

**“COPYRIGHT: THE MORAL RIGHT
AND IT’S PERSPECTIVE”**

DISSERTATION

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This is certified that GARIMA TIWARI, Student of LL.M. II Semester ROLL NO 1200990041, **Babu Banaras Das University, Lucknow (Uttar Pradesh)** has written dissertation entitled “**COPYRIGHT: THE MORAL RIGHT AND IT’S PERSPECTIVE**” under my supervision. This dissertation embodies the authentic and genuine work done by her.

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LIST OF ABBRIVATION

AIR	All India Reporter
AI	Amnesty International
ADRD	American Declaration of the Rights and Duties of man
Art.	Article
ICC PR OP1	Option Protocol to the ICCPR (On Individual Complaints)
ICC PR OP2	Second Option Protocol to the ICCPR aiming at the abolition Of the
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

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CHAPTER-I

INTRODUCTION

Copyright constitutes an essential element in the development process of a country. The enrichment of the national cultural heritage depends directly on the level of protection afforded to literary, dramatic, musical and artistic works, cinematograph, films and sound recordings. Encouragement of intellectual creation is recognized as one of the basic pre requisites of all social, economic and cultural development¹.

The concept of copyright is a unique kind of intellectual property. Copyright is that right which someone obtains in a work which is the fruit of his/her brain labour. The primary function of a copyright law is to protect the fruits of a man's work, labour, skill or test from being taken away by other people.² The copyright and neighboring rights have assumed significance in the context of contemporary scientific, economic, social, political and legal environment not only in India, but also in the entire world. The scope of copyright which was restricted only to the protection of literary and artistic works in the earlier days, has now been broadened to include not only literary and artistic work but also dramatic and musical works, cinematograph, films, sound recordings and computer program. Besides this, right of performers, right of producers of phonograms and the right of broadcasting organization known as neighboring rights are also covered by copyright law.³ One of the main features of the present world is the unprecedented progress in science and technology stemming from the growth of productive and communicative forces.⁴ Information technology, which is the result of the computers, internet and cyber space has also posed new problems in jurisprudence. It has shown inadequacy of law while dealing with the-
i. Information technology itself, ii. Changes brought about by the information technology in the way we live, perceive and do business.

The word "copyright" is derived from the expression "copier of words" first used in the context, according to Oxford Dictionary, in 1586. The word "copy" is presumed to date back to circa

¹ Ahuja, V.K, (2007), Law of Copyright and Neighboring Rights: National and International Perspectives, Lexis Nexus, New Delhi, at P.1

² .Wader, B.L, (2007), Law Relating to Intellectual Property, Universal Law Publishing Co., Delhi, a t P.263.

³ .Supra note 1.

⁴ Dutta, NaliniKanta, (2009), the Law of Crime and Correction, Purbanchal Prakash, Guwahati, at P.260.

(Approximate date) 1485 AD and was used to connote a manuscript or other matter prepared for printing.

1.2. Concept

1.2.1. Meaning of Copyright

Protection granted under law to the creators of original works of authorship such as literary works, including computer programs, computer databases, tables and compendium that may be articulated in writing, codes, schemes or in any other variety, counting a machine readable medium; theatrical, musical and artistic works; motion picture photographic films and sound recordings is a form of intellectual property protection which is called copyright. Basically copyright protection is granted to the authors of original work of authorship. This includes published and unpublished works. It is an exclusive right to or authorizes to do the following activities or functions.

- a. Reproduce the work.
- b. Prepare the derivative work.
- c. Transfer of ownership by sale, license, lease, rental etc.

Authors of a joint work are co-owners and have the copyright in the work. Collective work is distinct from copyright in the collective work. Copyright protection is available on public works as well. The fair use doctrine in education is a legitimate right within the copyright system.⁵ only the outward appearance or expression of idea is protected by Copyright, not the underlying ideas themselves.⁶

Exclusive rights have been given to the creators of literary, theatrical, musical and artistic works and producers of motion picture photography films and sound recordings by modern copyright law. The purpose of copyright law is to support authors, composers, artists and

⁵ Mukharji, P.B., (2016), The New Jurisprudence, Eastern Law House, Delhi, at P.494

⁶.Ganguly, D.K., (2010), Law Relating To Protection of Human Rights And Violation of Human Rights Problems, Dwivedi Law Agency, Allahabad, at P.497

Designers to create unique works by giving them exclusive right for a limited period to reproduce the work for the profit of the society.⁷

Copying or distributing copyrighted music over the Internet without permission is stealing. Downloading illegal copies is no different than shoplifting CDs out of a record store, and uploading those recordings for others to illegally copy is no different than handing out stolen CDs on the street corner and the act of downloading or uploading music on peer-to-peer networks is not an unidentified one. An artistic, literary or musical work is the brainchild of the author which is considered to be his/her property that is highly placed by national and international conventions.

1.2.2. Historical Perspective of Copyright

Tracing back to the historical development of the copyright protection of the author's work the Idea of copyright protection only began to emerge with the invention of printing, which made it possible for the literary work to be duplicated by mechanical processes. Following Gutenberg's invention of the printing press in 1436 in Germany, the necessity of protecting printers and booksellers was recognized there. Consequently German principalities granted certain privileges to printers and publishers and also authors. The art of printing spread quickly in Europe. King Richard III, in 1483 allowed foreigners to import manuscripts and books into England and print them. The spread of this technological innovation led to creation of a class of intermediaries who made the initial investment in bringing out a book, i.e., printers who at the same time also functions as book sellers.⁸ In 1523 and 1528, restrictions were introduced by Henry VIII prohibiting the importation of books altogether in 1533 on the ground that there were enough printers and book binders in England. In 1529, a system of privileges was set up for printing books. In 1556, a Royal charter was granted to the Stationers' Company who is provided the right to administer a system of private registration of all public works.⁹

In 1662 the Licensing Act was passed in England which prohibited the printing of any book which was not licensed and registered with Stationers' Company. The Act was short lived

⁷ Narayanan,P, (2007)Law of Copyright and Industrial Design, Eastern Law House, Delhi, at P.3.

⁸ . M StewartStephen, (2006), International Copyright and Neighbouring Rights, Oxford University Press , New York, at P.20.

⁹ .Supra note 1, at P.2.

and was replaced in 1679. With the onward march of civilization copyright assumed more significance. As a result the Act of Queen Anne was passed in 1709 in the United Kingdom. This was the world's first copyright law which laid down their basic rules.¹⁰ the law of 1710 was restricted to the rights of authors of books only, and more specifically the claim to reprint. It did not include other creative works such as paintings, drawings etc. which also by that time became targets of piracy, in addition to other aspects relating to books e.g. translation, dramatization etc. Though, piracy was born by the end of the fifteenth century, it was only in 1710 the first law on copyright in the modern sense of the term came into existence in England. To overcome this problem a new enactment namely 'Engravers Act' came into existence in 1735.

Prior to 1709 the Copyright was recognized by the common law. After the enactment of the Statute of Anne also, the common law copyright continued to subsist in perpetuity but was lost on publication. A number of statutes were adopted to give effect to the copyright protection. In 1911 the Copyright Act was adopted in England which substantially codified law and common law copyright was abolished.

In the United States, the revolution of 1776 gave a strong nationalistic favor to the English concept of copyright and in 1790; the Copyright Act was passed.¹⁸ The Copyright Law 1790 provided protection to books, maps and charts.

In India, the earliest statutory law on copyright was Indian Copyright Act, 1847, which was enacted during the East India Company's regime. The Act passed by the Governor General of India affirmed the applicability of English Copyright law in India.¹¹ In 1914 the Indian Copyright Act was enacted which modified some of the provisions of the Copyright Act, 1911 of England and added some new provisions to it to make it applicable in India. The Indian Copyright Act, 1914 remained applicable in India until it was replaced by the Copyright Act, 1957.

¹⁰ . Id.

¹¹ .Thailand Kala, (1996), How Copyright Works in Practice : The Copyright Act 1957 and Judicial Interpretation : a Case Law Study in Perspective, Popular Prakashan, Mumbai, at P.2.

1.2.4. Importance of Copyright

Learning of Intellectual Property (IP) and its development has to consider the significantly important character of copyright and the copyright-based industries, including publishing; film; television; computer software; radio and music in the creation and distribution of knowledge and knowledge-based merchandise. These industries supply the intellectual “raw material” for science and innovation, as well as for education and instruction in general, and they have helped bring about dramatic increases in productivity through aiding the creation of information-based products like desk-top publishing software, electronic mail or sophisticated scientific computer databases.

Moreover, the copyright-based industries have developed into a huge source of wealth and employment creation in the knowledge-based global economy. In America, its overall total value has increased at such a rapid rate in the last twenty or thirty years, that together it currently give more than \$460 billion to America’s gross domestic product and sold almost \$80 billion in exports in 1999.¹²

For developing countries this provides both enormous opportunities and challenges. The creation and ownership of knowledge products are of increasing importance because of the centrality of information and knowledge to post-industrial economies. The notion of copyright, initially intended to guard authors and publishers of books. But gradually it has broadened to include other knowledge products such as computer programs and films etc. Intellectual Property rights opened new horizons in all field of human activity, helped inventions, promoted technology, multiplied production of goods, globalized markets and spread better living standard across the world.¹³

Considering its rich cultural heritage, India had always remained a powerful force in the field of copyright. The works that are related to copyright are largely common in India and they are mounting. India is considered among the top seven publishing countries of the world with a large part of its publications being in English. It constitutes the largest market for music and films. As many as 1600 films had been produced in various languages in India in the year 2012. India has

¹² O.Commission on Intellectual Property Rights, (2002), Copyright, Software and the Internet, London, at P.11.

¹³ Acharya,N.K., (2007), Text Book on Intellectual Property Rights, Asia Law House, Hyderabad, at P.2.

a huge potential in the field of computer software. The software industry has been mounting at an astonishing rate greater than 50% for consecutive years since the starting of the present decade.

The world today has entered into an era of instant communication. We can thank the electronic media because a person being in the remotest place in India is able to enjoy live show taking place in the faraway places like America or Africa. Telephone and fax have made it possible to communicate oral or written messages across the globe within seconds. The computer-assisted communication mechanisms such as E-Mail and Internet have provided a new height to today's communication technology by making it faster, informative and cheap. The ways through which different types of information can be communicated have also undergone a sea change. Now a day's film songs, films, videos, texts, electronic books etc. can easily be stored and shared all over the world by a single device like computer or mobile phone etc. While all these have made communication among people more effective and efficient both in terms of time and cost, they pose the greatest threat to the copyright world. Due to heavy reliance on variety of copyrighted products by the Contemporary communication channels makes it vulnerable to piracy in large scale, if adequate precautions are not exercised. Law gives the creators of literary, dramatic, musical and a variety of other works of brain the right of copyright. It normally suggests that the creator only has the right to create copies of his or her works and prevents everybody else from making such copies. The fundamental plan behind such defense is the principle that innovations require incentives. Copyright recognizes this need and gives it a legal sanction. Furthermore, mercantile use of copyright gives profits to the creators and thereby provides monetary rewards to individual's creativity.

1.2.4. Information Technology (IT)

Information technology is the use of computers to store up, recover, broadcast and man oeuvre data.²⁴Information technology is a blend of telecommunications and computing to get, process, save, spread and output information in the form of voice, pictures or text. This includes the following:

Software applications and operating systems.

- Web-based information and applications such as distance learning.

- Telephones and means of telecommunications.
- Video equipment and multimedia products.
- World Wide Web.
- Electronic devices such as photocopiers.

The Information Technology Act provides a very comprehensive and scalable definition of computer. It identifies the key „legal components“ of computers along with certain inclusions such as-

- (i) Any electronic, magnetic, optical or other high speed data processing, device or system,
- (ii) Performs logical, arithmetic and memory functions, and (iii) manipulates electronic, magnetic or optical impulses, and it incorporates all input, output, processing, storage devices, computer software or communication services which are linked or related to the computers in a computer system or computer network. This definition is in fact the corner stone of the Act, as almost all the important provisions talk about computer and its application in some form or the other.

According to the Information Technology Act, 2000 the term „Information“ includes data, text, images, sound, voice, codes, computer programmers, software databases, micro film.

1.2.5. Moral Rights and the Internet in the context of Copyright

Morals are for human being and it provides rules for shaping human character. Morals look to the intrinsic value of conduct, or in other words, they look into motive.²⁹ In UK, it is fair to say that copyright law is primarily concerned with protecting the rights of the owner. Moral rights recognize that the creator of a work also has a continuing interest ensuring that his work is treated with respect, even if, by transferring copyright to another, he may no

longer have an economic interest in it. Unlike copyright, moral rights are personal to the author of a work and may only transfer on death.¹⁴

The Copy right besides conferring economic benefit also confers moral right on the author. Such rights are not statutorily defined. The Berne Convention recognizes some of these rights and requires member States to provide the author with the right to claim authorship and to object to alternation. These moral rights are recognized as author's special rights under the provisions of the section 57 of the Copyright Act. It recognizes two rights- (a) to claim authorship of the work. (b) to restrain or claim damages.

The authors of computer programmers are treated differently. The author of computer program does not have the right to restrain or claim damages when the making of copies or adaptation is done.¹⁵

1.2.7. Copyright and National Economy

Copyright protects creative potential of the society and contributes towards a nation's exchequer. The copyright based industries together generate huge employment in the country of its origin. The national exchequer benefit from the contribution made by these industries in the form of excise duty, sales tax, income tax etc. from the production and sale of copyrighted products. Because of the natural demand for such products from across the national boundaries help consolidate country's foreign exchange reserves position.

Regarding the works which comes under the purview of copyright industry there is a general consensus. This incorporate within it production and sale of aural products such as Cassettes/CDs, printing and publishing of books, newspapers, journals etc., making of computer programs and databases and their allocation, creation and distribution of movies, videos and cables, radio and television broadcasting, advertising, photography, dramatic and musical performances etc.

The commercial importance of copyright had been widely explained by a number of studies undertaken in various parts of the world. Such studies were done in USA, Germany, Australia,

¹⁴ Gupta, Sarla & Agarwal, Beni Prasad (2008), Cyber Laws, Premier Publishing Company, Allahabad, at P. 194.

¹⁵ Wadehra, B.L., (2006), Law Relating to Patents Trade Marks Copyright Designs & Geographical Indications. Universal Law Publishing Co. Pvt. Ltd., Delhi, at PP.352- 353.

U.K., Sweden and some other developed countries. For example, a study conducted in 1993 for the U.S.A. showed that the core copyright industries comprising motion picture, computer software, music & recording and book publishing industries accounted for \$ 238.6 billion in value added to the US economy, which approximately accounted for 3.47 % of the country's Gross Domestic Product (GDP). These industries grew at more than twice the annual growth rate of US economy as a whole between 1991 and 1993 i.e. 5.6% as against 2.7% for the economy as a whole. The whole copyright industries i.e. basic copyright industries and those involved in dispensing copyrighted products and other merchandise those depend on copyrighted materials, engaged more than 5.7 million workers i.e. about 4.8% of total U.S. workforce and accounted for approximately 5.69% US GDP in 1993.

Considering the quantity of units sold India is the biggest audio cassette market in the globe. More than Three hundred fifty million audio cassettes and CDs were sold in India in the year 1996 and the industry's sales turnover was Rs.105,605 million. As per report The Indian Music Industry (IMI) is worth rupees five hundred seventy five cores in 2011 and it has increased to rupees six hundred cores, with physical sales amounting between rupees twenty five to three hundred cores and digital sales to rupees three hundred fifty to four hundred cores. The industry grew between seven to ten percent in the year 2013. But the industry is still suffering a loss of around rupees thousand to fifteen hundred cores in revenue due to piracy. According to projections from KPMG, a global network of professional services firms providing audit, tax and advisory services, in association with FICCI, India's recorded music business will be of 18.9 billion Indian Rupee (US\$ 300 million) in 2019.³⁶ India's software industry is showing a phenomenal growth. The IT industry in India is a key part of the country's economy. In the year 2013, information technology and its different components constituted eight percent of the India's total Gross Domestic Product and thereby, making it the fifth largest industry in India. In the 2014/15 financial year alone, The Information Technology Business created a yearly income of around hundred and twenty billion U.S. dollars in India. It is a noteworthy increase from around sixty billion U.S. dollars in 2008/09. Of this revenue in 2015, the majority, ninety eight billion U.S. dollars, was generated in exports while domestic revenue amounted more than twenty billion U.S. dollars.

The publishing industry is also quite large in the country. Approximately eleven thousand publishers are involved in producing more than fifty seven thousand new books every year. 22% of it is published in English language. According to a survey, the present value of the book Industry of India is of rupees two hundred sixty one billion and it is the sixth largest in the world. It is expected to become rupees seven hundred thirty nine billion by 2020.

The other core copyright industry namely film and video, also occupies an important place in the country. Film is considered as one of the best means of entertainment for the common people. India annually produces more than 1600 films in major languages such as Hindi, Telugu, Tamil, and Malayalam & Kannada. In 2013, the Indian motion picture and television industry contributed USD\$8.1 billion (Rs. 50,000 cores) to the country's economy, equating to 0.5% of GDP. The sector also supports a significant 1.8 million (18.8 lakh) jobs.

1.2.9. Copyright and International Relations

At international level, there has been continuous surge to develop international uniform rule for safeguarding the right of owners of intellectual property including copyright. The continual search for better means of exploiting copyright works and the development of cultural exchanges between countries made it vitally necessary to protect copyright not only nationally but also internationally.

Berne Convention is the foremost many-sided agreement on copyright signed in 1886 and was for the protection of literary and artistic works. A country joining the Convention has to provide copyright protection to literary and artistic works of member countries in its own territory and also entitled for enjoying reciprocal protection from others. The Berne Convention was revised seven times in 1896 (at Paris), 1908 (at Berlin), 1928 (at Rome), 1948 (at Brussels), 1967 (at Stockholm) and 1971 (at Paris) and finally in 1978. Among these, the 1971 revision (the Paris Act) is of particular importance to the developing countries as it provided special concessions to these countries in making translations and reproduction of foreign literary works for educational purposes and the various challenges posed by the technological development.¹⁶ Ninety countries are at present member of the Berne Convention.

¹⁶ 2Supra note 1, at 309

The post Second World War era saw the emergence of the need for protecting copyright on a universal basis. The countries in the North America were not signatories to the Berne Convention until then and for protection of copyright these nations were depended on various national and regional agreements. In August, 1952 the Intergovernmental Copyright Conference was convened in Geneva which led to the adoption of another historical copyright convention, namely the Universal Copyright Convention (UCC). The UCC is not an alternative for the Berne Convention. On the other hand it tried to establish the link between the countries on the Berne Union and those in North America. India is a member of both the Berne Convention and the UCC. UCC protect „literary, scientific and artistic work including writings, musical, dramatic and cinematographic works and paintings, engravings and sculptors“. The major difference of Berne convention and of UCC that Berne Convention was automatic in the sense that the author by the creation itself enjoys the protection while UCC requires some kind of formalities.¹⁷

In recent years, the issue of Intellectual Property Rights (IPRs) figured prominently in the Uruguay Round of General Agreement on Tariffs and Trade (GATT). For the first time GATT crossed its boundary to include the Intellectual Property Rights. The Trade Related Aspects of Intellectual Property Rights, 1994 (TRIPS) is set out in Annex 1C of the Final Uruguay Round Text.¹⁸

1.2.9. Copyright and Piracy

The incidence of piracy of copyrighted work is common worldwide. It means illegal copying of copyrighted material and selling of it at very low prices in the 'grey' market. The ease of access to technology has made over the years, piracy more rampant. For instance, CD writers are available at the market at very low prices, making music piracy an easy task. The creator, of a work which is copyrighted, relishes some exclusive rights regarding his/her work. Right to reproduce, to publish, to adapt, to translate and to perform before audience is some of these rights. If the owner of the copyright intends to assign, sell, bequeath or license the copyright to another he can do so. A person who is not the copyright owner or not authorized by the copyright owner, if he does any of the above referred tasks with regard to a copyrighted work is said to infringe copyright. Therefore, piracy of copyrighted work is like any other theft which results in

¹⁷ . Gogia, Deepak, (2010), Intellectual Property Law, Ashoka Law House, New Delhi, at P.180.

¹⁸ Supra note 13, at 16.

the loss to the owners of the property. In addition to monetary loss, copyright infringement also negatively affects the innovative potential of a society as it bars creative people such as authors and artists from getting their legitimate dues. Piracy of copyrighted material is done by various ways. By installing a computer program in a machine in excess to the legitimate use the breach of copyright in Computer software is done. Similarly, piracy of book is done when it is published and sold in the market by someone other than the genuine publisher. When a live performance of a performer is recorded or telecasted live without his or her permission in that case performer's right is infringed. By Unauthorized reproduction of a film in video form or displaying the video through cable networks piracy in a cinematographic work of a film producer takes place.

Actually, there are number of ways through which piracy of copyrighted works take place. The nature and extent of piracy also vary across the segments of the copyright industry. It is, therefore, necessary to discuss the nature and extent of piracy problems segment wise. Such an attempt is made in the following paragraphs.

1. Literary Works

Through unauthorized reproduction and then distribution/selling of books and other printed materials for profit the piracy of literary works takes place. In India, the journals/magazines and other periodicals are not pirated much. Here piracy of literary works generally takes place in three principal ways. : a) extensive reprinting of text and trade books b) illegal translations and c) for profit photocopying of books/ journals. The piracy in the form of mass photocopying of books is largely prevalent in India, especially in and around educational institutions. Students bring books from libraries and then get those photocopied by the Xerox machine which is at the institution. While copyright law permits photocopying of literary works for limited private uses such as research, review or criticism what happens, many a time is that the entire book is photocopied including the cover pages. In the process student community and the photocopy operators gain, but the publishers lose huge revenue. Piracy of literary works leads to loss of revenue to publishers (in terms of less sales), authors (non-payment of royalty) and the national exchequer (non-payment of income tax and other levies payable by publishers/authors).¹⁹

¹⁹ Supra note 47.

2. Sound Recordings

The sound recording industry faces four 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 unauthorized recordings of performance by artists are made and subsequently reproduced and sold in the market.

The fourth and the latest kind of piracy are done through mobile, computer and internet. Now days, a song or video, which is available at internet can easily be downloaded and distributed through mobile, computer/laptop to numerous people instantly violating copyright.

All these happen without the knowledge of the performers, composer or the recording company.

In the Assamese music industry one of the famous young singers is Dikshu. He along with his co-artists produced an album of Assamese Bihu-Nam "CHENGKALI" under the production of Diwasam by their own investment as the Assamese CD production houses are reluctant to invest in music CD production because they are facing huge loss due to rampant piracy of Assamese music CD cassettes. The artists were very optimistic for the success of the music CD. But a college going youngster of Nagaon district very tactfully copied all the 10 (ten) Bihunams of the music CD "CHENGKALI" and uploaded all the songs in his website from where anybody can download these songs freely and enjoy those songs. The boy who has done this has also dared to give the link of his website in the face book account of Dikshu. After this incident selling of the CD has come down drastically. This has made the moral down of the artists and they regret that if such incidents take place they will neither be able to perform nor produce such music CD in

future.²⁰ This is one of the examples of copyright violation through the use of Information technology which is so rampant now a day.

3. Cinematographic Works

The character of Copyright in cinematographic works is more multifaceted as there is diversity of copyrights in a particular work and often these rights overlap. The first right in a film is the 'theatrical right' i.e. the right to exhibit films in theatres. The producer is the copyright holder. The distributors pay for the theatrical rights to producers and then come in contract with the theatre owners for showing it to the public. The theatrical rights are limited by territory and time.²¹ Though the producer of the film has the copyright in the film, the music incorporated in the film is due to efforts done by a particular group of innovative people such as the composer, lyricists etc. each of which is a right holder of its own right. In common parlance the producer sells this right to a music company who makes cassettes/CDs of such songs for sale in the market. The incidence of a large number of rights in a single work and the involvement of a variety of right holders make the copyright issue very complicated in cinematographic works.²²

The illegal recording of movies in cinemas, a practice known as "cam cording," is a significant problem for film industries both in the United States and abroad. Cam corded movies are often made available for download over the internet or in the form of a physical disc, such as a DVD, within days of a movie's cinematic release. Over 90% of pirated copies of new release movies now originate from cam cording. Cam corded movies are easy to reproduce and share, which provides an advantage in markets where consumers often value immediacy and convenience over quality.

Stemming the tide of cam corded movies on the internet and in shops and stalls around the world is difficult due in large part to the lack of effective intellectual property rights legislation and enforcement. As a result, local movie industries fail to see adequate returns on their investments and fail to grow. Losses are not confined to the industry either. Pirated movies harm the creators of the works, theatre owners and video retailers.

²⁰ The Assamese daily „Asomia Protidin” , 11.12.2013

²¹ .Guerrieri, P. LelioLapadre Paolo& Georg, Koopman etc., (2005), Cultural Diversity and International Economic Integration: The Global Governance of the Audio- Visual Sector, Edward Elgar, UK, at P. 256.

²² Sundara Rajan, Mira T.,(2011), Moral Rights: Principles, Practice & New Technology, Oxford University Press, New York, at P.393.

Even consumers are ultimately left with fewer choices as writers and directors are unable to fund their art.

4. Computer Software

Computer software comprises of the programmers of the computer which are set of instructions given to the computer using different languages understood by the computer to carry out various tasks given to it. Software has many functions on the computer system. Software used on computers may be of different types. Some important classes of software are application software, system software and service system.

The piracy in computer software plainly express, making copies of the original software and distributing it without the copyright holder's authorization. The software industry, generally, consists of creation and distribution of computer programmers. Creation of computer programmer is similar to writing a novel or other literary works and it requires intellectual skill and training in software programming. Despite the fact that a software can be created by a single programmer, most of the significant computer softwares are created by group attempt. Here medium to large group of experts spend months or even years to create a software. Distribution of computer programmers in most of the developed countries occurs through a two-tiered system of wholesalers and dealers, similar to that of many other industries. The software publishers make a significant amount of their supply of products to a small number of distributors in a country, who has well-stocked warehouses and can give these immediately to hundreds of retail dealers as and when order is placed. The dealers provide the software products directly to end-users of computers. The end users can be individuals, commercial enterprises, educational institutions and government establishments. Sometimes, software publishers also deal directly with a small number of the larger dealers or resellers in an individual country. Licensing is a common practice in software industries. The publisher of a software usually gives permission to its end users through the means of the shrink-wrap license placing it in the package. Like other copyright based industries, the software industry also faces several forms of piracy. Actually, piracy in computer program is more than in other copyrighted work because it is comparatively simple to copy a software in computers. Again the pirated edition looks and works in the same manner as the original. There are

five major types of software piracy. These are (a) counterfeiters (b) resellers (c) mail order houses (d) bulletin boards and (e) end-user piracy. Counterfeiters are relatively new occurrence in the software industry and most unashamed software counterfeiters makes disks, documentation and packaging that look identical to those of the software publisher. During software distribution, when distributors/dealers build copies of software onto CD, or the "hard disk" of computers that they are selling, without permission from the software publisher then Reseller piracy occur. The illegal copying of software onto diskettes, CDs, or other media and distribution of such software by post constitutes Mail-order piracy. Bulletin board pirates engage in unauthorized reproduction and distribution of software via telecommunication. Typically, this involves an individual computer user who has installed a number of software programs on his computer, and who allows other users to connect to his computer through the telephone line via modem and copy the programs onto discs. The pirate in most cases copies the program onto his own computer without authorization of the copyright holder's consent and thus commits copyright violation. End-user piracy takes place when a user copies software onto hard disks of more computers than the number authorized by the publisher. This kind of piracy takes place on a wider scale than other kind because end-users often make ample copies of the programs possessed by them and then distribute or share the same. Though this harms the interests of right holders, end users definitely gain out of it because this leads to obvious economic advantages for them. Identifying a pirated software is not an easy task. This is primarily for two reasons. First, there is scarcely any difference between original program and a pirated program, once it is copied onto a hardware. Second, detection of piracy requires access to software or hardware or both, which may not be feasible in many cases. However, there are some ways through which an unauthorized copy of a software can be identified. Many a times publishers supply softwares in packaged form which contain software on diskettes with printed labels giving manufacturer's name, full product name, version number, trade mark and copyright notices. Moreover, the packages usually, have professionally printed documentation, a keyboard pattern, end-user license and registration cards and other printed materials in accordance with a model bill of materials that would affect to all packages of that particular product. In those instances, the unfussy illegal copies may be identified easily on "black disks", which do not have

producer's label but somewhat type written, handwritten or bluntly printed labels representing the software contained on the diskettes. In case of installed software it is more difficult to identify a pirated copy. Once a computer is searched, the programs copied onto it can be found and identified. After that users can be urged to show the proof of original ownership i.e. original packages, documents, bills, license cards etc. of such software. If users fail to do so, there is a prima facie case of infringement. In some cases even test purchases can be made to secure evidence of piracy. The amount of computer program piracy and losses due to such breach of copyright cannot be calculated in exact quantity though it is obvious that piracy in this sector is extensive. In Europe alone the software industries lose an estimated \$ 6 billion a year. The country-specific data show that in 1996 Vietnam and Indonesia had the highest piracy rate of 99 per cent and 97 percent respectively, followed by China (96%), Russia (91%), Thailand (80%) etc.⁵⁴ According to BSA Global Software Survey made in 2013 global rate of use of unlicensed software is 43%. In India software piracy is costing the IT industry quite dear. According to a survey conducted jointly by Business Software Alliance (BSA) and National Association of Software and Service Companies (NASSCOM) in May 2006, total losses due to software piracy in India stood at a staggering figure of about Rs. 500 cores (US \$ 151.3 million) showing about 60 per cent piracy rate in India.

5. Copyright Law and Activities by Information Technology

It is useful to see how the copyright law applies to the Internet. The copyright statute is triggered by the unauthorized act of copying, publishing, performing by digital means or otherwise, displaying in public, make derivatives of any copyright protected materials. Automatically copies are produced when one access the Internet through a personal computer (PC), mobile or laptop in various ways. At least in four different ways these copies are produced. One way copies are made is by simply viewing a page on the Internet. This causes a copy of that page to be made and stored in the Random Access Memory (RAM) of the PC. Browsers also make copies so that surfer can return to a site faster. This is technically sufficient to trigger the copyright statute. But this does not mean that everyone who merely surfs the Internet is liable for copyright infringement and have the risk of being sued. Here Implied Consent is the safe guard for the surfer. Legal

scholars argue that that anyone who posts content on the Internet expects people to visit their site. Up loaders are aware that internet users' PCs will make copies in the process of accessing their website or material, and the website host grants users an implied license to make those copies.⁵⁶ Various activities on the internet which may cause copyright violation are.

6. Downloading from the net

Downloading any work or material from any website is like making a copy of the content. This can be compared to making copies of a book in the library. It makes sense to presume that by doing so one will infringe the copyright of the author of that content. Before downloading any work from internet without the infringement of copyright law he/she must receive permission from the copyright holder. The exception to this is Fair Use. As in copying printed material such as books in the library, one will not need permission if he/she qualifies for Fair Use. Some websites expressly give permission to download content. That is, if they hold the copyright to the content one want to use.

7. File Sharing

Now-a-days, the most obvious copyright-breaching activity on the Internet is the dispensing of music, movies, or software. The music and movie industries are aggressively pursuing those who are downloading music or movies in file sharing forums such as peer-to-peer (P2P) networks. Thousands of lawsuits have been filed in the United States and many other countries in the world. Students who use the University's Internet service to download or upload music, movies, or other unauthorized materials face consequences including being sued by the Recording Industry Association of America (RIAA) or the Motion Picture Association of America (MPAA) and losing a lawsuit that costs thousands of dollars, being charged with criminal violations, or serving prison time. When copyright infringement, through file sharing or otherwise, occurs on the University Internet service, the university is also vicariously liable for copyright infringement.

1.3. Significance of the present Study

Copyright Law has become more important in the recent past due to an unprecedented development in the field of science and technology particularly in the field of information technology. According to a survey namely- “Internet in India 2017” conducted by Internet and Mobile Association of India the number of internet users in India will be fifty crore in 5th June, 2018.⁶² In the age of satellites and internet, any development that takes place in one corner of the world gets communicated to the other corner in no time. This gives rise to enormous possibility of piracy of literary, artistic, musical, and cinematographic and computer programmers etc. In such situation rights of person with respect to his intellectual property requires more protection by stringent Copyright law. Because of unauthorized working of copyrighted materials affects adversely not only the individual commercial interest of the owner of the intellectual property, but also affects the economy of a nation to which the owner of intellectual property belongs. If ones intellectual property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without his or her knowledge, without its even leaving their possession, question arises how it can be protected. In that case creators are not going to get paid for the work they do in their minds. And if creators can't get paid, the continued creation and distribution of such work is hampered.

“Intellectual property” is an intellectual work, produced by the intellect of human brain. According to the definition given by WIPO (World Intellectual Property Organization) intellectual property means – Literary, artistic and scientific works, performances of performing artists, phonograms and broadcasts, inventions in all fields of human Endeavour, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations; protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary and artistic fields(Convention establishing World Intellectual Property Organization signed at Stockholm on July 14,1967). Intellectual property refers to creation of the mind; inventions, literary and artistic work and symbols, names and images used in commerce. Literary work produced by the authors, musical work produced by the musicians, inventions invented by the inventors, etc. are intellectual properties as they are created by the human intellect. Computer programming is also an intellectual property as it is also the creation of human intellect. The person who creates an intellectual piece of work owns it

like any other tangible property like land or movable goods. “Intellectual Property” like tangible property is owned by its owner to the exclusion of all others. The owner of intellectual property has exclusive right over his intellectual property. No one can make use of intellectual property without the consent of the owner of the intellectual property. For example, no one can copy literary, musical piece of work, a computer programmer without the consent of the author, musician, or the inventor, as the case may be who has created this piece of creative work.

But in this age of information technology when the creators or owners of intellectual property upload their inventions, ideas , creation , literary works, scientific works, artistic works in the internet for publicity they become easily accessible to all internet users and their creation become vulnerable to piracy, misuse etc. These types of activities results in great loss to the owners of copyright. As the laws available to protect intellectual property rights are not up to date to deal with such types of crimes the wrongdoers escape unpunished and such types of crimes are increasing by manifold.

1.4. Objective of the Study

The objectives of the study are as follows. To know the various types of violations of copyrights using information technology and its implications.

- b. To study the impact of such violation.
- c. To understand the loopholes of the present copyright laws to cope with the violation of such laws with the help of information technology.
- d. To find ways to prevent such violation of copyright laws using information technology.
- e. To know whether layman; students are aware of such crimes and what is their opinion to such crimes.
- f. To know the awareness of the law enforcing agencies such as police and others about the violation of copyrights using information technology and the response of police to such complaints.

g. To offer suggestion and recommendation on the basis of the above findings, for solving the problem of copyright violation through information technology.

1.5. Research Methodology

Methodology is a pre-requisite in any scientific inquiry. Different methods are applied in any research work. Research methodology is a systematic investigation to gain new knowledge about the phenomenon or problem in question. In its wider sense, methodology includes the philosophy and practice of the whole research process. It provides the standards which the researcher uses for integrating data and research conclusion.⁶⁸ The methodology of legal studies involves their own rules, interpretations and the criterion for admissible explanation as well as research design, data collecting techniques and data process routine. The research work is a mixture of Doctrinal as well as Empirical research.

In the present work, the research methodology consists of doctrinal as well as non-doctrinal method. Doctrinal study requires in-depth study of various text books, and reported cases to find out various fact situations of the subject and judicious analysis of the available data by studying the related literature. Again the empirical research is carried out by collecting and gathering data or information relating to Universe by first hand study. Hence field work is usually required for this type of research.²³

While following Doctrinal Research I have gone through the various enactments on copyright protection as well as their implementation by Judiciary usually published in various law reporters. For collection of secondary data, the researcher visited K.K. Handique Library, Gauhati University; Library of Administrative Staff College, Guwahati; Library of P.G. Department of Law, Gauhati University; District Library, Guwahati; Library of Assam Police Head Quarters, Guwahati; Library of NERIM, Guwahati. The Researcher has collected secondary data from various books, journals, newspapers, magazines, reports and internet sources etc.

Again while following the non-doctrinal research, the researcher has given one type of questionnaire containing 21 questions to 400 people of 7 categories in different part of the

²³ Supra note 68 at P35.

Guwahati City, like Students, Service Holders, Businessman, Housewife and Skilled/waged labour, Self-employed and others. For this purpose Guwahati city has been divided into 5 (five) zones i.e. east, north, west, south and central. In this segment my sample size is total 400. This questionnaire is for collecting data regarding pattern of use of internet and resulting copyright violation by common people. Sample was collected of people of the age group above 17 years and above i.e. the adult group. Reason for this is that only adult is held responsible and punished for crime committed.

1.6. Hypothesis

- i. Rampant copyright violation through information technology is going on unabated.
- ii. Present law and law enforcement mechanism has failed to address the problem of copyright violation through information technology.
- iii. Commercial interest of the copyright owners is affected due to large scale copyright infringement through information technology.

1.7. Review of Literature

The present study deals with the crimes committed through Information Technology in the field of copyright in India with special reference to Guwahati city. The subject has been taken for the study to resolve the problems relating to copyright violation using Information Technology. It is very difficult to identify the culprit who infringes the copyright works as it can be easily done with mobile phone or computer/laptop. Due to this rampant piracy in the field of cinema, book, music, these industries have to face huge amount of loss. This demoralizes people involved in this industries and negatively affects them. There is no stringent law for violation of copyrights in India. The Copyright Act, 1957 deals with copyright violation but it is seen that in practical field it has completely failed to protect the interest of copyright owners in this age of Information Technology. Technology has left behind the present law. The present law has failed to reach the huge numbers of violators through internet. Therefore, it is very important to seek the solution to this problem for the protection of copyright owner.

Hence on the basis of the study and from the analysis of collected data some findings are reached and accordingly it gives some suggestion to solve these problems in the field of copyright through Statute.

During the course of study many literatures has been studied. Mainly copyright laws of various countries have been studied to find out the law relating to copyright. The following four literature reviews attempt to describe the law relating to copyright and neighboring rights and violation of these right through Information Technology.

In a work prepared by Panko Jain and Pandey Sangeet Rai,⁶³ the authors have done extensive study about the copyright relating to computers. This work also studied the meaning of copyright, computer software and copyright, copyright and internet, linking, framing, met tagging etc.

The author worked about the copyright protection of computer software and programmers. In reference to the history of copyright law suggests that it has undergone various changes with technological developments. Initially copyright protection was given only to literary works. The scope and extent of traditional copyright law was very narrow and did not include photographs, sound recordings etc. However, with the growth of technology, changing circumstances required existing copyright law to include photographs, sound recordings etc. in the definition of artistic and dramatic works. ⁶⁴ The author has worked in various acts of internet like linking, framing, met tagging etc. and its effects on copyright violation.

The other work reviewed by the researcher is the book written by Dr. V K Ahuja⁶⁵ in which extensive study was done on the copyright laws and neighboring rights .This work also studied the meaning of copyright, historical development of the law of copyright, ownership of copyright, various rights of the copyright owner and infringement of copyright. The chapter -17 worked about copyright and internet and the defense of fair use, available to the user while making use of the copyright material available in the traditional form. In this literature, author has discussed about infringement of copyright on internet. Infringement of copyright on the internet has become a common phenomenon and takes place either by ignorance or willfully.

However, regarding the technology, the author has provided the copyright owners new tools such as conditional access system and encryption by which they can limit access to and use of works to those users who are willing to accept certain obligations and make payments for such use.

Another literature reviewed by the researcher is the book of Dr.B.L.Wadehra⁶⁶ . The author has discussed various issues relating to intellectual property rights in this work. The author has discussed various provisions of Copyright Law in India like meaning of copyright, various rights conferred by the copyright, ownership of copyright and its implications, infringement and remedies of copyright violation in this work. The author discusses case law on copyright and international copyright.

Another literature reviewed by the researcher is the book of Deepak Gogia⁶⁷.In this work the author studied the intellectual property rights, historical evolution of intellectual property rights, introduction to law of copyright, various aspects of copyright law in India. The author has also discussed about international protection of copyright and copyright protection under TRIPs and limitations and exceptions. The author worked on different copyright case laws of different countries like Australia, Canada, France, United Kingdom and United States. These case laws will help the researcher to review how copyright law in different countries has been applied by the judiciary and what types of offences are committed in different countries relating to copyright.

These four literatures are related to the present study as the present study is concerned with the analytical study of the crimes committed through information technology in the field of copyright in India. However, the literatures mentioned above and its findings have some limitations and the researcher has tried to remove those limitations through the present study.

These four literatures are silent about what type of people are committing crimes of copyright violation through information technology and in which field it is done mostly. There is no mention of any technological measures to detect and identify copyright violators through internet in these literatures. These literature reviews are also silent about what remedies can be followed to combat this type of crimes. These literatures are also silent about what immediate amendments are required in the existing law to combat such crimes.

Further researcher found no specific guidelines from these literatures in the present study and no one has conducted research regarding crimes committed through information technology in the field of copyright in the Lucknow city. Hence the study has been undertaken to find solutions to such problems of the present literature regarding crimes committed through information technology in the field of copyright in India especially in Lucknow city.

CHAPTER-II

VULNERABILITY OF COPYRIGHT IN THIS MODERN AGE OF INFORMATION TECHNOLOGY AND ITS IMPLICATIONS IN INDIA

In comparison to earlier times, when Information Technology was not so developed, as in today's world it has become very difficult to protect the interest of the copyright owners. Technology has left behind the law. Today's age is digital age. Earlier information, data, records, literature etc. were recorded only in physical form such as books, slats etc. These were available only to a smaller section of people of the society. As at early times copying of such records was very difficult and time consuming so rights of the copyright owners was easy to protect. If any incident of copyright violation takes place it can be easily detected and wrongdoer could be punished easily as per law. But in this age of digitalization every bit of information can be digitized i.e. can be coded in a combination of „0“ and „1“. If a book, a video, a song, a record, a film etc. is digitized it can be easily stored in CD, DVD, Pen Drive, hard drive, computer etc. and numerous perfect copies of the same can be made which is same in quality with the original. Moreover, if these copies are uploaded in the internet then anybody in any part of the world having internet access can easily download the same easily and use and enjoy it without being caught for any copyright infringement.

Copyright is a form of intellectual property protection granted under Indian law to the creators of original works of authorship such as literary works (including computer programs, tables and compilations, computer databases which may be expressed in words, codes, schemes or in any other form, a machine readable medium), dramatic, musical and artistic works, cinematographic films and sound recordings.²⁴ Copyright Law has become more important in the recent past due to an unprecedented development in the field of Information Technology. About a century ago, Paterson J said, 'what is worth copying is prima facie worth protecting'. This is the genesis of all intellectual property rights.²⁵ In this age of satellite, internet and telecommunication, any development that takes place in one corner of the world gets communicated to the other corner in no time. This gives rise to enormous possibility of piracy of literary, artistic, musical, and cinematographic and computer programmers etc. In such situation

²⁴ .<http://www.legalserviceindia.com/article/l195-Copyright-Law-in-India.html>, retrieved on 04.12.2017 at 7 A.M.

²⁵ University of London Press Ltd v. University Tutorial Press [1916] 2 Ch 601.

rights of person with respect to his intellectual property require more protection by stringent Copyright Law. Because unauthorized working of copyrighted work affects adversely not only the individual commercial interest of the copyright owner but also affects the economy of a nation to which the owner of intellectual property belongs. If one's copyrighted property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without his/her knowledge, without even leaving one's possession it becomes very difficult to protect it. In that case copyright owners are not going to get paid for the work they do in their minds which is detrimental to the continued creation and distribution of such work.

2.1. Infringement of Copyright on Internet

Infringement of copyright on the Internet has become a common phenomenon. Infringement of copyright on the Internet takes place either by ignorance or willfully. In a tangible medium, it is easy to determine whether a 'copy' of a protected work has been made, or whether infringement of any of the exclusive rights of the copyright owner has occurred. However, in the digital environment, it is a debatable issue whether data transmitted through the various nodes of the networks comprising the World Wide Web (www) is 'copied' for the purposes of copyright law. Even if one assumes that a 'copy' has been made, determining where that copy actually exists in the network may prove extremely difficult. Thus, determining that whether the 'copy' has been distributed or displayed publicly becomes difficult. Once it is proved that a copy has been made and exists in digital form somewhere on the computer network, it may be considered that the digital copy is an infringing copy of the original copy and the exclusive rights of the copyright owner have been violated.²⁶

Copyright infringement in cyberspace may be categorized as follows:

- (i) Posting or uploading of materials on the website;²⁷
- (ii) Linking;
- (iii) Framing;

²⁶ Abuja, V.K., (2007), Law of Copyright and Neighbouring Rights: National and International Perspectives, Lexis Nexis, New Delhi, at P. 246.

²⁷ Koul, A.K. & Ahuja, V.K. (eds.), (2001), Law of Copyright: From Gutenberg's Invention to Internet, Delhi University Publication, Delhi, at P. 289

(iv) Caching; and

(v) Archiving.

2.1.1. Posting or Uploading of Materials on the Website

Copyright in a work is infringed where the copyright material is uploaded on one's website without the prior permission of the copyright owner. There is a mixed response of the judiciary on the issue of uploading or posting copyright material on the website without the permission of copyright owner. Courts have arrived at different conclusions on the basis of the facts and circumstances of the individual cases. For example, in **Playboy Enterprises Inc. v. Frena**,²⁸ the US District Court has found liability where a person merely created and managed a Bulletin Board Service (BBS) on to which infringing materials were posted by others without the knowledge of the BBS operator. Through Bulletin Board Service (BBS), the users may post not only the messages, but also images, software and other material on the bulletin board which is in fact an electronic, bulletin board. Once the aforesaid materials are posted, the same can be downloaded. The court observed that there was irrefutable evidence of direct copyright infringement. It did not matter that defendant was unaware of the copyright infringement. Intent to infringe was not needed to find copyright infringement.

In **Sega Enterprises Ltd v. MAPHIA**,²⁹ the court granted permanent injunction against the defendant, which was a BBS operator and had solicited the uploading and downloading of plaintiff's videogames on to the BBS. The downloading of videogames was allowed either in exchange for the uploading of videogames or payment. While holding the defendant liable, the court observed that the defendant had knowledge of the infringement and encouraged infringement knowingly and also derived a profit.

2.1.2. Linking

Linking is a feature in the original site, which automatically connects the user to a linked site. Linking provides the user, access to a page or site through the original site, without typing universal resource locator (URL) in another browser. A universal resource locator is the address of a file, i.e., resource accessible on the internet. The URL contains the name of the protocol

²⁸ .839 F Sup 1552 (MD Fla 1993).

²⁹ 857F.Supp 679 (N.D. Cal 1994).

required to access the resource, a domain name that identifies a specific computer on the Internet, and a pathname on the computer. The user is required to click on the page or the site, which is displayed as a link on that original site. Linking, which allows a user to move from site to site is a very important medium of conducting research on the Internet. However, linking of web pages of one website to that of another may cause legal difficulties having legal consequences.

Types of Linking

There may be two types of linking: (a) surface linking; and (b) deep linking. In surface linking, the user may access the home page of another site through a link of that site provided in the original site which has been visited by the user. In deep linking, the user may access the inner pages of another site through links provided on original site which has been visited by the user, without accessing the home page of that another site.

In case of surface linking, the linking site owner may not be held liable for copyright infringement of the material available on the linked site as he is providing a link to the home page of the linked site and not to the inner pages of that site or the materials contained therein. Thus, surface links may be deemed as addresses designating the location of a document on the web and may be treated as references provided in the footnotes or library card index.³⁰ However, the liability may be considered where the link itself contains copyright material, for example, where the linking document links to a specific phrase, picture or other copyright material which has their own URL address.

In **Shetland Times Ltd v. Dr. Jonathan Wills and Zet News Ltd**,³¹ the defendant included on his website, Shetland News, exact reproductions of the headlines of Shetland Times which were hyperlinks and when selected, the user was linked to the text of the relevant story on the Shetland Times website. Being deep links, they bypassed the home page of Shetland Times, and any advertising on that page. The plaintiff argued that the headlines made available by them on their website are cable programmers and the headlines were literary works. They argued that the defendant had infringed their copyright by storing the work in the electronic means. The court granted interim injunction on the basis of copyright protection. Lord Hamilton observed that all access to the substantive material on the website of plaintiffs should be obtained

³⁰ Supra note 3, at P.249.

³¹ (1997)FSR 604, 1997 SLT 669.

exclusively by accessing their website through the homepage and that there should not be deep linking.

2.1.3. Framing

Framing allows one website to incorporate the contents from another website into a window or frame of its own in a manner wherein the framing site appears as the original website. In framing, each frame functions independently so that the information downloaded into that frame goes within the frame and does not go into the other frame or overlap onto the frame itself.³²

In case of framing, the user remains at the framing website and views the contents from the framing and framed websites. The user may not even know that the content in the frame comes from another framed website. The reason is that contents from the framed website are reduced to-the frame of framing website.

2.1.4. Caching

A cache is a place where something is stored temporarily. Computers include caches at several levels of operation, including cache memory and a disk cache. Caching is an activity in which a copy of the material from an original source is stored in cache for later use, when the same material is requested again. Caching generally increases the speed of accessing materials, which are repeatedly requested. Cached material is generally stored in a cached memory available to the user for a temporary period.³³

There are three types of caching. The first type of caching involves the copying of document that is currently displayed on the screen of the personal computer while the user is browsing the web. The second type is where a personal computer not only makes a copy of the documents that are currently being displayed, but also temporarily retains copies of documents which are reviewed by the user in the past. When the computer receives a request for the documents which were previously viewed, it will bring up the cached copy rather than retrieve the documents from the Internet. In the third type of caching, instead of storing the materials on the personal computer, the documents are stored by an Internet Service Provider (ISP) or by the operator on the website. When the user requests a webpage the ISP checks if the documents are

³² Supra note 3, at p 249.

³³ 45USPQ2d(BNA)2005(CDCa1998).

already stored in his machine and if he has stored it, the server sends this cached copy of the documents to the browser. This may cause some problems, e.g., the users may not view the current copy of the requested website even when the website owner has already updated the information. Further, caching can cause damage to a site's reputation and may also reduce advertising.³⁴

2.1.5. Archiving

Archiving is the process of downloading and storing the materials of one website in another so that the second website can provide its users with the materials of the first website in its own website, without having to hyperlink to the former to retrieve the materials. When the user clicks on the hyperlinks, instead of going to that website, the user will be taken to another area of the same site, where the materials are stored. This may result in copyright infringement, as the copyright materials of one website are stored by the owner of another website in his website without prior permission of the owner of the former website.³⁵

2.2. Negative use of Information Technology to violate Copyright in India

Copyright is violated easily nowadays with the help of information technology in all over the world including India. Any literary, artistic, musical, cinematographic work which is converted to digital form can easily be transmitted throughout the world with the help of internet at the click of a mouse. With the emergence of globalization and open market new technologies and facilities are being made easily available to the Indian consumers. "2G" internet is replaced by "3G" internet in India. And recently the internet market in India is revolutionized by introduction of "4G" by Reliance Jio of MukeshAmbani and other telecom companies. At the time of "2G" to download or upload a photograph one has to wait several minutes, to download or upload a video one has to wait for hours. But the advent of "3G" and "4G" internet has changed the whole scenario in India. Now anyone can enjoy a movie, video, song, game, read books online easily at one's mobile sitting at a cozy corner of one's choice. This has made copyrighted works in the digital form vulnerable and free. This has become a great concern for copyright owners in India.

³⁴ Supra note 4.

³⁵ Ibid at P. 299.

2.2.1. Online Film Piracy in India

India has emerged as one of the biggest hubs of online film piracy, with Delhi, Bangalore and Mumbai accounting for the major share of illegal downloads. According to studies commissioned by the Motion Picture Distributors' Association (MPDA), the local office of the Hollywood Motion Picture Association (MPA), India accounts for maximum film piracy in any English-speaking country if one goes by the number of broadband subscribers. Overall, India is the fourth largest downloader of films after the US, Great Britain and Canada, according to the MPDA's Internet piracy studies.³⁶

Studies have found that Bollywood films are downloaded at huge rate with the maximum downloads happening in Delhi, Bangalore and Mumbai. The Bollywood film „Kamenev“ released on Aug, 2009 was downloaded over 350,000 times on Bit-Torrent and of this about two- third of the downloaders were from India. Tamil films are mostly downloaded in Chennai and Bangalore, and nearly 80 per cent of the downloads of Tamil films on Bit-Torrent happen in India, while Telugu films are mostly downloaded in Hyderabad and Bangalore, with 88 per cent of the downloads of Telugu films on Bit Torrent traced to India.

The first study for the MPDA was carried out by Internet firm Decent, based on the tracking of downloading IP-addresses on P2P networks. It showed that India was among the top 10 countries in the world with the largest number of illegal P2P activities.³⁷

Similar results were found by internet company Envisioned. In its Internet Piracy Landscape Report, Envisioned found that online piracy of film and television content in India is mainly through the file-sharing network Bit Torrent and cyber lockers, or web based file hosts such as Rapid Share or Hot File.

Video-streaming sites are also popular, though their usage is lower than Bit Torrent and cyber lockers. Major international Bit Torrent portals were heavily used by Indian downloaders.³⁸

³⁶ <http://www.deccanherald.com/content/41541/india-major-online-film-piracy.html>, retrieved on 27.12.2017 at 2.30 P.M.

³⁷ Supra note 15

³⁸ . Ibid.

2.2.2. Film Piracy and Impact on Bollywood

2.2.2.1. Delhi man held for illegally uploading latest release of 'Udta Punjab'

The Cyber police, New Delhi arrested a 25-year-old man from the Bandra Kurla Complex, New Delhi for illegally uploading the controversial movie 'Udta Punjab'-on his website namely www.allzmovies.in, two days prior to its release-on torrentz.comsite on June 15, 2016. The cyber police team kept a watch in New Delhi for 3-4 days before arresting Deepak Kumar. Police has seized Kumar's laptop and other gadgets that he has used to upload the movie. He does it to earn money through his website. Kumar has been arrested and brought to Mumbai for getting details from Kumar, who provided him with the pirated uncut version of the entire movie.

2.2.2.4. Bajrangi Bhaijaan

Salman Khan's much popular movie of 2015 „Bajrangi Bhaijaan“ too reportedly was leaked online before its release.

2.2.2.5. Paa

Starring Amitabh Bachchan, Abhishek Bachchan and Vidya Balan, „Paa“ was a comedy-drama film directed by R. Balki. Unfortunately, the movie, which was released in December 2009, was leaked online on the day of its release.

2.2.3. Piracy, a serious threat to Indian film industry

According to a report released by the US India Business Council and Ernst & Young the Indian film industry lost \$959 million (Rs 4,411 crore) in revenue and around 5,71,896 jobs in 2008 because of piracy. The effects of counterfeiting and piracy on India's entertainment industry, estimates the piracy rate at 60%. The industry lost around Rs 2,000 crore in 2009 due to piracy.³⁹

³⁹ . <https://spicyip.com/2013/01/guest-post-taking-look-at-online-piracy.html> retrieved on 27.12.2017 at 2.55 P.M.

India along with twelve other countries found itself in the highest priority watch list of 2012, in the U.S. Trade Representative's annual list of countries on America's official piracy radar. As per the report online piracy is rapidly supplanting physical piracy in many markets around the world.⁴⁰

2.2.4. Other Reported Instances of Film Piracy in India

2.2.4.1. Action against film Piracy in Kerala

In September 2012 a crackdown was done on online film piracy in Kerala. The anti-piracy cell of the Kerala state police traced down the IP address of a total of 1,010 persons who illegally uploaded or downloaded the then recently released Malayalam movie Bachelor Party. The police took action on the basis of a complaint filed by a Trissur based firm Movie Channel which bought the video CD, DVD rights of the film. This is one of its kind incidents in India.

2.2.4.2. Theatre sealed as operator pirates movie

Police sealed a movie theatre in Tindivanam, Chennai where the operator was caught pirating the movie 'Kavan' with a video camera. He was moving the film using the satellite-based UFO digital projection. The doing of piracy was detected through the 'UFO Analyzer' which keep an eye on projection of movies from a centrally-based server. The proof became useful to the video piracy wing of the Crime Branch of Central Investigation Department to arrest the offenders under sections of the Copyright Act (1957) and Cinematograph Act (1952). The operator of Swastik theatre, Tindivanam, Prakash, was arrested for the breaching act. Cinema halls take help of satellite-based digital cinema projection platforms like Qube and UFO for receiving and casting films. The Cinema hall owner is allowed to screen the movie only during the slotted show timings. Swastik theatre operator Prakash was identified through the central server information which caught him projecting the film after midnight when all the shows for the day were over. Police confiscated all digital equipment including the UFO projector from the theatre.⁴¹

⁴⁰ .Supra note 24.

⁴¹ .<https://timesofindia.indiatimes.com/city/chennai/theatre-sealed-as-operator-piratesmovie/articleshow/58865571.cms>, retrieved on 27.11.2017 at 5 P.M.

2.2.4.3. Police arrests torrent up loaders

Hyderabad police has captured four individuals in the age group of 19 to 24 years for their association in obtaining pirated motion pictures, making its duplicates, and transferring them on a site for profit. The site being referred to as Torrentrockerz.com. It is maintained and directed by Vijay Prabanj Reddy, whose group uploads torrents and lists the details on the forum and through this forum the members collect lot of money from the Anti-Piracy Cell for removing movies from their site. Other arrested persons were involved in making unlicensed copies of movies and distributing them. This is the first case recorded relating to torrents in India. Torrent Freak additionally pointed that two Indian movies Golmaal 3 and Action Replay were most downloaded motion pictures on Bit-Torrent.

India has emerged as one of the biggest hubs of online piracy, with Delhi, Bangalore and Mumbai accounting for the major share of the illegal downloads. 30 According to India Business Council – Ernst & Young 2008 report on „The Effects of Counterfeiting and Piracy on India’s Entertainment Industry,“ the Indian film industry lost USD 959 million and 571896 jobs due to piracy.

2.2.4.4. Popular website shut down

In 2006, two graduates of the Indian Institute of Technology, Delhi, Anurag Dod and Gaurav Mishra, launched a unique Internet search engine called Guruji.com from Bengaluru. Using proprietary algorithms, Guruji.com sought to provide better search results in the Indian context. The search engine soon became extremely popular, especially for its „music search“, which allowed users to locate and play music from different sites, including “pirate” sites that hosted copyright-infringing content. From the time of its launch, there were murmurs of how Guruji could be the first Indian Google. Like Google, Guruji was founded by two young graduates from an elite engineering college, and like Google, Guruji had received funding from reputed venture capital firms like Sequoia Capital and Sandstone Capital. The Bengaluru Police in April 2010 raided Guruji.com’s office and arrested its chief executive officer, Anurag Dod, on charges of copyright infringement by making musical content online free which was originally owned by T-Series. The sites like songs.pk, musicplug.in, PZ10.com, bollymobile.in and various similar websites could be accessed, used for playing music by the users of Guruji.com. The

action was filed by music label T-Series whose music catalogue was allegedly exploited by the website Guruji.com. The arrest took place on the basis of a complaint under the Copyright Act made by Super Cassettes Industries Ltd, also known as T-Series. T-Series had alleged that Guruji.com had infringed its copyright in songs from the movies Om Shanti Om, All the Best, Bhool Bhulaiya, Aapkaa Suroor , and Aashiq Banaya Aapne and had demanded the arrest of the website's CEO. Dod's arrest was shocking because until then, arresting people for copyright infringement had been restricted to roadside vendors or small-time shopkeepers. Dodd's arrest led to Guruji.com wrapping up its music search engine and eventually shutting down the website; it is no longer active.

2.2.4.5. T- Series moving courts

T-Series has filed lawsuits against several major companies like YouTube, MySpace, Yahoo and Ibibio for unauthorized streaming, alleging copyright infringement. In 2012, the Calcutta High Court granted an ex-parte injunction restraining 387 Internet Service Providers (ISPs) from blocking access to 104 websites that were indulging in piracy of Bollywood music tracks. The petition was filed by Phonographic Performance Ltd. (PPL), Indian Music Industry (IMI) and Sagarika Music Pvt. Ltd against various ISPs.

2.2.4.6. Online archive and URLs have been blocked

“archive.org” has been archiving online content like web pages, books, text, audio, video, images, and software since 1996. It has become one of the latest target of the Indian movie industry's fight against online piracy. On August 8, 2017, <http://archive.org> along with 2649 other URLs has been blocked from public access across the country pursuant to orders issued by the Madras High Court.³⁴ The orders were issued in connection with civil suits filed against 37 ISPs, 5 cable operators and 8 unknown defendants, impleaded as “Ashok Kumar”, the Indian equivalent of “John Doe”, by Red Chillies Entertainment and Prakash Jha Productions, respective producers of Jab Harry Met Sejal and Lipstick Under My Burkha, alleging copyright infringement of their works.

Most users trying to access the website are simply shown the message “You're requested URL has been blocked as per the directions received from Department of Telecommunications, Government of India. Please contact administrator for more information.” It is important to

mention that the Internet Archive was blocked once before in late 2014 as part of a larger group of websites, but this block was subsequently reversed.

2.2.5. Music Piracy in India using Information Technology

Music piracy means the making unauthorized copies of music cassettes that flood the market as soon as the launch of a new release. In India Music companies' have to face huge loss due to pirated compact discs and cassettes, as these are available at substantially lower prices compared to that at stores. Anurag Gupta, CTO and cofounder of „Saavn“, India's favorite online music service, said that In India about ninety eight percent music content online is pirated.³⁷ One study estimated that only 1-2 % of music consumed in India is by way of legal purchase, whereas 99% of the music consumption is still illegal i.e. pirated.⁴²

The size of the Indian music industry is estimated to be around 980 crore and is expected to grow annually at 14% from 2014- 2019. Piracy is one of the biggest challenges for the industry given the ease with which music is downloaded and shared.

It is estimated that India already has 300 million internet users and is well on its way to reaching 500 million users by 2018. The last five years have seen a steep rise in internet penetration in India, mainly fuelled by the sharp fall in prices of smart phones, which are now available for as little as Rs.5,000/-. By the end of 2014, India had around 116 million internet enabled smart phones and the number is expected to reach 435 million by the year 2019. In the current environment, internet, media and telecom industries are fast merging and the borders of these industries are fast blurring. Thus bringing in a fresh set of challenges for stakeholders to build business models that can not only deliver content but preserve their revenue.⁴³

2.2.6. Software Piracy in India

Software is a set of instructions which when installed in a machine readable form is capable of making a computer to perform a defined task. As per Indian Copyright Act software is a kind of Computer Programmed and which is a literary work and is protected under the Act. Software piracy is copying and use of Software without proper license from the developer.

⁴² . <http://rnaip.com/wp-content/uploads/2015/07/taking-on-digital-music-piracy1.pdf> ., retrieved on 06.12.2017 at 10 P.M.

⁴³ Supra Note 38.

According to NASSCOM (The National Association of Software and Service Companies), software piracy involves the use, reproduction or distribution without having received the expressed permission of the software author.⁴¹ The software industry losses more than thirty three billion dollar annually worldwide due to software piracy.⁴² There are three essential types of software which help to function the computer, micro code which is a programmer which controls the details of execution, the operating system software which controls the sources of a computer and manages routine tasks and which is a necessary requirement for a computer to function; application software which is designed to perform a particular task. Piracy occurs when copyrighted software is made available to users to download without the express permission of the copyright owner. These illegal software is advertised over online sources such as online advertisements newsgroups, bulletin board service and auction sites. Piracy hampers innovativeness, prevents the advancement of new software and local software industry eventually impacts internet business. Piracy harms consumers and has negative impact on local and national economy. There is risk of viruses and having corrupted and defective programs while using such pirated softwares.⁴⁴

2.2.6.1.2. Software Counterfeiting

When illegal copies of software are made and distributed in packaging that replicates the original manufacturer's packaging it amounts to Software Counterfeiting. Counterfeit software copies come out with similar packaging, manuals, license agreements, labels, registration cards, security features and often look authentic. The intention is to directly imitate the copyrighted product. This is a more serious offence as it is done in an organized manner and the buyer is also made to believe that he is buying genuine product.

2.2.6.1.3. Internet Piracy

Internet Piracy is unauthorized downloading of software over the Internet. Any form of software piracy that involves the use of the Internet either to market or distribute copyrighted software programs can be termed as Internet Piracy. Lots of websites on the internet provide software as freely downloadable or can be downloaded after uploading a software in exchange. Many online auction sites offer counterfeit or infringing copyright software. Email, IRC, News

⁴⁴ . <http://www.ipcsit.com/vol9/19 -B006.pdf>, retrieved on 01.09.2017 at 7 P.M

Groups and FTP could be the tools which facilitate in illegally uploading or downloading of copyrighted software programs over Internet.

2.2.6.1.4. Hard-Disk Installation

One, who sells new computers, installs in the hard-disk unlicensed copies of software freely to make the purchase of their machines more attractive then hard-disk installation takes place.

2.2.6.1.5. Pre- installed Software Piracy

When a computer manufacturer uses one licensed copy of software and illegally installs it on more than one computer it is called Pre-installed Software Piracy. To avoid this type of piracy the consumers should be on the lookout for proper license documentation when purchasing new PC in order to ensure that they're getting what they paid for.

2.2.6.1.6. Client-Server license overuse

Client-Server overuse occurs when software is installed on the server for simultaneous use by several people over the network. Client-Server overuse is having more users than allowed by the license.

2.3. Copyright infringement through Online Piracy

Online piracy is unlawful act of copying of licensed or copyright material from internet. Piracy takes place online in three fields namely - music, movie and software. Piracy means unauthorized reproduction, importing or reproduction of the whole or any part of work protected by copyright. With the emergence of 3G-4G internet, advancement of technology, broadband connection almost in all households the method of piracy has changed from physical reproduction and distribution to online distribution.

2.3.1. Auction Site Piracy

This type of piracy occurs when the seller offers software or content on CD or DVD for sale in an online auction. For example a counterfeit copy of a software program or an electronic archive of several years' worth of magazines or school textbooks in PDF format on DVD. The

seller will often attempt to sell multiple copies simultaneously and as quickly as possible to avoid detection by Software and Information Industry Association (SIIA) and other enforcement agencies. This type of sellers may also attempt to collect the names and e-mails of losing bidders and contact those bidders in an attempt to sell additional copies. SIIA can remove these pirate auctions shortly after they have been posted as it has a good working relationship with many major auction sites such as Amazon and eBay etc.⁴⁵

2.3.2. Classified Ads Sites

At first newspapers introduced classified advertisements. This helps private individuals to solicit sales for products and services. The same concept has been used in the Internet. There now exists hundreds of sites dedicated to it e.g. Craigslist. For the anonymous nature of the Internet, many pirates use these sites to upload listings advertising the sale of pirated copies of software and content, usually providing an email address or website address where they can be contacted to make a sale.⁴⁶

2.3.4. FTP (File Transfer Protocol) sites

It is a network protocol used to transfer data from one computer to another over the Internet. It allows a user to upload files to and download files from a site. Pirates who transfer illegal copies of software and/or content to one another commonly use FTP sites because it is efficient for transferring large files and most FTP servers support some form of anonymous login to allow any user to access the site freely and download illegal copies of software and/or content.

2.4. Some methods used by general mass to reach Copyrighted content freely

By using this website one can easily download You Tube videos. Some videos at You Tube can be easily downloaded by using download option but some videos can't be downloaded. But using the website <http://en.savefrom.net/> one can download such videos also. Just one has to copy the link shown in the You Tube video and paste it on the box shown in the website <http://en.savefrom.net/> and to press enter and the downloading process of the sought video will start. It will be downloaded at the designated place of the Hard-disc of the Computer.

⁴⁵ <http://www.siiia.net/Divisions/IP-Protection-Services/About/Internet-Piracy>, retrieved on 04.05.2017 at 9 P.M.

⁴⁶ .Supra note 46.

Writing „Conv“

By using this method one can download any video from You Tube for personal enjoyment either by smart mobile or computer with internet access. In this method one has to choose the URL/Link of the You Tube video and delete the letters preceding “.YouTube ” and in that place has to write “conv” and has to press enter. This starts the process. Some options like “Save as MP3”, “Save as GIF” and “Save as MP4” appears and one has to choose according to his wish. After clicking any one of the options the conversion process starts and the desired video, audio is downloaded in the computer or mobile of the user.

Other methods

There are some other applications like YouTube mate, YouTube downloader etc. to download You Tube videos. In earlier days when digital technology was not available only efficient and expert people could copy copyrighted material. But now-a-days with the advancement of technology everyone has in their hand sophisticated gadgets like digital camera, mobile phone, video camera, computer/laptop and the wonderful internet. With the help of these anyone can copy copyrighted material and easily share and distribute it to others without even knowing by the copyright owner or the law enforcing agency. This is done in such a large scale that law fails to do anything.

CHAPTER - III

LEGISLATIVE MEASURES TO PROTECT COPYRIGHT IN INDIA AND ITS IMPLEMENTATION

“Ideas are nobody’s property; they belong to whoever expresses them best”

-Emilio Cecchi, Tacchini

Copyright is a unique kind of intellectual property. The right which a person acquires in a work, which is the result of his intellectual labour, is called his copyright. The primary function of a copyright law is to protect the fruits of a man’s work, labour, skill or test from being taken away by other people⁴⁷. The word “copyright” is derived from the expression “copied of words” first used in the context, according to Oxford Dictionary, in 1586.⁴⁸ Copyright is intended to ensure that protected matter should not be reproduced without the express permission of the creator. This is often limited to an economic right by which the creator is entitled to a share of any return that is earned by the utilization or reproduction of the copyright knowledge.⁴⁹

The property is of two kinds, (i) Corporeal and, (ii) Incorporeal property i.e. consisting of non-material/non-tangible things. The things which are the result of human intellect are called Intellectual Property.⁴ The subject-matter of the right is the literary expression of facts or thought. This right may be available to writers, painters, engravers, sculpture, photographers, musical and dramatic personnel for their outstanding work.

3.2. Main Features of the Copyrights Act, 1957

1. Creation of a Copyright office and a Copyright Board to facilitate registration of Copyright and to settle certain kinds of disputes arising under the Act and for compulsory licensing of Copyright.
2. Definition of various categories of work in which copyright subsists and the scope of the rights conferred on the author under the Act.

⁴⁷ Wadehra, B.L.(2007), Law Relating to Intellectual Property, (Universal Law Publishing Co., Delhi, at P. 263.

⁴⁸ Wadehra, B.L.(2006), Law Relating Patents Trade Marks Copyright Designs & Geographical Indications, Universal Law Publishing Co., Delhi, at P. 307

⁴⁹ May, Christopher & Sell, Susan K., (2008), Intellectual Property Rights: A Critical History, Viva Books, New Delhi, at P. 75.

3. Provision to determine the first ownership of copyright in various categories of works.
4. Term of Copyright for different categories of works.
5. Provisions relating to assignment of ownership and licensing of copyright including compulsory licensing in certain circumstances.
6. Provisions relating to performing right of or by societies.
7. Broadcasting Right.
8. International Copyright.
9. Definition of infringement of Copyright.
10. Exception to the exclusive right conferred on the author or acts, which do not constitute infringement.
11. Author's special rights.
12. Civil and Criminal remedies against infringement.
13. Remedies against groundless threat of legal proceedings.

India being a member both of the Berne Convention and Universal Copyright Convention, amended its copyright Act, of 1957 in 1983, 1984, 1992, 1994, 1999 and 2012 to bring the Indian Law in conformity with these International Conventions.⁵⁰

3.3. Copyright is protection in form and not in Idea.

Copyright is a right given to or derived from works and it is not right in novelty only of ideas. There is no copyright in ideas. Idea is a thought that pictures in the mind. Ideas are expectations that are probable and not likely to be realized. They may be unrealistic, outrageous. Idea lives in thinking only.⁵¹ Copyright subsists only in the material form to which the ideas are translated. A person may have a brilliant idea for a story or for a picture but if he communicates that idea to an artistic or play writer then the production which is the result of the communication

⁵⁰ .Supra note 1 at P.265

⁵¹ Myneni, S.R., (2016), Jurisprudence (Legal Theory), Asia Law House, Hyderabad, at P.47.

of the idea are the copyright of the person who has clothed the idea in a form (whether by means of a picture or play) and the owner of the idea have no right in the product. New ideas are not protected under the law of intellectual property rights whereas expressions are protected. New software programs are developed as expressions of ideas with the alphanumeric.

3.4. Works in which copyright subsists

Sec.13 of the Act list out the works, in which copyright subsist.⁵² It reads as follows

- (a) Original Literary, Dramatic, musical and artistic works.
- (b) Cinematograph films, and
- (c) Sound Recording.

The Copyright Act, 1957 provides copyright protection in India in the following two forms -

- (i) Economic rights of the author, and
- (ii) Moral Rights of the author

(i) Economic Rights

The creators of original literary, dramatic, musical and artistic works; cinematographs films and sound recordings can claim copyright. The authors of copyright in the aforesaid works enjoy economic rights u/s 14 of the Act. Except computer program the economic rights subsists in reproduction in any material form including the storing of it in any medium by electronic means, issuing copies to the public, performing in public or communicating to the public literary, dramatic and musical works, in making any cinematograph film or sound recording in respect of the work, and in making any translation or adaptation of the work. Besides these rights the author of a computer program enjoys the right to sell or give on hire, or offer for sale or hire any copy of the computer program regardless whether such copy has been sold or given on hire on earlier occasions. The rights given to an author of an artistic work include the right to reproduce the work in any material form, including depiction in three dimensions of a two dimensional work or

⁵² Ahuja, V.K., (2007), Law of Copyright and Neighbouring Rights National and International Perspective, LexisNexisButterworths, New Delhi, at P.19.

in two dimensions of a three dimensional work, to communicate or issues copies of the work to the public, to include the work in any cinematograph work, and to make any adaptation of the work. Regarding cinematograph film, the author has the right to make a copy of the film including a photograph of any image forming part thereof, to sell or give on hire or offer for sale or hire, any copy of the film, and to communicate the film to the public. The author of sound recording also enjoys same rights. Besides these rights, the author of a painting, sculpture, drawing or of a manuscript of a literary, dramatic or musical work who was the first owner of the copyright, shall be entitled to have a right to share in the resale price of such original copy provided that the resale price exceeds rupees ten thousand.

(ii) Moral Rights

There are two basic “moral rights” of an author. These are:

- (a) Right of paternity, and
- (b) Right of integrity

Right of an author to claim authorship of work and right to prevent all others from claiming authorship of his work is the right of paternity. To prevent distortion, mutilation or other alterations of author’s own work, or any other action in relation to said work, which would be prejudicial to his honor or reputation, is the author’s Right of integrity. The exceptions to section 57(1) prevents the author from having any right to restrain or claim damages in respect of any adaptation of a computer program to which section 52 (1)(aa) applies i.e. reverse engineering of the same. Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section. The legal representatives of the author may exercise the rights conferred upon an author of a work by section 57(1), other than the right to claim authorship of the work.

(i) Copyright in Original Literary work

The word original does not mean that the work must be the expression of original of inventive thought. The copyright Act is not concerned with the origin of ideas but with the expression of thought. In the case of “Literary work „required“ means the expression

of the thought. The Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another.

(ii) Copyright Protection of Computer Programs

The history of copyright law suggests that it has undergone various changes with technological developments. At the very beginning of computer industry, the question of software protection was not raised.⁵³ Initially copyright protection was given only to literary works. The scope and extent of traditional copyright law was very narrow and did not include photographs, sound recordings, etc. However, with growth of technology, changing circumstances required existing copyright law to include photograph, sound recording, etc. in the definition of artistic and dramatic works. With the invention of computers, it was deemed necessary to enlarge the scope of copyright laws and subsequently to include computer programs and computer software in the cluster of copyright. The purpose of copyright is to encourage people to use their skill, time and resources to create material that is of cultural and economic benefit to society.

It does this by giving the owner legal rights to control use of that material by other and earn an income from the skill and effort which went into creating that material.

Certain problems were faced while giving copyright protection to computer programs and software. The law assumes that if a thing is in writing, it can be protected through copyright and if it is a machine or invention then it can be protected by patent. Computer programs have both aspects i.e. authorship simultaneously. One of the views is that a computer program uses mathematical algorithms and functions in a technical manner. Though it needs patent as granting monopoly like protection i.e. patent in computers may hamper technology development of society. However, it is apparent that a computer program subsists only in material form in which ideas are expressed and it is to be protected under copyright as copyright protects expression of ideas and not ideas themselves. Thus, most countries have protected computer software and program under copyright.⁵⁴

⁵³ .Infra note 13.

⁵⁴ Jain, Pankaj & Panedy, Sangeet Rai, (2005), Copyright and Trademark Laws Relating to Computers, Eastern Book Company, Delhi, at PP.17 -18.

3.5. The Copyright Act, 1957: An overview

a. Excepting computer program in the case of a literary, dramatic or musical work to reproduce the work in any material form including the storing of it in any medium by electronic means; to make and provide copies of the work to the public not being copies already in circulation; to present the work in public, or communicate it to the public; to create any cinematograph film, or sound recording regarding the work; to make any translation and adaptation of the work; to do in relation to a translation or adaptation of work, any of the acts specified in relation to the work in sub-clause (i) to (iv).

b. In the case of a computer programmer to do any of the acts specified in clause (a); to sell or give on hire, or offer for sale or hire any copy of the computer programmer, regardless of whether such copy has been sold or given on hire on earlier occasions; **c.** In the case of works of artistic creation 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; to communicate the work to public; to issue copies of the work to the public not being copies already in circulation; to show the work in any cinematograph film; to make any adaptation of the work; to do in relation to any adaptation of the work any of the acts specified in relation to the work in sub clause (i) to (iii).

c. In the case of works of artistic creation 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; to communicate the work to public; to issue copies of the work to the public not being copies already in circulation; to show the work in any cinematograph film; to make any adaptation of the work; to do in relation to any adaptation of the work any of the acts specified in relation to the work in sub clause (i) to (iii).

- **Literary, dramatic and artistic work**

The Copyright Act provides that in the absence of any contract between the proprietor of a newspaper, magazine or a periodical and the author of the work who is under the employment of the said proprietors under a contract of service or apprenticeship regarding ownership of the created work, the said proprietors will be the first owner of

the copyright in the work published or for the reproduction of the work with the object of being so issued.⁵⁵

In *Thomas v. Manorama*,⁵⁶ it was held that in case of termination of the employment, the employee is entitled to the ownership of copyright in the works created subsequently and the former employer has no copyright over the subsequent works so created.

The copyright in a work done by an employee on his own time and not in the course of his employment belongs to him.

- **Photograph, Painting, Portrait**

At the initiative of a person if any photograph is taken or a portrait or painting drawn or any engraving or a cinematograph film is created by another for valuable consideration and there exists no contract that the person at whose initiative such work is done, will not be the owner of such creation then the person at whose initiative such work is done will be the first owner of the copyrighted work.⁵⁷

- **Work made in the course of employment**

Where a work is made in the course of the author's employment under a contract of service or apprenticeship, the employer (not being the proprietor of a newspaper, magazine or periodical) in absence of a contract to the contrary, the employer will be the first owner of the copyright in the work so created.⁵⁸

- **Lectures Delivered in Public**

A person who delivered a speech in public he will be the first owner.²³ But if such speech is delivered on behalf of another person then such person on whose behalf speech was delivered will be the first owner.⁵⁹

- **Government work**

Government is the first owner of a work if it is created at the instance of the Government.

- **Work made on behalf of a public undertaking**

⁵⁵ . Ibid, Section 17 (a)

⁵⁶ AIR 1989 Ker. 49

⁵⁷ Supranote 14, Section 17 (b)

⁵⁸ Supranote 14, Section 17 (c)

⁵⁹ . Ibid

If any work is first issued or published by a public undertaking or first published under the direction or control of a public undertaking and there is no agreement denying its ownership in such case the public undertaking shall be the first owner of the copyright therein.⁶⁰

❖ **Direct Infringement:**

Copyright infringement which is direct in nature is a strict liability offence. In case of strict liability it is not required to prove criminal intention to establish criminal liability. The requirements to establish a case of copyright infringement under this theory are:

- (i) Ownership of a valid copyright; and
- (ii) Copying or infringement of the copyrighted work by the defendant.

Therefore, anyone who unintentionally or even inadvertently infringes a copyright may be held liable under the Copyright Act. The criminal intention of the infringer can be considered for ascertaining the quantum of damages to be awarded for the alleged infringement. In linking, direct infringement occurs if the link itself contains copyrighted material.

❖ **Contributory infringement**

The contributory infringement requires the existence of awareness and involvement by the alleged contributory infringer. To claim damages for infringement of the copyright, the plaintiff has to prove:

- (i) That the defendant knew or should have known of the infringing activity; and
- (ii) That the defendant induced, caused, or materially contributed to another person's infringing activity.

3.6. Offence of infringement of copyright or other rights conferred under this Act

Whoever intentionally violates or aids the violation of copyright in a work, or any other right conferred by the Act, except the right conferred by Section 53-A, shall be liable for penalty with incarceration for a term which shall not be less than six months but which may extend to

⁶⁰ Supra note 14, Section 17 (dd)

three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees.

However, if the violation has not been made for profit during trade or business, the court with reasoned judgment may impose a sentence of incarceration for a term of less than six months or a fine of less than fifty thousand rupees.

3.6. Enhanced penalty on second and subsequent convictions

Whoever having already been convicted of an offence under Section 63 is again convicted of any such offence shall be punishable for the second and for every subsequent offence, with incarceration for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

However, if the violation has not been made for profit during trade or business, the court with reasoned judgment may impose a sentence of incarceration for a term of less than one year or a fine of less than one lakh rupees.

3. 7. Knowingly use of infringing copy of computer program to be an offence

Whoever intentionally use on a computer an illegal copy of a computer program shall be punishable with incarceration for a term which shall not be less than seven days 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.⁶¹

3.8. Authors' Moral Rights

The moral rights of the authors have been recognized in most Countries. There are mainly two moral rights. These are-(a) Right of Paternity (b) Right of Integrity. In India, section 57 has

⁶¹. Supra note 36

recognized moral rights of authors. The provision is based on Article 6 of the Berne Convention.⁶²

This section has been amended so that right to integrity subsists even after the end of copyright in the concerned work, and to enable not just the author but also his/her legal representatives to exercise the right to paternity presumably.

3.8.1. Author friendly Amendments on mode of Assignment and Licenses Assignment of Rights

As per the new amendment copyright holder in any work or aspiring owner of a future work may assign the copyright. However, for future work, assignment will come into force only when the work comes into existence.

As per the new amendment the author of a literary or musical work included in a cinematograph film or sound recording shall not assign the right to receive royalties in any form other than as a part of the film or sound recording.

According to the new amendment the assignment of copyright is void if it is made contrary to the terms and conditions of the previous assignment to a copyright society in which the author of the work has membership. This amendment is an attempt to simplifying the business practices. The amendment provides claim to royalties for the use of the work utilized to make a cinematograph or sound recording irrespective of any assignment of the copyright in the same.⁶⁷ This is an effort to simplify the business practices prevalent in the film industry.

3.8.2. Amendments to Facilitate Access to Works

For easy access to works the amendment of 2012 has provided for the following

- Grant of Compulsory Licenses
- Grant of Statutory Licenses
- Administration of Copyright Societies

⁶² Supranote 10at P.95

- Fair Use Provisions
- Access to copyrighted works by the Disabled
- Relinquishment of copyright

3.8.3. Compulsory Licenses

The Act deals with compulsory licenses of works withheld from public.⁶⁸ As per the amendment any unpublished work or any work published or communicated to the public if such work is withheld from the public in India, the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found, any person may apply to the Copyright Board for a license to publish or communicate to the public such work or a translation thereof in any language.⁶⁹ It extends the applicability of this section from „Indian work“ to „any work“. The word „complainant“ is also replaced with the words „such person or persons who, in the opinion of the Copyright Board is or are qualified to do so“. Copyright Board is enabled to grant compulsory license to more than one person.

3.8 . 4 Grant of Statutory Licenses

The new amendment provides for statutory license to any person desiring to make a new performance or recording i.e. cover version of a sound recording in respect of any literary, dramatic or musical work. According to this the man who is making the sound recording shall give to the owner prior information of his desire in the prescribed manner, submit the copies of all covers or labels with which the version is supposed to be sold, and pay beforehand the royalty at the rate fixed by the Copyright Board.⁶³ Such sound recordings can be made only after the end of 5 years i.e. after publication of the original sound recording. There is a need of payment of a minimum royalty for 50,000 copies of the work during each calendar year.

This is not completely a new law for statutory license for cover version. It is a replacement of Section 52(1)(j) of the un-amended Act.

As per the new amendment any broadcasting organization intending to air a work including sound recording may do so by giving earlier notice to the copyright owners and pay royalty as

⁶³Supranote 14, Section 31C.

fixed by the Copyright Board in advance.⁶⁴ The names of the authors and principal performers shall be declared at the time of broadcast. The broadcasting organization shall keep records of the broadcast, books of account and provide to the owner such records and books of account.

3.8.5. Administration of Copyright Societies

Sections 33, 34 and 35 of the amended Act provides for functioning of a copyright society and its registration. These have been amended to simplify the functioning of the copyright societies. The Central Government may, having regard to the interests of the authors and other owners of rights under this Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licenses in respect of the relevant rights and the ability and professional competence of the applicants, register such association of persons as a copyright society.

All copyright societies will have to register a fresh with the registration granted for a period of five years. Registration of a copyright society will be renewed only if the copyright society is capable of continued collective control shared with the authors of works in their capacity as owners of copyright or of the right to get royalty.

There are specific amendments to protect the interests of the authors. In Section 35, the phrase „owners of rights“ has been substituted with „authors and other owners of right“. There shall be a governing body in every copyright society according to the amended Act. The body will consist of elected members from among the members of the society. This society consists of equal number of authors and owners of work for the purpose of the administration of the society.⁶⁵ All members of a copyright society shall enjoy equal membership rights and there shall be no discrimination between authors and owners of rights in the distribution of royalties.

There are specific amendments to protect the interests of the authors. In Section 35, the phrase „owners of rights“ has been substituted with „authors and other owners of right“. There shall be a governing body in every copyright society according to the amended Act. The body will consist of elected members from among the members of the society. This society consists of equal number of authors and owners of work for the purpose of the administration of the society.

⁶⁴ Supra note 14, Section 31 D

⁶⁵ Supra note 14, Section 35(4)

All members of a copyright society shall enjoy equal membership rights and there shall be no discrimination between authors and owners of rights in the distribution of royalties.

3.8.6 . Tempering with computer source documents

Whoever veils, erases code or alters or causes another to veil, erase code or alter any computer, computer program, computer system, or computer network, knowingly and intentionally, he shall be indictable with incarceration up to three years, or with fine up to two lakh rupees, or with both.⁶⁶

3.8.7 Computer related offences and its punishments

Whoever dishonestly, or fraudulently, does any act mentioned in section 43 of the IT Act, he/she shall be indictable with incarceration for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.⁶⁷

3.9. Provisions of the Indian Copyright Act and Information Technology Act and their application in defining and limiting various copyright infringing activities on the Internet

3.9.1. Linking

Under Indian Copyright Act, 1957 the legality of linking can be tested by applying the provisions of section 51 read with section 14 of the Act.

The Act defines the term “communication to public”, as 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.⁶⁸ Therefore, linking comes within the ambit of Indian copyright law. If any linking is done to the detriment of any site, its owner can take recourse to legal remedy under the Indian Copyright act, 1957.

Before linking deep in to any site it is prudent to first take the permission of the owner of site. On the other hand, in order to prevent unwanted linking the creator of web site should insert a

⁶⁶ Supra note 75, Sec. 65

⁶⁷ Section 24, 25 of the Indian Penal Code No. 45 of 1860

⁶⁸ Supra note 14, Sec. 2(off)

prohibition clause in its terms of use as “do not link to this site without any express consent on the part of the copyright holder of this site.”

3.9.2. In-lining

The in-line linking is not covered by the Section 14 and 51 of the Indian Copyright Act, 1957 as the person employing an inline link on his site is not causing any reproduction of the copyrighted contents. But, the definition of the „communication to public“ as provided under section 2(off) of the Copyright Act can be interpreted to include „in-line linking“ by virtue of the expression „by any means of display“.

On the other hand, Section 14(a) (vi) of the Act grants the right of adaptation only to the author of copyrighted work. By in-lining the linking site could take some elements from the linked site’s settings i.e. pictures, text, film clips etc. and create its own site. This amounts to an infringement of adaptation rights of the author.

In-lining creates moral issues also. Section 57 of the Copyright Act, 1957 guarantees special rights of the author of any proprietary work that is adversely plagued by in-lining. Though, the Act does not expressly provides for making in-lining illegal, but any modification or mutilation to the contents of a web site without the express permission of the owner of the copyrighted material amounts to an infringement in the eye of copyright law of India

3.9.3. Framing

Under Indian Copyright Act, 1957 the legality of framing can be tested by applying the provisions of section 51 read with section 14 of the Act. In case of framing, the framer of the other’s site neither reproduces the copyrighted content nor making copy of the same but he provides only a visiting browser with instructions to retrieve the content of that site in to framer’s website. Therefore, the framer of site cannot be held liable for unauthorized copying or reproduction of copyrighted work under Indian Copyright Act but he could be trapped under section 57(1) of the Act for infringing the right to integrity of the copyright owner.

Only owner of copyrighted work is entitled to make adaptation to such work under section 14(a)(vi) of the Indian Copyright Act, 1957. This right is adversely affected by the process of framing because the framing site acquires some elements from the multimedia settings

of the framed site(s) and creates its own web pages(s). Now, it is the primary responsibility of our courts to look in to the intention of the framer in order to test the legality of framing.

3.10. Software Piracy

The amendments to the Copyright Act in 1994 included the definition of Computer Programs and Computer Databases. The Copyright (Amendment) Act, 1994, clearly explains the rights of copyright holder, position on rentals of software, the rights of the user to make backup copies and the heavy punishment and fines for infringements on copyrighted software. There is provision in the Copyright Act for punishment of imprisonment, ranging from seven days to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees, if a person intentionally installs an illegal computer program on a computer.⁸⁴ However, if the computer Program has not been used for gain or in the course of trade or business, the court may, for adequate and special reasons to be mentioned in the judgment, not impose any sentence of imprisonment and may impose a fine which may extend to fifty thousand rupees.⁶⁹

Copyright in case of a computer program has been provided under the Copyright Act, 1957. Hence, a computer Program cannot be copied, circulated, published or used without the permission of the copyright owner. Conventional copyright infringement theories can be applied if computer program is used in such a way that it infringes the copyright in it. Further, if the medium of Internet is used to advance that purpose, invoking the provisions of the Copyright Act, 1957 and supplementing them with the stringent provisions of the Information Technology Act, 2000 can prevent the same.

Under the Copyright Act, there is a minimum jail term of 6 months for copyright infringement⁸⁶. The section also provides for fines up to 2 lakh and jail term up to three years or both. Any person or company who indulges in unauthorized copying, sale, downloading or loading of software is punishable under this section. Section 63-B of Copyright Act is applicable against those who knowingly use infringing copies of computer programs. Any person, individual or company, using pirated software is liable under this section. The Copyright Act authorizes any police officer of the rank of Sub Inspector or above to confiscate without warrant

⁶⁹ Supra note 14, Sec.63B.

illegal copies as well as the material that is being used for the purpose of making such copies.⁸⁷ Those accused who are indulging in software counterfeiting are doing it in an organized manner by conspiring with each other to cheat both the government in general and copyright owner as well as the public in particular, hence they are liable for prosecution under Section 120-B r/w Section 420 of Indian Penal Code. A counterfeit product is basically a forged electronic document prepared for the purpose of cheating and is also sold to the public as genuine; hence the counterfeiters are punishable under Sections 468 and 471 of the Indian Penal Code.

There are many pirate websites on internet which make software available for free download or in exchange for uploaded programs. There are also many online auction sites which offer counterfeit or infringing copyright software. The webmasters of these websites are punishable under Section 120B IPC r/w Sec 63 of Copyright Act as they are part of the conspiracy by way of abetting copyright violations and enabling people to gain access to copyrighted software. Those people who are abetting infringement as well as those who are using pirated software are doing so knowing fully well that they are causing wrongful loss or damage to the copyrighted owner. They are also diminishing the value of such software by making illegal copies. All such people are committing offences under Section 66 of IT Act and are therefore punishable under Section 66 of the Information Technology Act. Apart from prosecution under Section 66 of IT Act, all the accused who are providing assistance to any person to facilitate access or those who are illegally downloading/copying/extracting software are also liable to pay damages to the affected party as per section 43 of the IT Act. The Modus Operandi like Client-Server overuse, Hard-disk loading, Pre-installed software and End-user piracy are generally adopted by companies or firms or by an association of individuals. In such cases the company/firm as well as its in-charge is liable under section 85 of the IT Act. The counterfeit products which are replicated & packaged abroad are illegally brought into India through various seaports and airports, hence Section 132 of Customs Act, 1962 can be applied against such importers. It is also suspected that these counterfeit products are being smuggled into India in active connivance with some officials of Customs Department. These officials can be booked under Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988. Hence a case u/s 120B r/w 420, 468, 471 of IPC, u/s 63, 63B of Copyright Act 1957, u/s 66, 85 of Information Technology Act 2000, u/s 13(2) r/w 13(1)(d) of Prevention of Corruption Act 1988 and u/s 132 of Customs Act and substantive offences thereof can be made out against the suspects.

3.11.1. Libraries in the Indian Copyright Act.

Under the Act there are no separate provisions dealing with libraries and archives under the Act, although the fair dealing provisions specifically cover libraries and archives to a limited extent. Under Section 52(1)(o), a non-commercial public library is allowed to make not more than three copies of a book for library use, provided such books are not available for sale in India. Moreover, the term „library“ is undefined in the Copyright Act. There is, similarly, no indication of how the various qualifiers attached to the term across the legislation should be interpreted. Further, the phrase „not available for sale in India“ has not been defined or tested so that there may be some guidance on whether for instance, the purchase of a book from an e-commerce website operating from United Kingdom, but delivered to India would be understood as the purchase of a book that is available for sale in India.

Other than this, Section 52(1)(p) permits reproduction of literary, dramatic or musical work for the purpose of research or private study, provided that these works are kept in the library or 60 years have passed since the death of the author. The Amendment has brought about another provision which now allows a non-commercial public library to store a work in any medium by electronic means for the sole purpose of preservation, provided that the library possesses a non-digital copy of the work.

It is not clear whether the differing terminologies in the Act are intended to refer to different institutions. At any rate, these introduce a worrying lack of clarity for institutions seeking to avail the protections offered to libraries. A broader concern across all the provisions which relate to libraries is that of unnecessary limitations that these qualifiers introduce at all. All libraries should be entitled to take advantage of the exceptions created in their behalf, and it is a missed opportunity of the amendment to empower them to do so effectively.

CHAPTER – IV

JUDICIAL APPROACH TOWARDS THE VIOLATION OF COPYRIGHT USING INFORMATION TECHNOLOGY

The Judiciary is one of the branches of Government. The Judiciary is charged with adjudicating disputes under the law and reviewing the laws passed by the legislature. The Judiciary in India performs various important role and functions which do not remain confined within the traditional jurisdiction of Civil and Criminal. In case of violation of law, a suit is filed against the offender. The judge hears both sides and decides whether there has been a breach of the law. In case of violation of law, the judiciary establishes justice by providing redress and punishing the offender. The judges, by way of interpreting the existing laws, make new laws. The judiciary can obey precedents settled in previous decisions. It can also rescind such precedents, and thus, makes new law.

The importance of Judiciary in a democratic set up for protection of personal and proprietary rights can hardly be overestimated. The principal function of Judiciary is to provide legal remedies against infringement of personal and property rights of persons. The right conferred by the copyright law can be enforced through the court of law. The Judiciary in the United States has been very active in disposing of the controversies regarding the Jurisdiction.⁷⁰

In *Mac Milan v.Cooper*⁷¹ the Privy Council of United Kingdom held that the precise text to determine whether a person is entitled to copyright is to ascertain whether “skill, judgment and experience or labour, and capital have been expended in creating the work”.

Judicial approach towards copyright violation through information technology can be inferred by going through various important judicial decisions of the national and foreign judiciary in this connection.

4.1. Case Laws relating to Copyright violation while Caching

MAI System Corp. V. Peak Computer Inc.⁷²

⁷⁰ Ahuja, V.K, (2007), Law of Copyright and Neighbouring Rights: National and International Perspectives, Lexis Nexis, New Delhi, at P.259.

⁷¹ (1923) 93 LJPC 113 and 117

In this case the 9th Circuit Court of America held that, “loading of copyrighted computer software from a storage medium into the memory of the computer causes a copy to be made.” Thus copies made into the Random Access Memory (RAM) are „copies“ and this process is called caching. This decision has given rise to a big controversy as every time a user browses on the Internet, copies of web pages or software or any other material that are made into the RAM of the user’s computer will amount to „copying“ and therefore one can be held liable for violation of copyright even if ones aim was to read only and not copy.⁷³

4.1.2. Religious Technology v. Netcom⁷⁴

But in Religious Technology v. Netcom, the Court observed that momentary copying while browsing is the action similar to reading and hence does not involve copyright laws. The process of temporary copying of the works on the RAM is somewhat similar to the act of a person going to a bookshop and just looking at a book. Thus, the decision given in the MAI case was liable to be criticized and was not followed in many subsequent cases. Temporary copying on the RAM does not amount to copyright violation and should be treated as a technical necessity. It may also not be wrong to say that the author who knows that such copying is obvious and incidental, has impliedly given the authority for such temporary copying.

4.2. Case laws where Right of Distribution of Copyright owners have been dealt with on the Internet

4.2.1. Sega Enterprises Ltd. v. Maphia et al⁷⁵

Sherman, owner and operator of Maphia was not held directly liable for copyright infringement. The court relied on Religious Technology Centre v. Netcom Online Communication Service. Inc. Case which found that the Internet provider was not directly liable for copyright infringement of a copyrighted work posted and distributed through its system. The Court found this to be the case even when the defendant had knowledge of potential copyright infringement by its subscribers. Though Sherman’s actions in this case are more participatory

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⁷³ Jain, Pankaj & Pandey, Sangeet Rai, (2005), Copyright and Trademark Laws relating to Computers, Eastern Book Company, Lucknow, at P.57.

⁷⁴ 907 F Sup 1361.

⁷⁵ 857 F.Supp.679 (N.D.Cal.1994)

than those of the defendants in Netcom, the court considered Netcom applicable. Sega failed to show that Sherman himself uploaded or downloaded the files, or directly caused such uploading or downloading to occur, so Sherman could not be found directly liable.

4.2.1.2. Contributory infringement

However, the Court found Sherman liable for contributory copyright infringement because Sega established that the users of Sherman's Maphia Bulletin Board Service directly infringed Sega's copyright and that with knowledge of the users' infringing activity, Sherman induced, caused or materially contributed to their infringing activity. The uploading and downloading by Maphia BBS users constituted illegal copying. It was clear through evidence such as print-outs of upload/download statistics and Sherman's admissions, that Sherman had knowledge of the copying that was occurring. Sherman contributed to the infringing activity by providing the site and facilities for the known infringing conduct. He solicited users to upload illegal games, and imparted a road map on his BBS for easy availability of Sega games for downloading. Additionally, through the same MAPHIA BBS medium, he offered copiers for sale to facilitate playing the downloaded games.

4.2.1.3. Doctrine of fair use

To prove fair use Sherman stated before the court that there was no evidence that his subscribers were playing the games outside their own homes or further distributed the games. But the court rejected the defense. The four non-exclusive factors that the court considered in determining whether the use was fair were

a. Purpose and character of use

The bulletin boards were intended to induce users to purchase defendants' game copiers to play the games they downloaded from the boards, who would otherwise have bought Sega's game cartridges. This „for-profit“ use at Sega's expense weighed against accepting a fair use defense

b. Nature of the copyrighted work

The Sega games are for entertainment use and are creative rather than informational works, which is against a fair use.

c. Amount and substantiality of the copyrighted work Used

As the subscribers of defendant copied entire copyrighted games without providing any public benefit the Court found that it did not fall under the fair use exceptions.

d. Effect of the use upon the potential market for the copyrighted work

The court weighed this factor most heavily. The court determined whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the copyrighted work. Here the court found that even if users only played the games in their own homes and didn't further distribute them, Sherman's conduct of allowing users to avoid paying for games would, if widespread, adversely impact the market for Sega games.

The court held Sherman responsible for contributory infringement as in this case the presence of the above mentioned four factors barred to provide the defense of fair use.

Because Sherman intentionally contributed to the users' infringement of Sega's copyright by uploading to BBS, encouraging downloads, selling copiers, using and allowing others to use Sega's trademarks, with the intention to profit the court found that he „willfully infringed upon their copyrights, which would entitle to greater damages.⁷⁶

4.3. Case Laws relating to Copyright violation while the copyrighted material is on public display on internet

Public display is a right, which is infringed through the placing of the contents of the copyrighted work at some particular place without the authorization of the owner, which is viewable by the general public. Thus, the display of work on postings, web pages or any component of the Internet through which any person can view the work can be regarded as public display. Display of literary, dramatic, and choreographic or other such works on the Internet can be construed as public display. It is immaterial, in the case of display on the Internet, whether any net user has viewed such work or not. The moment it is posted on the Internet it would fall within the purview of public display.⁷⁷

⁷⁶. <http://www.patentarcade.com/2011/07/case-analysis-saga-v-maphia.html>,retrieved on12.10.2017at 6A.M.

⁷⁷ Supra note 4, at P.60.

4.3.1. Playboy Enterprises, Inc. v. Frena⁷⁸

In this case the Defendant operated a subscription bulletin board service (BBS). It contained hundreds of computerized photographs which were copyrighted by the Plaintiff i.e. Playboy Enterprise. The Court held that making the photographs available on BBS was public display, even though the display was limited to subscribers, and subscribers viewed the photographs only upon downloading the photographs from the BBS on demand. Thus, the material available on the Internet even to a small number of people is a public display and therefore, liable for copyright violation.

4.3.2. Marobie-FL, Inc. v. National Association of Fire Equipment Distributors⁷⁹

Similarly, in this case also administrator of the web page of the Defendant, National Association of Fire Equipment Distributors (NAFED) placed certain files on NAFED's web page containing three volumes of copyrighted clip art of the Plaintiff. The Court ruled that the placement of files containing the clip art on the web page constituted a direct violation of both the Plaintiff's distribution right and the public display Right.

4.3.3. Michael v. Internet-Group Inc.⁸⁰

In this case the Court held that it is violation of copyright owners' exclusive statutory right of display by making available videotape over internet without authorization and posting unauthorized copies of electronic clipart on web pages.

4.3.4. Super Cassette Industries Ltd. v. MySpace Inc⁸¹

Super Cassettes Industries, is involved in the business of music distribution and film producing. The plaintiff claims to be the owner of several sound recordings, cinematograph films, songs etc. It is largely dependent on the exploitation of its copyright, as this exploitation benefits the plaintiff monetarily enabling it to carry on its various business activities. The plaintiff claims that exploitation of its copyright is done by granting public performance licenses by it, for which they receive a certain amount towards royalty. The defendant in this case; is

⁷⁸ 839 F Sup 1552:29 USPQ 2d (BNA) 1827 (MD Fla 1993)

⁷⁹ 983 F Sup 1552:29 USPQ 2d (BNA) 1236 (ND Ill.1997)

⁸⁰ F. Supp.2d C. D. Lal 1988 F

⁸¹ MIPR 2011 (2) 303

MySpace Inc. which is a social networking and entertainment website. The defendants published the plaintiff's copyrighted work on its website without any license or authority from the plaintiff regarding which plaintiff informed the defendants many time.

Section 13 of the Copyright Act, 1957 lays down in what work copyright exists and in what work it does not. Section 14 of the Act, defines the rights of the copyright owner. What would amount to infringement has been given under section 51 of this Act. Section 51 (a) (i) lays down that a copyright in a work shall be considered to be infringed, when any person does any act without a license given by the owner of the copyright or Registrar of Copyrights under this Act, or if he does any act in contravention of the conditions given in the license which was so granted to him or contravenes any condition imposed on him by any competent authority, where the exclusive right to do such an act vests exclusively with the owner of the copyright under this Act. Section 51 (a) (ii) lays down that when a person provides for profit any place to be used for communicating to the public, such communication can be regarded as infringement unless that person is not aware and he also has no reasonable grounds for believing that such communication to the public will amount to infringement.

The court in this case found in favor of the plaintiff. With regard to infringement under Section 51 (a) (ii), the Court held that the defendant's acts could be considered to be prima facie infringement with regard to this provision of law. With respect to the defendant's role of authorizing infringement under Section 51 (a) (i) the court held that this issue was not clear from the matter presented before it, however there was clear knowledge on the part of the defendants of what they were communicating. The court also stated that when the plaintiff informed the defendants about its copyrighted material, the defendants became aware not only of the mode of infringement but also the rights of the plaintiff, and the defendants cannot after becoming aware continue to do the same acts in relation to the work for which no permission has been given to it. If the defendants fail to do what is necessary then they will be placed in the position of an ordinary infringer under Section 51 (a) (i). The court also passed an interim direction and order, restraining the defendants, agents, representatives, servants, officers or any other persons on the defendants behalf from modifying the plaintiffs work, by adding advertisements, logos, sponsorship to the plaintiffs work and making any profits in any manner, by uploading the same to their webpage without any enquiry into the ownership of such work, the defendants were also

ordered not to make such work available to the public on their webpage. The court held that, as and when it comes to the plaintiffs notice that any of its copyrighted material is available on the defendants website, the plaintiff shall give the defendants a detailed list of the songs and films available on its website and the defendants shall take action to remove the same within one week from the date of such communication. The court also ordered the defendants to take action to check the ownership and updating in the work of the plaintiff through its own efforts and to remove any infringing material or offending content once it gains knowledge of such work being available on its website.

The court while deciding this case first discussed the law on the subject of copyrights in India. It examined the wording of section 51 (a) (ii) which provides permitting “any place” for profits. From the wording alone it cannot be understood what type of place is to be used in order for it to amount to infringement. However the court held that from the wording in the subsections it would mean that any place would be physical place or place on the internet or web space. In order to get a clear view of this term the court looked into the UK Copyright Act, 1956 and the Act of 1988. The court while deciding on this aspect made a reference to a decision of the House of Lords in *Compel Commodities Ltd v. Spore Trade*, SA13 which held that when there is a change in the social conditions and the law does not provide for the same there shall be no assumption that the law does not apply to it, when the wording in the law is wide enough to apply it to the situation. The court also looked into *State of Maharashtra v. Paul B Desai*.¹⁴ In keeping with these judgments the court held that since the wording in section 51 (a) (ii) is loosely worded there can be the presumption that the term “any place” includes web space in order to cover the wrongs committed in the web space. The defendants also had advertisements that appeared on their web pages along with the plaintiff’s copyrighted work either before showing clips or after. In this case the defendants also have a limited license to add, modify, and delete certain work uploaded by the users. This would also amount to permitting the place for profits. The court held that even though there may not have been active approval or sanction the defendants acts infringes the plaintiff copyright.

4.4. Case laws on Adaptation on the Internet

An alteration in the original work to produce a new work is generally termed as adaptation. Many countries protect the adaptation right of the copyright owner. However, there exists a

difficulty in protection of adaptation right on the Internet due to the vastness and depth of the material available on the internet .

There are many software and other copyrighted works which are freely available on the Internet for the user to use. But, it is generally seen that users gather the works available on the Internet and add new features to it for commercial use.

Violation of adaptation right with respect to copyrighted computer programs, computer software and other such computer work available on the internet is detrimental to the original copyright owner of these materials. Dramatizations, translations, abridgements, arrangements, and other alterations in the original computer work ought to be protected. The new work shall not affect the strength of any subsisting copyright in the original works or any part thereof.

Many cases have arisen where there has been copyright infringement in adaptation work.

4.5. John Doe and Anton Piller Orders

Judiciary's initiative for protection of copyright in this age of internet and computer through Anton Piller and John Doe order is worth mentioning. In cases of copyright infringements wherein unknown entities are involved, there are specific legal reliefs that can be pursued. These are known as Anton Piller and John Doe orders. John Doe Orders –these orders are issued by the Courts against anonymous offenders. Anton Piller Orders –by these orders Court allows search and seizure and tearing down of any property of an offender believed to be engaged in acts of copyright infringement.⁸²

4.5.1. John Doe Orders in India

The usage John Doe orders by the Indian judiciary can be traced back to the case of Taj Television Limited vs. Rajan Mandal. In fact, the 2011 Special 301 Country Report on India prepared by the International Intellectual Property Alliance (IIPA) specifically cites the Delhi High Court in this context, stating “The industry enjoys a very high success rate with respect to

⁸² Tyagi, R.K., (2013), Understanding Cyber Warfare and Its Implications for Indian Armed Forces, Vij Books India Pvt. Ltd, Delhi, at P.20.

the grant of such orders at the Delhi High Court”. According to this report, the Business Software Alliance (BSA) was able to obtain 34 such orders in 2009.⁸³

4.5.2.1. Taj Television Limited v. Rajan Mandal⁸⁴

The case dealt with an unauthorized broadcast of a particular television channel by several unlicensed cable operators without the authorization of the plaintiff's i.e. of Taj Television official marketing partners in India. The court found that except 1377 cable operators, many others were broadcasting the channel illegally. As a result, the plaintiff was having problems, especially for unauthorized broadcast of the 2002 Football World Cup. This resulted in the revenue loss of the plaintiff. The court, as a result, passed a John Doe order against anonymous cable operator networks asking them to stop the aforementioned unlicensed broadcast.

4.5.2.2. Microsoft Corporation v. Arunava Jana⁸⁵

In this case the High Court of Delhi issued an order on allowing the Court appointed Commissioner to only take mirror copies of the hard-disc containing the infringing software without seizing or sealing the same. The “mirror copies” were required to be deposited in the Court.

The Commissioner can be ordered to take an inventory of the pirated software in the presence of the Defendant and record any possible objections after which the Commissioner's report would be signed by both the Plaintiff and the Defendant. The Commissioner can instead, also take back-up copies of the hard disc containing the infringing software. Once the back-up copies are taken the same can be introduced during the course of the trial and the Court can decide on the basis of these copies.

⁸³ <https://cis-india.org/internet-governance/blog/privacy/copyright-enforcement> retrieved on 12.09.2017 at 6 A.M.

⁸⁴ 2003 FSR 22

⁸⁵ CS (OS) No. 478 of 2011

4.5.2.3. Sony Pictures v. Home Cable- 2017⁸⁶

Plaintiff Sony Pictures has been granted exclusive media and broadcasting rights in respect of the Indian Premier League (IPL) 2017, an annual Twenty 20 cricket tournament, by Board of Control for Cricket in India (BCCI). The plaintiffs apprehended that the named defendant Nos. 1 to 40 and unnamed defendant, defendant No. 41, described as Ashok Kumar(s) who are Multi System Operators, Local Cable Operators and other similarly placed distribution platform operators having their networks in various towns and cities across the country might infringe upon their exclusive broadcast, reproduction rights by illegally broadcasting/re-broadcasting /transmitting/re-transmitting or communicating to the public through any medium whatsoever through their cable TV networks(s) or otherwise of the IPL Tournament 2017. Humble Delhi High Court in this case directed the defendants to refrain from broadcasting/re-broadcasting/transmitting/re-transmitting or communicating to the public through any medium whatsoever through their cable TV networks(s) or otherwise of the IPL Tournament 2017. Court also gave directions to appoint a local Commissioner to visit and search the premises of person(s) who are involved in copyright violation and to seize and make an inventory of all equipments which are being used for the unauthorized broadcast, telecast or communicating to the public. The commissioner is to take photographs and video recordings of infringing materials and activities.

4.6. Case laws on Secondary or third party liability of the Internet Service Providers (ISPs)

4.6.1. A&M Records, Inc. v. Napster, Inc.⁸⁷

In this landmark IPR case the Court of Appeals for the Ninth Circuit of America held Napster, Inc., a peer-to-peer file sharing online service responsible for contributory and vicarious infringement of the plaintiff's copyright. Regarding use of copyright laws in connection with peer-to-peer file sharing this was the first important case. The court held that the enormously popular Napster online service, having about 20 million users, was used largely to buy and sell copyrighted material with the full knowledge of Napster.

⁸⁶ CS (COMM) 239/2017

⁸⁷ 239 F.3d 1004 (2001)

The plaintiff A&M Records was in the business of recording, distribution, and sale of copyrighted musical works. The defendant Napster, Inc. was a peer-to-peer file sharing program that allowed users to make MP3 audio files available on the users' own computers. The users of the program Napster could make perfect copies like original of other users' music files and transfer the files among them through the Internet and computer. Copyrighted materials were not uploaded by Napster in its server by itself. But Napster had the ability to block access to infringing users and delete infringing material. Napster utilized a central server to catalogue connected users and files available on their machines. Thus it prepared a searchable list of music available in Napster's network. The user friendly nature of Napster rapidly made it a popular service for music lovers to find and download digital song files absolutely free. Napster's large-scale distribution of music for free created resentment among major record companies and they sued Napster for Direct, Contributory and vicarious infringement of copyright in order to protect their intellectual property.

4.7. Case Laws relating to Database Protection

4.8.1. McMillan v. Suresh Chunder Deb⁴⁷, and Govindan v. E.M. Gopalakrishna⁸⁸

In these cases, it was held that compilations like dictionaries developed through devotion of time, capital, energy, brain skill and labour, taken from a common source, even though the originality level is small, it can be considered as a literary work and can be protected under copyright.

In both the decisions Indian courts followed the doctrine of "sweat of the brow." The Court held that in law books there is very little amount of originality but the same is protected by law and no man is entitled to steal or appropriate for himself the result of another's brain, skill or labour even in such works. The Court further clarified that where there is a common source, the person relying on it must prove that he actually went to the common source from where he borrowed, employing his own skill, labour and brains and that he did not merely copied.

⁸⁸ 11 AIR 1955 (Mad) 391

4.8.2. University of London Press, Ltd. v. University Tutorial Press, Ltd.

In this case it was held that the meaning of the words „original literary work“ that the original does not mean expression of original or inventive thought. The Copyright Act is not concerned with the original ideas, but with the expression of thought. The originality which is required relates to the expression of thought and the Act does not require that the expression must be in original or novel form. The work must not be copied from any other work and it should originate from the author itself. It is clear that the compilation work need not be an original literary work.

4.8. Case law relating to Photocopying

The Chancellor, Masters & Scholars of the University of Oxford &Ors.v.Rameshwari Photocopy Services &Anr.⁸⁹

In 2012 five publishing houses i.e. Oxford University Press, Cambridge University Press, United Kingdom, Cambridge University Press India Pvt. Ltd, Taylor & Francis Group, U.K., Taylor & Francis Books India Pvt. Ltd, initiated a suit for permanent injunction before the Humble Delhi High Court, Delhi restraining Rameswari Photocopy Service and the Delhi University from preparing and Photocopying course packs from its books claiming it to be copyright infringement. This is popularly known as Delhi University Photocopying case. The photocopy service in question has been selling to students, course packs based on syllabi prescribed by the University. Some of those course packs had extracts from books published by the publishers who initiated the litigation. The publishers alleged that besides providing room on campus for the photocopy service, University libraries were also issuing books to the photocopy service for making those course packs. The litigation was initiated by the publishers before the Delhi High Court in the year 2012, alleging violation of rights under copyright law. Justice Rajiv Sahai Endlaw’s judgment on 16.09. 2016 has ruled in favor of the University and the photocopy service. It declared that there was no copyright violation in the activities challenged by the publishers. This judgment can undoubtedly be considered as a landmark in the access to knowledge movement, for three reasons – first, the manner in which the Court has attempted to strike a balance within the copyright system; second, the manner in which the Court has

⁸⁹ CS(OS) 2439/2012

interpreted the specific educational use exception provided under the Copyright Act; and finally, the reaffirmation that copyright is not a natural right.

Justice Rajiv Sahai End law, by his judgment held that copyright is a statutory right and not a natural right, and hence subject to exceptions carved out by law. The nature of Section 52 of the Copyright Act is such that any act falling within its scope will not constitute infringement. Section 52(1)(i) allows for the reproduction of any work i) by a teacher or a pupil in the course of instruction; or ii) as part of the questions to be answered in an examination; or iii) in answers to such questions.

The crux of the dispute was about whether course packs fall within this exception. The petitioners tried to provide a narrow reading of the section, claiming that at best what the section allows for is the provision of materials in the course of a lecture and spatially restricted to a classroom. The court, while rejecting this claim, argues that “instruction” cannot be narrowly understood and, through a historically informed reading of the phrase “in the course of”, concludes that instruction includes the entire ambit of pedagogy from the creation of syllabus to teaching and provision of reading materials.

The judgment held that when an act is not an offence if it is done laboriously, it cannot become an offence when it is done easily using technology. To make this point, Justice End law contrasts his own experiences as a law student where photocopying was very limited and studying entailed students copying by hand, scribe like, pages after pages of books. Photocopiers have just made the task simpler and faster, but if the act of copying for a particular purpose is itself not illegal, and “the effect of the action is the same, the difference in the mode of action cannot make a difference so as to make one an offence”.

In a clear statement of the philosophical basis of copyright law, Justice End law rejects the populist and unit-dimensional assumption that copyright is about the protection of the property rights of owners. On the other hand he states that Copyright is not a usual, heavenly, or natural right, particularly in literary works, that gives authors the total ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to obstruct the yield of knowledge. It is

intended to motivate the creative activity of authors and inventors in order to benefit the public.”
171 Copyright is usually for creating.

4.10. Case Law relating to Plagiarism

In *R.G. Anand v. Deluxe Films*⁹⁰ after referring to various judicial decisions, from both Indian and western jurisdictions, the Supreme Court of India stated that “an idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person.”

It introduced a method similar to that of abstraction test indicated in that case in the following words

The fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishment here and there. Indeed, if on a perusal of the copyrighted work the defendant’s work appears to be a transparent rephrasing or a copy of a substantial and material part of the original, the charge of plagiarism must stand proved. Care however must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in a different form, different tone, and different tenor so as to infuse a new life into the idea of the copyrighted work adapted by him. In the latter case there is no violation of the copyright.⁹¹

⁹⁰ The Hindu, dated 01.11.2016

⁹¹ PTC (Suppl.) (1) 802 SC, at P. 823.

CHAPTER -V

A COMPARATIVE STUDY OF THE COPYRIGHT LAWS IN INDIA AND IN INTERNATIONAL ARENA UNDER THE INFLUENCE OF INFORMATION TECHNOLOGY

Comparative study helps in better understanding of a concept. The same is true about law also. Comparative study of law helps for better understanding of different law in different countries. Every civilized country has recognized the importance of the protection of the right of the creators of intellectual property. Copyright is also one of such intellectual property right. Copyright is a positive advantage that provides exclusive rights to the author of a copyright or authorizes others to benefit from a copyrighted work. Copyright Law seeks to balance the level of incentive to create and the interest in maximizing access to information once created.⁹² Copyright provides legal protection without any substantive assessment of the substance of the work.⁹³ Copyright constitutes an essential element in the development process of a country. The enrichment of the national cultural heritage depends directly on the level of protection afforded to literary, dramatic, musical and artistic works, cinematograph films and sound recordings. Copyright protection is not by itself a human right, but it is an instrument that defend the human rights of authors and publishers.⁴ Thus protection of copyright of its owners has gained importance in national as well as international law. In the beginning copyright was confined to books only.

The Information Technology has led to the enhancement of the scope of international copyright. The increasing and widening scope of copyright has generated interest globally in focusing on key issues such as the protection of computer program, databases, music, film, videos, books, photographs in this age of internet.

There are several international copyright conventions that have had significant effects upon the development of the copyright law. The Universal Copyright Convention (UCC) and the

⁹²Kreiss, Robert A., (1995), Accessibility and Commercialization in Copyright Theory, UCLA L. REV. 1, 2-4 at P.43.

⁹³.Zekos, Georgios I, (2008), Intellectual Property Rights and Cyberspace, Amicus Books, Hyderabad, at P. 2.

Berne Convention for the Protection of Literary and Artistic works oblige member States to provide same rights to authors of other member States as they provide to their own authors.⁹⁴

5. 1.International Convention

5.1.1. Berne Convention

The international Convention for the Protection of Literary and Artistic Works, generally known as the Berne Convention, governing copyright was adopted in 1886, to identify and control the rights of the copyright owners. This was the first international Convention on copyright which was revised several times at Berlin in 1908, at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971 to meet the various challenges posed by the technological developments.⁹⁵

Different aspects of contemporary copyright law were authorized by the Berne Convention. It set in motion the idea that a copyright is created, the moment a work is "fixed" i.e. produced. It does not require registration. It also makes compulsory, an obligation, that countries accept copyrights held by the citizens of all other parties to the convention.

The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.

All creations in the literary, scientific and artistic domain are included by the term "literary and artistic works". Its mode of expression may be various such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic creations and amusements in dumb show; musical compositions with or in the absence of words; cinematographic works to which are incorporated works expressed by a process similar to cinematography; works of sketch, canvas, structural design, carving, engraving and lithography; photographic works to which are incorporated creations expressed by a process similar to photography; creations of applied art; illustrations, maps, plans,

⁹⁴ .Jain, Pankaj& Pandey, Sangeet Rai, (2005), Copyright and Trademark Laws relating to Computers, Eastern Book Company, Lucknow, at P.82.

⁹⁵ Supra note3, at P.12

drawing and sculptural works in connection with geography, topography, architecture or science.⁹⁶

5.1.2. Universal Copyright Convention (UCC)

Besides, Berne, there was another convention called the Universal Copyright Convention, 1952. This convention was adopted at Geneva by an international conference convened under the auspices of United Nations Educational, Scientific and Cultural Organization (UNESCO), which for several years had been consulting with copyright experts from various countries.⁹⁷ The Universal Copyright Convention (UCC) is another important international convention for protection of copyright. It was adopted in Geneva, Switzerland, in 1952. The convention came into force in 1955, which was, less protective than Berne convention, and attracted many signatories including the US .The major difference was the presence of formality and no provision for moral rights of the author.⁹⁸ It was an alternative to the Berne Convention for those states which disagreed with aspects of the Berne Convention, but still wished to participate in some form of multilateral copyright protection. These states included developing countries as well as the United States and most of Latin America.

The main features are -

- (1) Party countries to this convention shall not provide more favorable copyright treatment to domestic authors than the authors of other signatory.
- (2) In all copies of a work, a copyright notice consisting of the symbol ©, name of the copyright owner and the year of first publishing must be there. However, a party nation may require more formalities but it should not favor domestic over foreign works.
- (3) As per the convention minimum term of copyright in the party countries must be life time of the author and another twenty-five years after his or her death. But in case of photographic works and works of applied art the term is ten years.

⁹⁶ Ibid, Article 2(1)

⁹⁷ Gogia, Deepak, (2010), Intellectual Property Law, Ashoka Law House, New Delhi, at P.179

⁹⁸ Ibid

(4) All party countries are to grant an exclusive right of translation for a seven-year term, subject to a compulsory license under certain circumstances for the balance of the term of copyright.

The Universal Copyright Convention is not against any other multi-sided or two sided conventions or arrangements between two or more party countries.

5.1.4. World Intellectual Property Organization (WIPO)

The foundation of WIPO was laid down in 1883 in the Paris Convention. Here fourteen nations came into agreement for protection of industrial property, which started the process of intellectual property protections for inventions, trademarks and industrial designs. It assisted the creators of intellectual property to get protection for their works outside their local countries. The Berne convention of 1886 started the system of automatic protection to creative works originated in the member countries.

WIPO was established for the purpose of promoting worldwide protection of both industrial property and copyrighted works such as literary, musical, and photographic and other artistic creations. WIPO gave its attention for the protection of computer program when in 1978 it made model provisions for the protection of computer program.

The aims of WIPO are twofold.

1. Promotion and protection of intellectual property through international cooperation. At present it manages more than twenty intellectual property treaties.
2. another objective of WIPO is to govern the organizational coordination among the Paris, Berne, and other intellectual unions concerning settlement on trademarks, patents, and the safeguard of creative and written works.

WIPO's functions for protection of intellectual property started increasing from mid 1990s when it signed cooperation agreement with World Trade Organization. The increase and development of the use of internet resulted in the growth of e-commerce. With the increase of electronic commerce, disputes relating to this also increased and therefore, WIPO was charged with resolving these issues.

More than one hundred eighty countries are members of WIPO. General assembly of WIPO is the policy-making body. It convenes its meeting biennially where its budget and programs are fixed. To the tune of hundred and seventy nongovernmental organizations or more preserve spectator status.

Copyright law has confronted challenges adapting up to computerized advances, particularly the Internet. To protect copyright has been an intense problem because the secured works can be effortlessly shared and exchanged through the web. Keeping in mind the end goal to change the legitimate framework to be in consonance with the most recent mechanical improvements the World Intellectual Property Organization (WIPO) has set down two settlements which are known as Internet Treaties. They are the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These two arrangements are thought to be the updates and supplements to the Berne Convention for the security of the artistic material.

- WIPO Copyright Treaty, 1996

This treaty was adopted by the Diplomatic Conference at Geneva on December 20, 1996. It is a special agreement within Article 2 of the Berne Convention. It is related to digital technology and the internet.³¹ Although the WIPO document was prepared and, therefore, has the status of historical documents as far as the computer industry is concerned, it shows that major problems were evident even at this early stage.⁹⁹

The WCT is a unique contract amongst the party nations to provide authors more wide-ranging rights than those provided by the Berne Convention. It also has other provisions which are in conformity with the Berne Convention.

The treaty provides, “Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.”

⁹⁹ Supra note 29, at P. 7

As per the treaty, collection of fact and figures or other material, in any variety, which, for the arrangement of it constitute intellectual creations, are protected as intellectual property. This safeguard is not available to the facts and figures and other materials itself. This protection is without hampering any copyright existing in the facts and figures or material contained in the compilation.

- **WIPO Performances and Phonograms Treaty (WPPT)**

The WIPO Performances and Phonograms Treaty is an international accord of the World Intellectual Property Organization which further increases the efficacy of the Berne Convention for the Protection of Literary and Artistic Works and Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

WPPT was introduced to deal with the revolution brought by the digital technology and communication, specially the sharing of digitally secured creations over the internet. The provisions of WPPT are adopted in America as the Digital Millennium Copyright Act.

The WPPT and WCT are called internet treaties. They are introduced to deal with new marketplace and technology where lots of copyrighted work is shared in digital form.

WPPT was enacted to improve the WIPO copyright treaty and its regulations. It was enacted mainly to deal with the rapidly evolving development of new markets, distribution methods and types of works.

5.1.5. The Council of Europe's Cyber-Crime Convention 2001

America and twenty nine other nations signed the Council of Europe's Cyber Crime Convention in 2001. Under this convention the member countries are to make laws which bars number of activities. The convention declares the following as illegal-

- (i) unauthorized access of an Internet computer system;
- (ii) unauthorized interception of Internet data;
- (iii) damage to Internet-related computer equipment;
- (iv) interference with the functioning of Internet-related computers;
- (v) Internet fraud and forgery;
- (vi) the production or distribution of child pornography, and

(vii) copyright infringement using the Internet.

5.2. A comparative study of Digital Rights Management in India with United States of America (US) and European Union (EU)

The 1980s and the 1990s saw the digital revolution sweeping the world and advent of internet over the World Wide Web. It is very pertinent for lawmakers, content owners, consumer electronics and consumer manufacturers to understand the technology of the Internet, the function it performs, the uses of such technology, and the role of the principal players on the Internet in order to understand the legal implications of the Internet on the copyright of authors. Internet is often described as a “network of networks”.

Through internet material can be accessed, viewed, retrieved, printed and downloaded from all over the world. We do not have an “owner” or “proprietor” who owns and controls internet. It is, therefore, sometimes described as “information technology communications anarchy”.

It is also termed as a set of computer network which are probably not alike, connected by gateways that control information, transmit messages from the distributing network through the protocol used by receiving network.

Indian Copyright Amendment Act, 2012

In India, the Copyright Act was amended in the year 2012 so as to comply with the international treaties, Wipro Copyright Treaty (WCT) and Wipro Performances and Phonogram Treaty (WPPT) though India has still not ratified the same. Making copies on the internet has become lot easier and each one looks original. The fact that they are made available on the Internet neither constitute a waiver of copyright nor does it carry any implied license for anyone to download or reproduce the material without the permission of the copyright owner. Digitization has caused the cost of copying and distribution to fall to virtually zero. Here arises the question whether the distinction between traditional “original” and “copy” will be applicable to such a communication technology where these distinctions are meaningless. It is a

fundamental issue that arises pertaining to determination of the scope and protection of rights of copyright owners in the digital environment. Some of the specific issues that have arisen are:

- a. defining rights of authors and exceptions as well as limitations to such right,
- b. enforcement and administration of these rights in this digital environment.
- c. adequacy of the existing laws to protect copyright.

Provisions added by Copyright Amendment Act, 2012 regarding Digital Right Management (DRM)

Sec. 65A and Sec. 65B were added by way of amendment in 2012 to the Copyright Act. Sec.65A, the anti-circumvention provision along with the exceptions enumerated three major implications of the legislative approach.

Firstly, by limiting the application of the anti-circumvention provision to cases of intentional infringement, the legislator has used a fairly high bar for invoking actions based on this provision.

Secondly, as the exception provision clearly mentions, if the circumvention was for a purpose not expressly prohibited by the Copyright Act, the anti-circumvention provision will not apply.

Thirdly, the legislature also allows circumvention with the help of third parties, provided certain procedural conditions are met.

Any person who circumvents a useful technological measure applied for the purpose of protecting any of the rights given by this Act, with the intention of violating such rights, shall be punishable with incarceration which may extend to two years and shall also be liable to fine.³⁸ But there are some exceptions provided in the Act where circumvention of technological measures is allowed.

In U.S.A

Digital Millennium Copyright Act (DMCA), 1998

To know how Indian Govt. has taken minimalist approach in implementing the Digital Rights Management Information provisions, as mentioned in WCT and WPPT, it is important to see the same provisions of other country like America and European Union.

These countries are selected for study not only for their important role in the evolution of the WCT and the WPPT, but also for their comparatively longer experience with DRM provisions. 42 The DRM requirements projected under the WIPO Internet treaties were executed in the United States through the Digital Millennium Copyright Act ,1998.¹⁰⁰

One of the most significant reasons that differentiate the DMCA from other DRM legislation is that it tries to make a distinction between protection for measures that control access to a work and protection for measures that control use of a work.

Fascinatingly, the DMCA access control provisions not only prevents the actual evading of access control measures fixed on a work, but also is concerned for preventing preliminary activities like manufacture and distribution of tools that are primarily meant for facilitating circumvention of access control.⁴⁵ On the other hand, the anti-circumvention provisions relating to protection of usage control measures proscribe only preparatory activities.

The DMCA also put a stop to changing of rights management information and doing similar works being aware that the rights management information has been tampered.

The explicit exemptions provided under the DMCA are very narrow in scope and they are provided for the purposes of encryption research, law enforcement and security related government activities, reverse engineering, and acquisition assessment for non-profit libraries, archives, and educational institutions.

¹⁰⁰ Pamela, Samuelson & Scotchmen, Suzanne,(2002), The law and economics of reverse engineering, Yale Law Journal, (7) 1634, at P. 111

Though the DMCA has delegated some powers to the Librarian of Congress to periodically make rules for allowing specific exemptions, a review of the exemptions made so far in this regard shows that its scope of application is very narrow.

European Union

In Europe also same condition regarding DRM laws could be seen. The copyright law in Europe is not yet wholly coordinated at the community stage and there are still substantial differences in the approaches taken by diverse member states of the European Union with regard to copyright law. The Information Society Directive of 2001 was most important attempt meant for copyright synchronization within the community and it had also made it compulsory for all the member states to bring DRM policy in the national legislation of member states.¹⁰¹

Article 6 of the Information Society Directive makes it compulsory for the member states to give sufficient legal defense against the evading of efficient technological measures, if the person concerned is engaged in evading with the knowledge, or with reasonable grounds to know, that he/she is pursuing that objective.¹⁰²

The Directive also specifically outlaws many preparatory activities of commercial nature, with regard to circumvention of technological protection measures.

Article 7 of the Directive also outlaws tampering of rights management information and dealing in such tampered works, when the person concerned is engaged in such acts with the knowledge or reasonable grounds to know that he/she is inducing, enabling, facilitating or concealing infringement of copyright or database rights through such actions.

Contrasting the novel Indian DRM provisions or the DMCA, the Directive does not give exceptions for any precise group. The assessment of the functioning of the DRM provisions arranged under the Information Society Directive in different member states shows that member states have taken different approaches for execution. 53 While some member states have restricted the protection to instances of copyright infringement, some member states have protected the technological measures per se. It is also interesting to see that none of the member

¹⁰¹ .Official Journal of European Communities, (2001), L 167, Vol.44, PP. 10 – 19

¹⁰² .Ibid P17.

states have provided an express right for users to circumvent the technological measures for non-infringing purposes.

As is evident from the procedural mechanisms installed by different member states, users who want to make use of any legitimate copyright exceptions may have to approach the designated authorities, and in some cases the courts directly, in the absence of voluntary agreements with the right holders. This in turn reflects a highly disturbing picture of how the legitimate exceptions to copyright infringement, used to balance the rights of copyright holders with that of copyright users, are distorted by the new DRM regime in Europe.

The anti-circumvention provision attaches liability to every person who “circumvents an effective technological measure”. However, it is noteworthy that neither the term “circumvention” nor the terms “technological measure” or “effective technological measures” have been defined in the Act. The corresponding provisions in the WCT and the WPPT also left these definitions open ended so that different Member States could interpret these terms keeping in view their domestic needs. The absence of definitions for terms like “technological measure” in the Indian amendment creates a gap because it is not clear as to whether the provision relates to access control measures or copy control measures or both. Furthermore, it being preceded by the term “effective” necessarily implies that all technological measures are not effective. This further implies that circumvention of non-effective technological measures does not attract liability under this provision and if infringement is caused, liability can be attached only to infringement and not circumvention. But the provision does not lay down any guideline as to how to differentiate between an effective technological measure and a non-effective technological measure. If the purpose of a definition is to give clarity as to what will be the activities that will be covered by the provision, the amendment has failed in this aspect. Consequently it has also not done much to simplify possible problems relating to the interpretation of the term “plate” under Section 2(t) of the Copyright Act, 1957 which was earlier in existence. From the drafting of the provision it seems that the legislature has left it entirely to the domain of the judiciary to decide as to what will comprise an effective technological measure and what will constitute circumvention. This is a policy decision that should have taken into account various facts like identification of all effective technologies that have minimum adverse effect on the legitimate interest of the public, recognition of all technologies that serve the need

of the owners of copyrighted works protected by technology, etc. Further the application of the provision essentially lies in the meanings attributed to these words and leaving them to the judiciary does not seem to be a commendable approach.

5.3. Comparative Study of Copyright Protection of Computer Program

The history of copyright law suggests that it has undergone various changes with technological developments. Initially copyright protection was given only to literary works. The scope and extent of traditional copyright law was very narrow and did not include photographs, sound recordings, etc. However, with growth of technology, changing circumstances required existing copyright law to include photographs, sound recordings, etc. in the definition of artistic and dramatic works. With the invention of computers, it was deemed necessary to enlarge the scope of copyright laws and subsequently to include computer programs and computer software in the cluster of copyrights. The purpose of copyright is to encourage people to use their skill, time and resources to create material that is of cultural and economic benefit to society. It does this by giving the owner legal rights to control use of that material by others and earn an income from the skill and effort which went into creating that material.

Certain problems were faced while giving copyright protection to computer programs and software. The law assumes that if a thing is in writing, it can be protected through copyright and if it is a machine or invention then it can be protected by patent. Computer programs have both aspects i.e. authorship as well as invention- which law generally does not assume simultaneously. One of the views is that a computer program uses mathematical algorithms and functions in a technical manner. Thus, it needs patent protection. Another view is that it cannot be protected under patent as granting monopoly like protection i.e. patent in computers, may hamper technological development of society. However, it is apparent that a computer program subsists only in material form in which ideas are expressed and it is to be protected under copyright as copyright protects expression of ideas and not ideas themselves. Thus, most countries have protected computer software and programs under copyright.

a. India

Initially in India, the Copyright Act, 1957 did not protect computer programs. However, after the Amendment Act of 1999, it has given protection to computer programs a

literary works, which are already protected under copyright.¹⁰³ The Amendment Act of 1999 has added definitions of „Computer“ and „Computer Program“ to the Act.

Sec. 2(ffb) provides that “Computer” means any electronic or similar machine having information processing capacity.

Sec. 2(face) again defines “Computer Program” imports set of commands articulated in words, codes, schemes or in any other form, counting a machine-readable medium, competent of causing a computer to perform a particular job or achieve a particular result.

Sec 2(o) provides that “Literary work” includes computer programs, tables and compilations including computer databases.

b. Australia

In Australia, copyright law is contained in the Copyright Act, 1968 and in decisions of courts that have interpreted the provisions of the Act. Copyright protects computer programs as “literary works”. The Copyright Act, 1968 defines a computer program as an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended, either directly.

c. Canada

In Canada also computer software is protected by copyright law, which is governed by the copyright Act. Computer software is protected in Canada as literary work. However, patents for some types of software have also been granted in Canada.

d. United Kingdom

In United Kingdom, Copyright Designs and Patents Act, 1988 does not define computer and computer program. Probably, the country would allow courts to develop the meaning of computer and computer program depending upon technological changes. However, computer programs are protected under Copyright, Designs and Patents Act, 1988. The Act states,

¹⁰³ Sec. 13 of the Copyright (Amendment) Act, 1999

„Literary work“ imports any work, other than a theatrical or melodic work, which is in black and white, vocal or sung, and accordingly includes-

I. a table or compilation, and

II. a computer program.

(2) Copyright does not exist in a literary, theatrical or musical work except it is recorded in writing or otherwise; and references in this part to the time at which such a work is made are to the time at which it is so recorded.”¹⁰⁴

Thus, the Act places computer programs firmly within the literary works category for purposes of copyright. Under this Act, computer programs are protected through the definition of “writing” as it includes any form of notation or code, whether by hand or otherwise and regardless of the method by which or medium on which, it is recorded.”

Thus, the Act places computer programs firmly within the literary works category for purposes of copyright. Under this Act, computer programs are protected through the definition of “writing” as it includes any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium on which it is recorded.

5.4. Legislative Developments in Some Countries to Counteract Copyright Infringement through Information Technology

In France, French Parliament introduced a law in May 2009, promoting the distribution and protection of creative works on the internet (HADOPI law). As per the law Internet Service Providers (ISP) to make contact with account holders by email and then by letter to notify that they were violating copyright with the consequence that, if the caution were mistreated, the account could be closed for up to a year. In June 2009, the Constitutional Council repealed the law as the law was unconstitutional. It pronounced that free access to online communication services is a human right and any decision to prevent that access required judicial intervention. Furthermore, the surveillance required of the ISP would breach French citizens' right to privacy. In October 2009, the Constitutional Council passed an amended edition of the law which needs that any suspension or closing of user accounts can be done only after a judge has approved it.

¹⁰⁴ Sec.3 of Copyright, Designs and Patents Act, 1988

In Canada, the main components of the Canadian approach are a notification regime aimed at alerting internet users to the fact that their account has been used for alleged copyright infringement, and a series of safe harbour that allow internet intermediaries to escape any liability for copyright infringement. Under the notification regime, rights holders identify online copyright infringement by internet subscribers and send a notice to the relevant intermediary. Intermediaries include not only ISPs acting as a mere conduit but also host, information location tools etc. ISPs are generally required simply to pass on the notification to their subscribers as a way of alerting them to the alleged infringement and a potential encouragement to change their behavior. Hosts are similarly required to pass on the notification to their subscribers and are under no immediate obligation to remove the infringing content. However, the Canadian Courts can order take down or blocking of access to infringing material, and once a host is aware of any such court decision it must take action otherwise it will lose its liability safe harbour. In this case, information location tools must also remove the material from their cache. Civil action can be taken against copyright infringers and rights holders can claim statutory damages.¹⁰⁵

In Brazil, contrary to most of the other countries analysed, it does not include any special dedicated organization or body for the solution of disputes in copyright infringement. The strategy adopted in Brazil is instead to have a specific set of laws strongly focused on several “internet-related” crimes, in addition to traditional copyright laws. The complaints and judgments then run through the normal judicial system. The system relies on imprisonment for some relatively mild crimes, to act as a deterrent. The present structure therefore is completely different from an international inclination of comprehending online copyright violations as an act that needs an extra legal and institutional framework to tackle it, frequently divorced or free from the judicial system. In part, this may stem from the fact that the current law originally dates from 1999, when it would not have been possible to have been influenced by more recent approaches in other countries, such as the HADOPI law in France.¹⁰⁶

In United Kingdom (UK), the Digital Economy Act, 2010 came into force on 8 April 2010. Under the legislation, it is mandatory for ISPs with 400,000 customers or more to keep

¹⁰⁵ 9. The Intellectual Property Office, (2015), International Comparison of Approaches to Online Copyright Infringement: Final Report, Newport, UK, at P.30.

¹⁰⁶ Supra note 59, at P.39

watch over file sharing and launch the "Three Strikes" procedure, which may end in users who recurrently break copyright having their internet bandwidth reduced or even finished.

The UK approach focuses on both individual subscribers engaging in infringing activities and those providing infringing material and enabling access to such material by methods or measures mentioned below

1. Individual users accessing infringing material are targeted through a voluntary scheme agreed between the British Phonographic Industry (BPI), the Motion Picture Association (MPA) and the four largest Internet Service Providers (ISPs - BT, Sky, Talk Talk and Virgin Media). Under the scheme, copyright owners will identify individuals engaging in unlawful peer-to-peer (P2P) file sharing and inform the ISP who will send a notification of alleged infringement to the account holder.
2. Action against the enablers of infringement such as those websites providing access to infringing material can be taken under UK copyright law (the Copyright, Designs and Patents Act, 1988 (CDPA). Under the CDPA website owners found by the courts to be infringing copyright can be fined and or imprisoned. Legislation provides for a notice and action regime where the rights holder identifies infringing material and takes steps to take down the content or to request ISPs to block access to that content. Sections 18 and 19 of the Electronic Commerce (EC Directive) Regulations 2002 provide an incentive for ISPs to remove infringing material or block access to material hosted in the UK if they have been notified by the rights holder of the existence of such material. Doing so „expeditiously“ means that they escape any liability for copyright infringement to which they might otherwise be exposed. Sec. 97A of the Copyright, Designs and Patent Act 1988 entitles rights holders to seek court injunctions against ISPs that require the blocking of subscriber access to infringing material. This is of particular importance where that material is hosted outside of the UK are more difficult to target via notice and takedown requests. There is complementary support from the police in the form of a dedicated, operationally independent enforcement unit – the Police Intellectual

Property Crime Unit (PIPCU). One of PIPCU's major operations has been „Operation Creative which aims to disrupt and prevent online copyright infringing websites by engaging with site owners, disrupting advertising revenue and de-registering domain names.

5.5. Comparative study of the main features of copyright law In India, United States of America (USA) and United Kingdom(UK)

Here, a comparative study of the main features of Copyright Law in India, United Kingdom (UK) and United States of America (USA) is embarked upon.

5.5.1. Comparative study of history of copyright

Today almost every nation has a copyright law in place and is mostly standardized to some extent through international and regional agreements such as the Berne Convention and the European copyright directives. When one looks back, one can realize that the Copyright law has a very unique history.

In India, Copyright law was legislated in 1847 through an enactment during the East India Company's regime. According to the 1847 enactment, the term of copyright was applied for the lifetime of the author and another seven years after the death of the author. But in no case could the total term of it exceed a period of forty-two years. In India the first Copyright Act was enacted under the British Raj in 1914 in accordance with the Copyright Act, 1911 of U.K. Entry 49 List I of the Seventh Schedule of the Indian Constitution empowers the Union to enact laws relating to copyright, patents and trademarks.¹⁰⁷ Accordingly in the post-independence, the Act of 1914 was replaced by the Copyright Act of 1957 which includes number of changes. India is a member of Berne Convention and Universal Copyright Convention 1952.⁶⁴ This Act has been amended six times since then, i.e., in 1983, 1984, 1992, 1994, 1999 and 2012 with the amendment of 1994 being the most substantial.

In U.K. the printers, known as stationers, formed a collective organization, known as the Stationers Company. In the 16th century the Stationers Company was given the power to require all lawfully printed books to be entered into its register. In 1707 the parliaments of England and

¹⁰⁷ Shukla, V.N., (2006), Constitution of India, Eastern Book Company, Lucknow, at P. 4

Scotland was united and changed the laws in both countries. In England the early piece of legislation was the Copyright Act, 1709 also known as the Statute of Anne. It came into force in April 1710 which marked a historic moment in the development of copyright law.⁶⁵As the world's first copyright statute. It provided publishers of a book official protection of 14 years with the beginning of the statute. Statute of Anne ended in 1731. In a case, namely *Midwinter v. Hamilton* (1743– 1748), the London booksellers started to follow common law and thus started the „battle of the booksellers“ which lasted for 30 years. In 1875 a Royal Commission suggested that the present Acts should be improved and codified. Thus Copyright Act 1911 brought provisions on copyright into one Act for the first time by revising and repealing earlier Acts.

In U.S.A, the copyright law started with the introduction of the printing press in England in the late fifteen century. The United States Constitution clearly provides Congress the power to make copyright law under Article 1, Section 8, and Clause 8, known as the Copyright Clause. The First Congress in 1790 legislated the earliest Federal Copyright Act. This Act gave protection to author's rights. It gave copyright for a term of fourteen years from the time of recording of the title, with a right of renewal for another fourteen years, if the author survived to the end of the first term. The legislation included books, maps and charts. The Act of 1790 had imitated almost word for word from the Statute of Anne.

5.5.2. Eligibility of works for copyright protection

There is no copyright in ideas. The Copyright subsists only in the material form to which the ideas are translated.¹⁰⁸ The copyright protects the right of an author, artists, or composer to prevent another person from copying his original work.

In India Copyright law protects expressions of ideas rather than the ideas themselves. Copyright protection is conferred on original literary works, dramatic works, musical works, artistic works, cinematograph films and sound recording having form of Originality. It should originate from the author and to be a product of independent creation.¹⁰⁹ Initially in India, the Copyright Act, 1957 did not protect computer programmers. However, after the Amendment Act of 1999, it has given protection to computer programmers as literary works. “Fixation” – should

¹⁰⁸ .Wadehra,B.L., (2006), Law Relating to Patents Trade Marks Copyright Designs & Geographical Indications .Universal Law Publishing Co. Pvt. Ltd., Delhi, at P.311.

¹⁰⁹ Sec. 13 of the Copyright Act, 1957, No.14, Acts of Parliament, 1957(India)

be expressed in a material form. For example, books, computer programmers are protected under the Act, as literary works.

In U. K, Copyright subsists in (a) original literary, dramatic, musical or artistic works, (b) sound recordings, films or broadcasts, and (c) the typographical arrangement of published editions.⁷⁰ But Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise; and references in this Part to the time at which such a work is made are to the time at which it is so recorded.¹¹⁰

In U.S.A, copyright security is given in unique creation of authorship fixed in any physical medium of appearance, presently known or later developed, from which they can be apparent, replicated, or otherwise communicated, either explicitly or with the help of a machine or device. Creation of authorship includes bookish works; melodic works, including any associated works; theatrical works, including any associated music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; movies and other audio-visual works; sound recording ; and architectural works. Irrespective of the form in which a copyrighted work is described, explained, illustrated, or embodied, the copyright security is not available to any idea, procedure, and process, and system, method of operation, concept, principle, or discovery in it.¹¹¹

5.5.3. Formalities of copyright

Copyright formalities are legal requirements needed to obtain a copyright in a particular jurisdiction. Common formalities of it include its registration, renewal, notice, and deposit.

In India, acquisition of copyright is automatic and it does not require any formality. It comes into existence as soon as a work is created and no formality is required to be completed for acquiring copyright. Whether one gets his copyright registered or not this right subsists in oneself.⁷³ However, certificate of registration of copyright and the entries made therein serve as prima facie evidence in a court of law with reference to dispute relating to ownership of copyright.

¹¹⁰ Supra note 70, Sec.3 (2).

¹¹¹ U.S. Copyright Act, 17 U.S. C § 102(a).

In U.K, there are no formal requirements for copyright protection. However, UK law imposes a formal requirement to assert the moral right of attribution.¹¹²

5.5.4. Scope of rights

The Copyright Act grants five rights to copyright owner which are right of reproduction, right to make derivative works, distribution, public performance and public display. But there are some limitations to copyright protection such as (i) fair use, (ii) items which are not copyrightable like titles, names etc., (iii) works which are in the public domain.

In India the copyright is extended to reproduce the work, to prepare derivative works based upon the work, to distribute copies of the work to the public, to perform the work publicly, to display the copyrighted work publicly and in the case of sound recordings, to perform the work publicly by means of a digital transmission.¹¹³

In U.K, the scope of copyright includes (i) Right to copy the work. (ii) Right to issue copies of the work to the public. (iii) Right to rent or lend the work to the public.

(iv) Right to perform, show, or play the work in public.

(v) Right to communicate the work to the public. (vi) Right to make an adaptation of the work or do any of the above in relation to an adaptation.¹¹⁴

In U.S.A, fundamental economic rights for most works includes (i) Right to reproduce the work in copies. (ii) Right to prepare derivative works. (iii) Right to distribute the work in copies to the public. (iv) Right to perform most types of works publicly.(v)in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio-visual work, to exhibit the copyrighted creation openly; and (vi) in the case of sound recordings, to present the copyrighted creation in public through a digital audio transmission.

¹¹² Supra note 70, Sec. 78

¹¹³ Supra note 6, at P.23.

¹¹⁴ Supra note 70, Sec.16(1),17,18,18A,19,20 & 21.

5.5.5. Moral rights

The copyright besides conferring economic benefits also confers moral rights on the author. The moral right of the author is known as “special rights.” The Berne Convention recognizes some of these rights and requires member States to provide the author with the right to claim authorship and to object to alterations. These rights remain with the author even after the transfer of it and such rights last throughout the entire term of the copyright.

In India, the author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other acts in relation to the work which is done before the expiration of the term of copyright. Moral rights are available to the authors even after the economic rights are assigned. The moral rights are not dependent on the author’s copyright and stays with him even after assignment of the copyright. Failure to display a work or to display it to the contentment of the author shall not be considered breaching of the moral rights of the author. Besides the of copyright, moral rights of the author are also protectable.

In U.K, copyright law is primarily concerned with protecting the rights of the owner (not always the creator) to exploit a work economically. Moral rights recognize that the creator of a work also has a continuing interest ensuring that his work is treated with respect, even if, by transferring copyright to another, he may no longer have an economic interest in it.⁸³ In U.K, moral rights for most works include.

In U.S.A, certain works of visual arts are eligible for the following moral rights: (i) Right to attribution to the work. (ii) Right to integrity of the work, including right to prevent intentional destruction.

5.5.6. Assignment or transfer of copyright

The manner of exploitation of copyright in a work can be numerous. One of the chief benefits of copyright ownership is the capacity to convey some or all of those rights to third parties. These transfers can be for all of the rights in a copyrighted work or can be for a restricted portion of the rights provided by the Copyright Act.

In India, the owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright, either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof.¹⁰⁰ Nevertheless, in the case of the transfer of copyright in any prospective work, the transfer shall be effective only when the creation comes into existence. Where the transferee of a copyright becomes eligible to any right incorporated in the copyright, the transferee as respects the rights so transferred, and the transferor as respects the rights not assigned, shall be treated, as the owner of copyright and the provisions of this Act shall be applicable consequently. The term "assignee" regarding the assignment of the copyright in any upcoming work includes the legal representatives of the assignee, if the assignee dies before the work comes into effect.

In U.K, copyright is transferrable by assignment, by will or by operation of law, as individual or movable property in total or in part. For a valid assignment it must be in writing and signed by the assignor.¹⁰³ Exclusive licenses must be in writing and signed by the copyright owner. Statutory moral rights are not assignable.

In U.S.A, copyright, or any of the owner's exclusive rights, or any portion thereof, may be transferred to any other party. ¹⁰⁶ A valid transfer, other than by operation of law, must be in a written instrument and be signed by the copyright owner who makes the transfer.

Conclusion and Suggestions

The researcher began this journey of academic pursuit with zeal of identifying and understanding the challenges in the digital era and its impact on intellectual property with specific reference to the copyright law. As we know copyright is a right which subsists in different kinds of works consisting of bundle of rights which are granted by statutes, for limited period of time, which is subject to certain exceptions. The purpose of the copyright law is to encourage authors, composers and artists in creation of original work by incentivizing them with granting exclusive rights. The copyright owner has a property interest in preventing others from reaping the fruits of the labour. However, by this the author cannot prevent others from making use or building upon the existing works as such prohibition would have been a disaster for new creative works. Hence, by wisdom the statutes provide certain permitted uses, which are not considered to be infringement of copyright.

The authors of copyright have always faced challenges in protection of their works and this has become more difficult and challenging in the digital media. The reason being a work can be replicated with ease and instantaneous without reducing the quality by generating perfect copies. The digital copying has reduced the time required for copying and can reproduce required quantities instantaneously. Today any work like, books, music, movies, computer software are transmitted and used by multiple users by online transmission across the globe. Works in the digitalized form comprising of texts, images, sounds, animation, and photograph can be transformed, manipulated or mixed to create a completely new work. This has made the task of the copyright owner more difficult to control the reproduction and restrict unauthorized use of such work.

In view of this the author tried to understand the legal principles enshrined in copyright law with the help of decided cases. Conclusions are drawn and suggestions are made for the future development of copyright law based on intense introspection. The same has been enumerated in the following paragraphs:

- The copyright law protects original work of authorship, fixed in a tangible medium of expression and does not protect the ideas, procedure, process, system, method or operation. The fundamental limitation reflected in the idea/expression dichotomy should apply with same force in relation to computer software/program.
- The work stands protected if it is fixed either directly or with the aid of a machine or other device and it makes no difference what the form, manner, or medium of fixation may be. Any work fixed in words, numbers, notes, sounds, pictures or any other graphic or symbolic indicia is sufficient when it is embodied in a physical object in written, printed, punched, magnetic, or any other form are protectable subject matter.
- Any electronic incorporation of literary work, pictures, movie, songs, etc., in the RAM or hard disk of a computer, will constitute a fixation.
- The researcher suggests that, decision on the duration of preservation in the electronic memory for fulfillment of the fixation criteria is a matter for courts to decide based on facts and circumstances. Further, the courts may consider that a work retained even transiently in a computer memory is sufficient for subsistence of copyright.
- The research proposition reflects the justification for protection of computer program within the copyright law.
- The study reveals that, computer software protection initially was protected under the Trade Secret Law and with few cases of protection under Patent Law. The authors of computer software then turned towards Copyright Protection.
- The legislative intention and courts interpretation moved in favor of protecting computer software within the copyright jurisprudence. This study identifies the justification of computer software protection under copyright law for the following reasons:
 - Works consists of not only of literature proper, but also scientific writings with a purely utilitarian or commercial aim and original intellectual creation which the copyright law intends to protect them as literary works. Computer software/program being literary creations are thus, protected under copyright law.

■ The researcher found that if a work is in machine-readable form, retrieved and made available in such a way, as to be outside the scope of protection would have resulted in the end of copyright to such work.

If this is permissible then, the computer software industries will include all the categories of works in a computer system in such a way that, any storage will be considered as reproduction entailing liability.

■ Computer programs are frequently made of sub-routine elements and unless an unreasonably high originality test is applied, which nearly all computer programs would pass such a test. As copyright law does not require too high a creativity in the sense of it being new innovation, it is entitled to protection.

■ Quite appropriately algorithms are not protected by copyright law as they are considered the most fundamental creative elements of computer programs. And, copyright law does not protect any idea, procedure, process, method of operation, concept, principle or discovery, in general, other than protecting the concrete expressions of the ideas. By this researcher rests his conclusion that, the copyright law would precisely offer appropriate protection for computer software/programs without creating unreasonable obstacles to independent creation of such programs.

• The research reveals that, today, the authors of computer software have started exercising their right by way of licensing agreements, regulating the conduct of the users. The researcher suggest that, in the guise of licensing agreements, the users shall not be restricted or prohibited for use of copyright work within the framework of “fair use” under copyright law.

The researcher in Chapter 111 has explored the statutory definition of “literary works,” which discovers to include computer software, programs and computer data bases. It includes any verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as tapes, discs or cards, in which they are embodied. The following conclusions emerge from this research:

- ❖ Computer software/program consists of the source code and object code. The source code is written in a human readable form and the object code is written in machine

- language of the computer's central processing unit, which are literary works extending the meaning and protection under copyright law.
- ❖ Application programs and operating system programs can have copyright.
 - ❖ The researcher establishes that, computer program written in a programming language, using the commands; instructions and structure of the language are capable of copyright protection.
 - ❖ Computer program consists of both literal and non-literal elements. The literal elements are the program's source and object code with the set of instructions and ensure that the computer hardware performs certain functions are protected.
 - ❖ The study finds that, non-literal elements of a computer i.e. the way a program is constructed, structured, sequenced, organization of the program is done and the menu command structure and user interface, wherein user has little or no contact with these elements and only concerned with what he/she will see on the screen are protected under copyright law. The "look and feel" or "user interface" of a program are described as those features of a computer program, which a user perceives and enables him/her to execute the program with ease and comfort.
 - ❖ Computer program is protected if it is fixed in an internal permanent memory device (ROM). The researcher found that, the protection is recognized, even when the program is fixed in a ROM silicon chip, a floppy disc or in magnetic tape.
 - ❖ A Microcode, the lowest level of instructions that interpret higher level commands, letters, signs and symbols representing the program are also protected.
 - ❖ The repetitive sequence of a substantial portion of the sights and sounds of the games qualifies for copyright protection as an audiovisual work. Video displays are protectable subject matter.
 - ❖ However, the study found that, the functionality of computer software is not protected. There are certain inputs and output devices for an interface between the computer and user, which includes the keyboard, mouse, joystick, interactive pen, disk drives, audio equipment, microphone and screen displays should not be protected under the copyright law, as they are considered to be functional works.
 - ❖ As in case of literary works where words or simple common statements of rules of a game or contest will not get copyright protection even components of the computer

- code including simple routines, preliminary lists of functions or source code commands standing alone is not protected.
- ❖ Any alteration of the sequence, arrangement or selections of symbols may not be protected as copyright, as it is treated as idea and not an expression of idea.
 - ❖ In the case of flow chart and other depictions of program design an underlying algorithm or idea are not protected, unless it is expressed in a particular form in a flow chart or other format. Flow chart with only decorative features or patterns describing only steps to be taken cannot get copyright protection.
 - ❖ Graphic User Interface shall not be protected because, either they lack originality or scenes a fair or merger doctrine being made applicable.
 - ❖ Similarly, it may be also due to limited number of ways in which an idea can be expressed or to the external constraints imposed by the computer system
- The research features that, the courts may consider the external factors like, the technical, conceptual, or efficiency constraints, interface specifications, de facto industry standards, hardware standards and mechanical specifications of the computer on which a particular program is intended to run, software standards and compatibility requirements of other programs or hardware with which the program is designed to operate, computer manufacturer's design standards, the speed and power of the computer with which software is used in deciding infringement in computer software. The researcher suggests that courts should consider these external factors at the time of the alleged infringing activities and not at the time when the first program is written.

The study encompasses to understand certain tests adopted by the courts in order to identify copyright infringement in computer programs featuring the following propositions:

- o The “Merger Doctrine,” where the courts will find no infringement of copyright in using or copying of the existing works, if such copying or use is the only way to put a particular idea into practice,

The study reveals that, the idea/expression dichotomy in computer programs is necessary to find an infringement. The courts have adopted the three step test known as the “Abstraction-Filtration- Comparison”

Test, to decide upon the protectable and non-protectable elements under copyright law. The same test could be adopted in India to decipher the understanding of infringement of copyright in a computer program.

This set the standards of law in expressing that, ideas not only exist at exclusively the most abstract level but even at multiple levels of a computer program. The courts may testify that protectable elements of a computer programs are copied.

- The researcher suggests in excluding the methods of operation and processes from the scope of copyright in computer programs because, much of the content of computer programs is patentable. Neither the legislation nor judicial decisions may have set standards because of the complexity involved in computer software/program nor also because technology is changing within a short span of time, is thus suggesting the law to evolve from time to time in such cases.
- One more important issue researcher looks into, is with respect to a publication of any work which is an essential element to claim copyright. This study reveals three difficulties in internet context which are as follows:

- I. If any work gets published over internet, the task of finding the first publication is very difficult as dissemination may take place simultaneously at different points.
- II. When a work is published both in analog form and in internet, the question of determining the first publication is further more difficult to apply. The law as it stands provides that publication is said to be done when it is first issued or communicated to the public. Which means publication takes in different places at the same time,
- III. In the case of “on demand availability” the term publication may sound illogical and confused as the work is made “available on demand” and not published.

The researcher found adaptation occurs in relation to a computer program, when an arrangement or altered version of the program or a translation of it is made. The adaptation includes a version of the program, where it is converted into a different computer language or code. This would amount to a translation and the researcher suggests that the courts may adopt general principles of translation to computer program.

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