

# Copyright Protection in Cyberspace-A Comparative Study of USA and India

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**Abstract:** *The paper aims at understanding the laws of two countries-USA and India in the light of copyright protection of their works in cyberspace. The main issues like the jurisdiction of domestic courts, compliance with WIPRO, liability on infringement and remedies for the copyright owner have been discussed in detail. The issues have been discussed using the various laws and the decisions of the courts. The landmark judgements form a main part of the issues. In the end a comparison of the two laws are made with respect to the statistics of copyright infringement incidents and the effective implementation of copyright laws.*

Keywords: Jurisdiction, International Regimes, Copyright, Infringement, Liability

## 1. Introduction

'The information explosion about which so much has been said and written is to a great extent an explosion of misinformation.'

Murry Gell Hann [1]

It has become difficult to differentiate between an original work and a copied work in the internet, often the work of one author is found in the works of many others.

The term 'cyberspace' was coined by the Canadian scientist William Gibson in his novel 'Neuromancer' in 1984. He defined it as a 'consensual hallucination experienced daily by billions of legitimate operators, in every nation'. [2] In simple terms it is a virtual space created by interconnected computers and computer networks on the internet. The coming of digital technologies has created a revolution in the field of Intellectual Property law. One of the main contributions of cyberspace is that it facilitates transfer of data from one computer to another in a much hassle free manner than physical distribution. It has greatly helped in globalization by facilitating easy exchange of information from one place to another thus leading to increase in communications and spread of knowledge. According to UNESCO, approximately 8,50,000 items which include books, journals, electronic and multimedia resources are published worldwide every year. [3] But, it has also proved to be harmful in some ways. Copyright laws are aimed at maintaining a balance between the individual interests of the author and the interests of the public at large. [4] But with the coming of the internet and the advent of cyberspace, it is difficult to draw a clear line between the interests of the public and the interests of the author. [5] It has led to the commission of certain crimes in a much hassle free manner than executing them in person. Infringement of copyright is one of such wrongful acts. Earlier, the infringer had to do all acts physically so it was easy to locate him, but through a large number of networks in cyberspace, it is not even possible to track the offender or stop such infringement every time it occurs. Therefore, digitalization has a profound effect on creation, reproduction and dissemination of works protected by copyright. [6] Now almost anything or everything can be transmitted on cyberspace. Movies like Star Wars and Spiderman could be downloaded easily before

they hit the screens, mainly due to the advent of digital technology. [7] In the light of these situations, almost every country has felt the need for developing and enacting effective laws to prevent loss to the authors due to mass undetectable copyright infringement. The laws have been discussed below in detail.

## 2. Literature Survey

There is a huge literature on this issue which has been analyzed in this paper:

The author Anna Katz (2012) in her paper has analyzed the Digital Millennium Copyright Act in its totality with the help of landmark cases of Viacom and Youtube. The paper has spoken on the 'fair use' theory to be applied to these instances. The author Iftikhar Hussain Bhat (2013) has critically analyzed the legal framework for copyright protection both at the national and international levels. It has also focused on the need for international harmonization of copyright law for its efficient enforcement in digital environment. A report by Advisen (2010) indicates the various copyright laws in cyberspace in the US and the extent of their effective function. It has made a detailed study of all the legal battles that have been fought in the US with the help of the legislations. It indicates the rate of success of the litigations and their failure. According to the author Robert A. Cinque (1994) the Berne Convention is one of the leading international agreements to protect copyright in cyberspace. However it is limited in its reach and efficacy. The limits of this Convention are discussed here. According to the author R Muruga Purumal (2006) numerous factors like ease of sharing digital content, low cost of distribution and download, lack of supranational authority to regulate, difficulties in tracing violators, uncertainties in determining jurisdiction over infringing acts, etc., have contributed to increasing copyright infringements. The issues that were addressed in the paper were related to the threats in copyright protection in cyberspace, role of domestic regimes in combating it and the international legal regimes to combat it. The author Ishwor Khadka (2015) has addressed the issue of software piracy in particular, one of the biggest areas of copyright infringement in cyberspace. The different forms of software piracy are softlifting, internet piracy, hard disk loading, software counterfeiting,

unauthorized use of academic software and renting. The major factors behind software piracy are public unawareness, high price of software, no legal enforcements, social and cultural factors and easy availability of pirated software in the internet.

The Hindu (2014) in its article has emphasized that pirated and counterfeit software abets cybercrime and can lead to substantial productivity and economic losses to manufacturers and businesses, besides posing serious security risks and threats to the critical infrastructure of our country. The global counterfeit ranking list electronic and software counterfeiting as just the second biggest infringement of copyright in cyberspace next to drug piracy amounting to a market value of \$100 billion and \$58.8 billion respectively [Anti-Counterfeiting Committee Report, 2011].

### 3. Problem Definition

In the world of digitalization, the problem of copyright infringement in cyberspace has become a big challenge. There are several reasons for this, one such reason is in my opinion, the level of enforcement of copyright laws in the countries. So, to confirm this viewpoint, a detailed study will be made of the legislations that have been enacted in the two countries selected for study- USA and India, one with a strongly developed copyright law and one with a comparatively developing copyright law.

### 4. Research Methodology

Research Design- The research design adopted in this Article is both descriptive and comparative as it describes the laws of the two countries under various heads and makes a comparison of the two in the end.

Method of Data Collection-The research article is based on secondary data based on articles, books, newspaper items and reports of various committees and organizations.

### 5. Results/Discussion

#### 5.1 Types and Factors of Infringement

The acts constituting copyright infringement in cyberspace are linking (the act of providing a link from one website to another person's website or material)[8] and framing (the act of pulling someone else's work into one's own website and surrounding it with the frames of one's own creation), uploading and downloading of copyrighted material, software piracy etc.[9]

There are several factors responsible for the easy infringement of copyright in the internet. Some of these include: no loss of quality in reproduction, no meaningful marginal costs of reproduction or distribution, ability to act anonymously and uneducated users who do not understand the existing copyright legal framework.[10] Another major factor is the lack of any super national authority that can regulate copyright protection of items in cyberspace. There are other factors like jurisdictional issues in case of violation

and the difficulty in tracing the culprit among a large number of internet users.[11]

#### 5.2 Laws- A Comparison

The comparison of the laws of the two countries USA and India has been made on various aspects of the law as discussed below:

##### 5.2.1 Jurisdictional Issues

The question of jurisdiction of courts in case of copyright infringement in cyberspace is a matter of global debate due to the unique nature of dissemination of information through the internet.[12] The two countries have dealt with the issue in the following manner:

##### USA

It is relevant to mention that USA is the first country where computer software were developed, so naturally the country had to bear the burden of incidents of intellectual property infringement in cyberspace before any other country. As these incidents were on an increase, the US courts had to exercise their powers to give justice to the victims of copyright infringement. Since 1990s the Courts have developed two tests for determining their jurisdiction to entertain complaints of intellectual property infringement. The first test referred to as the Zippo test was developed in the case of Zippo Manufacturing Co v Zippo Dot Com Inc [13]. The test based jurisdiction of the US courts on the extent of a website's 'interactivity' in the given jurisdiction. In the opinion of the Court, "a passive website is insufficient to establish personal jurisdiction, but an interactive site through which a defendant conducts business with forum residents, is sufficient to establish personal jurisdiction." But a major drawback of this test was that it did not provide any guideline as to what amounted to the right level of interactivity in order to constitute jurisdiction, whether a continuous day to day record is required or it is sufficient to show a fairly regular interaction. The second test, also referred to as the 'effects test' was given in the case of Calder v Jones.[14] The test based jurisdiction on three criteria: (1) an intentional action (2) expressly aimed at the forum state (3) knowledge that the brunt of the injury would be felt in the forum state. Thus it indicated that if the person being affected by the copyright infringement or the spread of the copyrighted work is widespread in the forum state, it has full jurisdiction over the matter. Although the second test is not much in use today, the first test does have a great significance in determining jurisdiction in recent infringements.

A recent case of United States v Kim Dot Com [15] which decided the jurisdiction in case of a matter under the DMCA 1998, gave quite a similar view. The Court was of the opinion that 'corporations that are foreign in their registration and address but conduct a substantial amount of business in the United States will not be able to dodge the jurisdiction based on formalities'. The courts have however become a bit more flexible in this approach and do not always look for a high amount of business. This is reflected in the case of Inc v Yandex NV [16] where a Dutch search engine was held to be subjected to the California Court even

though only 6 per cent of the infringements occurred in the United States.

## INDIA

The Indian law is not very clear in this regard. Section 62(2) of the Indian Copyright Act, 1957 confers an additional jurisdiction to the courts to take cognizance of matters of infringement of copyright over the internet by providing for an extra place of suing other than the grounds provided under Section 20 of the CPC, 1908.[17] Thus such infringements can be brought within the purview of District Courts under Section 62. This again raises a very crucial question as to the constitutionality of Section 62(2) of the Act as it would mean extraterritorial jurisdiction of the courts which is clearly in conflict with Article 1(2) [18] of the Constitution of India, 1950. Although the IT Act provides for all cyber laws, it does not particularly the problems of intellectual property rights. So, provisions do not indicate any solution.

However, the Indian judiciary has read in jurisdiction of the Indian courts in these provisions. In the case of *Super Cassettes Industries Ltd v Myspace Inc & Anr.*, [19] the use of the words 'any place' for profit under Section 51(a) of the Copyright Act, 1957 have been interpreted to include common public place or library or any other kind of place. It subsumes within it physical place or place at the internet or web space.

A landmark case is that of *Banyan Tree Holdings Ltd v M Murali Krishna Reddy and Anr.*[20] in which the issue of extended jurisdiction was dealt with. The plaintiff here was a resident of Singapore and the defendant was from Hyderabad. The rationale of *Casio India Ltd v Ashita Tele Systems Pvt. Ltd.*[21] was relied upon to conclude that due to the ubiquity, universality and utility of the features of the Internet and the Worldwide Web, any matter associated with it possesses global jurisdiction. The Court also relied on the holding in *Zippo Manufacturing Co v Zippo Dot Com* [22] and some other US decisions and came to the conclusion that the Court did have the jurisdiction to deal with the matter.

### 5.2.2 Compliance With International Regimes

For the purpose of addressing the problems of intellectual property infringement over the internet, various international regimes were developed. The World Intellectual Property Organization Internet Treaty was one of its kinds. Both USA and India are signatories to WIPO. It is pertinent to check their incorporation of the treaty into their domestic laws.

## USA

In USA the Digital Millennium Copyright Act was enacted in 1998 to bring the Copyright Act in consonance with the provisions of WIPO treaties. Section 1201 of the US Copyright Act, 1976 added by Section 103 of DMCA protection against circumvention of technical measures used by copyright owners to protect their works.[23] Two types of technological measures have been recognized: measures that prevent unauthorized access to a copyrighted work and measures that prevent unauthorized copying of the copyrighted work. The circumvention of the first was prevented but not the second, in order to promote fair use.

These changes were made in consonance with Article 11 of WCT and Article 18 of WPPT. In this regard, the US Court has held in the case of *Kelly v Arriba Soft Corp* [24] that providing thumbnail versions of images and automatic indexing of webpages containing images will amount to fair use. Similarly, Section 1202 was added to protect the integrity of copyright management information in consonance with Article 19 of WPPT.

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In 2012 the Copyright Act of 1957 was amended to bring it in consonance with the World Intellectual Property Organization Internet Treaties- the WCT and WPPT.[25] Along with providing for technical measures to protect copyrighted works in cyberspace, it also provides for special fair use provisions for works in the internet. The word 'hire' was included in Section 14 of the Indian Copyright Act, 1957 in compliance with Article 7 of WCT and Article 9 of the WPPT, which provide for 'commercial rental' rights for computer programmes and cinematograph films. In Section 14(d) and (e) the term 'hire' was replaced by the term 'commercial rental' in order to narrow down the scope of hire to only commercial rentals and not non-commercial ones. The definition of the term commercial rental was also introduced under Section 2(fa) of the amended Act. Fair use provisions are now extended to digital works.[26]

### 5.2.3 Liability On Infringement

In case of copyright infringement over the internet, multiple parties are involved in the act. The parties involved in copyright infringement over the internet are: copyright owners, internet service providers and the individual involved in uploading the copyrighted material in the server of the Service Provider. ISPs (internet service providers) are organizations that provide their clients or customers with access to the internet.[27] It generally appears that the person uploading the document should be responsible for infringement, but there is a tendency to rather hold the service provider liable for infringement. There are mainly two reasons for this: 1) due to the wider reach of cyberspace it is difficult to locate an individual who actually uploads the copyrighted material, whereas the service provider is an organization having its place of business in a definite place, 2) an individual will not be able to pay the amount on infringement but an organization can pay for making good the losses on infringement.[28] This trend is also visible in the laws of two countries for fixing liability:

## USA

In US the liability for copyright infringement in cyberspace has been established with the help of case laws. One of the initial cases is that of *Sony Corp v Universal Studios* [29] where the Internet Service Providers were held liable by virtue of vicarious liability and contributory infringement. Later, in the case of *Religious Technology Center v. Netcom Online Communication Services, Inc.*[30] the Federal District Court of Northern California was posed with a similar question of liability of the ISP for a material posted by the clients. The court adjudged on three main issues: firstly, Netcom could not be directly held liable for the material posted directly by its clients. In its opinion, the ISP is the one which only provided the tool and the original infringing work was done by the client who uploaded it.

This was a clear dissent from the previous judgements in this regard. Secondly, the link between the infringing activity and Netcom's finances were not sufficient to hold Netcom vicariously liable. Thirdly, though Netcom could not be held liable for direct infringement or even vicariously, it could be definitely made liable for contributory infringement. This however had to be proved, which was left open for trial, and the case was subsequently settled out of the court.

After this the Digital Millennium Copyright Act was enacted in the year 1998. In fact, USA is the first country to have brought in any limitation in the liability of the Internet Service Providers.[31] The limitation was put through the provisions of the Online Copyright Infringement Liability Limitation Act as Title 11 of the DMCA on October 28, 1998.[32] The liability of the infringers was limited on many grounds like transitory digital network communications,[33] system caching,[34] unwittingly linking or referring users to sites containing infringing materials,[35] and the unwitting storage of copyright violating material on their systems.[36] The copyright owners were also not entitled to any monetary or injunctive relief from the ISPs in case of vicarious liability or contributory infringement.[37] The ISPs were also allowed to claim the defence of fair use.[38] The service provider is required to satisfy two conditions before claiming limitations on liability. These are: 1. The service providers should designate agents to receive notifications of copyright violations on their networks and should then implement a policy for the termination of services to subscribers who were repeatedly involved in infringing activities online. 2. They should not interfere with any of the standard technical measures designed to protect or identify copyrighted works.[39] Thus the law makes a complete departure from the existing copyright law in USA which makes the internet service provider liable for contributory infringement in cases of third party copyright violations.[40] There are further relaxations on liability of the non-profit educational institutions acting in the capacity of service providers. It is extended to such a provider until and unless when the infringing materials were officially required or recommended for a class taught at an institution for the preceding three years or when more than two notifications of copyright violations within three but failed to act on them.[41] There is also a provision made for counter notification, under which a person's material that has been taken down by misidentification as a result of a copyright owner's request shall be republished.[42] Therefore, it can well be said that in USA a well established law now deals with this matter and the liabilities and remedies are very clear cut in the law, giving enough substance to adjudicate upon.

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The stand in India is completely opposite to that of USA. There is no definite law or decision which provides guidelines for such kinds of infringement. A small provision can be said to have been made in the Information Technology Act, 2000 by virtue of Section 79 of the Act, which exempts the internet service provider from liability in case of third party violations, if due diligence is proved.[43] But confusion arises as to the specific position of copyright infringers within the text of this provision. The words 'under this Act, rules or regulations made thereunder' indicate only

a bar under this Act and not that of the Copyright Act. In such a situation it is important to look at various case laws in this regard in India. The judicial response suggests that the ISPs have been held liable for acts of contributory infringement, not following the provisions of the IT Act, 2000. In one case of Super Cassettes Ltd v Yahoo Inc and Anr [44] the Delhi High Court had issued a notice to the ISP Yahoo Web Services (India) Pvt. Ltd for infringing copyright of the plaintiff by streaming one of its videos in the portal video.yahoo.com. The Delhi High Court has issued similar notice to other ISPs like Google, Youtube.[45] Some amendments have also been brought about in the Act in Section 52(1) (c) for restricting liabilities. But there is still no express provision.

## 5.2.4 Remedies

### USA

The civil and criminal remedies for infringement of copyright over the internet as enumerated under the Copyright Act as follows:

#### Civil remedies:-

Any person affected by the violation of Section 1201 or 1202 may bring in a civil action in an appropriate United district court for copyright violation and the powers of the court in such cases shall be: [46]

- (a) Granting temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation, but no prior restraint on free speech
- (b) Impounding of the device or product that is in the custody or control of the alleged violator
- (c) Award damages under subsection (c)
- (d) In its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof
- (e) Award reasonable attorney's fees to the prevailing party
- (f) Remedial modification to the impounded device.

There are other remedies too provided under the Act for general cases of copyright infringement that are applicable.

### INDIA

#### Civil Remedies:

The types of remedies include:

Injunctions, damages and accounts.[47]

These remedies are also applicable to the cases of infringement under Sections 65A and 65B, which are specific to infringement in cyberspace.[48]

## 6. Statistics of Infringement

A study shows that software piracy in India is 69% while that in USA is 20%, which indicates a huge disparity. The reasons for this difference include software prices relative to income, cultural attitudes and most importantly the strength of intellectual property protection. [49] Now, as far as online piracy in India is concerned, there is a huge increase in its number. In fact India is one of the top priority countries in the US watch list in the year 2012.[50]

## 7. Conclusion

From the study conducted, it can be concluded that while the US law have advanced enough to incorporate new threats to

copyright protection, the Indian law has failed to do so. The Indian Copyright Act only contains vague provisions to incorporate copyright protection in cyberspace, it does not make its stand clear. While the US laws have laid down clear guidelines for the benefit of the courts, the Indian law has completely left it to the judiciary to interpret the law as flexibly as possible to incorporate the changing scenario. This is why it has not been possible to reduce piracy rates in India despite mechanisms being developed by various institutions. Although the problem also exists in USA, there is a strong law to deal with the matter along with technological measures.

However, it cannot be completely said that the Indian legislature is ignoring the issue. The law is still at its nascent stage and is developing slowly. It is expected to adopt a holistic approach in the next few decades and come at par with the American law.

Thus, the study has clearly conformed to the cause of problem identified before the discussion and also with the previous studies made. The solution therefore lies in the cause itself, 'effective implementation and application of laws in cyberspace'.

## 8. Future Scope

Although the paper makes a detailed study of the laws of the two countries, the law is yet to fully develop in India with respect to protection of copyright in cyberspace. Due to this, many of the issues have been left open ended with respect to India, providing scope for future accommodation of the improved standards to be set by a definite law. For example, the law related to jurisdiction, liabilities of ISPs and compliance with WIPO regimes is not complete in itself. Further, not all aspects of law could be analyzed in this research to avoid making it cumbersome. So, any future study shall include the complete law if developed.

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