, and claimed, among other things, that Microsoft effectively diverted advertising revenue that otherwise would have gone to the plaintiff. Ticketmaster Corporation had also entered into contract with other firms whereby those firms had agreed to pay to link to the Ticketmaster site. Free linking by Microsoft to the plaintiff’s site could have devalued those contractual relationships. Ticketmaster

\(^{226}\) Ticketmaster Corp. v. Microsoft Corp., No. 97-3055 (CD CA, complaint filed on April 28, 1997).
had also contracted to give Master Card prominence at its site. Microsoft’s bypassing of the home page threatened the ability of Ticketmaster to comply with that contract. Allowing such a free link undercut Ticketmaster’s flexibility both in designing its site and in its marketing efforts and arrangements with other sites. During the pendency of the court proceedings the parties entered into a settlement agreement whereby Microsoft agreed not to link to pages deep within the Ticketmaster site and agreed that the links will point visitors interested in purchasing tickets to the ticketing service’s home page.

In a Scottish case, *Shetland Times, Ltd. v. Dr. Jonathan Wills and Another*\(^{227}\), the plaintiff, the Shetland Times operated a Web site through which it made available many of the items in the printed version of its newspaper. The defendants also owned and operated a Web site on which they published a news reporting service. Defendants reproduced verbatim a number of headlines appearing in the Shetland Times. These headlines were hyper linked to the plaintiff’s site. Clicking on the headline took the reader to the internal pages in the plaintiff’s site on which the related story was found. The judge agreed that the plaintiff had presented at least a *prima facie* case of copyright infringement based upon the United Kingdom’s law governing cable television program providers. He found that the articles were being sent by the Shetland Times but through the Web site maintained by the defendants. In the process, the front page of the Shetland Times’ site (on which paid advertisements appeared) was bypassed significantly diminishing the value of the site to potential advertisers. The court issued an interim interdict barring defendants, without the plaintiff’s consent, from copying headlines from the plaintiff’s newspaper onto their Web site, and creating hyperlinks from those headlines to the location on the plaintiff’s site on which the article described in the headline appears. Thereafter, the case was settled out of court by the parties whereby the defendants agreed not to deep-link into the site of the plaintiff.

---

There have been many cases of unwanted linking to pages. An interesting (possibly apocryphal) case was where the parents of a dead girl had created an “in memorial” Web site to her memory, only to find that there was unwanted linking to the page which had a photograph of the girl from an Internet service entitled “Babe of the Week”. A few courts have now held that a hyperlink violates the law if it points to illegal material with the purpose of disseminating that illegal material.

In Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., the plaintiff, Intellectual Reserve held a copyright in the Church Handbook of Instructions. After being directed by the court to remove the Handbook from its Web site, defendants posted a message on its Web site that informed users that the Handbook was online. The message went on to provide users with the URLs of three Web sites at which the Handbook was posted. The plaintiff sought a preliminary injunction enjoining defendants from continuing to post such message to their site which, plaintiff claimed, constituted contributory infringement of its copyright in the Handbook. The court issued the requested injunctive relief and further held that by posting a message on their Web site providing users with the location of infringing materials and apparently aiding a user in viewing the infringing Web sites, the defendants had committed contributory infringement.

Deep linking by search engines has won the legal thumbs-up in Germany in Verlagsgruppe Holtzbrinck v. Paperboy. The German Federal Court of Justice ruled that Paperboy, an online search engine, neither violated copyright nor competition law for providing deep links to the plaintiff’s Web site. According
to Links & Law\textsuperscript{232}, a Web site which campaigns against legal attempts to stop deep linking, the plaintiff's argument against the headline scraper was that such deep links are illegal, because they "take users directly to news articles, bypassing introductory pages and advertising, thus depriving the plaintiffs of revenue from their advertisements". The question here is couldn't the plaintiff, publishing firm Verlagsrupee Holtzbrinck, sell more advertising on the traffic generated by deep-links to interesting stories? Most Internet publishers welcome a deep link to a story, courtesy of a Slashdot or a Drudge Report, or a prominent position on Google News. They know this traffic isn't going to come along every day, and they know it isn't "their" traffic. The German court also thought the plaintiff's demand that users must start with the home page was unreasonable. The court stressed the importance of deep links for the Internet and held that it is up to the plaintiff to prevent deep links with technical measures, if they don't like them.

**Liability for linking under Indian Law**

What liability is there for the content on a linked site? 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 does not generally require permission. This position is based on the theory that going online creates an implied license for anyone with a computer to view the Web site. Simply placing a surface link is no more an infringement than the library catalogue.\textsuperscript{233} The very fact that a person or an entity has put up a Website is in itself an invitation to all to visit the site. So, the owner of a Web site should only be happy that someone has provided a link to his Web site.

But what exactly can be the liability for a deep link under the Copyright Act of India. Section 14 states as follows:\textsuperscript{234}

\textsuperscript{232} http://www.linksandlaw.com/


\textsuperscript{234} S.14, Copyright Act, 1957
Chapter V: Protection of Domain Names and its Contents

Meaning of copyright. For the purpose of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely –

a. in the case of a literary, dramatic or musical work not being a computer programme, -

   ii. to reproduce the work in any material form including the storing of it in any medium by electronic means;

   iii. to issue copies of the work to the public not being copies already in circulation;

   iv. to perform the work in public, or communicate it to the public;

   v. to make any cinematograph film or sound recording in respect of the work;

   vi. to make any translation of the work;

   vii. to make any adaptation of the work;

   viii. to do in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

b. in the case of a computer programme, -

   i. to do any of the acts specified in clause (a);

   ii. to sell or give on hire, or offer for sale or hire any copy of the computer programme, regardless of whether such copy has been sold or given on hire on earlier occasions;

   c. in the case of artistic work, -

   i. to reproduce the work in any material form including depiction in three dimensions of a two dimensional
work or in two dimensions of a three dimensional work;

ii. to communicate the work to the public;

iii. to issue copies of the work to the public not being copies already in circulation;

iv. to include the work in any cinematograph film;

v. to make any adaptation of the work;

vi. to do in relation to any adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iii).

d. in the case of a cinematograph film,

i. to make a copy of the film including a photograph of any image forming a part thereof;

ii. to sell or give on hire or offer for sale or hire, any copy of the film regardless of whether such copy has been sold or given on hire on earlier occasions;

iii. to communicate the film to the public;

e. in the case of a sound recording:

i. to make any other sound recording embodying it;

ii. to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;

iii. to communicate the sound recording to the public.

(Emphasis added)
Further Section 51 states⁵:

When copyright infringed. Copyright in a work shall be deemed to be infringed—

a. when any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any conditions imposed by a competent authority under this Act—

i. does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, 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 works: Provided that nothing in sub-clause (iv) shall apply to the import of two copies of any work, other than a cinematograph film or record, for the private and domestic use of the importer. (Emphasis added)

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 could amount to copyright violation. But in case of deep linking, the linking site is not

---

⁵ S. 51, Copyright Act, 1957.
reproducing any work. The reproduction, if at all, takes place at the end of the user who visits the linked page via the link. Can the linking site said to be issuing copies of the work or communicating it to the public? Technically, the linking site is only informing people about the presence of the work and giving the address of the site where the work is present. It is the user's discretion to access the work by clicking the link. Nevertheless, the linking site is definitely aiding in the distribution of the work.

Looking from another angle, section 2(ff) of the Copyright Act says:

> 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 work regardless of whether any member actually sees, hears or otherwise enjoys the work so made available. (emphasis added)

This definition of communication to the public could be stretched to cover the communication of contents of a Web site on the Internet as the expression 'by any means of display' has been used to define communication.

Without deep linking the Internet as we know it would collapse. One couldn't have a search engine, for example. But some grey areas do need to be addressed. It is quite different for a search engine to deep link than a competitor of an e-business Web site to do the same. Deep linking to commercial Internet databases without the permission of the content owner could raise many problems. 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 is shepherded after a few days into paid-for archives. But many Web sites would welcome deep links as well.

So, should law be amended to stop deep linking without permission of the owner of the content? Or should the law provide complete immunity to links of all kinds? Internationally, no law till date has put a ban on deep linking. There

---

236 S. 2(ff), Copyright Act, 1957.
are indeed problems in doing so. On the one hand, one has to consider the rights of the owner of content and, on the other hand, the interest of the society for which growth of the Internet is all important. The international treaties and laws do emphasize the importance of control in the hands of the content owner, but specifically they have not dealt with the problem of deep linking. 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 unauthorized 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 injected.

Before linking deep within a Web site, the prudent course for business 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 or approval of the material on the linked sites.

2 Inlining

Inlining or ‘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 filed 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.

An example could be a Web page on art that contains images stored around the world. The Web page could contain the text: “See my favourite
paintings”. Using an inline link, the Web page could then direct the visiting browser to retrieve the images of famous paintings from the Web page of various museums and place it immediately below the text. To the end-user, the integration of the two pieces of content (text and pictures) is seamless, despite the fact that they were taken from two very different sources. The viewer cannot distinguish that the image has originated and been imported from a separate site and may never come to know that it was not created or stored at the site being visited by him. In this respect, inlining is different from deep linking where the user is usually aware that he has “changed pages”, either from the different appearance of the newly accessed page, or from the change in the URL address displayed in the Web browser.

In the USA, the Dilbert dispute, though did not involve the filing of a complaint or any judicial determinations, is one of the few inline controversies and thus serves as a point of discussion for these links. Dan Wallach created “The Dilbert Hack Page,” a site that presented the Dilbert comic strip via inlining to the United Media Web site, where the comic strips were located. The images appeared on Wallach’s Web site, where the comic strips were located. The images appeared on Wallach’s Web site via inlining. United Media, speaking for United Feature Syndicate, Inc., owner of the copyright in the comic strip, requested by letter to Wallach to discontinue the link. United Media contended that “the names or likenesses of the Dilbert comic strips and all other United Media intellectual property cannot be used – on the World Wide Web or elsewhere – without the express, written consent of UFS.” United Media asserted that Wallach’s inline links to copyrighted material constituted an unauthorized display of a copyrighted work, a violation of the Copyright Act. To avoid litigation, Wallach removed the page.

In Leslie A. Kelly v. Arriba Soft Corporation, a visual search engine (ditto.com, 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 text describing the size of the image, a link to the original web site, the Arriba banner, and Arriba advertising. Kelly filed suit on April 6, 1999, alleging copyright infringement.

A California District Court ruled that both the creating of the thumbnails and the inline-linking is justified under the fair use doctrine. On appeal by Kelly, the Ninth Circuit Court of Appeals affirmed and reversed in part the district court decision. The display of the tiny images was deemed to be legal fair use, but not the inline-linking. On February 6, 2002, the US Court of Appeals for the Ninth Circuit held that unauthorized inline linking to images residing on the copyright owner's Web site violates the copyright owner's right of the 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 (hereinafter referred as 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. In July 2003 the court withdrew that portion of its opinion which was relating to inlining, leaving it to the lower court to take a fresh look at the issue. It is now open for the court to reconsider whether inlining is violative of copyright or not.

---

238 Leslie A. Kelly v. Arriba Soft Corporation, Case No. 00-55521, US Court of Appeals for the Ninth Circuit.
Inlining and Indian Law

As in linking one has to turn to section 51\textsuperscript{239} read with section 14\textsuperscript{240} of the Copyright Act, 1957 to test the legality of inlining. 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 could amount to copyright violation. The person who employs an inline link on his site is not causing any reproduction of the copyrighted content. 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.

Looking from another angle, the definition of communication to the public under section 2(ff) of the Copyright Act\textsuperscript{241} could be stretched to cover the communication of contents of a Web site on the Internet as the expression ‘by any means of display’ has been used to define communication to the public.

Section 14(a)(vi)\textsuperscript{242} grants the right of adaptation\textsuperscript{243} only to the owner of copyrighted work. By inlining the linking site could take some elements from the

\textsuperscript{239} Supra note 186.
\textsuperscript{240} Supra note 185.
\textsuperscript{241} S. 2(ff), Copyright Act, 1957. See, supra note 187.
\textsuperscript{242} Supra note 185.
\textsuperscript{243} S. 2(a), Copyright Act, 1957 states:
“adaptation” means,
\begin{itemize}
  \item [i.] in relation to a dramatic work, the conversion of the work into a non-dramatic work;
  \item [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;\end{itemize}
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.

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:244

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. (emphasis added)

---

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.

244 S. 57, Copyright Act, 1957.
First, this section allows the copyright author to claim authorship of the work. In case of inlining, the user is confused about the original source and hence may 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 right of the author.

Second, section 57 talks about the right of integrity. The author of the copyrighted work has a right to see that his work is not being distorted, mutilated or modified. 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 form 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.

Should the law be amended to outlaw inlining or to allow this practice? The Copyright Act talks about various rights of owners and authors of works and describes situations where these rights can be infringed. So, there is no need for the law to be changed as such in this regard. A complete ban could restrict the growth of the Internet. At the same time owner's content should not be subject to exploitation by one and all. 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.
It is considered a breach of net etiquette to link to anyone else’s image through an inlining link without permission. Consequently, one should obtain permission from the copyright owner of the image prior to creating an inlining link.

3. Framing

Web browsers allow Web authors to divide pages into “frames”. A frame is an independently controllable window on a Web site through which pages from another Web site can be viewed. 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 own site. A typical use of frames is to have one frame containing a selection menu and another frame that contains the space where the selected (linked to) files appear.\(^{245}\)

The technology of framing was developed by Netscape and was introduced in 1996 and is now a common technology used on many Web pages, but sometimes it can lead to legal problems for those who use it.

In *Washington Post Co. v. Total News, Inc.*\(^ {246}\), the Washington Post filed a complaint against an online news site, Total News, the publisher of the Web site *www.totalnews.com*. TotalNews, an aggregator of web news sources, employed frame technology to display news sites from around the Web. Total News had created pages with frames that contained hyperlinks to other news Web sites, such as *The Washington Post, CNN, USA Today, Time* and *Sports Illustrated*, etc. Web users, therefore, could use *www.totalnews.com* to access articles from various sources. The TotalNews Web site generated its revenue from advertising, which it placed in a static border frame. Clicking on a hyperlink to ‘The Washington Post’ within the Total news Web page displayed the content of The

\(^{245}\) See, http://searchwebservices.techtarget.com/sDefinition/0,sid26,gci212154,00.html.

Washington Post page within a frame that was surrounded by TotalNews's URL, logo, banner, advertisements and information. Six content providers – CNN, Time-Warner, Reuters, The Washington Post, The Wall Street Journal and the LA Times, sued TotalNews, claiming that such framing was "the Internet equivalent of pirating copyrighted material. They also alleged misappropriation, trademark infringement and trademark dilution. The plaintiffs complained that TotalNews has designed a parasitic Web site that republishes the news and editorial content of others' Web sites in order to attract both advertisers and users. Total News settled the case by agreeing to link to, rather than frame, the Web pages of various plaintiffs and the court did not have an opportunity to decide any of the legal issues that were raised by the plaintiffs.

In, Futuredontics Inc. v. Applied Anagramic Inc., a dental service Web site, framed the content of a competing site. The frames included information about Applied Anagramic as well as its trademark and links to all of its Web pages. A US district court ruled that the addition of the frame somewhat modified the appearance of the linked site and such modifications could, without authorization, amount to infringement.

**Legality of framing under Indian Law**

As in linking and inlining one has to turn to section 51 read with section 14 of the Copyright Act, 1957 to test the legality of framing. The person who frames some other site's content on his site is not causing any direct reproduction of the copyrighted content. This is because 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

---


248 Supra note 105.

249 Supra note 104.
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)\footnote{Ibid.} 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.

Framing brings in the question of moral rights as well. Section 57(1)\footnote{Section 57 Copyright Act, 1957.} of
the Copyright Act, allows the 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 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
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.

The author of copyrighted work has a right to see that his work is not
being \textit{distorted, mutilated or modified}. Content from various sites could be pulled
into a single window, thus creating another work virtually new and different form
Chapter V: Protection of Domain Names and its Contents

187

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 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\textsuperscript{252} 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 or 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.

4. Content on Domain Names or Websites: Copyright Registration

The *sine qua non* to the existence of copyright, is the expenditure of skill and labour on any work which originated from its author and unless the original work on which skill and labour has been expended by its author is produced in court to *prima facie* show that the work has originated from the author, it cannot be said that there is copyright in the work.\textsuperscript{253} The Copyright Act under section 44 provides for registration of a work in which copyright subsists but registration of copyright is not compulsory either for acquiring copyright or for enforcing the copyright by infringement suit.\textsuperscript{254} Copyright subsists as soon as the work is created and given a material form.

\textsuperscript{252} Washington Post Co. v. TotalNews, 97 Civ. 1190 (S.D.N.Y.)


\textsuperscript{254} Kumari Kanaka v. Sundararajan (1972) Ker LR 536; Satsang v. Kiron Chandra AIR 1972 Cal 533.
The Copyright Act provides that the registration of copyright shall be *prima facie evidence of the particulars entered therein.* \(^{255}\) The registration only raises a presumption that the person shown is the actual author. The presumption is not conclusive but where contrary evidence is not forthcoming, it is not necessary to render further proof to show that the copyright vested in the person mentioned in the register.

The Copyright Office maintains a Register of Copyrights containing the names or titles of works and the names and addresses of authors, publishers and owners of copyright and other particulars as may be prescribed. \(^{256}\) The Register of Copyright is kept in six parts as follows:

| Part I | Literary works other than computer programmes, tables and compilations including computer databases and dramatic works. |
| Part II | Musical works |
| Part III | Artistic works |
| Part IV | Cinematograph films |
| Part V | Sound recordings |
| Part VI | Computer programmes, tables and compilations including computer databases. |

Since Web sites are relatively new, both in terms of content and technology, it may be tricky figuring out under which of the above parts one could register the entire Web site. Web sites are generally a combination of text, images, graphics, sound and video. So, individually each category of work could be registered under the corresponding part. For example, the textual component

\(^{255}\) S. 48, Copyright Act, 1957  
\(^{256}\) S. 44, Copyright Act, 1957.
of a Web site could be registered under Part I as a literary work and the sound component could be registered under Part V as sound recording.

The problem arises only as to registering the whole Web site as such, which could contain content in the form of multimedia. There is no provision under the existing Indian Copyright Legislation which specifically talks about multimedia works. But registering works which are a combination of many media is not unknown to the Copyright Act under Part IV, Cinematograph films could be registered which is nothing but a combination of various works existing in different media. Web site content, strictly speaking, cannot be described as 'Cinematograph film' but since it is a combination of several media it should be possible to register it under Part IV. Moreover every Web site has a software component to it. So, it can also be registered under Part VI as a Computer programme.

[D] Passing off Action on Internet: Judicial Directions

The various courts have given directions on important issues in some of the landmark cases which are discussed as follows:

For the first time the Delhi High Court in Yahoo Inc. Case\(^{257}\) has considered a stark question whether section 27 and 29 of the Trade and Merchandise Marks Act, 1958 would attract to the use of the domain trade name or domain on Internet. The brief facts of the case, where the plaintiff registered the domain name yahoo.com with NSI (Network Solution Inc.) on 18 January 1995.

The Domain name 'yahoo.com.' is registered in the plaintiff's favour with Network Solution Inc., in 1995. The Trade Mark 'yahoo' and its variance are registered or pending registration in 69 countries of the world and also pending in India. The plaintiff is a global internet media rendering services under the domain name/Trade name 'yahoo'.

---

The defendant has by adopting a deceptively similar trade mark “yahoo India”. The defendants have verbatim copies the format, contents layout, colour scheme, source code of the plaintiff's prior created regional section on India at yahoo.com and thus passing off the services to the plaintiff.

Dr. M.K. Sharma J. has rightly rejected the argument that the provisions of the Trade and Merchandise Marks Act would not be attracted to the use of domain name on the Internet. He has observed:

“although the word “services” may not find place in the expression used in sections 27 and 29 of the trade and Merchandise Marks Act, services rendered have to be recognised for an action of passing off...that the two marks/domain names ‘yahoo’ and ‘yahoo India’ are almost similar excepting for the use of suffix “India” in the latter.

The learned judge also rejected the argument of the defendants that the Internet users are sophisticated users and only literate people who are able to ascertain can approach the actual Internet site that they intend to visit. He observed:

“That if an individual is a sophisticated user of the Internet, he may be an unsophisticated consumer of Information and such a person may find his/her way to the different Internet site which provides almost similar type of information as that of the Plaintiff and there by confusions could be created in the mind of the said person who intends to visit the Internet site of the plaintiff, but in fact reaches the Internet site of the defendant. The Principal of disclaimer has no application on Domain Name. Interim Injunction granted.

The law relating to passing off in India is fairly well-settled. The principal under lying the action is that no man is entitled to carry on his business in such a way as to lead to the belief that he is carrying on or has any connection with the business
carried on by another man. It is also well established that passing off action is a common law remedy.

There are a catena of cases where it has been held that the principle of Common Law govern actions of passing off and have been recognised by sections 27 and 29 of Trade and Merchandise Marks Act, 1958. P. Narayanan rightly formulated the doctrine of passing off in the following words:

"The general principles of the law applicable to cases where a person uses a name or intends to use a name which is likely to deceive and divert the business of the plaintiff to the defendant or cause confusion between the two business are analogous to the principles which are applicable to ordinary cases of passing off relating to sale of goods." 260

Lord Greene MR. In Reddaway v. Benham 261 observed that:

"Passing off may occur in cases where the plaintiffs do not in fact deal with the offending goods."

In yahoo case, there can be no two opinions that the two marks/domain name’s ‘yaho’ of the plaintiff and ‘yahooindia’ of the defendant are almost similar except for the use of the suffix ‘India’.

It is crystal clear that the two names being almost identical or similar in nature, there is every possibility of an Internet user being confused and deceived in believing that both the domain names belong to one common source and connection although the two belong to two different concerns.

In British Telecommunications Pls and Another v. One in A Million Ltd., and Other Action. 262 In this case the court of appeal has resolved the conflict between Trade Marks and domain name on the Internet and infringement thereof and discussed the history of doctrine of passing off and quoted a number of

---

261 1996 Ac 199
262 1998 4 All ER 476
Chapter V: Protection of Domain Names and its Contents

cases. In Nicholson & Sons. Ltd. In this case Lawrence LJ that the right to restrain infringement of a trade mark depended not upon reputation, but use. The Trade Marks Registration Act, 1875 did not alter the common law rule that a mark did not become a trade mark until it had been publicly used. It provided for the establishment of a register of trade marks.

In Mangolia Metal Co. v. Tandem Smetting Syndicate Ltd., it was held by Lord Halsbury LC that the action for passing off is old and right to prevent other people fraudulently that it is their manufacture when it is not if that right is infringement there is a remedy.

In the case of Erven Warnink v. Townen which is known as Advocates case the essential characteristics which must be present in order to create a valid cause of action for passing off as stated by Lord Diplock as under:

1. misrepresentation;
2. made by a person in the course of trade;
3. to prospective customers of his or ultimate consumers of goods or services supplied by him;
4. which is calculated to use the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence; and
5. which can be actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.

However, for many years the court has granted injunctions to prevent the creation and disposal of instruments of fraud. Recourse to those cases is necessary to ascertain why and in what circumstances an injunction should be

---

263 Application (1931) 48 RPC 227 at 253
264 (1900) 17 RPC 477 at 484
265 (1980 R.P.C. 31)
Chapter V: Protection of Domain Names and its Contents

granted, bearing in mind that prior to 1938 there were two causes of action, one for infringement of trade mark and one for passing off. It follows that a court will intervene by way of injunction in passing off cases in three types of cases. First, where there is passing off established or it is threatened. Second, where the defendant is a joint tortfeasor with another in passing off either actual or threatened. Third, where the defendant has equipped himself with or intends to equip another with an instrument of fraud. This third type is probably mere quia timet action.

In Titan Industries Ltd. v. Prashant Kooapatí,' the defendant registered the domain name ‘tanishq.com’. The plaintiff Company, which has been using the trademark ‘TANISHQ’ with respect to watches manufactured by it, sued for passing off and alleged that the use of the domain name by the defendants would lead to confusion and deception and damage the goodwill and reputation of the plaintiffs. The Delhi High Court has granted an ex-parte ad-interim injunction restraining the defendants for using the name ‘TANISHQ’ on the Internet or otherwise and from committing any other act as is likely to lead to passing-off of the business and goods of the defendants as the business and goods of the plaintiff.

Recently, the Bombay High Court in Rediff Communication Ltd. Case has held that a domain name is entitled to protection under the Trade and Merchandise Marks Act, 1958 as a ‘Trade Mark’. Where the plaintiff is a well known on-line media company with a registered domain name ‘rediff.com’ the defendant also an on-line Company had registered the domain name “radiff.com.”

The Brief facts of the case were, the plaintiff are carrying on their business of communication and providing services through the Internet. The plaintiff’s are publishing advertisements of their clients by setting up plaintiff’s web pages. The

---

267 Rediff Communications Ltd. v. Cyberbooth, AIR 2000 Bomb. 27.
plaintiff also provide services such as sale of cinema tickets of selected cinema theatres in Bombay, made hotel booking and selling books and other goods etc. The services of the plaintiff under Trade Mark/Domain name Rediff had been widely published and the turn over of the group of companies is over 250 Corers. On the other hand the defendant had a common field of activities. Defendant is one operating on the web sites and providing information of similar nature. Both the plaintiff and defendant offer facility of sale of books, music cassettes and Compact Disks and flowers. Both offer a chart time and both presently offer a cricket opinion polls that the two domain names are of almost similar in nature. The petitioner filed a suit for permanent injunction restraining the defendant using the Domain name.

The Bombay HC has considered a pertinent question whether there is a case of misrepresentation, radiff.com create livelihood of confusion or deception of the public and consequent damage to the Domain names are of similar nature. On the other hand, defendant contended that the work “radiff.com is coined by taking first three letter of the word “radical” information, feature and free. He further contended that there is no likelihood of any deception or confusion between www.rediff.com of plaintiff and www.radiff.com of defendant and there is no similarity between the two.

Moreover, defendant argued that the plaintiff’s web site is more in the nature of web newspaper and provides various services from means to shopping whereas the defendant’s web site mainly provides hyper text links to its advertisers’ web sites it looks and feels of that plaintiff’s web site is totally different from the defendant web site. He further argued that the user of the internet are skilled and educated and there can be no confusion in their minds regarding the two domain names. Radiff.on line also argued that the design and content depicted on the web site of the plaintiff is not artists or literary work within the meaning of Copyright Act, 1957 and the plaintiff therefore not entitled for any
protection and relief under the Act. There is no Evidence about the alleged reputation in the Domain name rediff.

Bombay HC has discussed the new emerging concept of Domain on Internet and protection thereof in the global village. The HC heavily relied upon American Jurisprudence on Internet. The HC referred American Civil Liberties case. It was held that with the advancement and progress in technology the services rendered by and given protection from passing off.

In *American Civil Liberties Union* Case268, Justice Mekenna has aptly explained the Internet address system, as follows:

"Each host computer providing internet services site has a unique internet address. User seeking to exchange digital information (email, Computer programs, images and music) with a particular internet host requires the host address in order to establish a connection. Hosts actually possess two fungible addresses: a numeric “IP” address such as 123, 456, 12312, and an alphanumeric “Domain Name” such as microsoft.com with greater numeric potential... Internet Domain Name are similar to telephone number numeric, but they are greater importance – Domain name may be a valuable corporate asset, as it facilitates communication with a customer base. NSI which provides registration services of Domain name under the Internet Network Information Canter. NSI registers names free on the basic of “first come first served”. NSI does not determine the legality of the domain name registration or otherwise evaluate whether that registration or use may infringe upon the rights of third party. Any one can apply for the registration of a domain name and if the name is available, it is allotted to the applicant.

In *Marks and Spencer PLC* cases,269 where it was held that any person who deliberately registers a domain name on account of its similarity to the brand name or trade mark of an unconnected commercial organization must expect to

---

268 (929 F) (Supp 824) 1996
269 (1998) FSR 265
find himself on the receiving end of an injunction to restrain the threat of passing off and the injunction will be in terms which will make the name commercially useless to the dealer. The court further held that the name "marks and spencer", could not have been chosen for any other reason than that it was associated with the well known retailing group. The decision further goes on to say that where the value of a name consists solely in its resemblance to the name or trade mark of another enterprise, the court will normally assure that the public is likely to be deceived.

Similarly in Card Service International Inc.\textsuperscript{270} The U.S. Court held that the domain name serves the same function as the trade mark and is not a mere address or like finding number on the Internet and therefore, it is entitled to equal protection as trade mark. The Court further held that a domain name is more than a mere Internet address for it also identifies the Internet site to those who reach it, much like a person’s name identifies a particular person or more relevant to trade mark disputes, company’s name identifies a specific company. Accordingly the court granted the injunction as per under section 32 of the Lamhan Act. The Court further held that cardservice International’s customers who wish to take advantage of its Internet services, but do not its domain name are likely to assume that “cardservice.com,” belongs to Cardservice International. These Customers would instead reach MeGee and see a home page for “Cardservice” and there by many would assume that they have reached “Card service International”.

Having considered American jurisprudence on Internet, Bombay HC held that what emerges from these authorities is that Internet Domain names are important and can be an able corporate asset and need legal protection.

\textsuperscript{270} (42 USPQ) 2d (1850)
Chapter V: Protection of Domain Names and its Contents

In *Maruti Udyog Ltd.* and *Suzuki Motor Corp. Case*[^1], where the complaint was filed by e-mail on July 27, 2000 and in hard copy on July 31, 2000 with WIPO Arbitration and mediation center.

The complainant's trade marks Maruti and Suzuki are registered in more than ninety countries. The hybrid mark 'Maruti' 'Suzuki' has been used on the products of joint ventures of complainant 1 and 2 in various brochures and advertisements. The word 'Maruti' is the name of an Indian Goods but this does not detract from identity of the domain name with the mark. The respondent's domain name 'marutisuzuki.com' is identical and confusingly similar to the Mark "Marutisuzuki". The Respondent does not operate any business or have any interest in any company using the name "Maruti Suzuki". Further it has neither used nor demonstrated any serious preparations to use the domain name "Maruti Suzuki Com." in connection with a bonafide or legitimate offering of goods or service. It was alleged by the complainant that the respondent over the telephone had asked for an amount as advertising sponsorship on 'misgivingindiakids.com' and the registration of the disputed domain name shall continuous use in Bad Faith"? As contemplated under clause 4(b)(IV) of the uniform dispute Resolution Policy. Which says that complainant shall prove the following:

1. That the domain name registered by the respondent is identical or confusingly, similar to a service mark or trade mark in which the complainant has right, and

2. That the respondent has no legitimate interests in respect of the Domain name; and

3. That the Domain name has been registered and used in bad faith.

Manind Singh, Panelist after discussing the facts and held that the respondent's Domain name 'marutisuzuki.com' is identical to the trade mark 'Maruti Suzuki' and the complainant has right. It has no legitimate interest in the

[^1]: 2000 PTC 636
domain name "marutisuzuki.com" and registration of the domain name 'marutisuzuki.com' is in bad faith registration. Therefore, the respondent's domain name 'marutisuzuki.com' should be transferred to the complainant.

In the bodacious.tatas.com. Case272: WIPO decision under the UDNDRP, the panel held and cancelled the domain name. The action was brought by Tata group India, holding a trademark on "tata". The panel relied that the Tata trademark "deserves" wide protection due to high repute, and that bodacious-tatas was confusing similar to the Tata trademark".

Similarly in Fuji sawa pharmaceuticals Co. Ltd., case273 Where the domain name in dispute is "suprax.com." which is registered with NSI based in USA and that the respondent, Acaramba Inc. is the current registrant of the name. In February 1999, the complainant via its lisencee contacted the respondent by certified mail to demand that the domain name be transferred. The Respondent though telephone contracted to complainant and offered to transfer or assign the domain name "for expenses" in excess of any out of pocket cost. But he did not do. The complainant had instituted arbitration proceedings before the WIPO centre against the respondent in respect of the domain name "ativan.com.", "lo-oural.com." and "oural.com. The panelists had relied on Paragraph 4(a) and found in favour of the complainant's trademark rights. The only other requirement to be addressed is whether the domain name "suprax.com." is identical or confusingly similar to the complainant's trademarks. It is evident that the impinged domain name is identical to the trademark of the complainant and also the respondent has no legitimate interest in respect of the domain name at issue.

The panel holds that the doctrine of "advance inference", which is a well established legal doctrine in most justifications".274 For taking help of bad faith criteria element 3 class 4(b)(iv) of UDNDRP must be proved by the complainant

---

272 Available at Tata sons Sec. http'V/www.tala.com/tuta.sons/releases/20010828.htm.
273 2001 PTC 208 (WIPO)
that the Respondent has registered and is using the disputed domain name in bad faith. The policy indicates that certain circumstance may “in particular but without limitation be evidence of bad faith. Thus the panel reached on a conclusion that the conditions of paragraph 4(b)(1) of the policy have been met, i.e., “the Respondent has registered the domain name Primarily for the purposes of selling, renting or otherwise transferring the domain name registration to the complainant for valuable consideration in excess of the respondent’s documented out-of-pocket costs directly to the domain name.” Therefore, the panel held that the domain name “suprax.com.” has been registered is being used in bad faith.

In Satyam Infoway Ltd. v. Sifynet Solutions (P) Ltd., the appellant, a company incorporated in 1995, registered several domain names like www.sifynet.com, www.sifyrealestate.com, etc with the Internet Corporation for Assigned Names and Numbers (ICANN) and the WIPO. “Sify” is a coined word which the appellant invented using elements from its corporate name, Satyam Infoway .In 2001 the respondent, Sifynet Solutions (P) Ltd. Started its business of internet marketing under the domain names www.sifynet.net and www.siffy.net. The appellant filed a suit for damages and also sought an injunction against the respondent on the basis that they were passing off its business by using the appellant’s business name and domain name. In reply to the notice by the appellant, the respondent only alleged difference between the respective trade names i.e. ‘sify’ and ‘siffynet’. The reason put forward by the respondent for the choice of the word ‘siffy’ as part of its corporate domain name appear from the second written statement filed y them before the trial court in which the respondent company is said to be the brain child of its founder director Mr. Bawa Salim ,and that the word ‘Siffy’ was the acronym made out of names of its originators .But the same was turned down by the trial court considering that the respondent was aware of existent and success of ‘sify’ prior to their adoption of the word ‘siffy’ and that ‘sify’ has a large subscriber base and its business had

been high profile since 1999. Therefore, the respondent's explanation for their choice of the word ‘siffy’ was a post realisation.

However the High Court reversed the judgement of the trial court stating that no prejudice would be caused to the appellant as it was a case of bonafide concurrent use where the right to use was coequal.

An appeal was preferred before the Supreme Court allowing the appeal the Supreme Court held that:

The doubtful explanation given by the respondent for the choice of the word ‘Siffy’ coupled with the reputation of the appellant can rationally lead us to the conclusion that the respondent was seeking to cash in on the appellants reputation as a provider of the service on the internet.

It further said that domain names are not just Internet website addresses, they act as business identifiers. They identify the business itself, its goods and services and specify its corresponding online location. Therefore, maintaining an exclusive identity is critical. Domain names have all characteristics of trademarks and therefore could form the basis for an action against passing off.

The Tata Sons Ltd. Case The plaintiff Company seeks permanent injunction, restraining the defendants from passing off, dilution of trademarks and for realisation of account, damages, delivery-up etc. The defendants have been registered the plaintiff well known and famous Trade Mark TATA. Counsel for plaintiff has relied upon, yahoo. Inc. Case, British Telecom Plc. And Rediff Communications Ltd. Cases to submit that the Trade Marks Law applies with equal force on the Internet as it does not in the physical world. Justice Mukul Mudgal accepted the counsel's argument and held that with the advancement and progress in technology the services rendered by an internet site have also to

277 Tata Sons Ltd. v. Manka Kosuri 2001-432
be recognised and accepted and are being given protection from passing off. He further observed:

"With the advent of Modern technology particularly that relating to cyberspace, domain names or Internet sites are entitled to protection as a trade marks because they are more than a mere address. The rendering of Internet services is also entitled to protection in the same way as goods and services, and trademark law applies to activities on Internet."\(^{278}\)

The Plaintiff Company is entitled to a decree with costs. The suit is decreed in favour of plaintiff in the following terms:

(i) The defendants, their partners, or proprietors, officers, servants, agents and representatives are restrained from using domain names or operating any business, and making, selling offering for sale, advertising and in any manner dealing in any goods or services under any domain names containing the word 'TATA' or any other mark/name identical with or deceptively similar to the plaintiff's trade mark TATA, and

(ii) Permanent Injunction is passed in favour of the plaintiff and against the defendants from using the trade Mark and name TATA in any manner whatsoever, under any other domain names containing the word TATA or containing the word TATA on the Internet or otherwise and from doing any other causing dilution of the trade mark TATA.

In Sony Corporation Case\(^{279}\), Where the Respondent domain “New sony.com” is virtually identical and confusingly to the domain name of the complainant, “sny.com” and as the good will of the complainant who is one of the world’s premier entertainment electronics companies, Sony is a leading manufacturer of Audio, Communications and Information Technology Products for

---

\(^{278}\) Id. at P. 436.

\(^{279}\) Sony Corporation v. Park Kwangsoo, 2001 PTC 429 (WIPO)
the consumer and professional Market. The “Sony” Trade Mark is registered in over 150 countries and doing business for over 40 years and his turn over is more than $63 billion dollars and employs over 189,000 people world wise. The Respondent on the other hand played the mischievous activities and tarnished the image of complainant by showing of sexually explicit and pornographic material put on the website. There is nothing on record to even indicate that the respondent has been or is commonly known by the disputed domain name. Even there is no licence or authorization by the complainant in favour of respondent.

The WIPO panelists held that they have no hesitation in accepting the total possibility of confusion in the minds of the Website users/Consumers. The panel relied on Sony Kabushiki Kaisha (trading as Sony Corp. v. Inja Kilf). In this case the WIPO panel held that the use of various other prefixes and suffixes with the Mark Sony would not entitled the Respondent in that case to continue with the disputed for their transfer in favour of the complainant. Similarly in Dell Computer Corp., and Carrefour S.A. Case the WIPO Panel directed the transfer of the 122 domain names to the complainants.

The WIPO Panel in this case heavily relied on the above cited cases and held that:

(i) The Respondent domain name “newsony.com” is identical ad confusingly similar with the trademark ’sony.com’ of the complainant.

(ii) That the Respondent had tarnished the good will of the complainant by showing the pornographic material on his website. Thus it is clear that the Respondent has no ‘legitimate interest’ in the disputed domain name.

281 Sony Trade Mark Such as Sony academy.com’ sonycompus.com’ sonycollege.com’ worldsony.com’ sunsony.com; dreamsony.com, etc.
282 WIPO case D-2000-087
283 WIPO case D-2000-837.
(iii) That the Respondent's attempt to sell the disputed name to the complainant, the registration and use of the disputed domain name by the respondent is in bad faith.

Therefore, the WIPO Panel held that the Respondent's domain name "newsony.com" should be transferred to the complainant.

Dr. Reddy's Cyber squatter case\textsuperscript{284} is the first case of Delhi High Court arriving at "final decision and granting a permanent injunction against the offender from using the name drreddyslab.com. In this NSI, the domain name registering entity has been notified by the High Court and will transfer domain name to Dr. Reddy's Laboratories.

The Squatter Manu Kosuri is not new to the game and has a record of sorts, including several Tata domain names and 'spindia.com". The latter is proceeding ex-parte in the Delhi High Court as Mr. Kosuri is never known to have appeared for a hearing. He did not respond to the summons and did not file a written statement. Delhi High Court held that:

The injunction restrains the use of the trade mark and domain name "drreddyslab.com" or any other deceptively similar trade mark or domain name for internet related services which may lead to dilution of the plaintiff's trade mark "Dr. Reddy".

The Court further restrained them from registering a domain name or operating any business and, offering for sale, advertising and in any manner dealing in any service or goods on the internet or other wise under the trade mark/domain name, drreddyslab.com or any other mark/domain name which is identical without deceptively similar to the plaintiff's trade mark. Justice N.G. Nandi rightly observed that:

“In a matter where services rendered through the domain name in the Internet, a very alert vigil is necessary and a strict view needs to be taken for its easy access and reach by any one from any corner of the world;:. The Trade Marks/domain name Dr. Reddy’s of the plaintiff and “drredyslab.com” of the defendants are almost similar except for use of the “suffixlab.com” in the defendant domain name use. The degree of similarity of the marks usually is vitally important and significant in an action for passing off as in such a case. There is every possibility and likelihood of confusion and deception being caused. Considering both the domain names, it is clear that two names being almost identical or similar in nature there is every possibility of an Internet user being confused and deceived in believing that both the domain names belong to plaintiff although the two domain names belong to different concerns.”

The court directed to the defendant to transfer the domain name drredyslab.com to the plaintiff and also deliver all material including brochures, stationery and other printed material, which has the name ‘drreddyslab.com’. The High Court held that the ‘function of a domain name is akin to a trade mark on internet and it is vital importance in e-commerce.

In Lockheed Martin Corporation v. Dan Parisi285 a significant decision has been rendered which has a large bearing upon future domain name disputes on similar issues.

In the judgement the domain names in dispute were lockheedsucks.com and lockheed-martinsucks.com. In this case, the respondent Dan Parisi registered the aforesaid domain names allegedly to provide a website where individuals could criticize Lockheeds Martin Corporation’s practices and corporate America generally. The Complainant Lockheed martin Corporation is very well-know in the field of aerospace and electronic manufacturing.

Chapter V: Protection of Domain Names and its Contents

The complainant approached WIPO under UDNDRP on the ground that the domain names are in issue and Lockheed Martin's mark are confusingly similar because the marks are contained within the domain names and on the ground that the respondent had not made a legitimate non-commercial or fair use of the domain names. Another ground taken by the complainant was that none of the disputed domain names were being used and but were merely being held presumable, the parties concerned were waiting for the mark owner to buy them at an inflated price. It was also alleged that bad faith registration and use may be found in the present case, even if there was no resale offer, as the domain name was being held passively with no obvious motive other than cyber piracy.

The respondent took the plea that the only use the respondent had ever made of the disputed domain names had been to link them to the respondent’s website, sucks.com – a free speech website where visitors could register their complaints about corporate and the disputed domain names were neither identical nor confusingly similar to the complainant’s trademark. It is also argued that a website for free speech by its nature cannot operate with intended bad faith.

The WIPO panel held by a majority that “a reading of the plain language of the policy support the view that the domain name combining a trademark with the word ‘sucks’ or other language cleanly indicating that the domain name is not affiliated with the trademark owner, cannot be considered confusingly similar to the trademark’ with this observation, the two member panel rejected most of the previous cases which has been decided by the WIPO in this category. The panel further held that it believed that once the searcher searches lockheedsucks.com and lockheedmartinsucks.com listed amongst the websites for further search, he would be able to readily distinguish between the respondent’s site from the complainant’s site. Thus the panel held that the domain names in dispute were not confusingly similar to the trademark of the complainant and so the panel ordered that the disputed domain names lockheedsucks.com and lockheedmartin.sucks.com remain registered in the name of the respondent.
This is good decision and is aimed at a strong and robust growth of the Internet and domain names in as much as the corporate world should not be allowed to gag Citizens seeking free speech. This judgement is likely to have a tremendous impact over future cases involving the use of the word 'sucks' and future domain name disputes. In particular case the decision to register the domain name in question would be entirely yours.

[E] Internet and the Problem of Jurisdiction

Trademark rights are territorial. They are effective only in the country or territory where they are registered.\(^{286}\) When trademarks are applied to goods or services that are then supplied or provided under those trademarks, in a traditional sense, the territorial nature normally causes no problems. If an undertaking requires protection in other territories, it can apply to register the trademark elsewhere. Similarly, infringement involves use of a sign within a territory where the trademark in question is registered. Where signs identical to or similar to registered trademark are used, it is tolerably clear whether that use infringes or possibly infringes.\(^ {287}\) However, in the context of using on the Internet signs identical to or similar to registered trademarks, infringement is far less predictable. This is particularly so where the question is whether infringement has occurred in a jurisdiction other than that in which the server containing the website is located. To take an example, say an English company, which makes and sells confectionery, has a website advertising its goods which is hosted on a web server located in the United Kingdom. If the company places on that website a sign which is identical or similar to a trademark registered in Australia for similar goods, does the English company infringe the Australian trademark?\(^ {288}\) It is a

\(^{286}\) Of course, the Community trademark applies to the whole of the European Community but the rights afforded by registration apply only within the Community.

\(^{287}\) Though in many cases, the presence of a likelihood of confusion is required to be shown or, where goods or services are neither identical nor similar, unfair advantage of or detriment to the registered trademark must be proved.

\(^{288}\) In Australia, a person infringes a registered trademark, \textit{inter alia}, if the person uses as a trademark a sign that is substantially identical with, or deceptively similar to, the trademark in relation to goods or services in respect of which the trademark is registered; section 120(1) Australian Trade Marks Act, 1995.
possibility depending whether such use of the sign can be deemed to be use within Australia, bearing in mind that material placed on a website can be accessed from any where.

The implications of finding infringement in such a case are potentially very grave. The thought of defending litigation in an Australian State will frighten off many small and medium sized business, particularly if any judgment in favour of the proprietor of the trademark is likely to be able to enforce that judgment in England and Wales by application of the Foreign Judgments (Reciprocal Enforcement) Act 1933. This point looks at some of the issues relating to infringement of trademarks by the use of signs on websites located outside jurisdiction and the impacts of rules on jurisdiction and enforcement of foreign judgments and suggests the formulation of a test to be used to determine whether use on a website is use within a particular jurisdiction. First, it is important to determine whether use of a sign on a website can infringe trademarks registered in other countries.

1. Use of Sign on Websites

The rationale for trademarks is that they operate as badges of origin in that they indicate the source of goods or services to the consumer, 'enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent purchase'. In this way, trademark rights prevent others taking advantage of the reputation associated with a trademark and diverting trade away from the trademark owner's business by confusing the consumer as to the origin of goods or services. The essential function of a trademark is to guarantee the identity of the origin of the


291 However, not all forms of infringement require confusion to be proved, for example, where the use objected to takes unfair advantage of or is detrimental to, the repute of a well-known trademark, sometimes referred to as blurring and tarnishing.
marked goods or services and the protection extends to use that affects or is likely to affect that function, whether or not the use complained of is trademark use.  

The basic right given by registration of a trademark is to prevent the use in the course of trade of a sign that is identical to or similar to that mark in relation to identical or similar goods or services. Where there is not complete identity of the sign or the goods or services, a likelihood of confusion on the part of the public must be shown. Furthermore, infringement may come about where a sign that is identical or similar to a registered trademark of repute is used in the course of trade in relation to non-similar goods or services. The right conferred by a Community trademark is equivalent though it extends to the entire territory of the European Community. However, the Court of Justice has ruled that, subject to the defences to infringement in Article 6, the scope of the right is limited so as to preserve its essential function of a trademark, being to act as a guarantee of origin. Thus, use that is purely descriptive does not infringe. Trademark law in jurisdictions outside Europe is broadly similar to European trademark law, certainly sufficiently so for the purposes of the discussion that follows:

The question to be determined then is whether placing a sign on a page on a website where that sign is identical to or similar to a registered trademark infringes that trademark. First, the sign must be used in connection with the same or similar goods or services for which the trademark is registered and that use

---


293 See section 10(1) - (3) of the Trade Marks Act, 1994 and Article 5(1) and (2) of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks (OJ L40, 11.2.1989, p.1). The latter right applies only if the use complained of would take unfair advantage of or would be detrimental to the distinctive character or repute of the trademark. In the United States, the Trademark Dilution Act, 1995 could apply in similar circumstances; see §43 Trademarks Act 1946, 15 USC 1125 as amended.


must be in the course of trade.\textsuperscript{296} In the case where use is in the course of trade and is in relation to identical or similar goods (or, in some jurisdictions, non-similar goods where the trademark is one of repute), the sole issue to resolve to determine if infringement is a possibility is whether the use in question is use within the relevant jurisdiction.\textsuperscript{297} In other words, does a person, by placing a sign on a web page, use that sign in all territories in the world or is the geographical range of the use more limited than that?

There are a number of United State’s cases on trademark infringement on the Internet relating to whether a particular state has jurisdiction. The law as developed there is very instructive in deciding whether use is use for the purposes of infringement. The leading authority is \textit{Zippo Manufacturing Co. v Zippo Dot Com Inc.},\textsuperscript{298} in which the claimant, a manufacturer of cigarette lighters and proprietor of the 'zippo' trademark with its principal place of business situated in Pennsylvania, sued the defendant which was an internet subscription news service based in California. \textsuperscript{299} The defendant had no physical presence in Pennsylvania but posted information about its services on its web pages, which were accessible through its 'zippo' domain names. The defendant had 3,000 subscriptions from residents of Pennsylvania who had completed the application form after accessing the defendant's website. Furthermore, the defendant had entered into agreements with Internet access providers, two of which were established in Pennsylvania, for the purpose of allowing their subscribers to access the news service. The claimant sued in Pennsylvania for trademark infringement and dilution of its trademark.

\textsuperscript{296} Although, as noted above, use in relation to non-similar goods can infringe in some jurisdictions if harmful to the trademark. An example is afforded by \textit{Baywatch Production Co Inc v Home Video Channel} [1997] FSR 22 and by \textit{General Motors Corp v Yplon SA} [2000] RPC 572.

\textsuperscript{297} Assuming the proprietor of the trademark is able to show a likelihood of confusion or deceptive use or unfair advantage or damage to repute or dilution or tarnishing, etc. depending on the precise nature of trademark rights in that jurisdiction.

\textsuperscript{298} 952 F Supp. 119, 1124 (WD Pa 1997).

\textsuperscript{299} 952 F Supp 1119 (WD Pa 1997).
Chapter V: Protection of Domain Names and its Contents

The Federal District Court of Pennsylvania developed a sliding scale for determining whether a court would have personal jurisdiction in a case of Internet contacts. At one end of the scale, a defendant is clearly doing business over the Internet in jurisdiction by having an interactive website and making contracts with residents in that jurisdiction, involving the deliberate and repeated transmission of computer files over the Internet. At the other end, the website is passive, such as where a person has simply posted information on a website which is accessible by persons in other jurisdictions. In such a case, where the person posting the information does little more than to make the information available to those who might be interested in it, there are no grounds for exercising personal jurisdiction.

There is, however, a middle ground, where the website is interactive and where the user can exchange information with the host computer. In this case, it is a question of locking at the level of interactivity and the commercial nature of the exchange of information to determine whether a court in a state has personal jurisdiction.

From the United State's approach to jurisdiction for trademark infringement, it is reasonable to conclude that use of a sign to infringe a trademark must be real commercial use and that there must be actual sale of goods or supply of services to persons within the jurisdiction concerned. Simply placing a sign on a web page that can be and is accessed by persons in a particular jurisdiction is not sufficient, per se, to form the basis of a trademark action. But how does this equate to the approach of the courts in the United Kingdom? The first case to address the issue was 800-FLOWERS Trademark. An American company applied to register 800-FLOWERS as a service mark for receiving and transferring to florists orders for

---

300 See, for example, Intercon Inc v Bell Atlantic Internet Solutions Inc, 205 F.3d 1244 (10th Cir 2000) and Tech Heads Inc v Desktop Service Center Inc, 105 F Supp 2d 1142 (D Or 2000).

301 See, for example, Mink v AA Development LLC, 190 F.3d (5th Cir 1999) and Neogen Corp v Neo Gen Screening Inc, 109 F Supp 2d 724 (WD Mich 2000).

302 A bizarre aspect of this case was that neither party had any real trade in the United Kingdom. The legal costs of the action were in excess of £100,000 and the judge considered that the trademark registration in the United Kingdom was probably invalid for lack of use under section 46(1) of the Trade Marks Act, 1994.

flowers. At first instance, Jacob J rejected counsel's submission that placing a trademark on a website was potentially a trademark infringement anywhere in the world because this website use was use in and omnipresent cyberspace and placing a trademark on a website was 'putting a tentacle' into the computer of each and every person who accessed the website. Jacob J gave an example of a fishmonger from Bootle in Lancashire who advertised on his own website for local delivery. The fishmonger could hardly be said to be trying to sell his fish all over the world, or even the whole of the United Kingdom. Jacob J made the point that anyone 'surfing the web' will retrieve numerous irrelevant hits and someone who accessed such a website from another country would immediately realise 'this is not for me' and take no further interest in it. Of course, in practice it will depend on the circumstances. The website owner's intention and the impact on persons accessing the website will be important, especially what a person accessing the website would understand. The basic question as set out in the Zippo case, is whether the website owner targets a particular country or state for commercial purposes.

Jacob J had another opportunity to consider the matter in Euromarket Designs Inc., v Peters and Crate & Barrel. The claimant was an American company, which had a chain of stores there under the name 'Crate and Barrel' which it had registered as a trademark in the United Kingdom and as a Community trademark. The defendant had a shop in Dublin also called Crate and Barrel and sold household items and furniture. The defendant advertised in a magazine (Home & Garden) and had a website and had, in both cases, used the Crate and Barrel name. The defendant had never sold any goods in the United Kingdom. When the claimant sought summary judgement for infringement of the United Kingdom trademark, the defendant argued that its advertisements were not directed to the United Kingdom market and it had no intention of trading there.

As regards the advertisement in Home & Garden, Jacob J noted that it had a circulation in Eire and in the United Kingdom but he accepted that the defendant had no trade in the United Kingdom and had no intention of trading there.

---

there. The advertisement was for the shop and not for supplying goods by mail order. Counsel for the claimant pointed out that the proprietor of a trademark has '... exclusive rights in the trademark which are infringed by use of the trade mark in the United Kingdom without his consent' (emphasis added).

Section 9(1) has no equivalent in the trademarks Directive and if it really did mean that mere use of a trademark without consent would infringe, whether or not that use was in the course of trade that would extend trademark rights in the United Kingdom beyond that permitted in the Directive. As Jacob J previously said in British Sugar plc v James Robertson & Sons Ltd, section 9(1) itself adds nothing to the infringing acts in section 10 except for the fact that the use must be without the proprietor's consent.

To interpret the provision otherwise would mean that placing an advertisement in a magazine or on a website would be to use the trademark in any jurisdiction where copies of the magazine found their way or from which the website had been accessed.

In relation to the website, persons could visit the site by entering the address or through a search. Jacob J once again made the point that carrying out a search on the Internet almost always throws up lots of irrelevant hits. In whatever way a person got to the site, the question was whether the defendant was using Crate & Barrel in the United Kingdom in the course of trade. If the defendant was, bearing in mind there was no proof of actual trade or an intention to carry out trade in the United Kingdom, potentially it was using the name in every country in the world. However, the language of the Internet gives a clue as when a person accesses a website, he is said to go to the site or visit the site.

Jacob J favoured the argument that using the Internet was like the user focusing a super-telescope on the site concerned, for example, where a user had

---

305 section 9(1) of the Trade Marks Act, 1994.
306 [1996] RPC 281, in which Jacob J described section 9(1) as a 'chatty introduction' to section 10.
307 The address contained the letters 'ie' making it clear to most people that it referred to Eire.
the telescope on a hill in Wales to look at the defendant’s shop in Dublin. Without evidence of commercial activity in another country the website owner can hardly be said to be using a trademark in the course of trade in that other country. Of course, some websites deliberately target other countries or even the whole world. An example favoured by Jacob J was *amazon.com*, which actively seeks business on a worldwide scale.

In Scotland, Lord Drummond Young followed this approach in *Bonnier Media Ltd v Greg Lloyd Smith and Kestrel Trading Corp.*, in which the defender had registered domain names including variations of the names used by the pursuer. He accepted that, potentially, operating a website can result in a delict (tort) being committed in every country in the world from where the website can be seen but it does not follow that a delict is committed in every country in the world. He said that the website should not be regarded as having delictual consequences if the impact of a website in a particular country is unlikely to be of significant interest, considering the content of the website and the commercial or other context in which it operates.

In the context of the present case, especially as the defenders had announced an intention to offer on-line services similar to those offered by the pursuer, the impact of the defenders’ planned activities would have their main impact in Scotland and that impact would be commercially significant.

In the absence of commercial activity in other countries, there can be no use in the course of trade in those other countries. If it were otherwise, the possibility of conflicting rights would arise. To take an example, imagine that a company in England has a United Kingdom registration for the trademark ‘Psorolene’ for skin care creams and an Australian company had an Australian registration for ‘Psorolens’ for a cream used to treat eczema. Neither trade in the other’s country. If both have websites and use those names on the websites, the

---

308 [2002] IPLR 13, Court of Session Outer House, 1 July 2002.

309 An application of the *maxim de minimis non curat praetor*. 
English company would infringe the Australian trademark in Australia and the
Australian company would infringe the United Kingdom trademark. That cannot
be rational. It would also have the effect of disrupting the single European market
by causing conflicts between identical or similar trademarks registered in different
Member States by different proprietors who used their respective trademarks on
their websites.

The 800-FLOWERS case was appealed to the Court of Appeal, where the
correctness of the approach of Jacob J was confirmed. In terms of a submission
that 'publication' of statements in a particular jurisdiction by downloading from
the internet according to the rules of the law of defamation or of
misrepresentation was of at least strong analogical relevance to whether a
trademark downloaded from the internet had been 'used' in the jurisdiction to
which it was downloaded.

'There is something inherently unrealistic in saying that A "uses" his mark
in the United Kingdom when all that he does is to place the mark on the internet,
from a location outside the United Kingdom, and simply wait in the hope that
someone from the United Kingdom will download it and thereby create use on
the part of A the very idea of "use" within a certain area would seem to require
some active step in that area on the part of the user that goes beyond providing
facilities that enable others to bring the mark into the area. Of course, if persons
in the United Kingdom seek the mark on the internet in response to direct
encouragement or advertisement by the owner of the mark, the position may be
different; but in such a case the advertisement or encouragement in itself is likely
to suffice to establish the necessary use'.

Thus, to infringe a trademark, it must be placed on a website by someone
who actively pursues a commercial activity in the country concerned. To that
extent, law in the United Kingdom is of approximate effect to that in the United
States. However, the courts in the United Kingdom have not yet had an

\footnote{800 FLOWERS Inc v Phonenames Ltd [2002] FSR 191, paras 136-139.}
opportunity to develop an equivalent of the 'Zippo sliding scale', which has come about as a result of the nature of the United States Constitution and issues of State jurisdiction. Where a website goes beyond being merely passive, the question as to whether the owner seeks business in a particular jurisdiction probably will be treated by the courts in the United Kingdom as a question of fact, to be determined in accordance with the circumstances of the case. This may involve further development of Lord Drummond Young’s test of significance. However, there is already a useful body of case law available in relation to the grounds of revocation of trademarks for non-use. This can provide a litmus test for whether the use complained of is use within jurisdiction. The reason this is so is that, if the use in question is insufficient to save a trademark in an action for revocation, then it can hardly be said to have been used, in a trademark sense, within the relevant jurisdiction.

Logically, the concept of use must be the same in both cases. If the offending sign, had it been registered as a trademark within jurisdiction, would be susceptible to revocation on the grounds of non-use, how it could be said to infringe an identical or similar trademark validly registered in that jurisdiction. That there is already a significant body of law on revocation on the grounds of non-use, this would bring more certainty to the enquiry than trying to draw a line in the intermediate area in Zippo.

The grounds of revocation based on non-use or suspended use for five or more years are in terms of the sign not being put to genuine use for the relevant five-year period. 'Genuine use' is not the opposite of 'fake' or 'sham' use and advertisements in magazines published in the United States, which readers in the United Kingdom knew had come from the United States, and a small handful of sales to customers who were citizens of the United States but resident in the United Kingdom and posted to their United Kingdom addresses was not sufficient for genuine use.

See section 46(1) of the Trade Marks Act, 1994
Chapter V: Protection of Domain Names and its Contents

So Jacob J in Euromarket Designs Inc v Peters and Crate & Barrel where, 312 held that 'genuine use' must involve that which a trader or consumer would regard as a real or genuine trade in this country. The required use must be genuine use judged by commercial standards. However, it could be established in circumstances where no actual sales of the goods had taken place. 313 An example could be where targeted promotional literature had been distributed in a country. This would only apply, however, where it was clear from the circumstances that the undertaking responsible was actively pursuing commercial sales in that country. This is not the same as a passive website lacking such intention.

Section 46(2) is also helpful in that it defines use, for the purposes of whether a mark should be revoked for non-use as including use in a different form provided this does not alter its distinctive character. Again there is case law here that could be helpful where the sign used on a website is not identical to the registered trademark and the use in question has not been to such an extent to be able to prove a likelihood of confusion. 314

It is likely that other countries in Europe will follow the approach thus far in the United Kingdom if the question of infringement of a trademark by use of an identical or similar sign arises and it is almost certain that the Court of Justice will come to similar conclusions as the Chancery Division and Court of Appeal in England because any other view would lead to conflict and distortion in the internal market.

Outside the United States and the United Kingdom, there is little case law on trademark infringement on the Internet. 315 In Australia, before the Australian

315 There are, however, a large number of cases involving domain name disputes settled by dispute resolution services.
Trade Marks Office, in *Torrag Pty Ltd v Lyboots Pty Ltd and Petcure Pty Ltd*, the Office accepted that an opponent to an application to register a trademark containing the words 'Pet Vet' had established prior use of the name, *inter alia*, by use on its website. There was evidence that the website had regularly generated enquiries about the opponent's veterinary practice. The scope and effect of injunctions on websites can be unpredictable and this could make judges wary of granting interim injunctions in particular. In *Speechworks Ltd v Speechworks International Inc*, the difficulty of deciding whether to impose an interim interdict in the context of a website arose. The pursuer had a United Kingdom registered trademark 'SPEECHWORKS'. The defender was a substantial company incorporated in Delaware in 1994 and had registered 'SpeechWorks' in the United States as a trademark and dealt in speech recognition software. It had a domain name *www.speechworks.com* in respect of which it had made substantial use since 1997. Before the defender knew of the pursuer's trademark, it had applied for registration of 'SpeechWorks' in France and Germany and, at the time of the trial, these were expected to be granted shortly. In 1999, the defender established a European headquarters in Staines, Middlesex.

The judge, Lord Nimmo Smith, noted the consequences of granting an interdict. As it would apply to the defender's website, it could have worldwide effect, leading to closure of the website. Even if limited to the United Kingdom, this would cause immense problems for the defender, as it would have to use a different name in the United Kingdom. The application for an interim interdict was refused. The pursuer was only recently established and it would be easier for it to change its name. Furthermore, the balance of convenience favoured the defender, as it would be able to pay damages should the pursuer be successful at full trial and it was unlikely that the pursuer would be able to do so if it lost.

---

318 The judge said that, had he been minded to grant an interim interdict, he would have restricted it to Scotland as that was the only place the pursuer had any business.
2. Threatened Infringement of a Trademark in a foreign country

If we accept that use of a trademark on a website will only infringe if there is evidence of commercial activity within the relevant jurisdiction, what is the position where there is no evidence of such activity, only the threat that there might be some commercial activity? For example, will the courts in the United Kingdom have jurisdiction in respect of someone outside the United Kingdom who threatens to infringe a United Kingdom trademark? The rules on jurisdiction are fairly complex and there are different rules depending on where the defendant is domiciled or has a presence.

In Europe, there is the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the 'Brussels' Convention), now largely replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. For persons outside Europe and certain Commonwealth countries, jurisdiction can only be claimed by the courts in England if the defendant is present in the United Kingdom when served with the claim form, submits to the jurisdiction of the English courts or where the courts exercise their discretion to permit service in a foreign country. In the case of a company, it must carry on business in England. Infringement of a trademark is a tort. The basic rule-governing jurisdiction in Europe is set out in the Civil Jurisdiction and Judgments Act 1982, as amended, which is that defendants are sued in the Member State in which they are domiciled. However, in relation to a tort (or delict or quasi-delict in Scotland), the defendant can be sued '... in the courts in the place where the harmful event occurred or may occur' (emphasis added);

319 OJ L 12, 16.1.2001, p.1. This Regulation does not apply to Denmark. There is a parallel Lugano Convention covering the EFTA countries. The provisions of interest here are effectively the same as in the Brussels Convention. The necessary changes were made to the Civil Jurisdiction and Judgments Act, 1982 by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929.

320 Different rules apply to actions in rem. 34 [2002] IPLR 13, Court of Session Outer House, 1 July 2002.

321 Or, in terms of EFTA countries, the Civil Jurisdiction and Judgments Act, 1991.
Article 5(3) of the Council Regulation. This seems fairly clear that a court in the relevant part of the United Kingdom can have jurisdiction not just in terms of an act infringing a United Kingdom trademark but also to a threat to carry out such an act. However, Article 5(3) of the Brussels and Lugano Conventions do not have the additional words 'or may occur', or an equivalent form of words. Whether those Conventions extended to threatened torts or delicts was considered in the Scots case of Bonnier Media Ltd. v Greg Lloyd Smith and Kestrel Trading Corp.\(^{322}\)

The pursuer in Bonnier had a newspaper business called 'business a.m.'. It had a registered trademark, being the words 'business a.m.' set on a rectangular background. Along the top of the rectangle were the words 'Scotland's Business, Financial & Political Daily.\(^{323}\) The areas covered by the pursuer's newspapers were business, politics and finance. The pursuer also operated a website and provided an online service to supplement its publishing activities and it was claimed that the pursuer had substantial goodwill in its online service. The pursuer owned a number of Internet domain names, including 'business.co.uk'.

The first defender was domiciled in Greece and was the managing director of the second defender, a company incorporated in Mauritius. The pursuer published articles in business a.m. about the first defender alleging that he had registered domain names, such as 'amazon.gr'. Consequently, the first defender commenced defamation proceedings against the pursuer in the High Court in England. At the time of the Scots trial these proceedings were still on going.

During 2001, the pursuer received an email from one Mr Gregory A Lindstron purporting to be from a firm known as LJ & Co. The email confirmed that LJ & Co had acquired the domain name 'businessam.com' and would agree to sell it to the pursuer for $25,000. On the same day, the second defender published on its website a statement to the effect that it had agreed to acquire

\(^{322}\) [2002] IPLR 13, Court of Session Outer House, 1 July 2002.
'businessam.com' from LJ & Co and that it intended to launch an online business advisory service. The first defender's name was given as a contact name. The pursuer alleged that a further 22 domain names had been registered by the first defender which included forms of 'businessam', 'business-am' and 'businesspm'.

The pursuer brought the proceedings on the basis that it feared that the defenders had set up or would set up websites which would be used in breach of section 10(2) or (3) of the Trade Marks Act 1994 and sought an interdict to prevent this and to prevent the defenders passing themselves off as the pursuer. An interim interdict was granted and the defenders now applied for it to be recalled or restricted. They based their application on grounds relating to jurisdiction, title to sue and that the pursuer had not established a prima facie case of trademark infringement nor of passing off.324

Article 5(3) of the Brussels Convention does not expressly mention threatened wrongs. Some of the provisions in the Civil Jurisdiction and Judgements Act 1982 deal with jurisdiction as between parts of the United Kingdom and the equivalent rule, in Schedule 4 of that Act, stated that '[a] person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued ... in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or in the case of a threatened wrong is likely to occur'.325 It was argued that this strongly supported the view that threatened torts did not bestow jurisdiction as between European Member States and that the words in Article 5(3) of the Brussels Convention should be restricted to their literal meaning.

Lord Drummond Young rejected this submission for two reasons, saying that Article 5(3) also applies to threatened wrongs. The first reason was based on

---

323 The mark was registered in Class 16 for printed matter, etc., Class 35 (advertising, business management, etc.) and Class 41 (education and the provision of training, etc.).

324 Lord Drummond Young found that the pursuer had made out a prima facie case of trademark infringement and passing off. He also held that the pursuer had established title to sue.

325 Therefore, in terms of internal jurisdiction in the United Kingdom, anticipatory torts were catered for as in the Council Regulation on jurisdiction.
maintaining the rule of law. If a person domiciled in one Member State had no option but to commence proceedings in another Member State to prevent a wrong threatened in the first Member State, that would threaten the rule of law, as it was often vitally important for the courts in the first Member State to take effective action against any wrong of a delictual or tortious nature threatened there. The second reason was that it is not always easy to draw a distinction between a completed delict and a threatened delict. He gave an example of a discharge of effluent from a factory, the owner of which is domiciled in another country, which causes damage to another person’s land downstream. That person could sue in the courts in his own country for damages but would have to bring an action in the factory owner’s country for an injunction to prevent further discharges. In support of his finding that Article 5(3) of the Brussels Convention extended to threatened wrongs, Lord Drummond Young noted that the European Court of Justice has held that the phrase ‘tort, delict or quasi-delict’ in Article 5(3) must be given an autonomous meaning and that its construction must be determined without reference to domestic legislation 38 as to the second defender, a Mauritian company, the Brussels Convention did not apply but Schedule 8 of the Civil Jurisdiction and Judgments Act applied instead. Rule 2(1) of the Schedule was the equivalent rule and that was expressly stated to apply also to threatened wrongs. Therefore, the Scots court had jurisdiction over the second defender also.356

3. Enforcement of Judgments in Foreign Trademark Infringement Cases

If a company based in the United Kingdom is found to have infringed a foreign trademark, the question is whether the foreign judgment can be enforced in the relevant part of the United Kingdom. There are no real problems in Europe as the Brussels or Lugano Conventions or the Council Regulation on jurisdiction and

356 It had been argued that the company was domiciled in England or Greece. If it was domiciled in Greece it would be in exactly the same position as the first defender and, if domiciled in England jurisdiction would result from Schedule 4.
judgments in civil and commercial matters applies.\textsuperscript{327} Judgments obtained in other Member States are enforceable in another Member State. The only point to note is that if there is any question about the validity of the trademark, the proceedings must take part in the place where the trademark is registered; see Article 22(4) of the Council Regulation. However, that will normally be the case anyway. For some Commonwealth countries enforcement by registration with the relevant court is possible under the Administration of Justice Act 1920 or the Foreign Judgements (Reciprocal Enforcement) Act 1933.

For other countries, enforcement of a foreign judgment is possible at common law, where it is for a fixed sum in damages. However, an injunction imposed by a foreign court is not enforceable at common law.\textsuperscript{328} To be recognised and enforced by a court in England, however, the English court must recognise the jurisdiction of the foreign court. This requires that the defendant is a subject of that foreign state, was resident there when the action began, where he chose the forum by suing as claimant or counterclaimant and the judgment is in relation to the counterclaim, if he voluntarily appears or where he has contracted to submit to the forum in which judgment was given.\textsuperscript{329}

To take an example, say that an English company operates a website located on a host computer situated in England. The company has started offering goods for sale by mail order and has placed information about the goods and prices in sterling and in US dollars and the amount to be added for post and packing for delivery to either the United Kingdom or the United States, as appropriate. Imagine that some orders to the State of Florida have been fulfilled. A company in Florida, having the same name as the English company, has a

\textsuperscript{327} With respect to the Community trademark, the Member States have designated courts for the Community trademark and any infringement action would take place in the Member State in which the infringing act was performed. If infringement took place in a number of Member States, courts in the other Member States would decline jurisdiction in favour of the court first seized.


\textsuperscript{329} This is now doubted; see Collier, \textit{ibid.}, and \textit{Per Buckley LJ in Emanuel v Symon} [1908] 1 KB 302.
registered trademark in which the name is a prominent part. It sells similar goods. Say that the Florida Company sued the English company in Florida for trademark infringement. The English company decided to defend the action and appeared before the court. Substantial damages were awarded against the English Company and injunctive relief granted.\textsuperscript{330}

The judgment, if final, can be registered in and enforced by an appropriate court in the United Kingdom. However, only the award of damages can be enforced and the injunctive part of the relief will not be enforced. This is in contrast with the effects of the Brussels and Lugano Conventions and Council Regulation.

A problem for the Florida Company would be if the English company did not submit to the jurisdiction of the Florida court by failing to enter a defence. At common law, there seems to be some doubt whether the English courts will recognise and enforce any subsequent judgment. One way of overcoming this problem would be for the Florida Company to initiate proceedings in England on the basis of the Florida judgment and apply for summary judgement in England on the basis that the defendant has no real prospect of defending the case. However, if the judgment in Florida was entered in default and the defendant appears before the English court and puts forward a defence, the English court may be reluctant to grant summary judgment.

The court will have an even greater dilemma if the defendant then challenges the validity of the claimant's trademark registration. As regards registered intellectual property rights in Europe, if there is a challenge to the validity of the registration, that can only be determined in the courts in the Member State where the right is registered.\textsuperscript{331} If an English court declined jurisdiction where the validity of a United States registered trademark is in issue on an analogous basis, this could leave the trademark proprietor with no effective

\textsuperscript{330} Assuming that the Florida courts would be willing to accept jurisdiction after applying the Zippo test.

remedy. However, where the issue is clear-cut and there is no real question of the trademark being invalid, it is possible that the English court would grant summary judgment to the Florida Company. There is at present, a draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters which, if finally agreed and in force, will extend the enforceability of foreign judgments to a number of other countries including the United States. The draft Convention has a number of similarities with the Brussels and Lugano Conventions and the Brussels Regulation.

An English court might accept jurisdiction in relation to a finding in a foreign court in respect of infringement of an informal foreign intellectual property right such as a copyright. Alternatively, an English court might accept jurisdiction outright in relation to a foreign intellectual property right, if there was a contract between the claimant and defendant, which expressly conferred jurisdiction on the English courts. In Celltech Chiroscedence Limited v MedImmune Inc, Jacob J heard a case on the alleged infringement of a United States patent by a licensee of the proprietor where the licence conferred jurisdiction on the English courts. In that case there had been no counterclaim for revocation of the patent. If there had been, it would have been difficult to decide whether jurisdiction could be accepted or whether the English court would have little option but to apply the principle forum non-conveniens.

RECAPITULATION

There is no doubt that cyber-squatting is the most contentious issue in the Cyber Law area throughout the world. Even credit card frauds are not discussed with as much fervor as domain name disputes and cyber-squatting. Since the Internet is a

---


333 Hague Conference on Private International Law. The draft Convention was adopted by the Special Committee on 30 October 1999 but still awaits final agreement. There are currently 62 Member States of the Hague Conference.

global phenomenon, steps are already afoot to tackle the menace of domain name disputes, especially cyber-squatting, on an international level.

The application of trademark law to websites increases opportunities to carry out commercial activity in countries where the person carrying out the activity has no physical presence. This could be an attractive aspect of carrying out e-business as it may make it difficult for owners of foreign intellectual property rights to enforce those rights effectively. On the other hand, another feature of the Internet is that someone operating a website could be too easily accused of infringing a foreign intellectual property right. Clearly a balance has to be struck that results in reasonable certainty for persons operating websites and the effective enforcement of foreign intellectual property rights.

It appears that the courts in the United States and the United Kingdom have come some way towards achieving a reasonable approach to trademark infringement and that simply placing a sign identical to or similar to a foreign trademark on a web page will not necessarily infringe that trademark. It is a question of determining the existence and degree of commercial activity in the place where the trademark is registered. It is to be hoped that other countries follow suit. Nevertheless, any person operating a website that has any content that could possibly be seen as an infringement of a trademark would be best advised to include a disclaimer, particularly when engaged in a commercial activity. For example, if a trader advertises his goods on a web page for sale and delivery in the United Kingdom only, he should make that clear.

The United Kingdom has moved someway to taking a sensible approach but the jurisprudence has not yet developed to such an extent that a predictable and workable test yet exists. It is submitted that a test based on principles derived from the case law surrounding the grounds of revocation of trademarks on the basis of non-use or interrupted use for five or more years could provide that test. A real and effective use for a commercial purpose of the trademark in relation to appropriate goods or services must be present for infringement in a particular territory should be a precursor before a court in that territory and should accept
jurisdiction. Even where national laws provide for protection of trademarks for non-similar goods or services in cases of unfair advantage, detriment or dilution, a real and effective commercial use must be shown.

The difficulty of enforcement of foreign trademarks is still an important issue, especially in respect of trademarks registered outside Europe or the Commonwealth. There may be real problems in recognition of judgments in foreign countries outside Europe or not within the Commonwealth countries having reciprocal enforcement provisions. Enforcement will be an issue in respect of small and medium enterprises which have a presence in a European country only but which are carrying on commercial activities outside Europe by means of the Internet. Such companies or firms are unlikely to submit to the jurisdiction of a court outside Europe, which could make recognition and enforcement in Europe difficult. With large corporations the problem is less likely to exist, as they tend to have subsidiary companies or agents in numerous other countries.

One way to improve the situation is to develop more provisions for reciprocal enforcement. However, this could trigger other problems, particularly where there are national disparities in the registrability of trademarks and examination of applications for conformity with the domestic requirements for registration. Providing improved mechanisms on a wider international scale for the recognition and enforcement of trademarks rights must be balanced with such disparities and the further international harmonisation of domestic trademark laws beyond the European arena is most desirable and a timely response to the emerging global trading world we are all part of.

As the said issues have not yet been finally decided, much can be said on both the sides. It can be argued in favour of the cyber-squatters that the domain name registration system itself is flawed. When one is legitimately entitled to register a domain name, why should he be penalised if he seeks to trade in it? Making easy money in it is not a crime. From the legal angle, it can be contended that a cyber-squatter does not deal in any goods and hence, his activities are not likely to cause confusion in the minds of the public. Such being the case, it would be difficult to
place cyber-squatting within the realm of passing off, leave alone trademark infringement. The global experience has shown that even the US has tried to plug the legal lacuna by passing the Trademark Cyber Piracy Prevention Act.

Bringing cyber-squatting within the framework of the Trade Marks Act, 1999, would result in granting trademark holders more extensive protection than what the legislature originally intended. The development may not be healthy because, although the intention of the Court may be to discourage cyber-squatting and curb a social evil, it may result in dangerous precedents, where even genuine registrants of domain names may be adversely affected.

Therefore, the imperative need of the hour is that the legislature catches up with the technical developments and passes a separate law prohibiting cyber-squatting or any other malafide registration of a domain name.

The NASSCOM has made a recommendation to the Ministry of Information and Technology to bring about some more regulations in the statutory Acts pertaining to Copyrights and Trademarks applicable to Internet to prevent cyber-squatting.

It is pertinent to mention that as the decisions of the WIPO do not have any precedent value and are further subject to the decision of a Court of a competent jurisdiction, the subject of domain name disputes is certainly going to be a contentious issue in bringing actions done over the net under the framework of the existing law.

It is evident that domain names and their misuse by private as well as public portals and firms have become rampant in the absence of a strong jurisdictional jurisprudence. The Internet is a global collection of computer networks and requires global solutions and regulation in a new millennium for a world committed to the digital technology and welfare of the netizens through it. In the light of above discussion is submitted as follows:
Chapter V: Protection of Domain Names and its Contents

The first come first served basis for registration of Domain name was responsible for the spurt in the growth of cybersquatting or the process of registering a domain name which legally belongs to an others. The existing TLDs have been a big target of cyber squatting. It is possible that with the introduction of the new TLDs, cyber squatting will increase. The Existing ‘UDNDRP’ policy is a very limited policy and allows only for limited grounds to get back domain names.

In the existing proposals for new top level domain (TLDs), there are no mechanisms to prevent cybersquatting. It is yet to be seen how ICANN proposes to prevent the recurrence of cybersquatting practices in the TLDs. Therefore, it is clear that the situation is at present not very clear and it is yet to be seen how ICANN proposes to meet the challenges of cybersquatting in the times to come.

*****
Chapter-VI: Internet Service Providers Liability for Copyright Infringement

INTRODUCTION

[A] Theories on Internet Service Providers liability for Copyright Infringement

1. Direct Infringement
2. Vicarious Infringement
3. Contributory Infringement
4. Exemption from Liability as Public Utilities

[B] Caching

1. Information Residing on systems or networks at the direction of users
2. Transitory communication

[C] Fair Use

1. WCT
2. The European Union
3. The US
   a) Factors of Fair Use
      (i) The Transformative Factor: The Purpose and Character of Use
      (ii) The Nature of the Copyrighted Work
      (iii) The Amount and Substantiality of the Portion Taken
      (iv) The Effect of the Use Upon the Potential Market
   b) The De Minimis Defense
   c) Acknowledgement of the Source Material
[D] Internet Service Providers Liability in USA
1. Online copyright infringement case history
2. Legislative activities and policy arguments
3. The online copyright infringement liability limitation act of 1998.

[E] Liability of Internet Service Providers (ISP) and similar operators in India
1. ISP liability under the Copyright Act, 1957
2. ISP liability under the Information Technology Act, 2000
   a) Classification of ISPs under the IT Act, 2000
   b) Filtering ISP liability through the IT Act
3. Exemption from liability of an Internet Service Provider
   a) Lack of Knowledge
   b) Due diligence
4. Justification for the liability of ISPs in the cases of copyright infringement on the Internet

RECAPITULATION
INTRODUCTION

The legal liability of ISPs refers to the liability that ISPs should bear when an act of infringement of other person's copyrights occurs in Internet data transmissions. Now the problem is whether an ISP should be regarded as a traditional telecommunications public utility providing lines, or as a media publisher providing content. The difference between the scopes of such business and the respective natures thereof will give rise to a series of issues, such as whether certain ISPs have the capacity for, and obligation to screen or filter the contents of the Web, i.e., whether they can or should delete infringing content when aware of it, and whether they should bear joint liability with the Internet user publishing, copying or disseminating infringing content.

In judicial practice in some countries and regions, for example in the U.S. ISPs are usually joined as defendants. Judging from the considerations cited abroad, there are three reasons for making the ISP a co-defendant. First, when injurious acts occur on the Internet, more often than not the aggrieved party is unable to locate or identify the persons guilty of the infringement (who are usually Internet users); an ISP, however, has a fixed place of an ISP, however, has a fixed place of business, and trade symbols, so it is easy for the plaintiff to identify. Secondly, an ISP usually has abundant financial resources, and the aggrieved party believes that his injury will be more readily compensated if the ISP is joined as a defendant. Third, traditional law regimes provide that content media may bear liability for infringing content. Furthermore, because of the reach and potential reverberations of a Web-disseminated infringement, and because the public's feelings are becoming increasingly aroused as a consequence of the ubiquity of such factors on the Web as, for example, obscenity and eroticism, fraud, false advertising and invasions of privacy, the public clamor for the
imposition of legal liability is reaching fever pitch. The question comes down to one of how to weigh advantages and disadvantages, and respectively, how to develop and overcome them; how to prevent unguided drift, escalation of risks, encumbering business operations with unreasonable difficulties and obstruction of Internet development and data dissemination. These are the important issues that should be considered and imported into any analysis of the methodology for standardizing norms for ISP conduct and investigating and apportioning legal liability when infringement of people's legitimate rights and interests occurs. Generally speaking, instances of libel, threat, fraud, false advertising and copyright infringement on the Internet usually involve ISP liability.

The issue of how to reform copyright legislation in light of the many developments in new technologies has been the subject of close consideration by governments, copyright owners and users of copyright around the world over the last decade. Digital technology and the growth of computer networks, particularly, of course, the Internet, have posed many challenges to the protection and enforcement of copyright. These issues are of critical concern to creators and owners of copyright material. New Technology have also raised important issues in relation to ensuring that users of copyright material are able to obtain reasonable access to copyright material in the on-line environment.\(^{335}\)

The Business Software Alliance, which represents leading software companies worldwide, claims that software piracy on the Internet is reaching epidemic proportions and lack of controls could slow down or destroy the e-commerce boom.\(^{336}\) It argues for stronger copyright protection and claims that control measures on Internet piracy should include:

(a) Carefully defined liability rules for Internet Service Providers with no blanket exemptions;

---


Chapter VI: Internet Service Providers Liability for Copyright Infringement

(b) Strong copyright law covering temporary as well as permanent reproductions;

(c) Legislation to prevent the circumvention of technical measures used by copyright owners to protect their work;

(d) Penalties for software piracy that provide a deterrent, including criminal sanctions for Internet piracy.

One regulatory strategy, which is being subject to fierce debate throughout the world at present, is the imposition of liability for copyright infringement on telecommunications carriers and network service providers. Because such entities provide the facilities necessary to enable copyright infringements to take place, it has been suggested that they are best placed to detect and prevent infringements from occurring. Carriers and service providers have an interest in ensuring that networks are fully utilized and, as such, should be obliged to offer a secure environment in which works may be carried and transmitted.^^''

The Report of the Working Group on Intellectual Property presents the argument that Internet service providers are in the best position to regulate the nature of material, which appears on networks as they have a contractual relationship with users and have the ability to check any material, which is distributed. Although it may be impossible to check everything, which appears on the network, service providers have the ability to identify who is using their network and to investigate cases of infringement, which are brought to their attention. At present there are more than 60,000 Bulletin Boards operators and so there is a substantial number of individuals to conduct such surveillance. The Report further argues that ISPs expect compensation for the use of their facilities and have the ability to disconnect subscribers if they fail to pay subscriptions. Accordingly, it would be feasible for them also to be able to disconnect subscribers who infringe copyright. Finally, ISPs have the ability to take out

insurance to protect themselves against claims for infringement of copyright being leveled against them.^^ S. Peach and M. Garlick argue that the imposition of potential liability on ISPs and BBSs (hereinafter referred as Bulletin Board Service Providers) would impact on users of the Internet in two ways.

First, it would be both an incursion into the privacy and freedom of speech of individual Internet users since limitations would be placed on what they could access, and they would be conscious of their actions being susceptible to oversight.

Secondly, it would result in higher costs to consumers for these services as ISPs passed on to the public the increased costs of having to maintain equipment and employ personnel to monitor server space for infringing material.^^ Fitzpatrick contends that although the above considerations only bear on the copyright balance indirectly,^^ it is another example of potential strengthening of the rights of copyright holders at the expense of the public. The effect of imposing liability on ISPs would be to force these entities into the role of infringement watch dogs, monitoring for unauthorised uses of copyrighted works on their servers, and thus providing copyright holders with either a network of assistants in the process of detecting unauthorised use of the work, or alternative (and more accessible and more attractive) defendants if infringements occurs.

[A] Theories on Internet Service Providers liability for Copyright Infringement

1. Direct Infringement

---


Among the many provisions of the Civil Law and the Intellectual Property Law of the People's Republic of China, there are none bearing on the concept of direct infringement. Generally speaking, Chinese theoretical tort jurisprudence does not recognize a distinction between "direct infringement and indirect infringement". Some scholars assert that all infringements are direct, and there is thus no reason for a concept of indirect infringement. In line with this view, therefore, there is no basis for an artificial dichotomy between direct and indirect infringement. In recent years, however, many intellectual property scholars, inspired by the American Patent Infringement Law, have advanced the argument that direct and indirect infringement should be incorporated into the Patent Law of China in order to render more perfectly the protection of patent rights. In fact, there are legal provisions and theories on direct and indirect infringement not only in the field of patent law in the U.S. but also in the classification of copyright infringements. The direct infringement of a copyright law is roughly in line with the strict (or "no-fault") tort liability, and whether tort liability should be imposed is not determined based on the actor's subjective awareness of fault, i.e., whether deliberate intent or negligence is subjectively present. If the ISP's legal liability for its user's infringement is analyzed with reference to this form of liability, then the ISP should bear liability in tort when information infringing a copyright appears on a homepage or the server of the ISP, even if the ISP is entirely unaware of the fact.\footnote{See details from Analysis on Advisory Legal Affairs, p.18, 1998-5, by Zhang Yawen}

2. Vicarious Infringement

The formulation of a concept of vicarious infringement does not precondition the presence of subjective fault on the part of the actor as one of its essential elements. The determination of whether vicarious infringement applies is made based on a two-pronged test: 1) the defendant has the power and the capacity to control the actions of the tort-feasor; and 2) the defendant obtains some property interest from the actor directly as a result of the infringing act.\footnote{Zhang Yawen, \textit{ibid.} At P.18-19} Vicarious infringement is established only when these two requirements are met. The judge
in the case of RTC v. Netcom, \(^{\text{343}}\) tried in U.S. Federal District Court, referenced the defendant's actions in that case by application of the constructive requirements of the doctrine of vicarious infringement. The defendant Netcom did not reap any profits from the infringing act, and the second requirement was similarly lacking; therefore, the judge determined that tort liability could not lie.

3. Contributory Infringement

Contributory infringement is similar to joint tort liability, as provided for in the Civil Law of the People's Republic of China. Article 130 of the General Principles of Civil Law provides that: "where a party's injury is caused by the joint tort of two or more persons, joint and several liability shall be imposed". Article 148 of Opinions on Several Problems of Implementation of General Principles of Civil Law by the Supreme People's Court further explains that: "Those who aid and abet others in committing infringing acts are joint tort-feasors, and should bear joint liability. Those who aid and abet persons without civil capacity in carrying out the infringing act are tort-feasors, and, consequently, they should bear civil liability. Those who aid and abet person with limited civil capacity in carrying out the infringing act are joint tort-feasors, and should bear primary civil liability." Judging from the above provisions, the joint liability for tort as provided for by the Civil Law and Tort Law of China requires that joint tort-feasors possess joint fault and the external manifestations of the subjective condition of involvement in the infringement. The contributory infringement of American copyright law has two constructive requirements: first, the establishment of contributory infringement requires knowledge by the defendant about the infringing act; second, it requires that the defendant has encouraged, was involved in, or helped to commit the copyright infringement.\(^{\text{344}}\) Comparing the above two requirements for contributory infringement in the U.S. with the joint liability for tort in China, it can be seen that when the conditions for contributory infringement are satisfied, joint liability for tort in China, it can be seen that when

\(^{\text{343}}\) 907 F Supp. 1361 (N.D. Cal. 1995).

Chapter VI: Internet Service Providers Liability for Copyright Infringement

the conditions for contributory infringement are satisfied, joint liability for tort is established. This form of tort liability still espouses a mens rea element, that is, actual knowledge on the part of the defendant is required, yet there is a marked difference from direct infringement, strict liability or no-fault liability. American judges believe that applying direct infringement to ISPs would make every ISP an insurer bearing unreasonable legal liability. However, if they know and participate in the user's infringing act, then contributory infringement can apply. This form of tort liability is relatively conducive to the development of provision of Internet service, and is therefore supported by most American Online Service Providers (hereinafter referred as OSPs).

4. Exemption from Liability as Public Utilities

The scope of the provisions on exemption in China's General Principles of Civil Law is very narrow, and only Article 107 provides an exemption for force majeure. In other intellectual property rights laws, there are provisions on exemption for those who do not know and should not reasonably be charged with knowing of the unlawful sale of patented products. The provisions for exemption from legal liability may form the basis of the defendant's defense, or the basis for exemption. If the grounds on which such defense rests are validated, the party does not bear, or fully bear civil liability. The basis of the defense, therefore, is referred to as the basis or condition for exemption. Under what circumstances exemption should be applied to ISPs? Many scholars assert that, since law provides that telecommunication services, which only provide telephone connections, have no right to interfere with the content of subscribers' communications; thus, they accordingly bear no liability for their subscribers' infringements in the content of their communications. Likewise, ISPs solely providing Internet service should also be exempted from liability for the content transmitted on their lines even, if such are infringing. It is not suitable for them to bear too great a degree of liability, since they have no right to filter, compile,

examine, or oversee contents of the communications users exchange on the Internet. 346

[B] Caching

Now the question is whether system Caching is violation of copyright. The caching may cause damage because the copies in the cache are not necessarily the most current ones and the delivery of outdated information to users could deprive website operators of accurate "hit" information (information about the number of requests for a particular material on a website) from which advertising revenue is frequently calculated. Similarly harms such as defamation or infringement that existed on the original page may propagate for years until flushed from each cache where they have been replicated. Although different concepts, similar issues to caching arise with mirroring (establishing an identical copy of a website on a different server), archiving (providing a historical repository for information, such as with newsgroups and mailing lists), and full-text indexing (the copying of a document for loading into a full-text or nearly full-text database which is searchable for keywords or concepts).

Under a literal reading of some copyright laws caching constitutes an infringement of copyright. Yet recent legislation like the or the proposed EU Directive on copyright and related rights in the information society (amended version) have provided exceptions for ISPs concerning particular acts of reproduction that are considered technical copies (caching). Nevertheless the exemption of liability for ISPs only applies if they meet a variety of specific conditions. In the course of the debate about caching also suggestions have been made to subject it to an implied license or fair use defense or make it (at least theoretically) actionable.

Chapter VI: Internet Service Providers Liability for Copyright Infringement

1. Information Residing on Systems or Networks at the Direction of Users

ISPs may be confronted with problems if infringing material on websites (of users) is hosted on their systems. Although some copyright laws like the DMCA provide for limitations on the liability of ISPs if certain conditions are met, it is yet unclear if ISPs should generally be accountable for the storage of infringing material (even if they do not have actual knowledge) or exceptions be established under specific circumstances.

2. Transitory Communication

In the course of transmitting digital information from one point on a network to another ISPs act as a data conduit. If a user requests information ISPs engage in the transmission, providing of a connection, or routing thereof. In the case of a person sending infringing material over a network, and the ISP merely providing facilities for the transmission it is widely held that they should not be liable for infringement. Yet some copyright laws like the DMCA provide for a limitation (which also covers the intermediate and transient copies that are made automatically in the operation of a network) of liability only if the ISPs activities in certain conditions.

[C] Fair Use

In the "analogue world, the doctrine of fair use (Fair Dealing) was well defined as an exception to the right-holders" exclusive rights granted by copyright law such as the case of criticism, research and private study and reporting of current events. Individuals routinely engage in fragmented copying in their academic, professional, and personal activities without necessarily obtaining authorisation

---

347 Pro Sieben v Carlton (1999) E.M.L.R 109 where the Court of Appeal was willing to apply the principle that permissible criticism could extend to ideas in a work and its social and moral implications so extensively that it could cover disapproval of a general media practice of which the material was merely one illustration

from the copyright owner. There is need to balance the interests of the copyright owners and the users. Is the doctrine of fair use still applicable to copyright works on the internet in light of the easy accessibility and reproduction of digital works?

The Berne Convention provides for the so called 'three step test' in Article 9 (2) which is provides that members of the Berne Union may provide for limitations or exceptions which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the interests of the authors. This provision has been incorporated in TRIPS (Article 13), and Articles 10 and 16 of the WCT and the WPPT respectively. The main question however is, what constitutes a 'normal exploitation' or a 'legitimate interest?  

1. The World Copyright Treaty

The curtailment of user rights was also discussed during the WIPO Conference in Geneva. The proponents at the conference were of the opinion that it would be in line with the provisions of the Berne Conventions and the TRIPS Agreement. The fair use advocates on the other hand feared that a provision curtailing user rights would be too restrictive. Eventually the parties agreed to preserve the existing fair use like privileges in National laws and permit the evolution of new exceptions in the digital environment. Paragraph 6 of the preamble to the WIPO Copyright Treaty recognises the need to maintain a balance between the rights of the authors and the larger public interest in particular to education, research and access to information, as reflected in the Berne Convention.

Article 10 of the WCT relegates the task of making provisions as to the exceptions and limitations to the rights granted to the copyright owner to the

---


\(^{351}\) See Article 9 (2) of the Berne Convention and Article 13 of the TRIPS Agreement. 50 Last paragraph of the preamble to the WCT.
national legislation. The exceptions and limitations should not conflict with the normal exploitation of the work or prejudice the legitimate interests of the author. This also applies in the case of the application of the Berne convention.

The explanatory notes in the WCT makes it clear that the provisions contained therein vis a vis fair use, permit the Contracting Parties to appropriately incorporate the digital environment limitations into their national laws as long as they fall within the ambit of the Berne Convention.

2. The European Union

In respect of the right of reproduction and communication to the public, the Infosoc Directive adopts a similar approach to that of the WCT. The provision of limitations to the exercise of the above-mentioned rights is left to the national legislation. The limitations and exceptions include reproductions made by private persons for non commercial use, reproductions made by educational institutions for research and educational purposes, ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts and broadcasts that are made by social institutions such as prisons, and hospitals, on condition that the copyright owners receive fair compensation.

3. The US

The US did not make new provisions on fair use in the digital world and continue to rely on the provisions contained in the 1976 US Copyright Act. In the United States, fair use is viewed as a constitutional right. The fair use doctrine in the US is grounded on the common law tradition of case-by-case adjudication. The Copyright Act does not provide a definitive list of uses that fall within the realm of

---

352 Article 5 (2) of the Proposed Directive See also Article 5 (3) Which lists the fair use categories which the member States can make exceptions or limitations vis-à-vis the rights conferred upon the copyright owner.
Chapter VI: Internet Service Providers Liability for Copyright Infringement

The provisions in the DMCA[^54] as earlier stated does not directly deal with the question of fair use but the provisions contained therein do have an effect on the concept of fair use in the digital era. It contains a provision to the effect that the rights it grants shall not diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.[^55]

Judges use four factors in resolving fair use disputes, which are discussed in detail below. It's important to understand that these factors are only guidelines and the courts are free to adapt them to particular situations on a case-by-case basis. In other words, a judge has a great deal of freedom when making a fair use determination and the outcome in any given case can be hard to predict.

The four factors judges consider are:

i) The purpose and character of use

ii) The nature of the copyrighted work

iii) The amount and substantiality of the portion taken, and

iv) The effect of the use upon the potential market.

a) Factors of fair use:

(i) The Transformative Factor: The Purpose and Character of Use: In transformative fair use we have to find out that whether the material has been used to help create something new, or merely copied verbatim into another work. When some one is taking material from a copyrighted work the following can be

[^53]: It requires an open-ended fundamentally equitable balanced inquiry that bases are assessment on the relative factors to each case for example the purpose and character of the challenged act. See J. Cohen .The WIPO Copyright Treaty Implementation in the US: Will Fair Use Survive? In E.I.P.R 1999. 238. See also 17 US Copyright Act Sections 17. The list contained therein is not exhaustive.

[^54]: US Digital Millennium Copyright Act.

[^55]: Id Title Is. 3 at 1201 (c) (4)
considered as fair use: When the material was taken from the original work been transformed by adding new expression or meaning; some value was added to the original by creating new information, new aesthetics, new insights and understandings.

In a parody, for example, the parodist transforms the original by holding it up to ridicule. Purposes such as scholarship, research or education may also qualify as transformative uses because the work is the subject of review or commentary.

(ii) The Nature of the Copyrighted Work: The dissemination of facts or information benefits the public; it has more leeway to copy from factual works such as biographies than from fictional works such as plays or novels.

In addition, there will be a stronger case of fair use if the material copied is from a published work than an unpublished work. The scope of fair use is narrower for unpublished works because an author has the right to control the first public appearance of his expression.

(iii) The Amount and Substantiality of the Portion Taken: The less take, the more likely that the copying will be excused as a fair use. However, even if you take a small portion of a work, your copying will not be a fair use if the portion taken is the "heart" of the work. In other words, it is more likely to run into problems if any one takes the most memorable aspect of a work. For example, it would probably not be a fair use to copy the opening guitar riff and the words "I can't get no satisfaction" from the song, "Satisfaction."

This rule--less is more--is not necessarily true in parody cases. In a parody, the parodist is borrowing in order to comment upon the original work. A parodist is permitted to borrow quite a bit, even the heart of the original work, in order to conjure up the original work. That's because, as the Supreme Court has
Chapter VI: Internet Service Providers Liability for Copyright Infringement

acknowledged, "the heart is also what most readily conjures up the [original] for parody, and it is the heart at which parody takes aim." 356

(iv) The Effect of the Use upon the Potential Market: Another important fair use factor is whether the use deprives the copyright owner of income or undermines a new or potential market for the copyrighted work. As it is indicated previously, depriving a copyright owner of income is very likely to trigger a lawsuit. This is true even if it is not competing directly with the original work.

For example, in one case an artist used a copyrighted photograph without permission as the basis for wood sculptures, copying all of the elements of the photo. The artist earned several hundred thousand dollars selling the sculptures. When the photographer sued, the artist claimed his sculptures were a fair use because the photographer would never have considered making sculptures. The court disagreed, stating that it did not matter whether the photographer had considered making sculptures; what mattered was that a potential market for sculptures of the photograph existed. 357

b) The De Minimis Defense: In some cases, the amount of material copied is so small (or "de minimis") that the court permits it without even conducting a fair use analysis. For example, in the motion picture Seven, several copyrighted photographs appeared in the film, prompting the copyright owner of the photographs to sue the producer of the movie. The court held that the photos "appear fleetingly and are obscured, severely out of focus, and virtually unidentifiable." The court excused the use of the photographs as "de minimis" and a fair use analysis was not required 358.

As with fair use, there is no bright line test for determining a de minimis use. For example, in another case, a court determined that the use of a copyrighted poster for a total of 27 seconds in the background of the TV show,

"Roc" was not *de minimis*. What distinguished the use of the poster from the use of the photographs in the seven cases? The court stated that the poster was clearly visible and recognizable with sufficient observable detail for the "average lay observer" to view the artist's imagery and colorful style.\textsuperscript{359}

Parody is given a slightly different fair use analysis with regard to the impact on the market. It's possible that a parody may diminish or even destroy the market value of the original work. That is, the parody may be so good that the public can never take the original work seriously again. Although this may cause a loss of income, it's not the same type of loss as when an infringer merely appropriates the work. As one judge explains, "The economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original --any bad review can have that effect--but whether it fulfills the demand for the original."\textsuperscript{360}

c) **Acknowledgement of the Source Material:** Some people mistakenly believe it's permissible to use a work (or portion of it) if an acknowledgment is provided. For example, they believe it's okay to use a photograph in a magazine as long as the name of the photographer is included. This is not true. Acknowledgment of the source material (such as citing the photographer) may be a consideration in a fair use determination, but it will not protect against a claim of infringement. In some cases, such as advertisements, acknowledgments can backfire and create additional legal claims, such as a violation of the right of publicity. When in doubt as to the right to use or acknowledge a source, the most prudent course may be to seek permission of the copyright owner.

A disclaimer is a statement that "disassociates" your work from the work that you have borrowed. For example, if you write an unauthorized biography of

\textsuperscript{359} *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).

\textsuperscript{360} *Fisher v. Does*, 794 F.2d 432 (9th Cir. 1986).
Mickey Mouse, you may include a disclaimer such as "This book is not associated with or endorsed by the Walt Disney Company. "Will it help your position if you use a disclaimer? In close cases where the court is having a difficult time making a fair use determination, a prominently placed disclaimer may have a positive effect on the way the court perceives your use. However, a disclaimer by itself generally will not help. That is, if the fair use factors weigh against you, the disclaimer won't make any difference.

The provisions of the WCT and the EU proposed treaty seem to favour the interests of the users in the digital environment. Take the example of the existing library exceptions, particularly in relation to transmissions between libraries. The Digital storage offer economic advantages especially with regard to inter-library journal and book acquisitions. This has a serious implication upon the copyright industry.

Any imbalance in favour of either the copyright owners or the users will militate against the delicate equilibrium currently achieved by copyright law and endanger creativity and innovation.

[D] Internet Service Providers Liability in USA

As the Internet has grown, the problem of on-line copyright infringement has developed into an economically significant issue. According to the Motion Picture Association of America, U.S. companies are losing millions per year to on-line copyright pirates, and with the current growth of the Internet, the content community fears that the amount lost to pirates will only increase. The ISP industry, however, while acknowledging its unique position in terms of the Internet, does not want to become a “deep-pocket”, third party defendant in every on-line copyright infringement lawsuit. The Internet Service Providers have

---


argued that the law's lack of predictability in this area and its standards for ISP copyright liability over the past few years have caused real concerns for this new and growing industry. ISPs have argued that due to the nature of the Internet and the unique role of the ISP industry, a narrow limitation on copyright infringement liability should be established for Internet Service Providers so that those who are building the Internet will have a clearer sense of how and when they might be held liable for on-line copyright infringement. In turn, they argue that a heightened level of certainty about this issue will help speed the growth of the Internet by encouraging more entrepreneurs to enter the ISP industry.

Today the Internet is no longer just for researchers, and it is expected that within five years international commerce on the Internet could reach $3.2 trillion. The fact is that in the past 72 months the number of Internet users has risen from hundreds to millions of users, and is estimated by some experts to reach perhaps a billion users by the year 2008. In terms of copyright infringement, the commercialization and exponential growth of the Internet create an entirely new set of problems for copyright holders.

In this context, it is understandable why writers, publishers, and researchers often look upon using the Internet as "riding the Tiger." While the Internet has allowed researchers, educators, artists and publishers to expand their markets at an unprecedented rate, the same technology allows any anonymous and invisible copyright pirate to copy and disseminate instantaneously anything that is displayed on the Internet. Understanding how easy it is to duplicate

366 Raju Narisetti, New and Improved, Ad experts talk about how their business will be transformed by technology, Wall Street Journal, November 16, 1998, at R33, (quoting Kevin O'Connor, CEO, DoubleClick, Inc.).
copyrighted material from the Internet today, the content community has valid concerns about how much easier pirating could be five or ten years from now, and they argue that something must be done now to address this problem.

Recognizing the inherent difficulty of enforcing copyrights against individual Internet users worldwide, some experts have argued that the answer to this problem is placing legal liability for copyright infringement on those who allow and enable Internet copyright pirates to exist, namely the ISPs. It is argued that ISPs profit from the pirates’ use of the Internet, and in comparison to an independent publisher or author, an ISP is in a much better position to police how its subscribers use the Internet. On the other side of the argument, ISPs claim that they are passive carriers similar to telecommunications companies and therefore should be granted some limitation from copyright infringement liability. In addition, they argue that to make ISPs liable could stifle the growth of the Internet. Others argue that the answers to this problem will come from technological innovations, such as the use of “digital watermarking”, rather than through legal reforms. In addition, the argument has been made that cooperation between ISPs and the content community is what is truly needed to solve this problem.

ISPs share the content community’s desire to see the Internet grow, and some believe that the threat of holding ISPs liable for copyright infringement may not be the best way to encourage ISPs to help minimize Internet copyright piracy. The issue of on-line copyright infringement has been around since the use of the Internet started to expand rapidly in the early 1990’s and has been the subject

---


372 Id.
of extensive federal executive branch activities,\footnote{Digital Millennium Copyright Act, Pub. L. 105-304, Title II, 112 Stat 2877 (1998).} court cases, and Congressional action. In the closing days of the 105th Congress, President Clinton signed into law a bill that addressed this issue; Title II of the Digital Millennium Copyright Act, the Online Copyright Infringement Liability Limitation Act of 1998.

In this part will discuss the specific issue of on-line copyright infringement liability in context by analyzing the five leading court cases in this area of law and the next part policy arguments for and against the establishment of a limitation on copyright infringement liability for Internet Service Providers. Lastly, we will analyze the final version of the legislation.

1. **Online copyright infringement case history**

As seen in the following cases, copyright infringement liability on the Internet often hinges on the degree to which the owner or operator of a computer Bulletin Board Service or Internet Service Provider has knowledge and control of the information placed on the Internet by individual subscribers.

In *Playboy Enterprises Inc. v. Frena*,\footnote{Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla, 1993).} the defendant was an operator of a computer bulletin board service that, unknown to the defendant, distributed unauthorized copies of Playboy Enterprises, Inc.'s (PEI) copyrighted photographs. For a fee, anyone with an appropriately equipped computer could log onto the BBS, browse through different BBS directories to look at the pictures, download the high quality computerized copies of the photographs, and then store the images onto their home computer. Among the many pictures stored on Frena's BBS were one hundred and seventy that were copies of Playboy's copyrighted photographs. Frena admitted that the materials were displayed on the BBS and that he never received consent from Playboy. However, Frena argued that he did not personally upload any of the infringing pictures onto the BBS (his subscribers...
had uploaded the images) and that he removed the infringing pictures as soon as he was made aware of the matter.

On these facts, the court found Frena guilty of copyright infringement. In making its determination, the court analyzed the elements needed for copyright infringement as follows. In order to establish a prima facie case of copyright infringement, the plaintiff must show ownership of the copyright and "copying" by the defendant. In this case there was no question that Playboy owned the copyrights on the photographs due to the fact that at trial, Frena had offered no evidence to rebuff Playboy's copyright documentation. As for copying, the court noted that since evidence of copying is rarely found, copying could be inferentially proven by showing that defendant Frena had access to the copyrighted work, the work is substantially similar to the copyrighted work, and that one of the rights statutorily guaranteed to copyright owners is implicated by the defendant's actions. In this case there was no question about the elements of access and similarity—Playboy sells 3.4 million copies of its magazine per month in the United States, and the pictures were essentially exact copies of the copyrighted photographs. The only remaining issue was whether the defendant's actions implicated one of the copyright holders' exclusive rights.

The court held that Frena's actions had infringed Playboy's exclusive right to distribute the works and the exclusive right to display the works. Concerning the right to distribute, the court held that there was no question that Frena supplied a product containing unauthorized copies of a copyrighted work. As for display rights, the court held that Frena's display of the copyrighted materials to his subscribers constituted a public display even though his subscribers were limited in number.

---

376 See Frena, 839 F. Supp. at 1556.
377 Id. at 1559.
Chapter VI: Internet Service Providers Liability for Copyright Infringement

Frena defended his use as within the scope of the fair use exception to copyright infringement. His argument, however, fell on deaf ears. The court found that Frena's actions were commercial in nature and of the sort that if they were to become widespread would result in a substantially adverse impact on the potential market for or value of the plaintiff's work and therefore were not within the fair use exception.

Concerning Frena's argument that he had not uploaded any of the infringing photographs and was not aware that the photographs were in fact infringing PEI's copyrights, the court wrote, "it does not matter that Defendant Frena may have been unaware of the copyright infringement. Intent to infringe is not needed to find copyright infringement. Intent or knowledge is not an element of copyright infringement, and thus even an innocent is liable for infringement; rather, innocence is significant to a trial court when it fixes statutory damages."

Because knowledge is not an element of direct copyright infringement, the court set forth a standard that the creation and/or operation of a BBS can be sufficient to establish direct infringement liability where copyrighted materials appear on the system. In a similar case, Sega Enterprises v. Maphia, the defendants owned and operated a BBS known as "Maphia", which specialized in sharing video games among BBS subscribers. Sega Enterprises, a video game manufacturer, held copyrights on many of the video games that, with defendant's knowledge and indeed with their encouragement, were uploaded and downloaded onto the BBS by Maphia subscribers without the consent of Sega. In supporting the plaintiff's motion for a preliminary injunction, the court found that Sega had established the required probability of success on the merits for a case of direct and contributory copyright infringement against the defendants.

---

378 Id.
In order to prove a prima facie case of direct copyright infringement, Sega had to establish ownership and copying of their copyrighted work. Concerning the issue of ownership, there was no question that Sega owned the copyright for the video games. As for the "copying" requirement, the court cited MAI Systems Corp. v. Peak Computer, Inc.,^381 which held that saving an unauthorized copy of a work on a computer's "Random Access Memory" satisfies the "copying" element needed to prove infringement. Applying this standard to the facts of the Sega case, the court held that Maphia's activities satisfied the copying requirement. ^382

The MAI Systems case involved a computer repairperson who was not authorized to use a computer owner's licensed operating system software. ^383 The repairman's turning on of a computer automatically loaded an operating system into RAM for long enough to check an "error" log. The problem stems from how software systems function. The result of turning on the computer was that an unauthorized copy of the operating system was automatically generated on the computer. The MAI Systems case held that the automatic copying of an operating system onto the computer's RAM satisfied the "copying" requirement for copyright infringement. In the Sega case, the court cited the MAI Systems case and held that the act of uploading or downloading a game from the Maphia BBS constituted a "copying."

As for the issue of contributory copyright infringement, the court found that Maphia's activities, including the fact that the company sold hi-tech equipment that is only used for the illegal copying of video game software, satisfied the standard for contributory copyright infringement. The court held that even if the defendants did not know when games will be uploaded to or downloaded from the Maphia BBS, their role in the copying, including provision of facilities, direction, knowledge and encouragement, amounts to contributory

^381 MAI Systems Corp. v. Peak Computer, Inc., 991 F.2nd 511, 518 (9th Cir 1993).
^383 See MAI Systems Corp. v. Peak Computer, Inc., 991 F.2nd 511, 518 (9th Cir 1993).
copyright infringement. The defendants argued that their activities fell within the fair use exception for copyright infringement. Among the reasons for rejecting this argument, the court pointed out that in order to use the fair use defense the defendant must first possess an authorized copy of the copyrighted work. The defendants admitted that they did not own an authorized copy of any of the Sega games and as a result their fair use defense failed.

Notably, Mapia held in that case that a single, even temporary copy of a copyrighted work saved on a computer file is prima facie an infringement of the copyright. Due to the fact that the Internet functions by having files temporarily download onto a user's computer, extending the MAI Systems case, as the Mapia court did, could mean that every time an Internet-surfer transfers and/or opens a document or a Web page on the Internet, he or she would satisfy the "copying" requirement for copyright infringement. This problem was addressed in both the Administration's White Paper and in the Online Copyright Infringement Liability Limitation Act.

Another important copyright case involving an ISP is Religious Technology Center v. Netcom. The facts of the case are as follows: Defendant Dennis Erlich is a former minister of the Church of Scientology (the Church) and is a vocal critic of the Church. At the time of this case, Erlich was subscriber to an on-line BBS managed by co-defendant Thomas Klemensrud. The BBS, known as "support.com" functioned as an on-line forum for discussion and criticism of the Church. The BBS obtained access to the Internet through Netcom, one of America's largest ISPs. The plaintiffs in the case, Religious Technology Center and Bridge Publications, Inc. (RTC) hold copyrights in the unpublished and published works of L. Ron Hubbard, the late founder of the Church of Scientology. Mr. Erlich posted portions of Mr. Hubbard's works onto the BBS. Initially, RTC attempted to persuade Erlich to remove the materials but Erlich refused. RTC then asked Klemensrud and in turn, Netcom to keep Erlich off the

385 Religious Technology Center v. Netcom at 1366.
Internet. Both refused. Klemesrud refused to take Erlich off the BBS because RTC refused to prove that it owned the copyrights to the works posted by Erlich. Netcom refused, stating that it would be impossible to prescreen Erlich’s material, and to kick Erlich off the Internet meant kicking off the hundreds of users of Klemesrud’s BBS. As a result of their refusal to kick Erlich off the Internet, RTC added Klemesrud and Netcom to its lawsuit against Erlich. While RTC charged Erlich with several claims, the claims against Klemesrud and Netcom were limited to copyright infringement. For the purposes of brevity, this paper will address only those issues concerning Netcom’s potential liability for direct and vicarious copyright infringement.

The first requirement for satisfying a prima facie case of copyright infringement is to prove that the defendant made a copy of a valid copyrighted work. In this case the court analyzed the technological workings of the Internet and acknowledged the fact that the Internet functions by creating temporary copies of documents on every computer that transfers, receives and/or opens a given document. Nevertheless, although copies had technically been made, the court held that Netcom was not liable for direct copyright infringement. In reaching this decision the court wrote that, unlike the repairman in the MAI Systems case, Netcom had not initiated the copying of the copyrighted works in question. All Netcom did was establish a computer system that was integrated into the Internet. The court wrote that applying the MAI standard in this case would mean that everyone who owns a computer through which Erlich’s messages had been sent would be liable for copyright infringement. The court found this unreasonable and stated, “there is no need to construe the Copyright Act to make all of these parties infringers.” The court held that “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.” The court held that it “does not make sense to adopt a

rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet."

After dismissing the claim for direct copyright infringement, the court stated that Netcom was similar to the owner of a public copier machine and therefore its liability should be analyzed under the category of secondary copyright infringement.

The court held that Netcom was not liable for vicarious copyright infringement. For a finding of vicarious copyright infringement, RTC had to prove that Netcom had the right and ability to control the infringer’s actions and also received a direct financial benefit from the infringement. While the court found that questions of fact did exist concerning whether Netcom had the right and ability to control Erlich’s activities, the court held that the ISP did not receive a direct financial benefit from the infringement. The court reasoned that Netcom’s uniform monthly subscription fees and the fact that there was no evidence that Erlich’s infringement helped Netcom gain more subscribers was enough to prove that the ISP did not gain a financial benefit from the infringement. RTC’s claim of vicarious copyright liability was dismissed. The holding in this case is an excellent example of the courts melding the law to fit new technology. Congress later codified it as part of the Online Copyright Infringement Liability Limitation Act of 1998. 388

A similar case, but one that concerns a Website news-group rather than a BBS, is Playboy Enterprises v. Webbworld, Inc. 389 In this case, defendant Webbworld operated a Website-based news-group which collected news, pictures and articles concerning adult entertainment from various other web-pages and posted them on Webbworld’s “Neptics.com” web page. The WebPages was accessible for a monthly subscription fee. Among the materials maintained on the web page were various adult photographs on which Playboy Enterprises, Inc. held

388 Congressional Record E-160, February 12, 1998 (Extension of remarks of Congressman Howard Coble).
Copyrights. Initially Webb World argued that it could not be held liable because unknown third parties were the ones who placed the photographs on to other Internet news-group WebPages from which Neptics gathered its material. The court disagreed, stating that what was important was not whether Webb World could control who placed materials on other WebPages but rather that Webb World, and only Webb World, controlled what material eventually appeared on its own Neptics.com web page.

Recognizing that their arguments against copyright infringement were weak, Webb World cited Religious Technology Center v. Netcom and argued that Webb World was similar to Netcom in that it functioned only as an access point to the Internet for its subscribers. The court didn’t agree with Webb World and wrote that while Netcom only provided access to the Internet, Webb World provided and controlled the images and content of the Neptics.com web page and therefore Webb World was liable for direct copyright infringement.

In addition, the court found Webb World’s two principal operators, the individual who ran the day-to-day operations and the individual who thought up the business idea and created the computer software that operates on the Neptics.com web page, respectively, liable for vicarious copyright infringement. The court reasoned that if a defendant “has a direct financial interest in the infringing activity and has the right and the ability to supervise the activity which causes the infringement, then he should be held vicariously liable.” The two were held liable due to the fact that they had the right and ability to determine what materials appeared on the Neptics.com web page and because they financially benefited by the infringing actions of their subscribers.

The latest BBS case is Playboy Enterprises, Inc. v. Hardenburgh. Again, the degree to which the operator of the BBS could control the content on the BBS determined liability. In this case, the defendant’s own well-intentioned attempts to police his WebPages for copyright infringement were used as
evidence that he had participated in copyright infringement and had the right and ability to control his subscribers’ activities.

The subscribers to Hardenburgh’s BBS could, for a fee, download a set number of photographs per month from the collection of photographs maintained on the BBS’s computer files. As an incentive, Hardenburgh gave “credits” to subscribers who uploaded new photographs onto the BBS. These “credits” could be used by subscribers to increase the number of photographs they could download each month. In turn, Hardenburgh hoped that the new photographs would add value to the collection and help attract and maintain fee-paying subscribers to his BBS. Many of the photographs uploaded onto the BBS by subscribers infringed copyrights held by Playboy Enterprises, Inc.

Concerning the copyrighted photographs, Hardenburgh argued that he had no knowledge of any infringement and that he had, in fact, taken affirmative steps to avoid such infringement. When a subscriber first uploaded a picture on to Hardenburgh’s BBS, the picture would be maintained in an “upload file.” Before being made publicly accessible on the BBS, one of Hardenburgh’s employees would inspect each picture to ensure that they were not copyrighted material.

As part of its reasoning, using language that would please the ISP industry, the court held that “a finding of direct copyright infringement requires some element of direct action or participation...” in the infringing activities. The court wrote, “The Copyright Act is cast in terms of activities which are reserved to copyright owners. It follows that an infringer must actually engage in one of those activities in order to directly violate the statute. Setting up a computer BBS is not one of those activities. Merely encouraging or facilitating those activities is not proscribed by the copyright statute.” This standard mirrors the holding in RTC concerning the need for some act of volition to trigger liability for direct copyright infringement and is a major change from the strict liability standard set forth in the 1993 Frena case. Unfortunately for Hardenburgh, however, the court

391 Id. at 513, (See also, RTC v. Netcom, at 1370)
applied this standard to his BBS operation and held Hardenburgh liable for direct and contributory copyright infringement. The court wrote that Hardenburgh’s actions of encouraging subscribers to upload new pictures and Hardenburgh’s actions of pre-screening the photographs were enough to transform him from a passive provider exempt from liability to a participant in the infringement. Playboy had already presented evidence of proof of ownership of the copyrighted works, evidence to satisfy the copying requirement, and evidence that Hardenburgh had violated Playboy’s exclusive rights to distribute and display. As a result the court held the corporate owner of the BBS, Hardenburgh’s company, liable for direct copyright infringement. In addition, the court pierced the corporate veil and held Hardenburgh, in his capacity as the company’s corporate officer, liable for direct copyright infringement.

The court, cited Southern Bell Tel. & Tel v. Associated Tel. Directory Publishers, 392 which held that an individual who has the ability to supervise the infringing activities and had a financial interest in that activity, or who personally participates in that activity is personally liable for the infringement. Under this standard, the court found Hardenburgh liable for direct copyright infringement.

Finally, the court held Hardenburgh and the corporation liable for contributory copyright infringement as well. An individual is liable for contributory copyright liability when, “with knowledge of the infringing activity, (the party) induces, causes or materially contributes to the infringing conduct of another.” The court held that Hardenburgh clearly had satisfied the requirements for a finding of contributory copyright infringement. The court held that the BBS’s policies had induced, caused and materially contributed to the infringing activity. Concerning the issue of knowledge of the infringing activity, the court wrote that the defendant had at least “constructive knowledge” that infringing activity was likely to be occurring on their BBS. The court reasoned that an individual who

392 Southern Bell Tel. & Tel v. Associated Tel. Directory Publishers, 756 F.2nd 801 (11th Cir.)
encourages others to upload pictures must take appropriate steps to ensure that the images are not infringing on the copyrights of others.

As expected, the language from this decision that restates the principle that an act of volition is needed to trigger copyright liability is the kind of language that pleases the ISP industry. Any language that reaffirms the idea that passive providers should not be held liable will be supported by the ISP. However, the court's use of "constructive knowledge" rather than actual knowledge to hold Hardenburgh liable for contributory copyright infringement is the kind of language that worries ISPs. It begs the question, "How much knowledge of their subscribers' activities should ISPs have?"

In the context of these five cases, questions remained concerning the potential liability of ISPs.

What level of engagement or what level of service to subscribers would satisfy the standard set forth in Hardenburgh for contributory copyright infringement? Could an ISP that offered value-added services in addition to simple Internet-access, such as a telecommunications company, be held liable for contributory copyright infringement due to the actions of a subscriber? At what specific level of knowledge would an individual, or corporation be held liable for contributory copyright infringement?

Among other concerns, the ISP community worried about whether the standard set forth in the RTC case would stand. In the RTC case, the court held that passive activities, such as simply offering access to the Internet were not sufficient to be found liable for direct copyright infringement. The ISP community worried that a future court might reinstate the much stricter standard set forth in the 1993 Frena case. As for contributory copyright infringement, the

---

393 House Judiciary Comm Hearing on WIPO Treaty & Online Copyright Legislation, September 1997 at 87 (prepared statement of Roy Neel, USTA).


ISP community worried that the standard for what constitutes “knowledge” might be too easily satisfied and that the fear of legal liability would negatively impact the growth of the ISP industry and the growth of the Internet in general. 396

2. Legislative activities and policy arguments

As could be expected, the content community saw a limitation on copyright infringement liability for ISPs as a step in the wrong direction. 397 They made several arguments against the establishment of such a limitation based on their belief that it would weaken copyright enforcement on the Internet. Primarily, the need to exempt or limit the ISP industry’s liability from copyright infringement was questioned. While the ISP industry argued that the limitation on liability was needed to prevent a flood of legal suits, the truth is that there have only been a dozen or so a decision concerning this topic, and not a single ISP has been found liable for on-line copyright infringement. Secondly, the argument that the lack of protection from on-line copyright infringement liability has dampened entrepreneurial interest in the ISP industry also appears to be fairly weak. Between 1995 and 1997, a time in which the stricter “Frena” standards for copyright infringement liability were still in place, revenue for providing Internet access nearly quadrupled.

In opposing the limitation, some experts looked at the publishing industry and asked why should ISPs be granted a limitation on liability. The publishing industry has always been held strictly liable for copyright infringement, what makes the ISP’s any different? Similar comparisons were made about the fact that photo finishers also operate under a strict liability standard for copyright infringement. 398 In fact, many argued that rather than limiting the copyright infringement liability for ISPs, ISPs should bear their share of the burden. The argument was made that the ISPs performed a unique and lucrative function for

---

396 Id.
398 Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345 (8th Cir. 1994).
the Internet, were uniquely empowered to help minimize copyright infringement by Internet users, and therefore individual ISPs should have a legally enforceable duty to help minimize on-line piracy and a legal obligation to monitor their users for copyright infringement.

3. The on-line copyright infringement liability Limitation Act of 1998

It should be pointed out that the law does not establish an exemption to copyright infringement liability. The law is explicitly a “limitation” on liability, and the limitation takes the form of a statutory change in the remedies available to a plaintiff, rather than by creating a legal exemption to copyright infringement liability.

Codifying the Netcom decision into law was the main purpose of the legislation. By doing this, the ISPs’ fear of being found liable due to automatic passive acts was addressed. Throughout the legislative process the argument was made that cooperation between ISPs and the content community is what is needed to address properly the issue of on-line copyright infringement. This provision gives the ISPs the assurance that they will not be joined as third-party defendants simply due to the nature of the Internet and should encourage more ISPs to cooperate voluntarily with the content community. More importantly, however, the fact that it is now harder to find an ISP liable for copyright infringement, may give the content community more incentive to shift their anti-piracy strategy from legal tactics to technological innovations. As seen in the cases addressed in this chapter, it often takes the legal system several years to catch up with technological innovations. In fact, some experts have argued that the content community may have more success in fighting on-line copyright infringement using technology rather than the law.

---


As stated above, the law also makes it more difficult for an ISP to be found liable for contributory copyright infringement. The law contains provisions that require that the ISP must have actual knowledge of the infringement, awareness of the facts and circumstances of the infringement, or have received notice of the infringing activity in order to be found liable. The provisions state that an ISP will still not be liable if, upon notification, the ISP responds expeditiously to remove or disable access to the infringing material. The law also includes a provision that states that an ISP cannot be found liable for removing or disabling access to material claimed to be infringing as long as the ISP is acting in good faith. And lastly, the law allows ISPs to bring suits against individuals who misrepresent infringing activity.

As for the content community, the law still allows copyright holder to sue ISPs for injunctive relief to stop infringing activity. In considering such an injunction, the court would consider the burden on the ISP, the potential harm to the copyright holder, the feasibility and effectiveness of the injunction, whether it would interfere with non-infringing material, and whether less burdensome means were available.

Perhaps for the content community, the best thing about this law is that the On-line Copyright Infringement Liability Limitation Act is only one title of a much larger law—the Digital Millennium Copyright Act is the WIPO Copyright and Performances and Phonographs Treaties Implementation Act of 1998. Ratifying the WIPO Treaty is a major victory for the U.S. content community.

[E] Liability of Internet Service Providers and similar operators in India

The issue of on-line copyright infringement liability for ISPs has been around since the use of the Internet started to expand rapidly in the early 1990s and has been the subject of extensive debates worldwide. Should ISPs be held responsible for illegal activities committed by their users? To what extent are
online intermediaries responsible for third party material put on the Internet by
users of their facilities?

Because of the inherent difficulties of enforcing copyrights against
individual Internet users worldwide, the copyright owners have found the answer
to this problem is placing legal liability for copyright infringement on those who
allow and enable Internet copyright pirates to exist, namely the Internet service
providers (ISPs). For the content community, it is practical to sue the ISPs as
they are in a position of policing the Internet. On the other side of the argument,
ISPs are passive carriers similar to telecommunications companies and, therefore,
should be granted some limitation from liability with regard to copyright
infringement. In addition, to make ISPs liable could stifle the growth of the
Internet.

The liability of ISPs may arise in a variety of legal fields, such as criminal
law, tort law, trade secret law, copyright law, trademark law, unfair competition
law, etc. Worldwide many nations have tried to define the liability of ISPs in
disseminating third party content. Many of these national laws relate to criminal
law, information technology law or copyright law. These statutes have tried to
solve the problem by adopting either of the two approaches; horizontal approach
and non-horizontal approach. The horizontal approach\textsuperscript{401} covers not only
copyright infringement but also all other potential areas of law where liability of
ISPs might arise. It fixes the liability regardless of the grounds for illegality of the
transmitted material. Whereas, under non-horizontal approach\textsuperscript{402} the potential
liability of ISPs is determined under each law where it might arise. In this case
various statutes would determine ISP liability; for example, adopting non-
horizontal approach the copyright statute would address ISP liability that might
arise only in relation to copyright violations.

\textsuperscript{401} There are laws now in force in Germany, Sweden, Japan, etc. which approach the issue from a
horizontal perspective.

\textsuperscript{402} Non horizontal approach has been adopted by some countries such as Hungary, Ireland, Singapore
and the United States of America.
1. ISP liability under the Copyright Act, 1957

The Copyright Act, 1957 was obviously drafted in complete oblivion of the phenomenon called the Internet. Even after its amendments in 1994 and 1999 it does not contain any express provision for determining or limiting ISP liability. However, some provisions in the Act could be interpreted to have some bearing on the liability of ISPs. As per section 51 (a) (ii) of the Copyright Act:

> Copyright in a work shall be deemed to be infringed, when any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act... 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.

(emphasis added.)

ISPs allow their servers and other telecommunication facilities for storing user’s material and for transmitting that material. The computer servers and other telecommunication facilities are actually located at their business premises and hence they would verily come under the expression “any place” and could be held liable for the infringing activities of third parties whose material they store or transmit if other requirements are fulfilled. Further, the expression “permits for profit” means that to be held liable the activities of ISP should be for profit meaning thereby that he should be financially benefiting out of the infringing activities. ISPs normally charge for their services and even if they offer some services for free, they could indirectly be making profit out of it, e.g., from advertisements that they bundle together with the transmitted material. So, the above two requirements are fulfilled by ISPs for most of their activities in case they transmit or store infringing material. The expression ‘unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright’ is significant in the sense that
Chapter VI: Internet Service Providers Liability for Copyright Infringement

ISPs are liable only if they have knowledge of the infringing material stored or passing through their servers.

Further, “any person who knowingly infringes or abets the infringement of copyright...” is made criminally liable under the Act. Can an ISP be said to have abetted the infringement of copyright’ is a question to be decided by the courts in the light of actual facts.

2. ISP liability under the Information Technology Act, 2000

In India the provisions relating to the ISPs are specifically legislated in the IT Act, 2000 where an Internet Service Provider is referred to as Network service provider and is defined as:

“Network service provider” means an intermediary.

Intermediary again has been defined as:

“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. (Emphasis added)

Further the Act contains a clause which limits the liability of ISPs under certain circumstances:

Network service providers not to be liable in certain cases. For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention. (emphasis added).

403 S. 63, Copyright Act, 1957. (emphasis added).
404 Explanation (a) to s. 79 of IT Act, 2000
405 S. 2(w), IT Act, 2000.
a) **Classification of ISPs under the IT Act, 2000:** Under IT Act, 2000 no classification of ISP has been attempted. The expression ‘Network service providers’ used in section 79 subsumes within it all kinds of Internet service providers irrespective of what function they perform in the long chain of intermediaries that transport Internet content to the desired destinations. The ISPs perform different functions in the task of transporting content and their liability cannot be uniform. It has to be based precisely on what function they perform.

In the opinion of the researcher it is necessary to categorize the ISPs into functional categories otherwise different ISPs could be held liable under the IT Act, 2000 for something which they have played no role in or for the contents over which they have little control. To give a meaningful disposition to the limitation on liability of ISPs, for which section 79 has been drafted, it becomes essential to categorize the ISPs.

b) **Filtering ISP liability through the IT Act:** The title of section 79 of the IT Act “Network service providers not to be liable in certain cases” makes apparent the object behind the section, which is to limit the liability of ISPs. The liability of ISPs could arise in a number of ways under different statutes. The liability could be criminal or civil in nature depending on various factors. It is impractical to define the liability of ISPs which could arise in various forms at one place. Equally impractical could be to amend all our laws, which could hold ISPs liable, in order to limit their liability. The latter has not been attempted in any of the Indian legislations including the Copyright Act, 1957 till now. The IT Act, 2000 does not attempt the former but just seeks to create a filtering mechanism for determining the liability of ISPs. The idea is that the liability of an ISP for his action or omission be first determined in accordance with the statute under which it arises and then if at all the ISP is held liable, his liability again be filtered through section 79 of the IT Act. For example, if an ISP is accused to illegally distributing pirated copies of music, then his liability be first determined under section 51(a)(ii) and section 63 of the Copyright Act, 1957. If the ISP is found
liable then his liability again be tested on the touchstone of section 79 of the IT Act, 2000.

In this context, the expression “under this Act” which has been used in section 79 has created some confusion. Apparently, this limitation of liability would be applicable only when the liability has arisen under the IT Act alone. This could not be the motive behind drafting section 79 especially when the Act does not attempt to define the liability of ISPs in any of its provisions; it only talks about limiting their liability. For the removal of doubts it is desirable that the expression “under this Act” be removed from section 79.

3. Exemption from liability of an Internet Service Provider

To qualify for exemption, ISPs may neither initiate the transmission, select the receiver nor have any editorial control by the selecting or modifying the material. Section 79 of the IT Act also provides two circumstances under which an ISP can qualify for exemption from liability:

a) Lack of knowledge

b) Exercise of due diligence

a) Lack of Knowledge: Knowledge of the illegal contents on part of the ISP is a prerequisite for holding him liable under section 79 of the IT Act, 2000. The ISP can escape liability if it could be proved that he was unaware of all that was stored and passing through his servers. But if he is put under a notice that some infringing material is either stored or passing through his servers, he has to take proper action for removing or disabling that material otherwise he could be said to have knowledge of the infringing material and held liable.

b) Due diligence: For an ISP to escape liability, section 79 prescribes “due diligence” to be exercised by him. The provision requires actual knowledge or breach of the duty of care. What should be the extent of the “due diligence” requirement? Should the ISPs be required to monitor and judge legality of
millions of files that are present or passing through their servers? Considering the gigabyte that are stored or passing through their servers this seems to be an impossible task. But, if we say that the ISPs should not be under an obligation for “due diligence”, it might encourage them to consciously ‘look away’ and evade all liability. It can be safely concluded that ISPs are not liable for the (infringing) gigabytes that are stored and passing through their servers unless they are put on notice. If an ISP encounters particularly suspicious circumstances, he may be subject to “due diligence” i.e., a duty of care to investigate further whether material he hosts or refers to is unlawful and, where found to be so, to block access.

4. Justification for the liability of ISPs in the cases of copyright infringement on the Internet

Most of the time in every set of action that a copyright owner takes against infringements on the Internet, by and large the action is simultaneously taken against the ISP as well, apart from the person who actually commits the infringement. There are reasons behind ISPs being sued so often when it comes to Internet infringements.

It is very easy to trace an ISP. For example a software product is found loaded on a Web site which anyone is free to download. Let's presume the Web site actually operates some kind of bulletin board, i.e. a site where people just upload and download files and where anyone can contribute as well as can take. In such situations, often you can trace out the Web site owner but you can't trace out the actual contributor. But you definitely can find out the ISP whose facilities have been used to upload the software. In digital environment products are priced high and much damage can occur in less time. So, apart from suing the actual offender people would always like to sue the ISP as well.

Normally an ISP, as a business entity, has deeper pockets and is also more capable of paying the damages than is an individual private user. Another reason is that it deters infringement by other subscribers. If on a Web site there are 15
subscribers, all of whom can upload and download content to and from that Web site, if you sue one of them, the next day someone else might upload the same content. But if you sue the ISP directly it would have to shut off and make it very clear to his subscribers that the infringing content will not be uploaded on this Web site ever again. So with the intent of deterring infringement again, suing an ISP is quite practical. It is far easier to try and stop the copyright infringement by suing the ISP directly because he controls that network.

US Supreme Court in the case of Metro Goldwyn Mayer Studios v. Grokster,\textsuperscript{407} reversed the Central District Courts of California decision of 25\textsuperscript{th} April 2003 and over ruled the 20 year old decision of Sony Beta Max Video Recorder case and ruled unanimously on 27\textsuperscript{th} June 2005 that Internet file sharing services providers or Internet Service Providers could be held liable if they encouraged users to trade songs, movies, television shows online and copyrighted materials without paying for them.

Justice David Souter rightly stated that “we hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by the clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties”, Supreme court sent a strong and clear message that business based on theft should not and will not be allowed to flourish. But the court provided little in the way of describing what might qualify as behaviour aimed at encouraging infringement, has opened up the door to prohibitive legal battles that just might stifle future innovations.

The hypothesis in the research is supported by this particular decision of US Supreme Court and proves that the liability for copyright infringement in Internet should be on the Internet Service Providers.

\textsuperscript{407} The Economic Times of India, 28\textsuperscript{th} June 2005.
RECAPITULATION

Global networks and digital media represent a great challenge to copyright law. Infringement of music and movies through file-sharing programs is staggering. Legal efforts have thus far been ineffective at preventing what many view as socially acceptable. The targeting of direct infringers is difficult due to the nature of the Internet. Although targeting intermediaries could decrease infringement this must be done carefully and uniformly throughout the world to avoid safe havens for rogue servers. Globally, ISPs should only be liable for the actions of their users where they have been made aware of the infringing material and were able to control the material but failed to take action. This would follow the U.S. and European initiatives. Further, ISPs should not have a general duty to monitor conduct because this would likely be detrimental to normal users. Support for intermediary regulation may be gained by aiding ISPs in establishing their own Codes of Practice, as occurs in parts of Europe. On the issue of file-sharing operators, it has been shown that lawsuits have proven ineffective at deterring infringement. Therefore, either a well-considered system of levies or compulsory licensing is proposed. It is hoped that in this way a compromise between Copyright Industries and Internet users might be reached.
Chapter VII: CONCLUSION AND SUGGESTIONS

The discussion enunciated and the survey conducted in the preceding chapters reveals that the existing legislations governing the rights and obligations of the copyright owners, domain name holders, consumers, netizens and the internet service providers have failed to clarify the regulatory controversies which have come up in the process of convergence of telecommunication, broadcasting and information technology within the classical compartment of traditional intellectual property system. The shortcomings are not only evident in theoretical plane, the courts and legislatures are also finding it difficult to apply the existing intellectual property principles to settle some of the core issues concerning the scope and extent of copyright and trademark protection of converging technologies.

Indecision of policy makers in setting clear parameters for the development of convergent activities is a major stumbling block in many Asian countries. This not only retards the growth of many new beneficial systems and services, but also prolongs the agony of incumbents to adjust to the new environment while even basic services continue to be widely inaccessible.

The slowness of the reaction of regulators often means resorting to largely unsatisfactory stop-gap measures in order to cope with the rapid technological changes. Instead, regulators need to plan ahead with flexible frameworks of dealing with largely unforeseen and unpredictable technological and market changes. Governments cannot shy away from convergence or they will deny themselves necessary advancement while continuing to keep their people at a disadvantage.

Getting the regulatory house in order remains a primary challenge in much of Asia. Encouraging examples of providing for a proper regulatory environment are being developed in Hong Kong and Singapore. Providing for a reasonably autonomous converged regulatory agency apart from vested
operational interests is becoming increasingly important. Promoting reasonable competition and encouraging the private sector to participate is also needed along with the continuing divestment of government interest in traditional communications industry incumbents.

Focusing on providing transparent and fair regulation for the development of technologies and services to meet information needs and desires in the face of inevitable social and political changes from within and outside countries is the challenge to address in India as well as an opportunity not to be missed.

There is no one formula that can be used in all countries. Yet, India will have to approach the issues of ICT and media convergence in a forward looking manner not only for determining new rules for interconnection, universal access and access to scarce resources, but also for building a regulatory framework for increasing the growth potentials in a networked economy.

The very challenge for copyright in the digital environment is to maintain the delicate balance between the right owners' and authors' interests and the public interests that successfully contributed to progress in the analogue era.

Dramatic growth in broadband communications, convergence of technology systems, digitalisation of content and the globalisation of human interactions have changed the context within which copyright operates.

The technological measures to combat piracy are essential coupled with strong legal protections must be adopted and more importantly, vigorously enforced worldwide, if sufficient intellectual property incentives are to be upheld. The copyright laws do not appear to have developed adequately in line with technological advances.

Due to the nature of digital content, a combination of commercial, technological and legal solutions will be utilised to manage and protect copyright material.
There is a clear need for international consensus on the law relating to the Internet. Due to the 'global nature of the Internet's purely national responses to the copyright problems are inadequate' and 'a convergent approach is required'. It is obvious that due to the nature of the Internet ignoring boundaries, national law and territorial sovereignty are incapable of meeting the demands of this new technology. However, it will be shown that international efforts to date have been, at best, inadequate to meet these demands.

The TRIPs agreement resulted in no consensus in the area of copyright and technology. Thorny issues surrounding copyright protection for electronic commerce were not addressed explicitly in TRIPs, requiring the negotiation in 1996 of the Copyright Treaty and the Performance and Phonograms Treaty under the auspices of WIPO.

Unfortunately the twin WIPO treaties failed to directly legislate on issues relating to the Internet. This comes as no surprise though; regional agreements involving countries with more common ground have faired little better. The EU Copyright Directive in its full title aims to harmonise 'certain aspects of copyright and related rights in the information society'.

To reach the goal of international regulation of the Internet we must be realistic and look at specific problems that can be remedied in the short term. Some legal scholars even have asserted that cyberspace should have its own law and legal institutions, and have questioned whether state-based governments should have jurisdiction over online activity. This may well be true and is a bold objective for the long-term. However it is currently more of a moot point; nations are, at present, unlikely to relinquish sovereignty to an international 'Internet police force'. Therefore, pragmatic reform options are proposed.

In brief, there is a need to adopt a flexible method of regulation in India while a new comprehensive law is being drafted so that regulation of communications should sustain changes in a converging environment.
The manner in which legal and regulatory reform is carried out will determine the manner in which convergence impacts our daily lives.

In short we can submit as follows: Technology changes quickly, regulation changes slowly; Legacy regulation not relevant in convergence era; Prioritisation of Regulatory Challenges for optimum utilisation of regulatory resources; Drawing the Road Map for implementation of convergence; Need for efficient and timely dispute Resolution mechanism for converged licensing regime; Capacity and expertise building in the regulatory bodies to meet the challenges of convergence.

There is no doubt that cyber-squatting is the most contentious issue in the Cyber Law area throughout the world. Since the Internet is a global phenomenon, steps are already afoot to tackle the menace of domain name disputes, especially cyber-squatting, on an international level.

The application of trademark law to websites increases opportunities to carry out commercial activity in countries where the person carrying out the activity has no physical presence. This could be an attractive aspect of carrying out e-business as it may make it difficult for owners of foreign intellectual property rights to enforce those rights effectively. On the other hand, another feature of the Internet is that someone operating a website could be too easily accused of infringing a foreign intellectual property right. Clearly a balance has to be struck that results in reasonable certainty for persons operating websites and the effective enforcement of foreign intellectual property rights.

Bringing cyber-squatting within the framework of the Trade Marks Act, 1999, would result in granting trademark holders more extensive protection than what the legislature originally intended. The development may not be healthy because, although the intention of the Court may be to discourage cyber-squatting and curb a social evil, it may result in dangerous precedents, where even genuine registrants of domain names may be adversely affected.
It is pertinent to mention that as the decisions of the WIPO panel do not have any precedent value and are further subject to the decision of a Court of a competent jurisdiction, the subject of domain name disputes is certainly going to be a contentious issue in bringing actions done over the net under the framework of the existing law.

In catena of cases Indian courts have decided that the domain names are trademarks and can be registered as trademarks. The Law of passing off action is fully applied to domain names.

It is evident that domain names and their misuse by private as well as public portals and firms have become rampant in the absence of a strong jurisdictional jurisprudence. The Internet is a global collection of computer networks and requires global solutions and regulation in a new millennium for a world committed to the digital technology and welfare of the netizens through it. In the light of above discussion is submitted as follows:

The first Come first served basis for registration of Domain name was responsible for the spurt in the growth of cybersquatting or the process of registering a domain name which legally belongs to anothers. The existing TLDs or Top Level Domains have been a big target of cyber squatting. It is possible that with the introduction of the new TLDs, cyber squatting will increase. The Existing 'UDNDRP' is a very limited policy and allows only for limited grounds to get back domain names.

In the existing proposals for new top level domain, there are no mechanisms to prevent cybersquatting. It is yet to be seen how ICANN proposes to prevent the recurrence of cybersquatting practices in the TLDs. Therefore, it is clear that the situation is at present not very clear and it is yet to be seen how ICANN proposes to meet the challenges of cybersquatting in the times to come.

Possibilities for reform will now be outlined in relation to liability of intermediaries generally; the unique problem of file-sharing; and how social
norms of pirates might be changed. It should be noted that technological measures against infringement will not be considered, especially in its relation to the notion of fair use.

Countries should come to an understanding on the liability that should be placed on Internet Intermediaries, particularly ISPs. A degree of copyright enforcement can be achieved by holding ISPs liable for the actions of their users. ISPs are better targets for lawsuits, as they will typically have deeper pockets than individual users. A pragmatic approach would be to only hold intermediaries responsible for infringing content where they were made aware of the content, were able to control the content, and failed to act promptly. Evidence of this approach can already be found in the American DMCA and the European E-Commerce Directive. The issue of an appropriate definition for ISPs needs to be considered because a wide definition may not reflect the true services provided by the multitude of providers in existence.

In addition, when considering ISP responsibility, the level that they should monitor their users should be discussed. This monitoring function was left in flux after the ambiguous ruling in Napster.

If ISPs are given the responsibility to act as judge and jury over contents then the likelihood is that they will err on the side of caution and remove all material that might be infringing. This would lead to many fair uses of copyrighted material being denied. ISPs should not be made to actively monitor their users or content their users upload. Instead a more pragmatic approach should be adopted. The international community should follow the lead of Europe with the E-Commerce Directive where ISPs do not have a general obligation to monitor. They should only act when they have notice of clearly infringing content. Also, an element of good faith on the part of the ISP should be included so that they can contact copyright holders if they accidentally discover possibly infringing content.
It is particularly important to obtain wide support for an ISP-related agreement, as countries that did not sign up would become data havens for ISPs allowing infringing content. Wide support might be achieved by the agreement encouraging ISPs to take initiative and regulate themselves.

It is submitted that by including ISPs in deciding their level of responsibility and engaging them in the issue of copyright infringement, they will more receptive to their duties on the Internet and have a better understanding of the appropriate law.

Peer-to-Peer file sharing programs represent a unique problem to regulators. Currently, dozens of such programs exist where anonymous users swap millions of files per day, often infringing copyright. However, it would be unwise to have a blanket prohibition against them as some file-sharing programs have substantial non-infringing uses, as shown in the Kazaa judgement. A blanket prohibition would also be unenforceable. Evidence for this can be found by considering the situation after a preliminary injunction had been taken against Kazaa and the program had been removed from the official website. Even though official distribution had ceased the network continued to function unaffected. This was due to the completely decentralised nature of pure peer-to-peer file sharing: a central server is not required for operation of the network. Any computer on the network is capable of acting as a super node and this process is automatic. The decentralised nature also makes it extremely difficult for any P2P creator to effectively monitor or control the content or actions of its users.

In America lawsuits against P2P operators have only resulted in many more appearing. For example, when Napster was sued replacements appeared that were potentially even more of a threat to copyright than the original had been. However, the situation is not without hope. Two possible regulatory options are proposed.

The first option is the idea of levies. These are already common on the continent. The theory is that if infringement cannot be controlled, government
can take money from the infringers before they infringe by taxing blank digital media, particularly CDs and hard drives. The Canadian Private Copying Collective has recently submitted such a proposal to the Copyright Board of Canada of placing a tariff of $21/gigabyte on the purchase of hard drives. If levies were used they would have to be equal throughout the contracting states to avoid market inequality. One drawback with levies is that they could impede the development and uptake of new technology by making them financially prohibitive. Other issues include creating a body to act as a collecting agency, how it should apportion revenue and, most importantly, to whom. Money could be distributed dependant on popularity of music artist for example.

A second option proposed is that of compulsory licensing. 'What is needed most are practical solutions to make copyright on the Internet effective without making it threatening or needlessly interfering; such as campus licences which allow certain user groups to access entire databases instead of making users pay per document they actually consult'.

The idea of compulsory licenses could be used to make users pay subscription fees to access music libraries in the same way that online databases (such as WestLaw) are currently accessed, on a flat fee system. The Music Industry is already trying to introduce similar subscription systems, based on proprietary music file formats that significantly restrict user access. Instead what is suggested is that P2P operators have a compulsory licence whereby users pay a small monthly fee for access to the service, with the revenue going to the artists whose work is being exploited. ' govt. should pass low fixed compulsory license fees for distribution of [music and entertainment] content on the Web. These fees should not be tied to reporting every usage on the Web. They should be determined the same way they are now for radio; according to a sampling that gives some idea of what music is being played'. In fact, Napster asked the U.S. government to allow for compulsory licensing before being taken to court, but was refused.
To introduce compulsory licensing would require a major reform of international copyright law, as the Berne Convention in its current state seems to exclude such an option. Such reform would have to begin by determining whether file-sharing amounted to distribution or broadcasting. It is hoped that a special exception could be added to the Berne convention to allow for compulsory licensing for digital media so that states could choose which cases warranted licensing. However, this proposal would also create further disparity and less harmony between national copyright regimes and therefore could only be a temporary measure until states could agree on a fundamental, unifying Internet treaty that would regulate the use of copyrighted materials online. It is hoped that this possibility will be considered, as it is more pragmatic than ISP monitoring and less intrusive on the technology market than levies.

SUGGESTIONS

On the basis of the survey in the existing material the researcher has suggested as follows to meet the new challenges:

- For the purpose of achieving regulatory flexibility, it is suggested that the following words should be added to section 20 of the CCB 2001 i.e. “The Commission may make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under this section in relation to a communication service, class of services or a class of service providers, where the Commission finds as a question of fact that to refrain would be consistent with the provisions of section 19 and that there exists or will exist competition sufficient to protect the interests of users of that particular service.” Further It is believed that the repetition of a jurisdiction exclusion provision in the Bill similar to the above-mentioned section 14 (2) of the current TRAI Act will not be proper in an increasingly converging environment due to a possible inability to distinguish clearly the precise nature of a particular communications activity,
especially when it is being undertaken along with other similar activity like
print media.

- A legal framework that seeks to promote and regulate convergence should
  move towards conceptually de-linking the infrastructure provider, telecom
  service provider(s) and the content provider, recognising that these may be
  distinct and separate entities, requiring different types of regulation, a legal
  framework that seeks to promote and regulate convergence should recognise
  that the person establishing the telecommunications infrastructure that enables
  provision of multiple services through the same network, would not have
  control over the content of each of the services. The network service provider
  and the telecommunications service provider/s could be different entities.

- In order to provide a mechanism for checking abuse of the provisions of CCB
  2001, an additional “Citizen’s Programme Code Committee” should be
  formed which can hear appeals from the aggrieved persons and provide its
  views.

- If the decision of the committee is not acceptable, the aggrieved parties can
  resort to the legal remedy available through the Appellate tribunal. This will
  provide for a Citizen’s group to sit in judgment of subjective issues such as
  “Indian Culture”, “Allowable degree of Violence”, " Decency in portrayal of
  Women” etc for which legal remedies are not always the right answer.

- An applicant before the Tribunal can appear himself or authorize one or more
  Chartered Accountant, Company Secretary, Cost Accountant or a Legal
  Practitioner and proceeds to present his or its case before the tribunal. This
  restriction of representation to certain categories of professionals only is
  unnecessary and discriminatory. It is suggested that the appellant can
  authorize one or more persons of his choice to represent him without the need
  for such a person to be a Chartered Accountant etc. In such a case a Telecom
  Consultant can also represent the appellant.
Even though the objectives of the Bill provide that the Commission is duty bound to take care of consumer interest also, there is no evidence of how this can be achieved. It must also be accepted that “Consumer Interest”, “Business Interest” and “National Interest” will be conflicting in many areas and the Commission will be subjected to pressures from different sides. The national interest will be taken care by the Government and the Business interests will be taken care by the “Public Relation Managers”. The Consumer will have to however organize himself through voluntary organizations. The Bill can at least take note of the need for such organizations and if possible provide some support.

Provisions of Section 66 and Section 70 overlap with corresponding provisions in Information technology Act 2000 and provide for different penalties/punishments. This will create unnecessary confusion. Our submission is that there must be similar penalties/punishments in both the provisions.

Whoever attempts to commit or abets commission of an offence will be deemed to have committed the offence”. This is a dangerous provision and can be misused by the Police to harass innocent individuals. This totally removes the concept of “Need for a Guilty Mind” for any offence and will bring all erroneous and unintentional violations under punishable offences. One simple example could be a “Wrong tuning of a Radio equipment to a frequency other than the intended frequency”. It is submitted that the Sec.71 of CCB should be deleted. Alternatively, it may be replaced if necessary by a provision which may state “Whoever willfully attempts to commit or abets the Commission of any offence, under the provision shall be punishable with such punishment as may be deemed reasonable under the circumstances of the case and any such punishment shall not exceed half of the maximum punishment that could have been levied if the offence had been committed willfully”.
A license would be required for any "Wireless equipment". In order to avoid confusion, the consumer equipments such as Mobile phones, Cordless telephones, Radio sets, and Television sets, and infrared remote operating devices etc should be specifically exempted So there is emergent need to suppress the license Raj in this area.

The discovery reveals that the proposed Communication convergence bill 2001 is not sufficient to meet the new challenges in the convergence environment. Our submission is that, there is a need to adopt a flexible method of regulation in India while a new comprehensive law is being drafted so that regulation of communications should sustain changes in a converging environment.

The software copyright holders should adopt a corporate license system for using particular software in the place of 'one software-one PC' system. They may consider bringing out low-priced editions of their softwares for developing countries like India, in their own interest.

While it is likely that browsing and allied acts would be covered under fair dealing or implied license, it is recommended that the government should explicitly exclude browsing and allied activities from the purview of infringement and include printing and downloading, albeit only for personal use under section 52 of the Copyright Act.

For instance, the person establishing a cable television network would, ordinarily, have no control over the content being distributed over the network, since that would be the domain of the broadcaster. Such distinctions require to be taken into account, especially with regard to control and regulation of content.

Another aspect to be noted is that the law should not seek to over-regulate. The draft CCB 2001 envisage licensing for all kinds of network facilities, including fixed links and cables, towers, poles, ducts, and pits. Such a broad
provision could lead to a situation of unreasonable control, and would therefore require reconsideration.

- There is an urgent need to strike a balance whereby online copyright infringement is prevented without interfering the legitimate uses of software and computer programmes or limiting the opportunities offered by digital technology and the Internet. Combating software piracy in order to foster the growth of electronic commerce requires a multi-faced strategy.

- Therefore, the imperative need of the hour is that the legislature catches up with the technical developments and passes a separate law prohibiting cyber-squatting or any other malafide registration of a domain name.

- It is suggested that Indian government should amend the present copyright act and IT Act 2000 on the line of U.S. No Electronic Theft (NET) Act 1997 and the DMC Act 1998.

- The software piracy and music piracy is a threat to the Indian economy our present copyright law is not sufficient to tackle the piracy. It is suggested that the govt., should draft a separate law to tackle the piracy related crimes.

- However, a clear statement of responsibilities and duties is crucial, not just for traditional ISPs, but also for employers, educational institutions, and cyber cafe owners among others.

- The ISP providing content service capable of controlling, supervising, adding and deleting and compiling the transferring contents should bear liability as a joint tort-feasor for a user's transfer of contents infringing other's copyrights, when it fails to take any measures to halt the transfer of infringing contents after being informed thereof by the copyright owner.

- The ISP shall be exmpted from liability if the Internet user asserts a claim against the ISP for breach of contract on the grounds of the ISP removing the content per request by the copyright owner; any loss accruing to the user
caused by the ISP's removal shall be apportioned as between the user and the copyright owner applying for removal.

- Globally, ISPs should only be liable for the actions of their users where they have been made aware of the infringing material and were able to control the material but failed to take action. This would follow the U.S. and European initiatives. Further, ISPs should not have a general duty to monitor conduct because this would likely be detrimental to normal users. Support for intermediary regulation may be gained by aiding ISPs in establishing their own Codes of Practice, as occurs in parts of Europe. On the issue of file-sharing operators, it has been shown that lawsuits have proven ineffective at deterring infringement. Therefore, either a well-considered system of levies or compulsory licensing is proposed. It is hoped that in this way a compromise between Copyright Industries and Internet users might be reached. If an international levy system were to be supported, there would need to be an exemption for developing countries, especially for the purchase of hard drives, which are essential to the operation of modern computers.

- A dedicated institute under the ministry of information technology may be established as a nodal agency to deal with matters of Convergence of Information and communication technologies, its impact on IPR and e-commerce particularly relating to copyright and trademarks. The institution say the Indian Institute of Convergence Technology (IICT) should offer regular courses on Convergence and organise relevant training programmes for all concerned with the IPR like the producers, and sellers of Intellectual property products, E-commerce industries, industry associations, the police and the public at large. Besides, the institution should work in close liaison with the government and Intellectual property, e-commerce industry associations and provide guidance in policy matters.

- Intellectual property industry associations/convergence societies should launch an extensive campaign through print and electronic media highlighting the adversities associated with the convergence. Lectures, seminars, workshops
etc. could be organised in schools, colleges, universities and other places to create a consciousness among people against the evils of piracy. The message should be conveyed in clear terms that in the long run piracy is against the interest of all in the society excepting the pirates.

> A fund could be set up to research more successful technological protection schemes.

*****
BIBLIOGRAPHY

BOOKS


BITTER, J. Distance learning for accessibility. USA: University of Northern USA. 1996.


COOMBS, N. Disability and Technology: Historical and Social Perspective, USA: 1990.


PETER Brown,. News Issues In the Internet Litigation, 17th Annual Institute .1997

Bibliography


SOOD, V. Cyberlaw simplified. India: Tata McGraw-Hill publishing Co.Ltd. 2001. 598 P.


ARTICLES


ANTONIO Mille, "Copyright in the Cyberspace Era" 10 EIPR 1997. P 570


FEN Lim, "Internet Service Providers and Liability for Copyright Infringement through Authorisation 8 AIPJ, 1997, P.192.


JENNY Zaverdinos. Legal Aspects of Multi-media - Enforcing Copyright'; 8 AIPJ 1997. 151.


MURATORE & SHEARMAN, David "Copyright update", BLEC, 1996.

NATALIA Yastreboff, "Copyright for online databases on the Internet - Part I" 9(3) AIPLB 1996. P. 41.

NATALIA Yastreboff, "Copyright for online databases on the Internet - Part II" 9(4) AIPLB 1996. P. 56.


PASQUEU D.Daniela, LUIS Eduardo Duque DUTRA, Marisella Ouma, Advanced copyright issues in digital era WIPO world wide academy November 2000.


SIMON Gilchrist, Telstra v APRA - Implications for the Internet, Gilbert & Tobin


STEPHEN Loughnan, "Service Provider Liability for User Copyright Infringement on the Internet" 8 AIPJ 18


TOBY Patten, . "Legal Protection of Interactive Multimedia" 1 Media & Arts Law Review 17. 1996


VINJE Thomas , "A brave new world of technical protection: will there still be room for copyright?". In E.I.P.R., 1996, p. 431.


ACTS AND BILLS
The Indian Telegraph Act 1885
The Indian Wireless Telegraphy Act 1933
The Constitutional Law Of India.
The Telegraph Wires (Unlawful Possession) Act 1950
The Copyright Act 1957 As Amended Up To 2002.
The Patent Act 1970 As Amended Up To 2005
The Prasar Bharti (Broadcasting Corporation Of India), Act, 1990
Trips Agreement Part 111. 3(1994).
The Cable Television Network Regulation Act, 1995
UNCITRAL Model Law on E-Commerce 1996
The Federal Communication Act of USA, 1996
WIPO Copyright Rules 1996
WIPO Performances and Phonograms Treaty Rules 1996
The Communication And Multimedia Act Of Malaysia 1998
The Telecom Regulatory Authority of India Act, 1997.
ISP Guidelines 1997
The Digital Millennium Copyright Act USA, 1998
The Trademarks Act, 1999
The Register Of Interconnect Agreement Regulations, 1999
The ICANN Uniform Domain Name Dispute Resolution Policy 1999
The Digital Agenda Act Of Australia, 2000
The Information Technology Act, 2000
Cyber Regulation Appellate Tribunal (Procedure) Rules, 2000
The Freedom Of Information Bill, 2000
Information Technology (Certifying Authorities) Regulations 2001
The Communication Convergence Bill, 2001

DIRECTIVES AND REPORTS


"TELECOSM" George Gilder, June 2000.

Directive on a common regulatory framework for electronic communications networks and services - sets out the horizontal provisions of the new

Directive on access to, and interconnection of, electronic communications networks and associated facilities - establishes a framework for access and interconnection agreements across the EU.

Directive on the authorization of electronic communications networks and services - aims at a single European market for electronic communications services by harmonizing the rules for authorizing provision of such services.

Directive on the processing of personal data and the protection of privacy in the electronic communications sector - updates the current Directive to ensure it is technologically neutral and can cover new communications services.

Directive on universal service and users' rights relating to electronic communications networks and services - sets out the rights that users have in respect of electronic communications services. In particular in respect of universal service.


OFTEL "Ensuring access on fair, reasonable and non-discriminatory terms", April, 1999.


WIPO online "Digital Agenda" (visited Nov. 8,1999) /http://www.wipo.org/eng/PressreU1999/p.185r.hjm.

NEWSPAPERS AND MAGAZINES


Indian Express (Bombay), Statement of the Minister of Communication. 7 June 2001.

The Economic Times of India, “Court deals Internet-sharing a brutal blow”, 27th June 2005.


WEBSITES AND WEBPAGES

http://www.lix.com/intenet/complain.html
http://www.lix.com/LJXfiles/ticketmaster.html
http://www.wired.com/wired/2.03/features/economy.ideas.html
http://www.shetland-news.co.uk/opinion.html
http://www.icann.org
http://arbiter.wipo.int/domains/statistics/results.html
http://www.nolo.com/encyclopedia/articles/ilaw/dn_trdmk.html
http://arbiter.wipo.int/domains/decisions/word/D2000-0015.doc
http://arbiter.wipo.int/domains/decisions/word/D2000-0014.doc
http://arbiter.wipo.int/domains/decisions/word/D2000-0074.doc
http://www.nolo.com/encyclopedia/articles/ilaw/dn_trdmk.html
http://domain-names.org
http://www.arbiter.wipo.int/domains/decisions/word/D2000-0076.doc
http://arbiter.wipo.int/domains/decisions/word/D99-0001.doc
http://www.netsol.com/rs/dispute-policy.html
http://www.icann.org/udrp.html
http://www.icann.org/udrp/appoved-providers.html
http://www.wto.org/wto/about/devgroups.htm
http://www.ifpi.org
http://www.riaa.com/piracy/piracy.htm
http://www.wipo.org/enWdgtx.htm>

*****
APPENDIX

The Communication Convergence Bill, 2001

ARRANGEMENT OF CLAUSES

CHAPTER I
Preliminary
1. Short title, extent and commencement.
2. Definitions.

CHAPTER II
Regulation of Use of Spectrum, Communication Services, Network Infrastructure Facilities and Wireless Equipment.
3. Prohibition of use of spectrum without assignment.
4. Prohibition of provision of services, etc.
5. Prohibition of possession of wireless equipment without a license.

CHAPTER III
Communications Commission of India
7. Appointment of Chairperson and Members.
8. Term of office of Chairperson and Members.
9. Removal from office of Chairperson and Members.
10. Salary and Allowances of Chairperson and Members.
11. Vacancy or defect not to invalidate proceedings.
12. Functions of Regional Offices.
15. Secretary-General of the Commission.
16. Setting up of Panel, distribution of business, etc.

CHAPTER IV
Objectives of the Commission
17. Objectives and guiding principles.

CHAPTER V
Powers, Duties and Functions of the Commission
19. Powers to make recommendations in certain cases
20. Codes and Standards
21. Hearing of complaints and resolution of disputes by the Commission.
22. Directives by the Central Government.
CHAPTER VI
Frequency Spectrum Management
23. Spectrum Management Committee
25. Commission to notify schemes for assignment of spectrum

CHAPTER VII
License or Registration
26. Licenses for registration of service providers.
27. Period and form of license or registration.
28. Duties of service providers.
29. Certain Agreements to be registered with the Commission.

CHAPTER VIII
Licensing of Possession of Wireless Equipment
30. License for wireless equipment.

CHAPTER IX
Special Provision In Respect of Certain Services
31. Provision for live broadcasting of certain events.

CHAPTER X
Breach of terms and conditions of license or registration, civil liability and adjudication
32. Breach of terms and conditions of license, etc.
33. Civil liability for breach of terms and conditions of license, etc.
34. Civil liability for contravention of the provisions relating to transmission, etc.
35. Civil liability for delivery of content through facilities, services or equipment not licensed or registered.
36. Civil liability for failure to register agreements.
37. Civil liability for failure to comply with the decisions, etc. of the Commission.
38. Filing of complaint, reference for adjudication, etc.
39. Power to adjudicate.
40. Civil liability for willfully or otherwise damaging network infrastructure facility and causing interruption.
41. Civil liability for not taking consent for use of private land.
42. Factors to be taken into account by the Adjudicating Officer.
CHAPTER XI
Communications Appellate Tribunal

43. Establishment of Appellate Tribunal.
44. Composition of Appellate Tribunal.
45. Qualification, salary and allowances, etc., of the chairperson and members of the Appellate Tribunal.
46. Resignation and removal.
47. Distribution of business amongst benches, etc..
48. Procedure and powers of the Appellate Tribunal.
49. Right of applicant to take assistance of legal practitioners, etc.
50. Appeals to Supreme Court.
51. Execution of orders.
52. Penalty for failure to comply with the orders, etc. of the Appellate Tribunal.

CHAPTER XII
Officers and Employees of Commission and the Appellate Tribunal
53. Officers and employees of Commission and Appellate Tribunal

CHAPTER XIII
Finance, Accounts and Audit
54. Proceeds of license fee, etc.
55. Communications Commission and Appellate Tribunal Funds.
56. Grants and application of Funds.
57. Accounts and Audit.

CHAPTER XIV
Right of Way for Laying Cables and Erection of Posts
59. Rights of facility providers in public land.
60. Right of public authority to grant permission.
61. Provisions for removal or alteration of cable or post.
62. Determination of disputes.
63. Use of private land by facility provider.
64. Power of Commission to issue order regarding use of private land.
65. Right of facility provider.

CHAPTER XV
Interception of Communication and Punishment for Unlawful Interception
66. Interception of communication and safeguards.
67. Saving.

CHAPTER XVI
Offenses and Punishment
68. Punishment for unlicensed services
Appendix

69. Punishment for possession of wireless equipment, etc. without license.
70. Punishment for sending obscene or offensive messages.
71. Attempt to commit offenses.
72. Offences by companies.
73. Offences triable by Court of Session.
74. Offences to be cognizable.

CHAPTER XVII
Transfer of Proceedings
75. Transfer of proceedings to Commission.
76. Transfer of proceedings to Appellate Tribunal.

CHAPTER XVIII
Miscellaneous
77. Taking over control and management of Communication Service or network infrastructure facility.
78. Obligation of licensees and grantees.
79. Licenses to operate wireless equipment onboard.
80. Recovery of civil liabilities.
81. Supply of information to authorised officers.
82. Act not to apply in certain cases.
83. Bar of jurisdiction of civil courts.
84. Chairperson, Members etc., to be public servants.
85. Protection of action taken in good faith.
86. Exemption from tax on wealth and income.
87. Act to have overriding effect.
88. Power to make rules.
89. Power to make regulations.
90. Laying of rules and regulations.
91. Power to remove difficulties.

CHAPTER XIX
Repeal And Savings
93. Repeal of certain Acts, saving of licenses and registrations and dissolution of certain Authorities.

AS INTRODUCED IN LOK SABHA

Bill No. 89 of 2001

THE COMMUNICATION CONVERGENCE BILL, 2001
A BILL

to promote, facilitate and develop in an orderly manner the carriage and content of communications (including broadcasting, telecommunication, and multimedia), for the establishment of an autonomous Commission to regulate all forms of communications, and for establishment of an Appellate Tribunal and to provide for matters connected therewith or incidental thereto.

WHEREAS IT IS CONSIDERED NECESSARY -

(i) to facilitate development of national infrastructure for an information based society, and to enable access thereto;

(ii) to provide a choice of services to the people with a view to promoting plurality of news, views and information;

(iii) to establish a regulatory framework for carriage and content of communication in the scenario of convergence of telecommunications, broadcasting, data-communication, multimedia and other related technologies and services; and

(iv) to provide for the powers, procedures and functions of a single regulatory and licensing authority and of the Appellate Tribunal.

Be it enacted by Parliament in the fifty-second Year of the Republic of India as follows:-

CHAPTER I

PRELIMINARY

Short title, extent and commencement

1. (1) This Act may be called the Communication Convergence Act, 2001.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification, appoint and different dates may be appointed for different provisions of this Act and any reference in any such provision of this Act to the commencement of this Act shall be construed as a reference to the commencement of that provision.

Definitions.

2. In this Act, unless the context otherwise requires, --
(1) "Adjudicating Officer" means an officer of the Commission appointed as Adjudicating Officer under sub-section (1) of section 39;

(2) "Appellate Tribunal" means the Communication Appellate Tribunal established under sub-section (1) of section 43;

(3) "Broadcasting service" means a content application service for providing television programme or radio programme, to persons having equipment appropriate for receiving that service regardless of the means of delivery of that service, but does not include—
   (a) a service (including a teletext service) that provides only data, or text (with or without associated still images); or
   (b) a service that makes programmes available on demand on a point-to-point basis, including a dial-up service; or
   (c) a service, or a class of services, that the Central Government may notify as not being a broadcasting service;

(4) "Chairperson" means the Chairperson appointed under subsection (4) of section 7;

(5) "channel" means a set of frequencies used for transmission of a programme;

(6) "Commission" means the Communications Commission of India established under, sub-section (1) of section 6;

(7) "communication" means the process of conveyance of content through transmission, emission or reception of signals, by wire or other electromagnetic emissions;

(8) "communication service" means a networking service or network application service or value added network application service or a content application service;

(9) "content" means any sound, text, data, picture (still or moving) other audio-visual representation, signal or intelligence of any nature or any combination thereof which is capable of being created, processed, stored, retrieved or communicated electronically.

(10) "content application service" means an application service which provides content meant for the public and includes such other services as may be prescribed;

(11) "frequency" means frequency of electromagnetic waves used for providing a communication service;

(12) "grantee" means a person who has been granted registration under Chapter VII;

(13) "license" means a license granted under Chapter VII or Chapter VIII;

(14) "licensee" means a person who has been granted a license;

(15) "Member" means a Member of the Commission appointed under section 7 and includes the Chairperson;

(16) "network application service" means the service provided by means of one or more networking services and includes such other services as may be prescribed;
(17) "network infrastructure facilities" means any element or combination of elements of physical infrastructure, which would be utilised by licensees for providing networking services and includes such other facilities as may be prescribed;

(18) "network service" means a service for carrying communications by means of guided or unguided electromagnetic waves and includes such other services as may be prescribed;

(19) "notification" means a notification published in the Official Gazette and the expression "notified", with its cognate meaning and grammatical variation, shall be construed accordingly;

(20) "post" means a post and includes a pole, tower, standard, stay, strut, cabinet, pillar or any above ground contrivance for carrying, suspending or supporting any network infrastructure facility;

(21) "prescribed" means prescribed by rules made by the Central Government under this Act;

(22) "programme" means - television or radio programme including advertising or sponsorship, whether or not of a commercial kind, and broadcast programming shall be construed accordingly;

(23) "programme code" means the code specified under section 20;

(24) "public authority" means and includes –

(i) the Central Government;

(ii) a State Government;

(iii) any person, agency or organisation engaged in land development for public use, or in roads for public transportation.

(iv) any local authorities legally entitled to, or entrusted by the Central or any State Government with, the control or management of any municipal or local fund; and

(v) any institution, concern or undertaking or body which is financed wholly or substantially by funds provided directly or indirectly by the Government that may be specified by notification in this behalf by the Central Government.

(25) "public service broadcaster" means any body created by Act of Parliament for the purpose of public service broadcasting;

(26) "registration" means the registration granted under chapter VII;

(27) "regulations" mean regulations made by the Commission under this Act;

(28) "Secretary-general" means the Secretary-general appointed under subsection (1) of section 15.

(29) "service provider" includes any person who provides a communication service;

(30) "spectrum" means a continuous range of continuous electromagnetic wave frequencies upto and including a frequency of 3000 giga hertz;
(31) "Spectrum Manager" means Wireless Advisers to the Government of India notified as Spectrum Manager, Government of India under sub Section (3) of section 23;

(32) "subscriber of a service" means a person who subscribes to a communication service primarily for his own use;

(33) "Universal Service Obligation" - means obligation as may be prescribed;

(34) "value added network application service" means the service provided by means of value addition using one or more network application services and includes any article or apparatus as may be prescribed;

(35) "wireless equipment" means any equipment in use or capable of use in wireless communication and includes any article or apparatus as may be prescribed;

(36) "wireless communication" means any communication without the use of wire or cable.

CHAPTER II

REGULATION OF USE OF SPECTRUM, COMMUNICATION SERVICES, NETWORK INFRASTRUCTURE FACILITIES, AND WIRELESS EQUIPMENT.

Prohibition of use of spectrum without assignment

3. No person shall use any part of the spectrum without assignment from the Central Government or the Commission as provided for in this Act.

Provision of services, etc.

4.

(1) No person other than a public service broadcaster shall –

(a) own or provide any network infrastructure facility, or

(b) provide any networking service, or any network application service or any value added network application service, or any content application service, without a license or registration:

Provided that all facilities and services exempted from licensing or registration immediately before the commencement of this Act shall continue to be so exempt under this Act, until otherwise notified by the Central Government.

(2) The Central Government may, by notification, exempt any –

(a) person, or class of persons; or

(b) facility or service, from the provisions of this section.
Prohibition of possession of wireless equipment without a license

5. (1) No person shall possess any wireless equipment without obtaining a license in accordance with the provisions of this Act:

Provided that the Central Government may, by notification, exempt in the public interest any person or class of persons or any wireless equipment or category of wireless equipment from the provisions of this section.

(2) Nothing contained in subsection (1) shall apply to -

(a) any person or equipment licensed under any law for the time being in force immediately before the commencement of this Act; or

(b) any person or equipment exempted from the licensing immediately before the commencement of this Act, until otherwise notified by the Central Government.

CHAPTER III

COMMUNICATIONS COMMISSION OF INDIA

Establishment of Commission

6. (1) With effect from such date as the Central Government may, by notification appoint in this behalf, there shall be established for the purposes of this Act, a Commission, to be known as the Communications Commission of India. The Head Office of the Commission shall be located at Delhi with Regional Offices at Calcutta, Chennai and Mumbai.

(2) The Commission shall be a body corporate by the name aforesaid, having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable and to contract, and shall by the said name sue and be sued.

(3) The Commission shall consist of the following Members, namely:-

(a) a Chairperson;

(b) not more than ten persons to be appointed as Members; and

(c) the Spectrum Manager, as ex-officio member.

(4) The Chairperson and not less than six Members, (other than the ex-officio Member), shall be whole-time Members and the remaining shall be part time Members.

Appointment of Chairperson and Members.
7.  
(1) The Members (except the ex-officio Member) shall be appointed by the Central Government by notification, from amongst persons recommended by a search committee as may be prescribed.

(2) One-half of the Members shall be appointed from amongst persons of eminence in the fields of literature, performing arts, media, culture, education, films and from persons prominent in social and consumer activities.

(3) One-half of the Members shall be appointed from amongst persons of eminence in the specialized fields such as, telecommunications, broadcasting technology, information technology, finance, management and administration or law.

(4) The Chairperson shall be appointed by the Central Government, by notification, on the recommendation of the search committee referred to in subsection (1) from amongst persons of eminence in one or more fields enumerated in subsection (2) and (3).

(5) Before appointing a person as Chairperson or other Member, the Central Government shall satisfy itself that the person does not have any such financial or other interests as is likely to affect prejudicially his functions as such Member.

(6) A person, who is in the service of Government, shall have to retire or resign from service before entering the office of Chairperson or whole time Member.

Term of office of Chairperson and Members.

8.  
(1) The Chairperson and whole-time Members shall hold office for a term of five years from the date on which they enter upon their office or until they attain age of 65 years whichever is earlier. Provided that the Chairperson and whole-time members shall not be eligible for re-appointment

(2) The tenure of part time Members shall be such as may be prescribed.

(3) The Chairperson shall have powers of general superintendence and direction in the conduct of affairs of the Commission and shall, in addition to presiding over the meetings of the Commission, exercise and discharge such powers and functions of the Commission as may be assigned to the Chairperson by the Commission.

(4) The Chairperson or any Member of the Communications Commission may resign from his office by giving notice thereof in writing to the Central Government and on such resignation being accepted, the Chairperson or such other Member shall be deemed to have vacated office.

Removal from office of Chairperson and Members.

8.

The Central Government may remove from office any member who -

(a) has been adjudged insolvent, or

(b) has been convicted of any offence, which in the opinion of the Central Government involves moral turpitude; or
(c) has become physically or mentally incapable of acting as a Member, or
(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as Chairperson or other Member; or
(e) has so abused his position as to render his continuance in office prejudicial to the public interest.

No such member shall be removed from his office under clause (d) or clause (e) above unless he has been given a reasonable opportunity of being heard in the matter.

Salaries and allowances of Chairperson and Members

9. The salary and allowances payable to, and the other terms and conditions of service of the Chairperson and Members shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Chairperson or a Member shall be varied to their disadvantage after appointment.

10. Vacancy or defect not to invalidate proceedings.

11. No act or proceeding of the Commission shall be invalidated merely by reason of:

(a) any vacancy in, or any defect in the constitution of, the Commission; or
(b) any defect in the appointment of a person acting as a Member; or
(c) any irregularity in the procedure of the Commission not affecting the merits of the case.

Functions of Regional Offices.

12. The Regional Offices of the Commission at Calcutta, Mumbai and Chennai will perform such functions as may be determined by regulation.

Meetings of Commission.

13. (1) The Commission shall meet at such times and places and shall observe such procedure in regard to the transaction of business at its meetings as may be provided by regulations.

(2) A Member (other than the Chairperson) shall be deemed to have vacated his or her office if he absents himself for three consecutive meetings of the Commission without the leave of the Chairperson.

(3) The Chairperson or, if he is unable to attend a meeting of the Commission, any other Member nominated by the Chairperson in this behalf and, in the absence of such nomination or where there is no Chairperson, any other Member chosen by the Members present from among themselves shall preside at the meeting of the Commission.
Power of Commission to regulate its procedure.

14. (1) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) subject to the provisions of section 123 and 124 of the Indian Evidence Act, 1972, requisitioning any public record or document or a copy of such record or document, from any office;

(f) dismissing an application for default or deciding it, ex-parte;

(g) setting aside any order of dismissal of any application for default or any order passed by it, ex-parte; and

(h) reviewing its decisions;

(i) granting interim relief; and

(j) any other matter which may be prescribed.

(2) Every proceeding before the Commission shall be deemed to be judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code and the Commission shall be deemed to be a civil court for the purposes of sections 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

(3) The Commission shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Commission shall have powers to regulate its own procedure, including the fixing of places and times of business.

Secretary-general of the Commission.

15. (1) The Secretary-general shall be appointed by the Commission and shall be its Chief Executive Officer and shall exercise and discharge such powers and functions as determined by regulation.

(2) For the purpose of subsection (1) aforesaid the Commission may seek from the Central Government a panel of not less than three officers who are eligible to be, or are of the rank of, the Secretary to the Government of India for being appointed as Secretary-general.
(3) The terms and conditions, and period of service, of the Secretary-general shall be such as may be prescribed.

Setting up of Panel, Distribution of Business, etc.

16.
(1) The Commission shall set up a Panel from amongst Members appointed under subsection (2) of section 7 to deal with matters in relation to the content in content application services, and the Chairperson shall preside over the meetings of the Panel: Provided that wherever necessary the Chairperson may place before the Commission any issue relating to the matters referred to in this section.

(2) Except for the power to make regulations, the Commission may, by general or special order, make provisions for the distribution of its business amongst Members as may be considered appropriate and necessary.

(3) For the discharge of its functions under this act, the Commission may, if it considers necessary, set up bureaus or divisional organizations on the basis of its principal workload operations and subject to the provisions of section 53, such bureaus or divisional organizations shall be provided with such officers and other employees as are necessary to perform their functions.

(4) The Commission may, by order in writing, authorize any District Magistrate or Sub-Divisional Magistrate in any area or any other officer of the Central Government or State Government or Union territory Administration to implement and ensure compliance of its directions and orders; and when so directed or authorized, such Magistrate or officer shall be bound to implement and carry out such directions and orders.

CHAPTER IV

OBJECTIVES OF THE COMMISSION

Objectives and guiding principles

17. The Communications Commission of India while exercising its functions shall be guided by the following principles governing the administration of this act namely:

(i) that the communication sector is developed in a competitive environment and in consumer interest;

(ii) that communication services are made available at affordable cost to all especially uncovered areas including the rural, remote, hilly and tribal areas;

(iii) that there is increasing access to information for greater empowerment of citizens and towards economic development;

(iv) that quality, plurality, diversity and choice of services are promoted;
(v) that a modern and effective communication infrastructure is established taking into account the convergence of information technology, media, telecom and consumer electronics;

(vi) that defence and security interests of the country are fully protected;

(vii) that introduction of new technologies, investment in services and infrastructure, and maximisation of communications facilities and services (including telephone density) are encouraged;

(viii) that equitable, non-discriminatory interconnection across various networks are promoted;

(ix) that licensing and registration criteria are transparent and made known to the public;

(x) that an open licensing policy allowing any number of new entrants (except in specific cases constrained by limited resources such as the spectrum) is promoted; and

(xi) that the principle of a level playing field for all operators, including existing operators on the date of commencement of the Act, is promoted so as to serve consumer interest.

CHAPTER V
POWERS, DUTIES AND FUNCTIONS OF THE COMMISSION

Powers duties and functions of the Commission.

18. (1) It shall be the duty of the Commission to facilitate and regulate all matters relating to carriage and content of communications.

(2) Without prejudice to the generality of the provisions contained in subsection (1), the Commission shall-

(i) Carry out management, planning and monitoring of the spectrum for non-strategic/commercial usages subject to the provision of section 24A;

(ii) grant licenses for purposes of the Act, and determine and enforce license conditions and determine fees (including fees for usage of spectrum) wherever required;

(iii) determine appropriate tariffs and rates for licensed services, wherever considered necessary and keeping in view the objectives and guiding principles in the Act;

(iv) ensure that the grant of licenses will not result in eliminating competition or in one or more service providers becoming dominant to the detriment of other service providers or consumers;

(v) promote competition and efficiency in the operation of communication services and network infrastructure facilities;

(vi) formulate and determine conditions for fair, equitable and nondiscriminatory access to a network infrastructure facility or network service such other related matters in respect thereof;
(vii) take measures to protect consumer interests and promote and enforce universal service obligations;

(viii) formulate and lay down programme and advertising codes in respect of content application services;

(ix) formulate and lay down commercial codes in respect of communication services and network infrastructure facilities;

(x) take steps to regulate or curtail the harmful and illegal content on the internet and other communication services;

(XI) formulate and lay down codes and technical standards and norms to ensure quality and interoperability of services and network infrastructure facilities (including equipment);

(xii) carry out any study and publish findings on matters of importance to the consumers, service providers and the communications industry;

(xiii) institutionalise appropriate mechanisms and interact on a continual basis with all sectors of industry and consumers, so as to facilitate and promote the basic objectives of the Act; to encourage self regulatory codes and standards;

(xiv) report and make recommendations on such matters as may be referred to it by the Central Government;

(xiv) report and make recommendations either suo moto or on such matters as may be referred to by the Central Government in the matter prescribed

(xv) perform all or any functions in furtherance of the objects of this Act, or such as may be prescribed.

(3) The commission shall ensure transferancy whilst exercising its powers and discharging its functions.

Power to make recommendation in certain cases

19. The Commission may at any time make appropriate recommendations to the Central Government with regard to any particular practice or practices that impinges upon or adversely affect the interest of the sovereignty and integrity of India, security of the state, friendly relations with foreign countries or State, public order, decency or morality.

Codes and Standards

20. The Commission shall by regulations from time to time specify programme codes and standards which may include inter alia practices –

(i) to ensure that nothing is contained in any programme which is prejudicial to the interests of the sovereignty and integrity of India, the security of State, friendly relations with foreign States, public order or which may constitute contempt of court, defamation or incitement to an offence.

(ii) to ensure fairness and impartiality in presentation of news and other programmes.
(iii) to ensure emphasis on promotion of Indian culture, values of national integration, religious and communal harmony, and a scientific temper.

(iv) to ensure in all programmes decency in portrayal of women, and restraint in portrayal of violence and sexual conduct;

(v) to enhance general standards of good taste, decency and morality.

(vi) to ensure avoidance of offence to religious views and belief; and

(vii) to be followed in connection with the prevention of unjust and unfair treatment in any programme, and unwarrented infringement of privacy in, or in connection with, obtaining of material included in such programme.

Hearing of complaints and resolution of disputes by the Commission

21. (1) The Commission shall -

(a) decide any dispute or matter –

(i) between two or more service providers on issues relating to spectrum interference, interconnectivity, denial of fair access and practices restrictive of fair competition; and

(ii) between a service provider and a group of consumers.

(iii) arising out of enforcement of any provision of this Act;

(b) hear and determine any complaint from any person regarding contravention of the provisions the Act, rules, regulations or orders made thereunder including contraventions relating to any formulated codes and technical standards, and of other terms and conditions subject to which any license or registration was granted; and if necessary refer the matter for adjudication under Chapter X.

(2) For purposes of sub section (1) the Commission shall pass such orders and issue such directions as it deems fit.

(3) The Commission shall endeavour to decide disputes and complaints referred to in sub-section (1) as expeditiously as possible.

Directives by the Central Government.

22 . (1) In exercising its licensing and regulatory functions the Commission shall follow such policy directives as may be communicated to it in writing by the Central Government from time to time. Such directives may include the route and the mode in which any services are to be licensed, whether by way of auction or in any other form.

(2) In framing the policy directives the Central Government shall take into account the objectives and guiding principles governing the administration of the Act.

(3) The decision of the Central Government whether a question is one of policy or not shall be final.
(4) The Commission may request the Central Government by means of a written communication for a review of any policy directive, and if any such request is made the Central Government will respond in writing to such request with all expeditious dispatch.

CHAPTER VI

FREQUENCY SPECTRUM MANAGEMENT

Spectrum Management Committee

23. (1) The Central Government shall be responsible for coordination with international agencies in respect of matters relating to Spectrum Management and also for allocation of available spectrum for strategic and non-strategic or commercial purposes.

(2) For the purposes of discharging the responsibility under sub-section (1), the Central Government shall establish, by notification, a Spectrum Management Committee with the Cabinet Secretary as its Chairman and consisting of such other members as may be notified by it from time to time.

(3) The Central Government shall notify Wireless Advisor to the Government of India as Spectrum Manager, Government of India, to act as Member-Secretary of the Spectrum Management Committee.

(4) Subject to general supervision and control of the Spectrum Management Committee, the Spectrum Manager shall, inter-alia, perform the following functions, namely: - (i) to co-ordinate with international agencies, matters relating to overall spectrum planning, use and its management; (ii) to carry out spectrum planning, and assign frequencies to the Central Government and to State Governments to meet their vital needs, including those of defence, national security and of the public service broadcaster. (iii) to allocate frequencies or band of frequencies including frequencies which are to be assigned by the Commission; and reassignment of frequencies from time to time. (iv) to review constantly and make available as much spectrum as possible for assignment by the Commission, in particular by optimising usages, and. (v) monitoring as appropriate, in consultation with the Commission, the efficiency of the utilisation of the spectrum by all users including investigation and resolution of spectrum interference; and (vi) after meeting the requirements of the Central Government and of State Governments for fulfilling their vital needs including those of defence, national security and public service broadcaster, the Spectrum Manager shall make the spectrum available, to the maximum extent possible, for assignment by the Commission, both in the shared as well as in the exclusive bands.

(5) Subject to the general supervision and control of the Spectrum Management Committee, the Spectrum Manager shall assign frequencies on payment of such fee as may be prescribed.

Assignment of spectrum

24. (1) The Commission shall be responsible for assignment of the non strategic and commercial spectrum to various users: Provided that the Commission shall assign such frequencies in case these are not exclusively allocated to it, only with the prior approval of the Spectrum Management Committee.
(2) Whenever the Commission seeks allocation of additional spectrum for assignment, including in the shared bands, a process for mutual consultation between the Commission and the Spectrum Manager shall be initiated in such manner and within time frame as may be prescribed.

Commission to notify schemes for assignment of spectrum

25. (1) Before assigning any part of spectrum, the Commission shall prepare and notify from time to time one or more schemes or plans for such assignment, after such public hearing as it may consider appropriate.

(2) The Central Government may, by notification, determine the class or classes of persons or services for preferential assignment of any frequency or spectrum by the Commission.

CHAPTER VII

LICENSES FOR REGISTRATION

License or registration of service providers

26. (1) Having regard to the necessity of serving the public interest, ensuring competition and prevention of monopoly in the provision of network infrastructure facilities and communication services, the Commission may, by regulations specify,

(i) eligibility conditions for granting of licenses or registrations;

(ii) restrictions regarding ownership and control of the media;

(iii) restrictions on the number of licenses or extent of accumulation of interest in such licenses by a person; and

(iv) such other conditions as may be considered necessary from time to time.

(2) (a) The Commission may determine by regulation, the obligations, conditions, restrictions, tariffs and rates subject to which service provider shall provide facilities and services referred to in sub-section (1).

(b) The Commission may, by regulations, determine the conditions subject to which a license or registration may be granted or transferred and where a license or registration is transferred, the transferee shall be deemed as licensee or grantees, as the case may be, for the purpose of this Act.

(3) Subject to the provisions of sub-section (1), the Commission may grant license or registration in such manner, and within such time, subject to such terms and conditions, on payment of such fees and after following such procedure as may be determined by regulations. Provided that the fee for registration shall not exceed thirty thousand rupees.

(4) The Commission shall notify, from time to time, one or more schemes or plans for licensing or registration containing such details as may be specified by regulations. Provided that the Commission shall, before finalising such schemes or plans, consult the Central
Government in order to ensure that the defence and security interests of India are fully protected.

(5) Any scheme or plan referred to in sub-section (4) may provide for eligibility conditions, number, and scope of licenses and registration and such other matters as the Commission may consider necessary.

(6) The Commission may grant license to any person –

(a) to provide or own network infrastructure facilities.

Explanation.-For the purposes of this clause, network infrastructure facilities shall include earth station, cable infrastructure, wireless equipments, towers, posts, ducts and pits used in conjunction with other communication infrastructure, and distribution facilities including facilities for broadcasting distribution;

(b) to provide networking services

Explanation.-For the purposes of this clause, networking services shall include band-width services, fixed links and mobile links;

(c) to provide application services.

Explanation.-For the purposes of this clause, network application services shall include public switched telephony, public cellular telephony, global mobile personal communication by satellite, internet protocol telephony, radio paging services, public mobile radio trunking services, public switched data services and broadcasting (radio or television service excluding continued);

(d) to provide content application services.

Explanation,-For the purposes of this clause, content application services shall include satellite broadcasting, subscription broadcasting, terrestrial free to air television broadcasting and terrestrial radio broadcasting;

(e) to prove value added network application services such as internet services and unified messaging services.

Explanation.-For the removal of doubts, it is hereby declared that information technology enabled services such as call centers, electronic-commerce ,tele-banking ,tele-education, tele-trading ,tele-medicine ,videotex and video conferencing shall not be licensed under this Act.

(7)The Commission may, while granting a license for any one of the categories under sub-section (6), confine or limit the scope of the facility or service to be provided by the licensee in each category of license , and also specify the conditions for providing that facility or services.

(8) The Commission may, while granting a license under sub-section (6) grant licenses either singly or jointly for one or more of the categories of facilities or services specified therein ::. Provided that no license shall be granted under this sub-section if it conflicts with the objectives and guiding principles set out in Chapter IV particularly in relation to ensuring fair access and promotion of competition.
Provided that no license shall be granted under this sub-section, if it conflicts with the objectives and guiding principles set out under this Act particularly in relation to ensuring fair access and promotion of competition.

Explanation.-No license shall be required in respect of any person or class of persons, or any facility or service, which has been exempted under the proviso to clause (b) of sub-section(1) of section 4 unless specifically notified by the Central Government for the purposes of licensing under this Act.

Period and form of license or registration.

27. (1) A license or registration shall be granted for such period as may be specified by regulations.

(2) A license or registration granted under this Act , shall be in such form and shall be subject to the payment of such fees as may be determined by regulations:

Provided that the fee for registration shall not exceed the amount referred to in the proviso to sub-section(3) of section 26;

Provided that the Central Government may, by notification, in the public interest, exempt any person or class of persons from payment of the license fee or registration fee.

Duties of service providers

28 (1) Every service provider shall, wherever required or applicable-

(i) give effect to Universal Service Obligations;

(ii) provide such life saving services as may be prescribed;

(iii) provide service to any person on demand within a reasonable period of time and on a non-discriminatory basis; and

(iv) follow the codes and standards laid down and specified by the Commission;

(2) Every service provider of a content application service shall, wherever required or applicable –

(i) endeavour to provide a suitable proportion of programme of indigenous origin; and

(ii) ensure that no programme forming part of its services infringes any copyright.

(3) Without prejudice to the foregoing provisions of this Act, every service provider holding a license for providing distribution of broadcasting services shall, amongst others, -

(i) provide a specified number and type of broadcasting services, including those of the public service broadcaster, in such manner, as may be prescribed;

(ii) include only licensed broadcasting service in his delivery package for the purposes of distribution; and

(iii) use not more than such number of channels as specified by regulations, out of the total channel capacity of the system, for providing his own programming.
Certain Agreements to be registered with the Commission

29. Every agreement entered into or made by any service provider or infrastructure facility provider falling under one or more of the following classes shall, within sixty days from the making of such agreement, be registered with the Commission namely:

(a) shareholders or promoters agreements;

(b) interconnectivity agreements; and

(c) Such other agreements as may be specified by regulations.

CHAPTER VIII

LICENSING OF POSSESSION OF WIRELESS EQUIPMENT

License for wireless equipment

30. (1) Subject to the provisions of sub-section (1) of section 5, any person who intends to possess any wireless equipment shall make an application to the Commission for the grant of a license.

(2) Every application shall be in such form and shall be accompanied by such fees as may be determined by regulations.

(3) The Commission shall, on receipt of an application under sub-section (1), after making such enquiries as it deems fit, grant the license or reject the application:

Provided that no application shall be rejected unless an opportunity of being heard is given to the applicant;

Provided further that no application for a license shall be rejected except on grounds of security of India or part thereof, public order or other public interest.

(4) Every license granted under this section shall be subject to such conditions and restrictions as may be determined by regulations.

CHAPTER IX

SPECIAL PROVISION IN RESPECT OF CERTAIN SERVICES

Provision for live broadcasting of certain events.

31 (1) For the purpose of ensuring the widest availability of viewing in India of a national or international event of general public interest to be held in India, the Central Government shall notify the same well in advance.

(2) The National or International event of general public interest notified under sub-section(1) shall have to be carried on the network of a public service broadcaster as well.

(3) In order to strive towards providing a level playing field for bidders for broadcasting rights, or persons interested in receiving broadcasting right for events, notified under sub-section (1),
the Commission shall determine, well in advance of such event, the principles and terms for the access to the network of the public service broadcaster.

CHAPTER X

BREACH OF TERMS AND CONDITIONS OF LICENSE OR REGISTRATION, CIVIL LIABILITY AND ADJUDICATION

Breach of terms and conditions of licenses, etc.

32. (1) In any case of breach of any of the terms of the license or registration or failure to comply with any decision, direction or order of the Commission, it may, after providing an opportunity to the party concerned of being heard, do any one or more of the following, namely:

(a) direct the licensee or grantee to do or abstain from doing any act or thing to prevent such breach or for such compliance;

(b) suspend the license or registration for a specified period;

(c) curtail the period of the license or registration;

(d) revoke the license or registration; and

(e) initiate adjudication proceedings under this chapter.

(2) If the Commission has a reason to believe that the terms and conditions of a license or registration for providing a not work infra-structure facility or Communication service under this Act have been or are being breached, the Commission may direct or order the seizure of the equipment being used for provision of such facility or service, and for this purpose the Commission may, by order in writing, authorise any District Magistrate, or Sub-Divisional Magistrate in any area, or any other officer of the Central Government or State Government or Union territory Administration, to implement and ensure compliance of its directions and orders; and when so authorized, such Magistrate or officer shall be bound to carry out the directions and orders of the Commission.

(3) Any person aggrieved by such seizure under sub-section(2), may prefer an appeal to the Appellate Tribunal within thirty days of the seizure and the Appellate Tribunal may pass such orders, as expeditiously as possible as to the disposal of the property so seized as it may deem fit. Provided that no such equipment shall be retained by the Commission or the authorised officer for a period exceeding forty five days from the date of its seizure, unless the Appellate Tribunal on the report made by the authorised officer, approves such retention for a longer period.

Civil liability for breach of terms and conditions of license, etc.

33. If any licensee or grantee commits breach of, or fails to comply with any terms and conditions subject to which a license or registration, as the case may be, was granted or fails to comply with any rule, regulation or order made under this Act, the licensee or grantee shall be liable to a civil liability under this Chapter.
Civil liability for contravention of the provision relating to transmission etc.

34. If any person transmits or distributes any communication or performs any service incidental thereto, by the use of a network infrastructure facility, communication service or wireless equipment which is required to be licensed or registered under this Act and not so licensed or registered, as the case may be, or has been established or maintained or operated in contravention of the provisions of this Act or any rule or regulation made thereunder, such person shall be liable to a civil liability under this chapter.

Civil liability for delivery of content through facilities, services or equipments not licensed or registered.

35. If any person delivers any content for transmission or accepts delivery of any content sent by the use of network infrastructure facility, communication service or wireless equipment knowing or having reason to believe that such facility, service or equipment has been established or has been maintained or operated without a license or registration or in contravention of the provisions of this Act or any rules or regulation made thereunder, such person shall be liable to a civil liability under this chapter.

Civil liabilities for failure to Register Agreements

36. If a service provider fails without reasonable excuse to register an agreement, which is required to be registered as provided for in section 29, he shall be liable to civil liability under this chapter.

Civil liability for failure to comply with the decision, direction or orders of the Commission.

37. If any person wilfully fails to comply with any decision, direction or order of the Commission, he shall be liable to civil liabilities under this chapter.

Filing of complaint, reference for adjudication etc.

38. (1) A complaint may be filed before the Commission alleging that a service provider or any other person has incurred a liability to a civil liability under this Chapter.

(2) Every complaint under sub-section (1) , except a complaint under section 33, shall be filed within sixty days from the date on which any act or conduct constituting the contravention took place and shall be in such form as may be prescribed:

Power to adjudicate

39. (1) For the purpose of adjudging whether any person has contravened any of the provisions of this Act, any rules, regulations, made thereunder or directions or orders issued under this act is liable to a civil liability under this Chapter, the Commission shall, subject to the provision or subsection (3), appoint by general or special order, an officer of the commission as Adjudicating Officer for holding an inquiry in the manner provided for herein and in the regulations.

(2) The Adjudicating Officer shall give the person referred to in sub-section (l), a reasonable opportunity for making a representation in the matter, and if, on inquiry, the Adjudicating Officer is satisfied that the person has committed any contravention, and is liable to a civil
liability, then, such liability as may be determined, by order, shall be imposed by the Adjudicating Officer on such person:

Provided that where the Adjudicating Officer is satisfied that there has been no contravention, he may pass such order as he deems fit.

(3) No person shall be appointed as an Adjudicating Officer unless he possess such experience as may be prescribed.

(4) Where more than one Adjudicating officers are appointed, the Commission shall specify, by order, the matter and places with respect to which such officers shall exercise their jurisdiction.

(5) For the purpose of discharging his powers and functions, every Adjudicating officers shall have the same powers as are vested in a civil court under the code of Civil procedure, 1908 in respect of the following matters, namely:-
(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents
(c) receiving evidence on affidavits;
(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document or a copy of such record or document, from any office;
(e) issuing commission for the examination of witness or for production of documents;
(f) dismissing an application for default or deciding it ex parte;
(g) setting aside any order of dismissal of any application for default or any order passed by him ex parte;
(h) reviewing his decisions;
(i) granting interim relief; and
(j) any other matter which may be prescribed.

(6) The Adjudicating Officer shall endeavour to decide disputes and complaints referred to him as expeditiously as possible.

(7) Any proceeding before the Adjudicating Officer shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of sections 196, of the Indian Penal Code and the Adjudicating Officer shall be deemed to be a civil court for the purpose of section 195 and chapter XXXVI of the Code of Criminal Procedure, 1973.

40. (1). If any person damages, displaces or destroys and cable or any part of the network infrastructure facility laid, established or place in accordance with the provisions of this Act, or if the communication services by reason of the damage or displacement so caused is interrupted, such person shall be liable,-
(a) where the act is wilful and deliberate, to a civil liability which may extend to rupees five crores and where the actual loss or damage caused is more than rupees five crores then the civil liability up to the extent of damage;
(b) where the act is not wilful or deliberate, a civil liability not exceeding the actual loss or damage caused.

(2) out of the civil liabilities imposed under sub-sec. (1), such sum as may be determined by the Adjudicating Officer shall be payable to the licensee or the grantee, as the case may be, as reasonable compensation for damage suffered.

41. (i) If any person contravenes the provision of sub-section (i), such sum as may be liable to a civil liability as determined by the adjudicating Officer under this chapter.

42. (1) Any penalty imposed under this Chapter shall not exceed fifty crore rupees.
(2) The Adjudicating Officer shall, While adjudging the quantum of civil liability, under this Chapter, the Adjudicating Officer, have due regard to the provisions of this Act, and also to the following factors, namely:
(a) the amount of revenue loss to the Government;
(b) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
(c) the amount of loss caused to any person as a result of the default;
(d) the repetitive nature of the default; and
(e) that the amount adjudged shall be such as may act as a deterrent even though no financial loss has been caused by such contravention.

CHAPTER XI

COMMUNICATIONS APPELLATE TRIBUNAL

Establishment of Appellate Tribunal.

43. (1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Communications Appellate Tribunal, to exercise the jurisdiction, powers and authority conferred on it by or under this Act.

(2) Any person aggrieved by any decision or order of the Commission may prefer an appeal to the Appellate Tribunal.

(3) (a) Every appeal under sub-section (2) shall be preferred within a period of sixty days from the date on which a copy of the decision or order made by the Commission is received by the person aggrieved and the appeal shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed;
(b) Any person aggrieved by an order of penalty imposed by the Adjudicating Officer may prefer an appeal to the Appellate Tribunal within sixty days from the date on which such order is received and the appeal shall be in such form, verified in such manner and accompanied by such fee as may be prescribed:
Provided that the appellate Tribunal may entertain an appeal under clause (a) or clause (b) after expiry of the said period of sixty days, if it is satisfied that there was sufficient cause for not filing the same within that period.

(4) On receipt of an appeal under sub-section (2), or sub section (3), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(5) The Appellate Tribunal shall send a copy of every order made by it to each of the parties to the appeal and to the Commission or to the Adjudicating Officer, as the case may be.

(6) The Appellate Tribunal shall endeavour to deal with and dispose of every appeal preferred under sub-section (2) and sub section (3) as expeditiously as possible; and all parties appearing before the Appellate Tribunal shall actively assist in ensuring that the appeal is determined and disposed of not later than ninety days from the date of filing of the appeal.

(7) The Appellate Tribunal may, on its own motion or otherwise for the purpose of examining the legality, propriety or correctness of any order or decision of the Commission or of the Adjudicating Officer, call for all relevant records and make such orders as it thinks fit provided that the power under this sub-section shall not be invoked after the expiry of three months from the date of such order or decision. Composition of Appellate Tribunal.
44. (1) The Appellate Tribunal shall consist of a Chairperson and not more than six Members to be appointed, by notification, by the Central Government.

(2) The appointment of Chairperson and Members of the Appellate Tribunal shall be made by the Central Government in consultation with the Chief Justice of India.

(3) The appointment of members of the appellate Tribunal shall be from amongst persons recommended by the search committee as may be prescribed.

(4) Subject to the provisions of this Act —

(a) the jurisdiction of the Appellate Tribunal may be exercised by Benches thereof;

(b) a bench may be constituted by the Chairperson of the Appellate Tribunal consisting of two or more Members as the Chairperson may deem fit;

Provided that every bench shall be presided over by a Judicial member.

Explanation: For the purposes of this section “Judicial Member” means any member of the Appellate Tribunal who has been a judge of a High Court;

(c) the benches of the Appellate Tribunal shall ordinarily sit at Delhi and also at such other places as the Central Government may notify, in consultation with the Chairperson of the Appellate Tribunal.

(d) the Central Government shall, on the recommendation of the Appellate Tribunal, notify the areas in relation to which each bench of the Appellate Tribunal may exercise jurisdiction.

(5) The Chairperson of the Appellate Tribunal may, as the exigencies of business may require, request a member of the Appellate Tribunal sitting on one bench of the Appellate Tribunal to sit on another bench thereof.

(6) If at any stage it appears to the Chairperson or a bench of the Appellate Tribunal that the case or matter is of such a nature that it ought to be heard by a bench consisting of more than two members of the Appellate Tribunal, the case or matter may be transferred by the Chairperson to a bench of more than two Members. Qualification, tenure, salary and allowances, vacancy of the Chairperson and Members of the Appellate Tribunal.

45. (1) A person shall not be qualified for appointment as the Chairperson or a Member of the Appellate Tribunal unless —

(a) in the case of the Chairperson, he is, or has been, a Judge of the Supreme Court;

(b) in the case of a Member, he is or has been a Judge of a High Court, or has held the post of Secretary to the Government of India or any equivalent post in the Central Government or the State Government for a period of not less than two years, or he is a person who is proficient in any of the fields specified in sub-sections (2) and (3) of section 7.

(2) The Chairperson and every Member of the Appellate Tribunal shall hold office as such for a term of five years from the date on which he enters upon his office; Provided that no Chairperson or other Member shall hold office as such after he has attained—

(i) in the case of Chairperson, the age of seventy years;
Appendix

(ii) in the case of any other Member, the age of sixty-five years.

(3) The salary and allowances payable to and the other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal shall be such as may be prescribed:
Provided that neither the salary and allowances nor the other terms and conditions of service of the Chairperson or a Member of the Appellate Tribunal shall be varied to his disadvantage after appointment.

(4) (a) If, for reason other than temporary absence, any vacancy occurs in the office of the chairperson or a member of the Appellate Tribunal, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy.
(b) When the Chairperson of the Appellate Tribunal is unable to discharge his functions owing to absence, illness or any other cause, any member of the Appellate Tribunal, as authorised so to do by the Central Government, shall discharge the functions of the Chairperson until the day on which the Chairperson resumes charge of his functions.

(5) Before appointing any person as chairperson or member of the Appellate Tribunal, the Central Government shall satisfy itself that the person does not have any such financial or other interests as are likely to affect prejudicially his functions as such member.

(6) A person who is in the service of Government shall have to retire or resign from service before entering the office of chairperson or member of the Appellate Tribunal.

Resignation and removal

46. (1) The chairman or a member of the Appellate tribunal may resign his office by giving notice thereof in writing to the Central Government and on such resignation being accepted, the chairperson or the member shall be deemed to have vacated his office.

(2) The Central Government may remove from office, the chairperson or a member of the Appellate Tribunal, who –

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as the Chairperson or a Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as the chairperson or a member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest.

(3) Notwithstanding anything contained in sub-section (2), the chairperson or a member of the Appellate Tribunal shall not be removed from his office on the ground specified in clause (d) or clause (e) of that sub-section unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as it may specify in this behalf, reported that the Chairperson or a Member ought on such ground or grounds to be removed.

(4) The Central Government may suspend from office, the Chairperson or a Member of the Appellate Tribunal in respect of whom a reference has been made to the Supreme Court under sub-section (2), until the Central Government has passed an order on receipt of the
Distribution of business amongst benches, etc

47. (1) The Chairperson of the Appellate Tribunal may, from time to time, by order, make provisions as to the distribution of the business of the Appellate Tribunal amongst the Benches and also provide for the matters which may be dealt with by each bench thereof.

(2) On the application of any of the parties and after notice to the parties, and after hearing such of them as may desire to be heard, or suo motu without notice, the Chairperson of the Appellate Tribunal may transfer any case pending before one bench of the Appellate Tribunal for disposal, to any other bench thereof.

(3) If the members of a bench of the Appellate Tribunal consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the chairperson of the Appellate Tribunal who shall hear the point or points, and thereafter such point or points shall be decided according to the opinion of the majority who have heard the case, including those who first heard it. Procedure and powers of Appellate Tribunal.

48. (1) The Appellate Tribunal shall have, for the purpose of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;

(e) issuing Commissions for the examinations of witnesses or documents;

(f) dismissing an application for default or deciding it ex parte;

(g) setting aside any order of dismissal of any application for default or any order passed by it, ex parte;

(h) reviewing its decisions; and

(i) granting interim relief; and

(j) any other matter which may be prescribed.

(2) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.

(3) Every proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196,
of the Indian Penal Code, and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. Right of application to take assistance of legal practitioner, etc.

Rights of applicant to take assistance of legal practitioner, etc

49. An applicant or appellant may either appear in person or authorise one or more chartered accountants, or company secretaries, cost accountants or legal practitioners, or any of his or its accredited officers to present his or its case before the Appellate Tribunal.

Explanation: For the purpose of this section-

(a) "Chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act;

(b) "company secretary" means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act;

(c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act;

(d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader.

Appeals to Supreme Court.

50. (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law for the time being in force, an appeal shall lie against any order, not being an interlocutory order, passed by the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in section 100 of that Code.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

(3) Every appeal under this section shall be preferred within a period of ninety days from the date of the decision or order appealed against:

Provided that the Supreme Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time. Execution of orders.

Execution of orders

51. (1) An order passed by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of a civil court, and for this purpose, the Appellate Tribunal shall have all the powers of a civil court.

(2) Notwithstanding anything contained in sub-section (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.
Appendix

324

Explanation - For the purpose of this section, the expression "civil court having local jurisdiction" shall mean, the civil court within whose local limits of jurisdiction, the licensee, grantee, or judgment debtor, as the case may be resides or has a place of office or business and also within whose jurisdiction any property belonging to the licensee, grantee, or judgment debtor is located.

Penalty for failure to comply with the orders of commission and Appellate Tribunal

52. If any person wilfully fails to comply with any decision, direction or order of Appellate Tribunal such person shall be liable to a penalty to be imposed by the order of Appellate Tribunal which may extend to five crores rupees:

provided that no such penalty shall be levied without giving any opportunity of being heard to the party concerned.

CHAPTER XII

OFFICERS AND EMPLOYEES OF THE COMMISSION AND THE APPELLATE TRIBUNAL

53. (1) The Commission or Appellate Tribunal, as the case may be, shall appoint such officers and other employees as the commission or Appellate Tribunal, as the case may be, considers necessary for the efficient discharge of its functions under this Act subject to such conditions as may be prescribed.

(2) The salaries and allowances payable to and the terms and conditions of service of the officers and employees of the Commission and of the Appellate Tribunal shall be such as may be prescribed.

(3) The officers and employees of the commission shall discharge their functions under the general superintendence and control of the Chairperson of the Commission and the officers and employees of the Appellate Tribunal shall discharge their functions under the general superintendence and control of the chairperson of the Appellate Tribunal.

CHAPTER XIII

FINANCE, ACCOUNTS AND AUDIT

54. (1) Subject to the provisions of sub-section (2) of section 40 and sub-section (2) of section 23, the proceeds of the license fee, fee paid under sub-section (5) of section 23, registration fee, amount received by imposition of civil liabilities imposed under this Act and amount of penalties imposed by the Appellate Tribunal shall be credited to the Consolidated Fund of India.

(2) Such portion or percentage of the license fee as may be attributable to the Universal Service Obligation as may be prescribed shall be credited to a separate fund to be called Universal Service Obligation Fund in the public account of India. Communications Commission and Appellate Tribunal Fund
55. (1) There shall be constituted two separate funds to be called the Communications Commission Fund and the Appellate Tribunal Fund and there shall be credited to these funds sums of money paid or grants made by the Central Government to be utilised for the purposes of this Act.

(2) Subject to the provisions of sub-section (1) of section 54, fee receivable by the Commission shall be credited to the Communications Commission Fund, and fee receivable by the Appellate Tribunal shall be credited to the Appellate Tribunal Fund. Grants and application of funds

56. After due appropriation made by Parliament by law, the Central Government, shall credit to the funds referred to in sub-section (1) of section 55 by way of grant, separately for the Commission and for the Appellate Tribunal, adequate sums of money for being utilised for the purpose of this Act, and for meeting the salaries and allowances payable to the Chairperson and Members of the Commission and Chairperson and Members of the Appellate Tribunal and the administrative expenses including the salaries and allowances payable to, or in respect of, officers and other employees of the Commission and of the Appellate Tribunal, as the case may be.

Accounts and audit

57(1) The Commission as also the Appellate Tribunal shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form and manner as may be prescribed in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Commission as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall form part of the annual report of the Commission referred to in sub-section (1) of section 58.

(3) The accounts of the Appellate Tribunal as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government, and that Government shall cause the same to be laid before each House of Parliament.

Annual Report

58.(1) The Commission shall after the end of each financial year, furnish to the Central Government an annual report on its activities during the preceding financial year and containing such information relating to the proceedings and policy as may be prescribed, and such report shall also contain therein the statement of annual accounts of the Commission.

(2) The Central Government shall cause such report to be laid before each house of Parliament.
CHAPTER XIV

RIGHT OF WAY FOR LAYING CABLES AND ERECTION OF POSTS

Rights of facility providers in public

59. (1) Subject to the provisions of this Act, any person entitled under the provisions of this Act, services or facilities (hereinafter referred to as facility provider) may from time to time lay, and establish cables and erect posts under, over, along, across, in or upon any immovable property vested in or under the control or management of a public authority.

2) Any public authority under whose control or management, any immovable property is vested shall, on receipt of a request from a facility provider permit the facility provider to do all or any of the following acts namely :

(a) to place and maintain underground cables or posts; and

(b) to enter on the property from time to time, in order to place, examine, repair, alter or remove such cables or posts.

(3) The permission mentioned in sub-section (2) above shall be promptly given and shall not be unreasonably withheld or denied:

Provided that in case of an emergency the facility provider may at any time for the purpose of examining, repairing altering or removing any cable or post enter upon the property for that purpose without first obtaining such permission.

(4) The facility of right of way under this section for laying underground cables or erecting posts, shall be available to all facility providers without discrimination and subject to the obligation of reinstatement or restoration of the property or payment of reinstatement or restoration charges in respect thereof at the public authority.

(5) Where any shifting or alteration in position of the underground cable or post is required due to compulsive causes like widening of highways and construction of flyovers or bridges, the said facility provider shall shift or alter the same at his own cost within the period indicated by concerned authority

(6) For the purposes of speedy clearance of requests for laying cables or erecting posts on any property vested in, or under the control or management of any public authority, high powered committees, or other appropriate mechanisms shall be promptly set up by the Central Government or the State Governments in the manner prescribed, they shall in each State act as a single nodal agency to co-ordinate all activities in this regard; and the Central Government may provide appropriate guidelines in this behalf.

Rights of public authority to grant permission

60. Any permission granted by a public authority under section 59 may be subject to such reasonable conditions as that authority thinks fit to impose as to the time or mode of execution of any work, or as to any other matter connected with or related to any work under taken by the facility provider in exercise of those rights.
Appendix

Provision for removal or alteration of cable or post

61. When under the foregoing provisions of this Act, any cable or post has been placed by any facility provider under, over, along, across in or upon any property and the public authority having regard to circumstances which have arisen since the cable or post was so placed, considers it necessary and expedient that it should be removed or its position should be altered, it may require the concerned facility provider to remove it or alter its position as the case may be and it shall then be so removed or altered without any delay.

Determination of Disputes

62. (1) If any dispute arises under this Chapter including refusal of permission by the public authority, the district court within whose local limits of jurisdiction the property concerned is situated shall on application determine the same.

(2) Every such determination shall be in accordance with the provisions of this Chapter and such determination will be deemed to be a decree of the district court and be for all purposes treated as such.

(3) The provisions of the Code of Civil Procedure, 1908 shall apply to adjudication of all disputes under this section.

(4) Pending disposal of any application, the district court may pass such interim orders preventive or mandatory for the doing of any act under this Chapter on such terms and conditions as may be provided for in such order.

Use of private land by facility provider

63. (1) A facility provider may make use of private land for constructing or laying of cables or erecting posts only with the consent in writing of owner of the land or premises, as the case may be:

Provided that where in the opinion of a facility provider consent to the reasonable use of any land is not forthcoming such facility provider, may, on application to and with the approval of the or premises is not forthcoming, such facility provider may, on an application to and with the approval of the Commission, take steps authorized by the Commission for use of the land or premises for constructing or laying cables or erecting posts on such terms as the Commission may deem fit.

(2) where immediately before the commencement of this Act, a facility provider has made use of private land or premises for constructing or laying of cables or erecting posts without consent of the owner of the land or the premises and despite owner's objection, the facility provider shall, within a period of six months from the date of commencement of this Act, obtain a written consent of the owner, and the proviso to sub-section (1) shall apply mutatis mutandis to this situation.

Power of Commission to issue order, regarding use of private land

64. (1) The Commission may, by order, require any network infrastructure facility to be provided, constructed, installed, altered, moved operated, used, repaired or maintained on any private land or premises or any system of method to be adopted by any person interested in or affected by the order, and at or within such time subject to such conditions as to compensation or otherwise and under such supervisions as the Commission may determine to be just.
(2) The Commission may, by order, specify by whom, in what proportion and at or within what time the cost of doing anything required or permitted to be done under sub-section (1) shall be paid.

(3) Any orders of the Commission under Sub-section (1) or sub-section (2) shall be enforceable under Chapter X of this Act as if such order is the order referred to in section 37.

Right of a facility provider.

65. Nothing in this Chapter shall confer any right upon any facility provider other than that of a user for the purpose only of laying cables or erecting posts or maintaining them.

CHAPTER XV

INTERCEPTION OF COMMUNICATION AND PUNISHMENT FOR UNLAWFUL INTERCEPTION

Interception of communication and safeguards.

66. (1) Subject to the prescribed safeguard, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government, on the occurrence of any public emergency or in the interests of the security, sovereignty and integrity of India, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, may direct:

(i) any agency of that Government to intercept any communication on any network facilities or services;

(ii) any service provider that any content brought for communication by or communicated or received by, him shall not be communicated or shall be intercepted or detained or shall be disclosed to that Government or its agency authorized in this behalf:

(2) The service provider shall, when called upon by any agency, which has been directed to carry out interception under sub-section (1), extend all facilities and technical assistance for interception of the content of communication.

(3) Any service provider who fails to assist the agency referred to in sub-section (2) shall be punished with imprisonment for a term, which may extend to seven years.

(4) Save as otherwise provided under this section, any person, who intercepts any communication or causes any communication to be intercepted or discloses to any person, any content shall be punishable with imprisonment which may extend to five years or with fine which may extend up to ten lakh rupees, and, for a second and subsequent offence, with imprisonment which may extend to five years and with fine which may extend up to fifty lakh rupees.

Explanation-For the purposes of this section, "interception" means the aural or other acquisition of the content through the use of such devices or means as may be necessary for such acquisition.

67. Nothing in this Chapter shall affect the provision of section 69 of the Information Technology Act, 2000.
CHAPTER XVI

CRIMES AND PUNISHMENT

68. (1) Save as otherwise provided in this Act, any person who, without a license, owns or provides any network infrastructure facility or provides any communication service or knowingly assists in the transmissions or distribution of such service in any manner including -

(a) collection of subscription for his principal; or

(b) issuing of advertisements to such service; or

(c) dealing in, or distribution of, equipment for decoding programme,

shall be punishable with imprisonment which may extend to five years, or with fine which may extend to five crore rupees, or with both, and, for the second offence, with imprisonment which may extend to five years or with fine which may extend to ten crore rupees or with both.

(2) Any person who without the permission of the service provider and with the intent to defraud, diverts any signal or decodes any content or deals in decoding equipment for such purpose shall be punishable with imprisonment which may extend to five years and with fine which may extend to five crore rupees or with both and, for the second or subsequent offence with imprisonment which may extend to five years and with fine which may extend to ten crore rupees.

(3) Any person who, knowingly benefits from any unauthorised diversion or tampering with any communication service or network infrastructure facility with the knowledge that such service or facility is unauthorized or tampered, shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to rupees two crores, or with both.

(4) Any person who, abets or induces the making of any unauthorised diversion or tampering with any communication service or network infrastructure facility shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to rupees two crores or with both.

(5) Any person who, having already been convicted of an offence under sub-section (3) or sub-section (4) is again convicted thereunder, shall be punished with imprisonment for a term which shall not be less than six months but which may extend to five years, and with fine which may extend to rupees five crores.

Punishment for possession of wireless equipment etc without license

69. (1) Any person,-

(a) who possesses any wireless equipment in contravention of the provisions of section 5; or

(b) who uses a radio frequency which he is not authorised to use under this Act, shall be punishable with imprisonment which may extend to three years or with fine which may extend to rupees two crores, or with both.

Explanation: For the purpose of this subsection "radio frequencies" means any frequency of electro-magnetic waves upto and including a frequency of 3000 giga hertz.
(2) When any person is convicted for an offence punishable under sub-section (1), all wireless equipments or any part thereof in respect of which the offence has been committed, shall be forfeited to the Central Government.

(3) Any wireless equipment confiscated which has not been claimed by anybody shall vest in the Central Government.

(4) Any officer authorised by the Central Government or the Commission in this behalf may search any building, vehicle, vessel or place in which he has reason to believe that any wireless equipment in respect of which an offence punishable under sub-section (1) has been committed is kept or concealed and take possession thereof.

Punishment for sending obscene or offensive messages

70. Any person who sends, by means of a communication service or a network infrastructure facility, -

(a) any content that is grossly offensive or of an indecent obscene or menacing character; or

(b) for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill-will, any content that he knows to be false or persistently makes use for that purpose of a communication service or a network infrastructure facility, shall be punishable with imprisonment which may extend upto three years or with fine which may extend to rupees two crores or with both.

Attempt to commit offences

71. Whoever attempts to commit or abets the commission of any offence, under sub-section (3) or sub-sections (4) of section 66 under this Chapter shall be punished with the punishment provided for that offence.

Offences by companies

72. (1) Where an offence under this Act has been committed by a Company every person who at the time of the offence was committed was in charge of, and was responsible to, the company, for the conduct of business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1) where any offence under this Act has been committed by a company and it has proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purposes of this section -

(a) "company" means any body corporate and includes a firm or other association of individuals; and
(b) "director" in relation to a firm, means a partner in the firm.

Offences triable by court of session

73. No court inferior to that of a Court of Session shall try an offence under this Act.

Offences to be cognisable

74. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 every offence punishable under this Act shall be cognisable.

CHAPTER XVII

TRANSFER OF PROCEEDINGS

Transfer of proceedings to Commission

75. (1) On the date of establishment of the Commission under sub-section (1) of section 6, all proceedings pending before the Telecom Regulatory Authority of India established under sub-section (1) of section 3 of the Telecom Regulatory Authority of India Act, 1997 shall be deemed to be pending before the Commission and shall be disposed in accordance with the provisions of this Act.

Transfer of proceedings to Appellate Tribunal

76. On the date of establishment of the Appellate Tribunal under sub-section (1) of section 43 all proceedings pending before the Telecom Disputes Settlement and Appellate Tribunal established under section 14 of the Telecom Regulatory Authority of India Act, 1997 shall stand transferred to the Appellate Tribunal which shall hear and dispose such proceedings from the stage at which the proceedings were pending before the first-mentioned Tribunal in accordance with the provisions of this Act.

CHAPTER XVIII

MISCELLANEOUS

Taking over control and management of Communication Service or network infrastructure facility in public interest.

77. (1) In the event of war or any calamity of national magnitude, the Central Government may by notification for a limited period, in public interest, take over the control and management of any communication service or any network infrastructure facility connected therewith, suspend its operation or entrust any agency of that Government to manage it in the manner directed by the Government for such period as provided for in the notification.

(2) If it appears necessary or expedient to do so, the Central Government may, in public interest, at any time request the Commission to direct any licensee to-
(a) transmit in its broadcasting service specific announcements, in such a manner as may be considered necessary;

(b) stop any broadcasting service which is prejudicial to sovereignty or integrity of India, security of the State, friendly relations with foreign States, or to public order, decency or morality, or communal harmony.

(3) On the issue of such directions by the Commission it shall be the duty of the licensee to ensure strict observance of such directions.

Obligations of licensees and grantees.

78. (1) Every licensee or grantee shall—

(a) commence operation of his service within such period as may be specified by the Commission;

(b) maintain such documentary records and transmission schedules as may be specified by the regulations;

(c) allow inspection of such facilities and such documentary records and transmission schedules as may be specified by the Commission or by any person authorised by the Commission.

(2) The Commission may call for any information from the licensee or grantee including information necessary for ensuring transparency or for ascertaining the true ownership of the license or licensee or grantee.

(3) The Commission or any officer authorised in this behalf by the Commission shall have power to inspect and obtain information, wherever necessary, from programme producers, distributors and advertising agents.

(4) For effective enforcement of the terms and conditions of licenses or registration, the Commission or any officer authorized by the Commission for that purpose, shall have all the powers of an officer making inspection for the purpose of inspecting books of account and other books and papers of any licensee or grantee officer as provided under Section 209A of the Companies Act, 1956.

(5) It shall be the duty of every licensee to carry out the directions of the Commission given under this section.

Licenses to operate wireless equipment on board ships and aircraft

79. (1) No person shall operate any wireless equipment on board any ship or aircraft registered in India without a license granted by such authority or agency as may be notified by the Central Government.

(2) The Central Government may prescribe the qualification for the authority to be notified under sub-section (1) an the manner for granting the license to operate wireless equipment on board, ships and aircraft.

(3) The Central Government may prescribe qualification for the person to whom a license for operating wireless equipment referred to in sub-section (1) may be granted examination, if any, to be conducted for granting such a license the conditions of the license, the fee to be paid thereof and other connected matters.
Recovery of civil liabilities

80. Without prejudice to other modes of recovery, any civil liability imposed under this Act if not paid be recovered as an arrear of land revenue and the Commission shall be empowered to suspend the license or registration of the person on whom the civil liability is imposed till the same is not paid.

Supply of information to authorised officers

81. Notwithstanding anything contained in any other law for the time being in force, where the Central Government or a State Government is satisfied that any information, document or record in possession or control of any service provider relating to any service availed by any consumer or subscriber is necessary to be furnished in relation to any pending or apprehended civil or criminal proceedings, an officer specially authorised in writing by such Government in this behalf shall direct such service provider to furnish such information, document or record to him and the service provider shall comply with the direction of the officer.

Act not to apply in certain cases

82. Subject to the provisions contained in Chapter VI nothing contained in this Act shall apply to network infrastructure facilities or communication services owned, and operated by the Central Government or any State Government for their own use.

Bar of jurisdiction of civil courts

83. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Officer or the Appellate Tribunal or the Commission is empowered by or under this Act to determine, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Chairman, Members etc. to be public servants.

84. The Chairperson, Members and other officers and employees of the Commission, and the chairperson, members, officers of the Appellate Tribunal shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Protection of action taken in good faith.

85. No suit, prosecution or other legal proceeding shall lie against the Commission, or any Member or officer or other employee thereof or against the Appellate Tribunal or the chairperson or member or officer or other employee thereof for anything, which is in, good faith done or intended to be done in pursuance of this Act or of any rules or regulations made thereunder.

Exemption from tax on wealth an income.

86. Notwithstanding anything contained in the Wealth Tax Act 1957 the Income Tax Act 1961 or any other enactment for the time being in force relating to tax on wealth, income, profits or gains the Commission or Appellate Tribunal shall not be liable to pay wealth tax, income tax or any other tax in respect of its wealth, income, profits or gains derived.
Act to have overriding effect

87. The provisions of this Act shall take effect notwithstanding anything inconsistent or contrary therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Power to make rules.

88.(1) The Central Government may by notification make rules for carrying out provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely.-

(a) other services relating to content application service under clause (10) of section 2;
(b) other services relating to network application services under clause (16) of section 2;
(c) other facilities relating to network infrastructural facilities under clause (17) of section 2;
(d) other services relating to networking service under clause (18) of section 2;
(e) obligation in respect of services under clause (33) of section 2;
(f) other services relating to value added network application service under clause (34) of section 2;
(g) other article or apparatus relating to wireless equipment under clause (35) of section 2;
(h) the search committee for the purposes of sub-section (1) of section 7;
(i) the tenure of part-time members under sub-section (2) of section 8;
(j) the salary, allowances payable to and other terms of service of the Chairperson and other Members under section 10;
(k) any other matters in respect of which the Commission may exercise the powers of a civil court under clause (j) of sub-section (1) of section (14);
(l) the terms and conditions of service of the Secretary-General under sub-section (3) of section 18;
(m) other matters under clause (vi) of sub-section (2) of section 18;
(n) measure to protect consumer interests under clause (vii) of sub-section (2) of section 18;
(o) other matters under clause (xv) of sub-section (2) of section 18;
(p) fee for assignment of frequencies under sub-section (5) of section 23;
(q) the manner and time frame for consultation between the Spectrum Manager and the Commission for seeking allocation of additional spectrum under sub-section (2) of section 24;
(r) life saving services to be provided by a service provider shall provide under sub-clause (ii) of sub-section (1) of section 28,

(s) the manner in which the number and type of broadcasting services including those of the public service broadcaster is to be provided by every service provider under clause (i) of sub-section (3) of section 28,

(t) the form in which a complaint may be filed under sub-section (2) of section 38,

(u) experience required for the appointment of an adjudicating officer under sub-section (3) of section 39,

(v) any other matters in respect of which an adjudicating officer may exercise the power of the civil court under clause (j) of sub-section (5) of section 39,

(w) the form, the manner of verification and fee to be accompanied with the appeal under clause (a) of sub-section (3) of section 43

(x) the form, the manner of verification and fee to be accompanied with the appeal under clause (b) of sub-section (3) of section 43,

(y) search committee for the purposes of sub-section (3) of section 44,

(z) the salary and allowance payable to and other terms of conditions of service of, the chairperson and other members of the Appellate Tribunal under sub-section (3) of section 45,

(za) any other matter with respect to which the Appellate Tribunal may exercise powers of a civil court under clause (j) of sub-section (1) of section 48,

(zb) the conditions subject to which the appointment of officers and employees of the Commission or the Appellate Tribunal shall be made under sub-section (1) of section 53,

(zc) the salary and allowances payable to, and the terms and conditions of service of the officers and employees of the Commission or the Appellate Tribunal shall be made under sub-section (2) of section 53,

(zd) the portion or percentage of the license fee as may be attributable to Universal Service Obligation to be credited to the Universal Service Obligation Fund under sub-section (2) of section 54,

(ze) the form and manner in which the annual statement of accounts shall be prepared under sub-section (1) of section 57,

(zf) the information relating to the proceedings and policy to be contained in the annual report under subsection (1) of section 58,

(zg) the manner of setting up high powered committees or other appropriate mechanism by the Central Government or a State Government under sub-section (6) of section 59,

(zh) safeguards under sub-section (1) of section 66,

(zl) the qualifications for the authority to be notified under sub-section (1) of section 79 and the manner for granting licenses under sub-section (2) of that section,
(zj) the qualifications for the person to whom a license for operating wireless equipment referred to in sub-section (1) of section 79 may be granted, examination if any to be conducted for granting such a license, the conditions of the license, the fee to be paid thereof and other connected matters under sub-section (3) of that section;

(zk) any other matter which is to be or may be prescribed or in respect of which provision is to be made by rules.

Power to make regulations

89. (1) The Commission may by notification make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such regulations may provide for all or any of the following matters namely:-
(a) the function to be performed by the regional offices of the Commission under section 12;
(b) the time and places, and the procedure to be observed in regard to the transaction of business at the meetings of the Commission under sub-section (1) of section 13;
(c) the powers and functions of the Secretary General under sub-section (1) of section 15;
(d) the programmes, codes and standards to be specified under section 20;
(e) the eligibility conditions for grant of license or registration restriction regarding ownership and control of the media, restrictions on the number of licenses or extent of accumulation of interest of such licenses by a person and other conditions as may be considered necessary under sub-section (1) of section 26;
(f) the obligations, conditions, tariffs and rates subject to which a service provider shall provide facilities and services under clause (a) of sub-section (2) of section 26;
(g) the conditions subject to which a license or registration may be granted or transferred under clause (b) of sub-section (2) of section 26;
(h) the manner, the time, the terms and conditions, the fee and the procedure for grant of a license or registration under sub-section (3) of section 26;
(i) the details to be specified under sub-section(4) of section 26;
(j) the period for which license or registration shall be granted under sub-section (1) of section 27;
(k) the form and the fee payable for granting license or registration under sub-section (2) of section 27;
(l) the number of channels for providing distribution of broadcasting services under clause (iii) of of sub-section (3) of section 28;
(m) other agreements to be registered with the Commission under clause (c) of section 29;
(n) the form of application and the fees to be accompanied therewith under sub-section (2) of section 30;
(o) the conditions and restrictions subject to which the license may be issued under sub-section (4) of section 30;
(p) the manner of holding inquiry by the Adjudicating Officer under sub-section (1) of section 39;
(q) the documentary records and transmission schedules to be maintained by a licensee under clause (b) of sub-section (1) of section 78;
(r) the eligibility and other terms and conditions for granting license or registration under sub-section (3) of section 98;
(s) such other regulation as may be required to carry out the purposes of the Act.

Laying of Rules and Regulations

90. Every rule and every regulation made under this Act shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of 30 days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions
aforesaid, both Houses agree in making any modification in, the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

**Power to remove difficulties.**

91. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as may appear to it to be necessary or expedient removing the difficulty:

Provided that no such order shall be made after the expiry of a period of three years from the commencement of this Act.

(2) Every order made under this, section shall be laid, as soon as may be, after it is made, before each House of Parliament.

**Amendment of 2 of 1974**

92. In the Code of Criminal Procedure 1973 –

(a) in section 91, in sub-section (3), in clause (b) for the words “postal or telegraph authority” the words and figures “postal authority or any other service provider holding a license or registration granted under the Communication Convergence Act 2001” shall be substituted;

(b) in section 92, for the words “postal or telegraph authority” wherever they occur the words and figures “postal authority or any other service provider holding a license or registration granted under the Communication Convergence Act 2001” shall be substituted.

**CHAPTER XIX**

**REPEAL AND SAVINGS**

**Repeal of certain Acts, saving of licenses and dissolution of certain Authorities.**

93. (1) Subject to the other provisions of this sections, the enactments namely, the Indian Telegraph Act, 1885, the Indian Wireless Telegraphy Act, 1933, Telegraph Wire (Unlawful Possession) Act, 1950, and the Telecom Regulatory Authority of India Act, 1997 are hereby repealed.

(2) Notwithstanding such repeal, any person, who has obtained license or registration under the policy of the Central Government in force may continue to provide his services, if he has made an application to the Commission for the grant of a license or registration under this Act within a period of six months from the date of establishment of the Commission under this Act or where he has already made such an application, until the disposal of such application, whichever is later.

(3) The Commission shall, on receipt of an application referred to under sub-section (2), grant a license or registration after taking into consideration the terms and conditions on which such
service were licensed or registered under any of the provisions of the repealed Acts, or the policy referred to in sub-sections (2), as the case may be, and keeping in view the objectives of this Act.

(4) During the period of six-months mentioned in sub-section (2) or till his application is disposed off, whichever is later, the applicant shall continue to be governed by, and shall comply with, the provision of the Indian Telegraph Act, 1885, the Indian Wireless Telegraphy Act, 1933, Telegraph Wires (Unlawful Possession) Act, 1950 or the Telecom Regulatory Authority of India Act, 1997, as the case may be, as if these Acts had not been repealed, or the policy referred to in sub-section (2).

(5) Save as otherwise provided under this Act, with effect from the date of the establishment of the Commission and the Appellate Tribunal under this Act, as the case may be, the Telecom Regulatory Authority of India established under sub-section (1) of section 3 of the Telecom Regulatory Authority Act, 1997 and the Telecom Disputes Settlement and the Appellate Tribunal established under section 14 of that Act, shall stand dissolved.

Repeal of Act 7 of 1995 and transitional provisions.

94. (1) Subject to the other provisions of this section, the Cable Television Networks (Regulation) Act, 1995 is hereby repealed.

(2) Notwithstanding such repeal, any cable operator registered under the Act so repealed, may continue to provide his cable services, if he has made an application to the Commission for the grant of a license under this Act within a period of six months from the date of the establishment of the Commission under this Act or where he has already made such an application, until the disposal of such application, which ever is later.

(3) The Commission shall, on receipt of an application referred to under sub-section (2), grant a license after taking into consideration the terms and conditions on which such cable operator was registered under the provisions of the repealed Act, and keeping in view the objectives of this Act.

(4) During the period of six-months mentioned in sub-section (2), or till his application is disposed of whichever is later, the applicant cable operator will continue to be governed by, and shall comply with the provisions of the Cable Television Networks (Regulations) Act, 1995 as if that Act had not been repealed.

NOTES ON CLAUSES

Clause 1. - This clause provides for application of the proposed legislation to the entire country and for appointment of different dates for commencement of different provisions of the proposed legislation.

Clause 2. - This clause defines the various expressions occurring in the proposed legislation.

Clause 3. - This clause provides that no person shall use any part of spectrum without assignment from the Central Government or the Commission as provided for in the proposed legislation.

Clause 4. - This clause provides that no person, other than a public service broadcaster, shall own or provide any network infrastructure facility or provide any networking service or any value added network application service or any content application service without a license or registration. It also envisages that all facilities and services exempted from licencing or
registration immediately before the coming into force of the proposed legislation shall continue to be so exempt under the proposed legislation, until otherwise notified. Further it provides that the Central Government may by notification exempt any person, or class of persons or any facility or service from the provisions of this clause.

**Clause 5.** - This clause provides that no person shall possess any wireless equipment without obtaining a license under provisions of the proposed legislation. It also provides that the Central Government may, in public interest, by a notification exempt any person or class of persons or any wireless equipment or class or category of wireless equipment from the provisions of this clause. It further envisages that where any person or equipment licensed under any law for the time being in force or exempted from licensing immediately before the commencement of this proposed legislation, shall not be affected by the provisions of this clause, until otherwise notified.

**Clause 6.** - This clause provides for the establishment of the Communications Commission of India with its head office at Delhi and regional offices at Kolkata, Chennai and Mumbai. The Commission will be a body corporate having perpetual succession, a common seal and shall by the said name sue and be sued. The Commission shall consist of a chairperson, not more than ten Members and the Spectrum Manager as an ex-officio Member. The Chairperson and not less than six Members other than the ex-officio Members and the remaining shall be part-time Members.

**Clause 7.** - This clause provides that the Members of the Commission (except the ex-officio Member) shall be appointed by the Central Government from amongst persons recommended by a search committee. One half of the Members shall be appointed from amongst persons of eminence in the fields of literature, performing arts, media, culture, education, films and from persons prominent in social and consumer activities, while one half of the members shall be appointed from amongst persons of eminence in specialized fields such as telecommunications, broadcasting technology, information technology, finance, management and administration, or law. The Chairperson shall be a person of eminence from any of the fields mentioned above.

**Clause 8.** - This clause provides that the Chairperson and a whole time Member shall hold office for a term of 5 years from the date on which he enters upon his office or until he attains the age of 65 years, whichever is earlier, and he will not be eligible for reappointment. Further it provides that tenure of a part time member shall be such as may be prescribed. It also lays down the powers of the Chairperson with regard to functioning of the Commission in addition to presiding over the meetings of the Commission. It also deals with procedure of resignation by the Chairperson or a Member of the Commission.

**Clause 9.** - This Clause deals with circumstances under which, and the procedure for removal of Chairperson and Members from office.

**Clause 10.** - This clause provides for the fixation of the salary and allowances payable to and the other terms and conditions of service of the Chairperson and other Members of the Commission.

**Clause 11.** - This clause indicates the circumstances under which the acts or proceedings of the Commission shall not be invalidated.

**Clause 12.** - This clause provides that the functions of the regional offices of the commission shall be determined by the commission.

**Clause 13.** - This clause provides for the Commission to determine the procedure for the transaction of business in its meetings including times and places of its meetings.
Clause 14.- This clause provides for the powers and the procedure of the commission in the discharge of its function under the proposed legislation.

Clause 15. - This clause provides for matters relating to the appointment of the Secretary-General.

Clause 16.- This clause provides that the Commission may set up a Panel from amongst its Members to deal with matters in relation to the content in content application services. It also provides that, except for the power to make regulations, the Commission may distribute its business amongst its Members; it also provides that the Commission may authorize officers of the Government to implement and carry out orders and directions of the Commission.

Clause 17.- This clause indicates that while exercising its functions, the Commission shall strive to achieve objectives and principles governing the administration of the proposed legislation which inter alia include that the communications sector is developed in a competitive environment and in consumer interest, that communication services are available at affordable cost to all, that choice of services is promoted, that defence and security interests of the country are fully protected, that equitable and non-discriminatory interconnection across various networks are promoted, that licensing and registration criteria are transparent and made known to the public and that the principle of a level playing field for all operators is promoted so as to serve consumer interest.

Clause 18.- This clause stipulates the powers, duties and functions of the Commission. It lays down that it shall be the duty of the Commission to facilitates and regulate all matters relating to carriage and content of communications. The commission shall also inter alia carry out spectrum management, planning and monitoring for non-strategic or commercial usages; promote competition and efficiency in the operation of communication services and network infrastructure facilities; take measures to protect consumer interests and promote and enforce Universal Service Obligations; formulate and lay down programme and advertising codes in respect of content application services; take steps to regulate or curtail the harmful and illegal content on the internet and other communication services; formulate and lay down codes and technical standards and norms to ensure in a technology neutral manner the quality and interoperability of services and network infrastructure facilities (including equipment); institutionalize appropriate mechanisms and interact on a continual basis with all sectors of industry and consumers, so as to facilitate and promote the basic objectives of the proposed legislation to encourage self regulatory codes and standards; and report and make recommendations either suo moto or on such matters as may be referred to it by the Central Government. It has also been provided that while exercising its powers and discharging its functions, the Commission shall ensure transparency.

Clause 19.- This clause provides that the Commission may at any time make recommendations to the Central Government with regard to any particular practice that impinges upon or adversely affects the interests of the security, sovereignty and integrity of India, friendly relations with foreign states, public order, decency or morality.

Clause 20.- This clause provides that the Commission shall by regulations specify programme codes and standards which may include inter alia practices to ensure that nothing is contained in any programme which is prejudicial to the security, sovereignty and integrity of India, friendly relations with foreign states, public order or which may constitute contempt of court, defamation or incitement to an offence; practices to ensure fair and impartial presentation of news and other programme, promotion of Indian culture, values of national integration, religious and communal harmony, decency in portrayal of women, restraint in portrayal of violence and sexual conduct and to enhance general standards of good taste, decency and morality etc.
Clause 21.- This clause provides for the Commission to decide any dispute or matter between service providers, between service providers and a group of consumers or any matter arising out of enforcement of the proposed legislation. The commission shall also hear and determine any complaint from any person regarding contravention of the provisions of the proposed legislation or the rules regulations or orders made thereunder and if necessary refer the matter for adjudication.

Clause 22.- This clause empowers the Central Government to issue policy directives to the Commission which may include the procedure and the mode in which any services are to be licensed or registered. It has further been provided that in framing the policy directives, the Central Government shall take into account the objectives and guiding principles governing the administration of the proposed legislation.

Clause 23.- This clause provides that the Central Government shall be responsible for spectrum management and also for allocation of spectrum for strategic and non strategic or commercial purposes. This clause also sets up a Spectrum Management Committee with Cabinet Secretary as its Chairman. This also lays down that the Central Government shall notify Wireless Advisor to Government of India as Spectrum Manager, Government of India to act as the Member -Secretary of the Spectrum Management Committee. It also sets out, subject to the general supervision and control of the Spectrum Management Committee, the functions of the Spectrum Manager, and that he shall assign frequencies on payment of such fees as may be prescribed.

Clause 24.- This clause provides for assignment by the Commission of spectrum to non-strategic and commercial users and the procedure for dealing with requests by the Commission for allocation of additional spectrum.

Clause 25.- This clause provides that before assigning any part of spectrum, the Commission shall prepare and notify from time to time one or more schemes or plans for such assignment, after such public hearing as the Commission may consider appropriate. It also empowers the Central Government to notify the class or classes of persons or services for preferential assignment of any frequency of spectrum by the Commission.

Clause 26.- This clause provides for the grant of license or registration under this Act to service providers subject to such conditions, restrictions, fee, tariffs and rates etc at which facilities and services will be provided, as may be determined by the Commission, which may also determine the conditions for grant or transfer of license or registration. The commission shall also notify from time to time schemes or plans for licensing or registration after consulting the Central Government for ensuring that the defence and security interests of India are fully protected. This clause further provides for the five categories of licenses namely, to provide network application services, to provide network application services, to provide content applications services and to provide value added network application services. The Clause however also clarifies that information technology enabled services will not be licensed. The Commission may, while granting a license under the above said categories, grant licenses either singly or jointly for one or more of the categories of facilities or services.

Clause 27.- This clause provides that a license or registration shall be granted for such period, in such form and subject to payment of such fees as determined by the Commission. It also provides that the Central Government may in public interest exempt any person or class of persons from payment of license or registration fee.

Clause 28.- This clause stipulates the duties of service providers. It inter alia provides that every service provider shall wherever required or applicable provide services to give effect to universal service obligations, provide life saving services, provide services to any person on demand with a reasonable time and on a non-discriminatory basis, and follow the codes and
standards laid down and specified by the commission. It also lays down that every service provider of a content application service shall, wherever required or applicable, endeavour to provide a suitable proportion of programme of indigenous origin and ensure that no programme forming part of its services infringes any copy right. It further stipulates that every service provider holding a license for providing distribution of broadcasting services shall provide a specified number and type of broadcasting services including those of the public service broadcaster in such manner as may be prescribed.

Clause 29.- This clause provides that certain agreements entered into or made by any service provider or infrastructure facilities provider will be registered with the Commission.

Clause 30.- This clause provides for issue of license by the Commission for possession of wireless equipment.

Clause 31.- This clause provides that for the purpose of ensuring the widest availability of viewing in India of a national or international event of general public interest to be held in India, such event will have to be carried on the network of the public service broadcaster(s) as well.

Clause 32.- This clause provides for the powers of the Commission in case of breach of terms of the license or registration or failure to comply with its decisions or orders. Such powers include the power to revoke the license or registration and also in case of breach of terms and conditions of license or registration, for seizure of equipment being used for provision of services.

Clause 33.- This clause provides for civil liabilities which may be imposed on a license or grantee for breach of or failure to comply with any terms and conditions of a license or registration or for failure to comply with any rule, regulation or order made under the proposed legislation.

Clause 34.- This clause provides for the imposing of a civil liability on any person who delivers any content for transmission or accepts delivery of any content sent by the use of a network infrastructure facility, communication service or wireless equipment, which though required to be is not licensed or registered or which has been established or maintained or operated in contravention of the provision of the proposed legislation or any rule and regulations made thereunder.

Clause 35.- This clause provides for the imposing of a civil liability on any person who delivers any content for transmission or accepts delivery of any content sent by the use of network infrastructure facility, communication services or equipment has been established or maintained or operated in contravention of the proposed legislation or rules and regulations framed thereunder.

Clause 36.- This clause provide for the imposing of a civil liability on a services provider who fails to register, without a reasonable excuse, an agreement which is required to be register under Clause 29 of the proposed legislation.

Clause 37.- This clause provides for the imposing of a civil liability on any person who wilfully fails to comply with any decision, direction or order of the commission.

Clause 38.- This clause provide for the filing before the commission of complaints, limitation period, and reference thereon by the Commission to the Adjudicating Officer, including suo-motu reference by the Commission.

Clause 39.- This clause provide for the appointment by the Commission of Adjudicating Officers for the purposes of adjudging whether any person has contravened any of the
provision of the proposed legislation, any rule, regulation, direction or order made thereunder or whether he is liable to a civil liability, and for the powers of the Adjudicating Officers.

Clause 40.-This clause provides for the imposing of civil liability for willfully or otherwise damaging network infrastructure facility, and for causing interruption of a communication service.

Clause 41.-This clause provide for the imposing of a civil liability on any person who contravenes the provision of Sub-section (2) of Section 63 of the proposed legislation.

Clause 42.-This clause provide for the imposing of a civil liabilities shall not exceed fifty crore rupees, and also stipulates the factors to be taken into account by the Adjudications Officer in adjudging the quantum of civil liabilities.

Clause 43.-This clause provides that the establishment of the Communications Appellate Tribunal. It also lays down that appeals can be preferred to the Appellate Tribunal by any person aggrieved by any decision or order of the Commission, or by an order of civil liability imposed by the Adjudicating Officer. It also lays down that the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such order as it thinks fit, and also that the Appellate Tribunal may call for relevant records for examining the legality etc. of any order or decision of the commission or of the Adjudicating Officer, and pass such order as it thinks fit.

Clause 44.-This clause deals with the composition of the Appellate Tribunal which shall consist of a consist a chairperson and not more than six members to be appointed by the Central Government. The appointment of chairperson has to be made in consultation with the Chief Justice of India. The appointment of the Appellate Tribunal shall be from amongst persons recommended by search committee. This clause also provides for the constitution of benches by the chairperson, and that each bench shall be headed by a judicial member.

Clause 45.-This clause provide for the qualifications, tenure, salary and allowances etc. of the chairperson and members of the Appellate Tribunal and the manner of filling up of vacancies in the Tribunal.

Clause 46.-This clause provides for the procedure for resignation, and also the procedure for the removal of the chairperson or members of the Appellate Tribunal.

Clause 47.-This clause provides for the procedure for the distribution of business, and the procedure for the transfer of business, and the procedure for the transfer of cases, amongst benches of the Appellate Tribunal.

Clause 48.-This clause provides for the powers and procedures of the Appellate Tribunal, for the purpose of discharging its functions under the proposed legislation.

Clause 49.-This clause provides for the right of the applicant or appellant to take assistance of legal practitioners etc. before the Appellate Tribunal.

Clause 50.-This clause provides that an appeal against the order, not being an interlocutory order, of the Appellate Tribunal, shall lie to the Supreme Court.

Clause 51.-This clause provides that an order passed by the Appellate Tribunal under the proposed legislation shall be executable by the Appellate Tribunal as a decree of a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.
Clause 52.-This clause provides that if any person willfully fails to comply with any decision, direction or order of the Appellate Tribunal he shall be liable to a penalty which may extend to five crore rupees and no such penalty shall be imposed without giving an opportunity of being heard to the party concerned.

Clause 53.-This clause provides for appointment of the officers and other employees of the Commission and of the Appellate Tribunal, by the Commission or the Appellate Tribunal as the case may be, subject to such conditions as may be prescribed by the Central Government. This clause also provides that the salary and the allowances payable to and the terms and conditions of the service of the officers and the employees of the Commission and the Appellate Tribunal shall be prescribed by the central Government.

Clause 54.-This clause provides that the proceeds of the license and other fees, and the amounts received by the imposition of the civil liabilities and penalties shall be credited to the Consolidated Fund of the India. Its also lays down that such portion or percentage of the license fee as may be attributable to the Universal Service Obligation shall be credited to a separate fund to be as the Universal Service Obligation Fund in the public account of India.

Clause 55.-This clause deals with constitution of two separate funds to be called as the Communications Commission Fund and the Appellate Tribunal respectively. These shall be credited with money paid or grants made by the Central Government to be utilized for the purposes of the proposed legislation. These funds will also be credited with fees received by the Commission and the Appellate Tribunal.

Clause 56.-This clause provides for providing by way of grant to the two Funds by the Central Government adequate sums of money for being utilized for the purposes of the proposed legislation, and for meeting the salaries and allowances payable to the Chairperson and the Members of the Commission and of chairperson and members of the Appellate Tribunal and the administrative expenses including salaries and allowances payable to or in respect of officers and other employees of the Commission and of the Appellate Tribunal.

Clause 57.-This clause provides for maintenance of accounts and other relevant records by the Commission and the Appellate Tribunal and that these shall be audited by the Comptroller and Auditor General of India. It also provides that certified accounts of the Commission together with audit report thereon shall form part of the annual report of the Commission. It also lays down that the certified accounts of the Appellate Tribunal together with audit report thereon shall be forwarded to the Central Government and the Government shall lay the same before each House of the Parliament.

Clause 58.-This clause provides that the Commission shall after the end of each financial year submit an annual report containing prescribed information relating to the proceedings and policy and also the statement of annual accounts of the Commission. The report shall be furnished to Central Government which shall cause such report to be laid before each House of Parliament.

Clause 59.-This clause deals with the rights of persons entitled for providing services or facilities, referred to as facility provider, for laying and establishing of cables and erecting of posts under, over, along etc. any immovable property vested in or under the control or management of a public authority and issues relating to grant of permission by public authority, obligation for reinstatement or restoration of the property, shifting of cables or posts etc. It also provides for the setting up of high powered committees or other appropriate mechanisms for speedy clearance of such requests for laying cables or erecting posts in such property.

Clause 60.-This clause provides that a public authority while granting permission may impose reasonable conditions such as the time or mode of execution of any work.
Clause 61.- This clause makes provision for removal or alteration by the facility provider of cables or posts on public property which the public authority considers necessary and expedient to be removed or its position to be altered due to change in circumstances.

Clause 62.- This clause provides that disputes including refusal of permission by the public authority shall on application be determined by the District court within whose local limits of jurisdiction the property is located.

Clause 63.- This clause provides for use of private land by a facility provider for constructing or laying cables or erecting posts only with the written consent of the owner of the land or premises, and also the procedure to be followed when such consent is not available.

Clause 64.- This clause provides for powers of the Commission to issue orders for requiring any network infrastructure facility to be provided, constructed, installed, altered, moved etc. on private land or premises subject to such conditions as to compensation or otherwise, and the time and manner of doing so. It also provides that failure to comply with the order of the Commission will be liable to imposition of civil liability.

Clause 65.- This clause restricts the rights of facility providers only to that of a user for laying cables or erecting posts or maintaining them.

Clause 66.- This clause provides that, subject to the prescribed safeguards, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government, on the occurrence of any public emergency or in the interest of public safety, if satisfied that it is necessary or expedient so to do, in the interest of the security, sovereignty and integrity of the India, friendly relation with foreign state or public order or for preventing incitement to the commission of an offence, may direct any agency of the Government to intercept any communication on any network facilities or services or that any content brought for communication or communicated or received by any service provider shall not be communicated or shall be intercepted or detained or shall be disclosed to the Government or its agency authorized in this behalf. It also stipulates that the service provider shall extend all facilities and technical assistance for interception of the content of communication. It further provides that any service provider who fails to assist authorized agency shall be punished with imprisonment which may extend to seven years. This clause also lays down that any person, save as otherwise provided under this clause, who intercepts or discloses to any person any content shall be punishable with imprisonment which may extend to five years or with fine which may extend to ten lakh rupees and, for a second and subsequent offence with imprisonment which may extend to five years and with fine which may extend to fifty lakh rupees.

Clause 67.- This clause lays down that nothing in Chapter XV relating to interception of communication and punishment for unlawful interception, shall affect the provisions of Section 69 of the Information Technology Act, 2000.

Clause 68.- This clause provides for the punishments for unlicensed ownership or provision of any network infrastructure facility or communication service, for knowingly assisting in the transmission or distribution of such service, for diverting any signal without the permission of the service provider and with intent to defraud, for dealing in decoding equipment, for knowingly benefitting from any unauthorized diversion for tampering with any service or infrastructure facility, for abetting or inducing unauthorized diversion or tampering and for conviction of subsequent offences.

Clause 69.- This clause provides for punishment to any person who possesses any wireless equipment without a license or uses a radio frequency which he is not authorized to use under the provisions of the proposed legislation. The clause also provides for forfeiture of wireless equipment utilized for committing these offences and vesting of any unclaimed
wireless equipment in the Central Government. Further the clause also provides for power to any officer specially authorized by the Central Government or the Commission, to search any place in which he has reason to believe that any wireless equipment without a license has been kept or concealed, and take possession thereof.

Clause 70.- This clause provides for the punishments for any person for sending by means of a communication service or a network infrastructure facility any content that is grossly offensive or of an indecent, obscene or menacing character, or for the purpose of causing annoyance, inconvenience, obstructing, criminal intimidation, enmity etc. knowing that the content is false, and for persistently making use for this purpose a communication service or a network infrastructure facility.

Clause 71. - This clause provides that whoever attempts to commit or abets the Commission of any offence under sub-clause (3) or sub-clause (4) of Clause 66 or under Chapter XVI shall be punished with the punishment provided for that offence.

Clause 72. - This clause provides for offences committed by companies under the proposed legislation.

Clause 73. - This clause provides that no court inferior to that of a Court of Session shall try any offence under the proposed legislation.

Clause 74. - This clause provides that every offence punishable under the proposed legislation shall be cognizable.

Clause 75. - This clause provides for transfer of proceedings pending before the Telecom Regulatory Authority Of India to the Commission from the date of its establishment.

Clause 76. - This clause provides for transfer of proceedings pending before the Telecom Disputes Settlement and Appellate Tribunal to the Appellate Tribunal from the date of its establishment.

Clause 77. - This clause provides that the Central Government may by notification in the event of war or any casualty of national magnitude, for a limited period, in public interest, to take over control or management of any communication service or a network communication infrastructure facility or suspend its operation or entrust any agency of the government to manage it in the manner directed by the government for such period as provided for in the notification. The clause also provides that the Central Government, if it feels necessary or expedient to do so in the public interest, may at any time request the Commission to direct any licensee or grantee to broadcast specific announcements in a manner as may be considered necessary by the Government or to stop any broadcasting service, which is prejudicial to the security, sovereignty and integrity of India, friendly relations with foreign states, or to public order, decency or morality or communal harmony and on issue of such directions it shall be the duty of the licensee or grantee to ensure compliance of such directions.

Clause 78. - This clause provides for obligations of licensees and grantees which inter alia include commencement of operation of service within time specified by the Commission, maintenance of documentary and transmission schedule as specified by the Commission and allow inspection of such facilities and documentary record and schedules by any officer authorised by the Commission. The Commission may call for any information from a licensee or a grantee, and shall also have the power to inspect and obtain information from programme producers, distributors and advertising agents.

Clause 79. - This clause provides that no person shall operate any wireless equipment onboard any ship or aircraft registered in India without a license granted by an authority or
agency notified by the Central Government for the purpose. The Central Government can prescribe the qualification for such authority and the manner of granting the license to operate wireless equipment. This clause also provides for the prescription of qualifications of the licensee, for conduct of examinations, for conditions of license etc.

Clause 80. - This clause deals with recovery of any civil liability imposed under the proposed legislation, in case it is not paid, as arrears of land revenue and also empowers the Commission to suspend the license or registration of the person on whom the civil liability is imposed till it is paid.

Clause 81. - This clause provides that notwithstanding anything contained in any other law for the time being in force, where the Central or State Government is satisfied that any information or document etc. in possession of any service provider relating to any service availed of by any consumer or subscriber is necessary to be furnished in relation to any pending or apprehended civil or criminal proceeding, then the Government may authorise an officer in writing who shall direct such service provider to furnish such information.

Clause 82. - This clause provides that subject to provisions contained in Chapter V1 nothing contained in the proposed legislation shall apply to network infrastructure facilities or communication services owned and operated by the Central or any State Government for their own use.

Clause 83. - This clause provides that no civil court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which an Adjudicating Officer or the Commission or the Appellate Tribunal is empowered by or under the proposed legislation to determine and no injunction shall be granted by any court or any other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the proposed legislation.

Clause 84. - This clause provides that the Chairperson, Members, officers and other employees of the Commission and of the Appellate Tribunal shall be deemed to be public servants.

Clause 85. - This clause provides for protection against prosecution or legal proceeding, of action by the Commission or Appellate tribunal or any member or officer or other employees thereof which is done or intended to be done in good faith in pursuance of the proposed legislation or of any Rule, Regulation or order thereunder.

Clause 86. - This clause provides the Commission and the Appellate Tribunal with exemption from tax on wealth, income etc.

Clause 87. - This clause provides that the provisions of the proposed legislation shall have overriding effect over other laws.

Clause 88. - This clause confers powers upon the Central Government to make rules for carrying out the purposes of the proposed legislation.

Clause 89. - This clause confers power upon the commission to make regulations consistent with the proposed legislation and the rules made thereunder, for carrying out the purposes of the proposed legislation.

Clause 90.- This clause provides for procedure of laying of rules and regulations in each House of Parliament.

Clause 91.- This clause confers upon the Central Government to remove any difficulty arising out of implementation of the provisions of the proposed legislation. Every order of the
Central Government under this clause is to be laid before each House of parliament. This power is exercisable only for three years from the commencement of the proposed legislation.

Clause 92. - This clause provides for certain required amendments to the Code of Criminal Procedure, 1973.

Clause 93. - This clause deals with repeal of four enactments namely the Indian telegraph Act, 1885, the Indian Wireless Telegraphy Act 1933, the Indian Telegraph Wires (Unlawful possession) Act, 1950 and the Telecom Regulatory Authority of India Act 1997. It also provides that notwithstanding such repeal, any person, who has obtained a license or registration under the repealed acts or has obtained a registration under the policy of the Central Government in force may continue to provide his services if he has made an application to the Commission for the grant of a license or registration under the proposed legislation within a period of six months from the date of establishment of the Commission or till the time of disposal of his application whichever is later. It also envisages that while granting a license or registration the Commission will take into consideration the terms and conditions on which such services were licensed or registered and keeping in view the objectives of the proposed legislation. Furthermore during this period the applicant shall continue to be governed by the repealed Acts or the Policy, as the case may be. Further, with effect from the date of establishment of the Commission and of the Appellate Tribunal under the proposed legislation, the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal shall stand dissolved.

Clause 94 - This clause deals with repeal of the Cable Television Networks (Regulation) Act, 1995. It also provides that notwithstanding such repeal, any cable operator registered under the repealed Act may continue to provide his cable service if he has made an application to the Commission for the grant of a license under the proposed legislation within a period of six months from the date of establishment of the commission or till the time of disposal of his application whichever is later. It also envisages that while granting a license the commission will take into consideration the terms and conditions on which such cable operator was registered and keeping in view the objectives of the proposed legislation. Furthermore during this period the applicant shall continue to be governed by the repealed Act.

STATEMENT OF OBJECTS AND REASON

1. Convergence connoting the provision of different kinds of services over the existing infrastructure and the enhancement of existing technologies so as to provide a wide variety of services is a relatively new phenomena; in addition the rapid technological developments are leading to an inability to predict the emergence of new services. The existing legislations are proving inadequate in dealing with the emerging scenario of convergence. Furthermore, the existing licensing and registration powers and the regulatory mechanisms for the telecom, information technology and broadcasting sectors are currently spread over different authorities. Therefore a flexible type of legislation to accommodate and encourage permutation and combination of technologies and services is required. The Communication Convergence Bill proposes to establish a structured mechanism to promote, facilitate and develop in an orderly manner the carriage and content of communications (including broadcasting, telecommunications and multimedia) in the scenario of increasing convergence of technologies.

2. The Bill aims at facilitating development of national infrastructure for an information based society, and to enable access thereto; providing a choice of services to the people with a view to promoting plurality of news, views and information; establish a regulatory framework for carriage and content of communications in the scenario of convergence of
telecommunications, broadcasting, data-communication, multimedia and other related technologies and services; and establish the powers, procedures and functions of a single regulatory and licensing authority and of the Appellate Tribunal.

3. These objectives are proposed to be achieved by setting up an autonomous body to be known as Communications Commission of India with wide ranging powers, duties and functions. The head office of the proposed Commission shall be located at Delhi, and its regional offices shall be located at Kolkata, Chennai and Mumbai. The Commission shall consist of a chairperson, not more than ten Members and the Spectrum Manager as an ex-officio Member. The chairperson and Members, other than the ex-officio Member, shall be appointed by the Central government from amongst persons of eminence recommended by a Search Committee from fields such as literature, performing arts, media, culture, telecommunications, law, broadcasting technology, information technology, finance etc.

4. The Bill proposes to combine and bring under the purview of the Commission the licensing and registration powers and the regulatory mechanisms for the telecom, information technology and broadcasting sectors. It is also proposed to replace large number of categories of license with the following five broad categories to enable service providers to offer a range of services within each category, namely:

(a) to provide or own network infrastructure facilities;
(b) to provide networking services;
(c) to provide network application services;
(d) to provide content application services;
(e) to provide value added network application services

5. This flexible licensing regime is expected to optimize the use of resources and encourage the development of infrastructure. The information technology enabled services such as call centers, electronic-commerce, tele-banking, tele-education, tele-trading, tele-medicine, videotex, video conferencing shall not be licensed under this legislation and all the facilities and services exempted from licensing or registration immediately before the commencement of this legislation shall continue to be so exempt, until otherwise notified.

6. The Commission is envisaged to be involved in the assignment of the spectrum; it will carry out frequency management, planning and monitoring for non-strategic or commercial usage of spectrum; determine appropriate tariffs and rates for services; facilitate and regulate all matters relating to the carriage and content of communications; promote competition; take measures to protect consumer interest and promote and enforce universal service obligations; formulate and lay down codes and technical standards and norms to ensure in a technology neutral manner the quality and interoperability of services and network infrastructure facilities; report and make recommendations either suo motu or on such matters as may be referred to it by the Central Government etc.

7. The Commission is also proposed to be empowered with dispute resolution functions and will have the power to appoint Adjudicating Officers. It is also proposed to set up an Appellate Tribunal, to be known as the Communications Appellate Tribunal, to hear appeals against decisions or orders of the Commission, or against orders of Adjudicating officers imposing civil liabilities. The jurisdiction of the Appellate Tribunal may be exercised by its Benches, which shall ordinarily sit at Delhi and at such other places as may be notified. The Appellate Tribunal shall consist of a Chairperson and not more than six members. The Chairperson of the Appellate Tribunal shall be a person who is, or has been, a judge of the Supreme Court and shall be appointed in consultation with the Chief Justice of India. The members of the Appellate Tribunal shall be appointed from amongst persons recommended by the Search Committee and they should be, or should have been, Judges of High Court or should have held the post of secretary to the Government of India or any equivalent post in the Central Government or a State Government for a period of not less than two years, or should be persons who are proficient in any of the fields specified for appointment as Members of the Commission.
8. The Bill proposes to repeal the following legislations namely:
(a) The Indian Telegraph Act 1885.
(b) The Indian Wireless Telegraphy Act 1933.
(c) The Telegraph Wires (Unlawful possession) Act 1950.
(d) The Telecom Regulatory Authority of India Act 1997.
(e) The Cable Television Networks (Regulation) Act 1995.

9. The Bill also provides that with effect from the dates of establishment of the Commission and of the Appellate Tribunal, the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal respectively, established under the Telecom Regulatory Authority of India Act 1997, shall stand dissolved and proceedings pending before them shall stand transferred and deemed to be pending respectively before the Commission and the Appellate Tribunal.

10. The Bill seeks to achieve the above objectives.
New Delhi;

Ram Vilas Paswan

PRESIDENT’S RECOMMENDATION UNDER ARTICLE 117 OF THE CONSTITUTION OF INDIA

[Copy of letter No. 13-7/2001-Restg. Dated 29th August, 2001 from Shri Ram Vilas Paswan, Minister of Communications, to the Secretary-General Lok Sabha]

The President, having been informed of the subject matter of the Communications Convergence Bill, 2001 recommends the introduction and consideration of the Communications Convergence Bill, 2001 in the House under article 117(1) and (3) of the Constitution of India.

****

LOK SABHA

A

BILL

to promote, facilitate and develop in an orderly manner the carriage and content of communications (including broadcasting, telecommunication, and multimedia), for the establishment of an autonomous Commission to regulate all forms of communications, and for establishment of an Appellate Tribunal and to provide for matters connected therewith or incidental thereto.

(Shri Ram Vilas Paswan, Minister of Communications).